

Frustration

Construction Law Terms: A to Z

By Huw Wilkins

F is for Frustration

Introduction

"Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is in fact a kind of last ditch." So said Lord Justice Harman in *Tsakiroglou & Co Ltd -v- Noble Thorl GmbH*.¹ It is also a legal doctrine that has been subject to a reasonable amount of recent debate as a result of both Brexit and the Covid-19 pandemic, as performance of certain obligations became harder either because of changes in regulations, or the introduction of restrictions on working and international travel.

What is frustration?

The doctrine of frustration can be traced back to 1863 and the case of *Taylor -v- Caldwell*,² although the classic statement of the doctrine is said to be the following description by Lord Radcliffe from *Davis Contractors Ltd -v- Fareham UDC*:³

"frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render a thing radically different from that which was undertaken by the contract ... It was not this that I promised to do."

Proving frustration

As can be seen from the words of Lord Justice Harman above, although the doctrine of frustration may be argued frequently, it is less frequently established. What must a party do to prove that a contract has been frustrated?

In *Denny, Mott & Dickinson Ltd -v- James B Fraser & Co Ltd*,⁴ the court stated that the data to analyse whether a contract has been frustrated is:

- The contract terms, read in the light of the circumstances at the time the contract was entered into; and
- The events that have subsequently occurred.

1. [1960] 2 Q.B. 318 at 370
2. (1863) 3 B&S 826
3. [1956] AC 696 at 729
4. [1944] A.C. 265HL at 274-275

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A party seeking to prove that a contract has been frustrated must prove that, after a contract has been entered into, an event has occurred that:

- Was beyond what was contemplated by the parties when they entered into the contract;
- Is not either party's fault; and
- Renders performance impossible, illegal or "*radically different*" from what was anticipated at the time of entering into the contract.

What does, and does not, amount to frustration

Two examples relevant to the construction industry where a contract was frustrated are:

- Where the contractor was a sole trader, known personally by the employer and his price was significantly lower than market rate, the contract was frustrated when that contractor became seriously ill and was therefore unable to complete the job.⁵
- In a contract to erect machinery in existing premises, the contract was frustrated by those premises being entirely destroyed (by an accidental fire).⁶

However, a contract was not frustrated where:

- The event complained of was already apparent at the time the parties entered into the contract (and didn't subsequently get any worse).⁷
- The event complained of was due to one of the parties.⁸
- It was possible to perform the contract by some alternative method.⁹
- The contract was more expensive to perform.¹⁰

What are the consequences for a frustrated contract?

If a contract is frustrated, the parties are excused from their *future* obligations and, because neither party is considered to be at fault, neither party is entitled to claim damages for the other's non-performance. However, a party remains bound to perform any obligations that arose prior to the contract being frustrated.

But, what if parties have already partly performed the contract?

At common law:

- A contractor who has partially completed work before the contract was frustrated has no claim for payment for that work;¹¹ and
- An employer, who has paid money to a contractor before the contract was frustrated, could only recover that money in circumstances where the consideration for that payment had wholly failed.¹²

5. *Atwal -v- Rochester* [2010] EWHC 2338 (TCC)

6. *Appleby -v- Myers* (1867) LR 2 CP 651

7. *Flying Music Company Ltd -v- Theater Entertainment SA and others* [2017] EWHC 3192 (QB)

8. *Joseph Constantine SS Line -v- Imperial Smelting* [1942] AC 154

9. *Seabridge Shipping Ltd -v- Antco Shipping Ltd (the 'Furness Bridge')* [1977] 2 Lloyd's Rep 367

10. *Tsakiroglou & Co Ltd -v- Noblee Thorl GmbH* [1960] 2 Q.B. 318

11. *Appleby -v- Myers* (1867) LR 2 CP 651

12. *Fibrosa Spolka -v- Fairbairn Lawson* [1943] A.C. 32 HL

However, the Law Reform (Frustrated Contracts) Act 1943 (the "Frustration Act") provides that, where a contract governed by English law has become impossible to perform or otherwise frustrated (and the parties are therefore discharged from the further performance of the contract):

- Monies paid out before frustration are recoverable afterwards.
- Monies due before frustration are no longer due afterwards.
- A party who has obtained a valuable benefit under the contract may have to pay for it if the court considers it just.
- A party who has incurred expenses in respect of the contract before the frustrating event may recover such expenses from the other party if the court considers it just.

The Frustration Act is wide ranging, although there are contracts to which it does not apply (e.g. certain shipping, insurance and perishable goods contracts). It is also possible to exclude the Frustration Act from applying to your contract. This can be done in two ways:

- By expressly excluding the Frustration Act; or
- Including a provision that deals fully and completely with an event that would otherwise frustrate the contract.

Construction contracts rarely expressly exclude the Frustration Act (for example, none of FIDIC, JCT or NEC standard forms do so). However, construction contracts commonly include a definition of force majeure and detailed provisions setting out how such events are to be dealt with. A detailed force majeure clause – which deals fully and completely with an event that would otherwise frustrate the contract is capable of amounting to an agreement to exclude the doctrine of frustration¹³ and the effects of the Frustration Act.¹⁴ In those circumstances, the event will be dealt with solely in accordance with the contractual force majeure provisions.

Conclusion

Whilst the doctrine of frustration can be expressed fairly simply, it has been confined by the courts who are traditionally reluctant to let a party escape a bad bargain. It is not an argument that is commonly advanced in the context of construction projects, but there are scenarios in which it might be relevant. However, before advancing such an argument, careful consideration should be given to both the underlying contracts and the caselaw.

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April 2022

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13. *Bank Line Ltd -v- Arthur Capel & Co* [1919] AC 435
14. Section 2(3) of the Frustration Act