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### Frustration

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**CONTRACTS:  
CASES AND  
COMMENTARIES**

**SIXTH EDITION**

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## FRUSTRATION

### 1. Introduction

As noted elsewhere in this book, “sanctity of contract” has been identified as one of the cornerstones of the classical model of contracts. However, as the previous chapter on mistake indicated, in certain limited situations parties may be excused from their contractual obligations. Frustration provides another example of an excuse from performance obligations. Whereas mistake deals with inaccurate assumptions or lack of knowledge about past or existing circumstances, frustration relates to inaccurate assumptions about future circumstances. Sometimes it is not clear whether a mistake or a frustration analysis is appropriate.

For example, assume that a popular rock band has been scheduled to play in the only outdoor stadium in your hometown. Two days before the concert, the local municipality revokes the licence because it is discovered that the stadium has become very dangerous due to serious architectural flaws. No other venue is available. All the parties involved in the concert — the band, the promoters, the airlines, the trucking companies, the roadies, security companies, franchises and the fans — had assumed that the stadium would be available. Large sums of money have been expended in anticipation and significant profits expected. What is to be done? If the situation (the revocation of the licence) is seen as linked to danger arising after the contract, then the doctrine of frustration would be applicable. If, on the other hand, the revocation is seen as linked to a problem of architectural flaws pre-existing the contract, then the doctrine of mistake could be applicable.

Under the regime of “sanctity of contract” all the parties would be locked in: they would have to perform their respective obligations or pay damages for breach. Contractual liability is absolute. But, as we shall see in this chapter, in the course of the last century the courts have been gradually widening the ambit of the doctrine of frustration, thereby allowing the parties to walk away from their future obligations because of a supervening contingency. Thus the focus of Part 2 of this chapter, Development and Application of the Doctrine, is to identify some of the limited circumstances in which a claim of frustration might possibly succeed. Such circumstances might include: death, incapacity or unavailability of a contracting party; destruction or unavailability of the subject matter; illegality; method of performance becoming impossible; and thwarting of a common venture. As will become apparent, certain types of arrangements, such as shipping,

building and export sales contracts, are particularly vulnerable to unforeseen upheavals.

Part 3 addresses the issue of self-induced frustration, and Part 4 deals with contracts conveying an interest in land. Part 5 raises the question of whether the doctrine should be expanded further while Part 6 deals with the judicial response to efforts by the drafters of contracts to plan for the unforeseen via *force majeure* clauses. Finally, Part 7 discusses the effects of frustration.

Frustration also provides a particularly good illustration of the debate on the role of the judiciary in developing contract law. Over the years, a variety of theories have been espoused by judges and academics as to the underlying rationale and justifications for the doctrine. In relation to the question of whether a contract has been frustrated they are usually catalogued as the “implied term”, “construction”, and “foundation of the contract” theories. With respect to the effect of a frustrated contract, they are commonly described as the “failure of consideration” or “just solution” approaches. One way to conceptualize the debate is between those who espouse judicial restraint and those who favour judicial activism.

Those who favour restraint proclaim that “no court has an absolving power” (*Tamplin (F.A.) S.S. Co. Ltd. v. Anglo-Mexican Petroleum Co. Ltd.*, [1916] 2 A.C. 397 at 404 (H.L.)). They explain the rare cases of frustration on the basis that there is an implied term which allows the parties to avoid their contractual obligations.

On the other hand, those who perceive themselves as more realistic claim it is better if we acknowledge that in these situations the courts are actually making aspects of the contract for the parties. An example is Lord Radcliffe’s unusually frank (for a judge) acknowledgment that the “reasonable man” is simply the court’s “anthropomorphic conception of justice” (*Davis Contractors v. Fareham U.D.C.*, [1956] A.C. 696 at 728(H.L.)). The most explicit version of this view is to be found in Lord Wright’s assertion that “[t]he truth is ... the Court ... decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The Court is in this sense making a contract for the parties — though it is almost blasphemy to say so”. (*Legal Essays and Addresses* (1939), at 259).

Those who advocate an interventionist analysis often appeal to “fairness” or “efficient allocation of risk” as the benchmark for an appropriate resolution of the case. The following four quotes are attempts by academics to identify guiding principles that can help resolve problems of frustration. Collins promotes fairness, while Atiyah and Posner discuss allocation of risk to the superior risk bearer and least cost avoider. Trebilcock questions the wisdom of any of these approaches. In reading the cases that follow the extracts, you might consider (a) whether the courts are adopting a literalist or an interventionist approach and (b) whether any of the extracts can provide guidance in explaining the current state of the law.

## COLLINS, THE LAW OF CONTRACT

3rd ed. (1997), pp. 279-280

Although the courts prefer to describe their practices as either construction of the contract in order to fulfil the intentions of the parties or as an independent rules of law named ... frustration..., neither of these accounts appears strongly persuasive. If the [judicial] intervention is described as merely construction of the contract, then, given that the parties did not foresee and have any clear intentions towards the events which have occurred, we must suspect that the courts use a further criterion for determining the intent of the parties. The best interpretation of this standard is one which takes fairness in the sense of the preservation of the balance of advantage of the contract as the unacknowledged but vital guide to interpretation. Alternatively, if the intervention is described as the application of the rules of ... subsequent impossibility, then again the decision whether an unexpected event renders an obligation impossible must depend upon a judgment as to whether to continue to insist upon performance would upset the balance of advantage contained in the contract...

Although many judges deny that fairness is relevant to the question of whether or not a contract is frustrated ... in increasing numbers they have been admitting that a notion of fairness underlies their decisions. The courts usually avoid the terminology of fairness, however, preferring the concept of justice and injustice to express the scope of the doctrine...

The process of judicial revision is not so simple as to compare the obligation of one party before and after the unexpected event in order to discover whether the event has substantially increased the cost of performance of his obligation. The criterion of fairness must also be sensitive both to the sophistication of the parties when they established their contract and the precise allocation of risks by the contract. Where the parties enjoyed comparable resources for devising a complex commercial transaction and exercised those resources in order to create a contract which attempted to allocate all the risks between the parties, then it is unlikely except in calamitous circumstances that the courts will be prepared to accept that unexpected events have created any imbalance in the obligations. If, on the other hand, either one or both parties lack these skills, then the contract is less likely to be regarded as a presumptively fair allocation of the burdens of unforeseen and unprovided for eventualities. In these cases, the courts will countenance judicial revision in order to restore the expectations of the parties with respect to the balance of advantage contained in the contract.

[Footnotes omitted.]

## ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT

5th ed.(1995), pp. 240-243

But if the contract does not expressly allocate the risks, the question is how the law (or the court, speaking for the law) should allocate them. If it is not reasonable to place the risk of the relevant events on either party the contract

is frustrated whereas, if the risk is placed on either party, that party will be bound to perform or to pay damages if he cannot do so. The following factors may be considered as very general guides in deciding whether the court will place a certain risk on one or other of the parties.

First ... it can be said that a party takes the risk of any changes in circumstances which affect only his own purposes in contracting, and do not affect the common object of both parties. Similarly, a change in circumstances which only affects *the way* in which one of the parties is to carry out his obligations does not normally frustrate a contract. ...

Secondly, it may happen that a party enters into a contract whereby he receives remuneration so abnormally large that it is clear that in effect he is receiving a sort of insurance premium against special risks. Then it must be reasonable to place on him those risks. ...

The third rule is perhaps the most important of all: generally speaking, a person who undertakes to do something takes the risk that performance of his undertaking may prove more onerous than expected, or even impossible, as a result of changes in circumstances which are normal, or merely slight deviations from the normal, whereas he does not take the risk of performance proving impossible owing to utterly abnormal or extraordinary occurrences. ...

Fourthly, even though a person does not normally take the risk of non-performance where performance is rendered impossible as a result of utterly abnormal developments, he does take the risk, or at all events the courts think it reasonable to place on him the risk, of non-performance, if the result of the impossibility is to give him a remedy over against some other person. ...

Finally, it may be laid down as a very rough general rule that, if parties make a contract which is only to be performed at some distant future date, one or other of them will be held to have assumed the risk of performance whatever the future may bring. The point is that a whole object of such contracts is frequently to eliminate the dangers of later events.

### POSNER, ECONOMIC ANALYSIS OF LAW

5th ed. (1999), pp. 115-119

Suppose I agree to supply someone with 1,000 widgets by July 1; my factory burns to the ground; and I cannot procure widgets from anyone else in time to fulfill the contract. Suppose, further, that there was no way in which I could have anticipated or prevented the fire, so that fulfillment of the contract was genuinely impossible. It does not follow that I should escape liability for the buyer's losses that resulted from my failure to perform. My undertaking may have implicitly included a promise to insure him in the event of my inability to deliver the promised goods on time. And if such a contract of insurance was implicit in the transaction, it should be enforced.

The distinction between *prevention* and *insurance* as methods of minimizing loss is fundamental to the analysis of contract law. A loss that can be averted by an expenditure smaller than the expected loss is preventable, but not all losses

are preventable in this sense; the fire that destroyed the factory in the preceding example was assumed not to be. Through insurance, however, it may be possible to reduce the costs created by the risk of loss. The insured exchanges the possibility of a loss for a smaller, but certain, cost (the insurance premium). ...

[I]f an event rendering the contract uneconomical (such as unexpectedly severe weather) is not preventable at a cost less than the expected loss caused by nonperformance, one of the contracting parties may be the cheaper insurer. This is a reason independent of ability to prevent the event from occurring for assuming that the parties, had they made provision for this contingency, would have assigned that party the risk. If the promisee is the intended risk bearer, the promisor is discharged if the risk materializes and prevents him from completing performance.

To determine the cheaper insurer, it is convenient to divide the costs of insurance into two categories: (1) measurement costs and (2) transaction costs. The first consists of the costs of estimating (a) the probability that the risk will materialize and (b) the magnitude of the loss if the risk does materialize. The product of the two is the expected value of the loss and is the basis for computing the appropriate insurance premium that will be built into the contract price ... . The main transaction cost is that of pooling the risk with other risks to reduce or eliminate it; where self-insurance is feasible, this cost may be lower than if market insurance has to be purchased. ...

This analysis is helpful for understanding the doctrine of impossibility and related grounds for discharging a contract. It explains, for example, why physical impossibility as such is not a ground for discharge. If the promisor is the cheaper insurer, the fact that he could not have prevented the occurrence of the event that prevented him from performing should not discharge him. Conversely, the fact that performance remains physically possible, but is uneconomical, should not *ipso facto* defeat discharge. If the promisor could not have prevented at reasonable cost the event that has prevented him from fulfilling his promise and the promisee was the cheaper insurer of the resulting loss, the promisor has a good argument that he did not break the contract. So impossibility is ill-named—but maybe not, because it dramatizes the critical fact that mere difficulty or unforeseen expense of performance is not an excuse for failure to perform. Ordinarily, a fixed-price contract is intended to assign to the performing party the risk of problems encountered in performance, since that party is better able to overcome them.

Discharge is routinely allowed in personal service contracts where the death of the promisor prevents performance, unless the promisor had reason to believe (and failed to warn the promisee) that his life expectancy was less than normal for someone of his age. The event, death, is probably not preventable at reasonable cost by either party, but the promisee is the cheaper insurer; although both parties are in an equally good position to estimate the probability of the promisor's death, the promisee is in a better position to estimate the cost to him if the promisor is unable to provide the agreed-upon services.

Another example is a contract to drill for water. The contractor who, because of unexpectedly difficult soil conditions, is unable to complete performance at the cost he projected is not excused. He probably is the superior insurer, even if he could not have anticipated the soil conditions. He will know better than



the promisee both the likelihood, and the consequences for the costs of drilling, of encountering subsoil conditions that make drilling difficult. He may also be able to self-insure at low cost because he does a lot of drilling in different areas and the risks of encountering unexpectedly difficult conditions are independent.

Now suppose a grower agrees before the growing season to sell his crop to a grain elevator, and the crop is destroyed by blight. Should the grower be excused from liability? Probably. He has every incentive to avoid a blight, so if it occurs, it probably could not have been prevented; and the grain elevator, which doubtless buys from a variety of growers, not all of whom will be hit by blight in the same growing season, is in a better position to buffer the risk of blight than the grower is—though it must be added that in this age of future contracts both parties may be able to insure against the loss quite inexpensively.

Often parties will include in their contract a *force majeure* (“greater force”) clause, specifying the circumstances in which failure to perform will be excused. If they do, should impossibility, impracticability, and related judicial doctrines be applicable to the contract?

Examples of the operation of these doctrines could be multiplied, but instead let us consider the related case where completion of performance by one of the parties is prevented, again by circumstances beyond his control, and that party wants to be excused from further performance or even wants to be paid for what he has done although it is not what the contract called for him to do. I hire a contractor to build a house and midway through construction the building burns down. The contractor demands to be paid for the material and labor that he expended on the construction or, alternatively, refuses to rebuild the house without a new contract. The fact that he was prevented through no fault of his own from performing as contemplated by the contract should not automatically entitle him to cancel it or to be paid as if the burned-down building had been what I contracted for. The issue should be which of us was intended to bear the risk of fire. In the absence of evidence of the parties’ actual intentions, we have to compare relative costs of preventing or insuring against fire. Like a manufacturer whose goods are destroyed by fire before delivery, the contractor generally is better placed for fire protection than the owner because he controls the premises and is knowledgeable about the fire hazards of buildings under construction.

[Footnotes omitted.]

### TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT

(1993), pp. 135-136

Posner and Rosenfield [“Impossibility and Related Doctrines in Contract Law: An Economic Analysis” (1977), 6 J. of Leg. Stud. 83] acknowledge that often (I would be inclined to argue, typically) the criteria they propose for identifying the most efficient insurer or risk-bearer will point in opposite directions — one party is better placed to estimate the probability of a given contingency materializing (typically the party whose performance is in issue); the other party, who is to receive the performance in issue, can better evaluate the magnitude of the loss

if the contingency does materialize; and either party may be better placed to diversify away or absorb the risk through self-insurance, market insurance, or, more debatably, superior wealth. Uncertainties surrounding these issues are likely to render judicially determined insurance extremely expensive compared with most forms of explicit first-party insurance. Moreover, in contractual settings such as entailed in the frustration cases, at least in the absence of major information asymmetries between the parties, it is not clear that the courts are likely to improve on the risk allocations of the parties by engaging in highly particularistic *ex post* assignments of losses. A clear, albeit austere, rule of literal contract enforcement in most cases provides the clearest signal to parties to future contractual relationships as to when they might find it mutually advantageous to contract away from the rule.

[Footnotes omitted.]

#### NOTE

See also Kull, "Mistake, Frustration and the Windfall Principle of Contract Remedies" (1991), 43 *Hastings L.J.* 1; Triantis, "Contractual Allocations of Unknown Risks" (1992), 42 *U.T.L.J.* 450.

## 2. Development and Application of the Doctrine

### PARADINE v. JANE

(1647), *Aleyn* 26, 82 E.R. 897, *Sty.* 47; 82 E.R. 519 (K.B.)

[Paradine had leased certain lands to Jane and brought this action in debt for rent which the defendant had failed to pay. The action occurred during the period of the English Civil War and, in response to it, the defendant pleaded] that Prince Rupert, an alien, and an enemy of the King invaded the land with an army, and with divers armed men did enter upon him, and did drive away his cattell, and expelled him from the lands let unto him by the plaintiff, and kept him out that he could not enjoy the lands for such a time. [His counsel argued strenuously that] by the law of reason it seems the defendant in our case ought not to be charged with the rent, because he could not enjoy that that was let to him, and it was no fault of his own that he could not.

ROLL J. ... When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house though it be burnt by lightning or thrown down by enemies, yet he ought to repair it. ... Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor; and though the land be surrounded or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent.

[Judgment for plaintiff.]

#### NOTE and QUESTION

1. The above extract is taken from a combination of two private reports of the case.

For discussions of the curious history of how *Paradine v. Jane* became a leading case see Page, "The Development of the Doctrine of Impossibility of Performance" (1919-1920), 18 Michigan L. Rev. 589 and Swan, "The Allocation of Risk in the Analysis of Mistake and Frustration" in Reiter and Swan, *Studies in Contract Law* (1980) 181 at 185 footnote 13. See also, more generally, Treitel, *Frustration and Force Majeure* (1994) Ch. 2.

2. Is the rule in *Paradine v. Jane* excessively harsh? What would have been the result if the lessee had been willing to take up possession of the premises, but the lessor had been prevented by the Civil War from delivering them up?

### TAYLOR v. CALDWELL

(1863), 3 B. & S. 826, 122 E.R. 309 (Q.B.)

BLACKBURN J. [delivering the judgment of the court] In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fetes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100*l* for each day.

... The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. ... But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering the contract,

they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. . . .

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable. . . . [Thus, a learned author states,]

if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed.

. . . In *Hall v. Wright* [(1859), 120 E.R. 688 at 695], Crompton J., in his judgment, puts another case.

Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused.

It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps in the case of the painter of his eyesight. . . .

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel. . . .

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the Gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things.

#### NOTE

Statute law also has dealt with the issue of destruction of the subject matter. Section 9 of *The Sale of Goods Act*, R.S.N.S. 1989, c. 408 provides the following presumptive rule:

Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.

Two points might be noted. First, this rule only applies to specific goods, thus if the goods are sold by description there is no frustration and the risk is on the seller who must still supply the goods. Secondly, if property has passed to the buyer before the goods perish, even though the goods are not in the buyer's possession, the contract is not frustrated because the main purpose of the contract has been fulfilled — the transfer of ownership.

#### CAN. GOVT. MERCHANT MARINE LTD. v. CAN. TRADING CO.

64 S.C.R. 106, [1922] 3 W.W.R. 197, 68 D.L.R. 544

The appellants contracted with the Canadian Trading Company (the respondent) to transport lumber from Vancouver to Australia in two vessels, the Canadian Prospect<sup>or</sup> and the Canadian Inventor. To the knowledge of both parties, the ships were, at the time of contracting, under construction for the appellants. Apparently, because of a dispute between the appellants and the shipbuilders, the vessels were not ready in time and the contracted voyage could not be made. In an action by the Canadian Trading Company, the appellants claimed, *inter alia*, that their contract had been frustrated because the ships were unfit for sailing at the time set for performance.

DUFF J. ... The principle of *Taylor v. Caldwell* [*supra*] has unquestionably been extended to cases in which parties having entered into a contract in terms unqualified it is found when the time for performance arrives, that a state of things contemplated by both parties as essential to performance according to the true intent of both of them fails to exist. For the purpose of deciding whether a particular case falls within the principle you must consider the nature of the contract and the circumstances in which it was made in order to see from the nature of the contract whether the parties must have made their bargain on the footing that a particular thing or state of facts should be in existence when the time for performance should occur. And if reasonable persons situated as the parties were must have agreed that the promisor's contractual obligations should come to an end if that state of circumstances should not exist then a term to that effect may be implied. ... But it is most important to remember that no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived.

The doctrine of English law is that generally a promisor except to the extent

to which his promise is qualified warrants his ability to perform it and this notwithstanding he may thereby make himself answerable for the conduct of other persons....

The contracts were made on the 19th of March and provided for shipment at the end of April or the beginning of May. Is there anything in the circumstances affording a ground for saying that the agents of appellant and of the respondent as reasonable men could not have contracted on the footing that the appellants should assume the risk of what subsequently happened?

It is important to remember that there is no evidence to indicate that the delay was due to any extraordinary occurrence, to anything outside the ordinary course of events. There is a suggestion of a strike and there is a suggestion of a dispute between the Government and the contractors who were building the ships. The respondents were not aware of the precise relations between the appellants and the contractors and were entitled to assume that the contractors in entering into the contract were duly taking into account the possibilities incidental to those relations. There was nothing in the facts known to them making it unreasonable from the respondents' point of view that they should expect an undertaking as touching the date of sailing unqualified, at all events, in respect of any of the matters which have been suggested as accounting for the appellants' default. Real impossibility of performance arising from destruction of the ships by fire, for example, would have presented a different case. There is nothing in the evidence inconsistent with the hypothesis that the impossibility which no doubt did arise at the last moment was due to lack of energy on part of the Government or to supineness or indifference on part of the appellants. Impossibility arising from such causes is not the impossibility contemplated by the case of *Taylor v. Caldwell*.

MIGNAULT J. [concurring] ... It seems to me ... that the contingency which relieves a party from performing a contract on the ground of impossibility of performance, is an unforeseen event. ...

So that if the event which causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened. ...

But here the appellant undertook to carry a cargo on a ship nearing completion. It could certainly have been foreseen that something might occur in the ship yard, especially in these days of labour troubles, to delay completion, and by making an absolute contract without providing against the contingency of non-completion in time, the appellant, in my opinion, assumed the risk of this contingency. The respondent prepared all its cargo for the ship in time and would be subject to considerable loss if the appellant were relieved from the consequences of non-performance. Such a condition, if it had been stipulated, might not have been accepted by the respondent, which possibly would have preferred to ship its lumber through another steamship company. And I think that the risk of such a contingency cannot be imposed on the respondent as an implied condition now that the loss has occurred.

[Idington, Anglin and Brodeur JJ. delivered concurring judgments dismissing the appeal.]

## NOTES and QUESTION

1. An example of the tendency of courts to place the risk of unforeseen developments on the promisor is provided by *Graham v. Wagman* (1976), 73 D.L.R. (3d) 667, appeal allowed as to measure of damages 89 D.L.R. (3d) 282 (Ont. C.A.). The defendants agreed to lease to the plaintiffs 150 parking spaces in a building which they intended to erect. However, the defendants were unable to proceed with the building, because they failed to obtain the necessary financing. Their argument that this failure excused their breach of contract met with no success. Weatherston J. commented at 352: "I have never heard that impecuniosity is an excuse for non-performance of a promise."

2. In *O'Connell v. Harkema Express Lines Ltd.* (1982), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), a strike which forced a trucking company out of business was found to have frustrated the contract of employment of the company's sales manager. But compare *St. John v. TNT Canada* (1991), 56 B.C.L.R. (2d) 311 (S.C.).

3. In the well-known consideration case of *Smith v. Dawson* (1923), 53 O.L.R. 615 (C.A.), the plaintiff contractors agreed to build a house for the defendant for \$6,464. When the house was almost complete, a fire occurred, causing considerable damage. The defendant had insured the house and some furniture which she had moved in, and she received \$2,150 from the insurers. The plaintiffs effected no insurance, but the defendant asked them to go ahead and complete the work on the basis that she would pay over the insurance money to them. Upon completion, the defendant refused to pay the insurance money and the plaintiff's claim to it was denied on the ground that the only consideration provided by the contractors for this promise was the performance of that which they were already legally obliged to do. In the case, Middleton J. commented: "In the absence of any provision to the contrary in the contract, the destruction of the building by fire would not afford any excuse for non-performance of the contract." Why is this the case? In practice, how would you expect contractors to react to this definition of their obligations?

### CLAUDE NEON GENERAL ADVERTISING LTD. v. SING

[1942] 1 D.L.R. 26 (N.S. S.C.)

DOULL J. This action is brought by the plaintiff for rentals alleged to be due by the defendant in respect of an advertising sign of the kind usually known as a Neon Sign, that is an electrical sign equipped with fixtures for lighting the same with a type of electric lights.

The parties entered into an agreement in writing on June 23, 1939, under which the plaintiff agreed to construct, and when constructed to lease to the defendant, a sign to be erected on the building ... which was occupied by the defendant as "Oriental Cafe Parlor". The defendant was to pay a rental of \$13 per month to the plaintiff for a term of 60 months. The plaintiff was to install the sign and keep it in repair but the defendant was to pay for the electric power. There was nothing in the agreement to release the defendant from payment of the rentals on the happening of any contingency.

Canada entered the present war on September 10, 1939 and on September 18, 1939 certain lighting restrictions were imposed by competent authority in the district in which the defendant's cafe is situate [which included a prohibition against the use of lighted outdoor signs between sunset and sunrise]. ...

The defendant admits that, if there were no such restrictions, the amount claimed in the statement of claim, viz. \$234, would be due. He tenders \$27.73 as the amount due to September 18, 1939 and says that the carrying out of the contract has become impossible by a change of the law and in effect that he

is relieved from further payment on the principles established by the cases which are referred to as cases of frustration. . . .

Since the beginning of the present century, these rules have been considerably extended and the doctrine which has been applied has been called frustration. There are two classes of these cases: (1) The "Coronation Cases," in which the contract could be carried out but the circumstances which formed its basis had wholly changed; (2) Cases in which a change in the law or the advent of war involved such a fundamental change in the contract that it might be said that any contract that could be carried out would essentially differ from what the parties had in contemplation.

In *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.), the defendant had made an agreement to hire certain rooms of the plaintiff which would provide a view of the Coronation procession of King Edward VII. Owing to the illness of the King, the procession was cancelled and it was held that the contract was thereby frustrated. Vaughan Williams L.J. in the Court of Appeal said (p. 749):

I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of a particular state of things.

.....

In *Bell v. Lever Bros. Ltd.* [*supra*, Chapter 9, section 3(a)], Lord Atkin says:

The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts make the contract something different in kind from the contract in the original state of facts. Thus, in *Krell v. Henry*, Vaughan Williams L.J. finds that the subject of the contract was 'rooms to view the procession': the postponement, therefore, made the rooms not rooms to view the procession. This also is the test finally chosen by Lord Sumner in *Bank Line v. Capel (A.) & Co.*, [1919] A.C. 435 (H.L.), where dealing with the criterion for determining the effect of interruption in 'frustrating' a contract, he says: 'An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.' We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject matter as it was in the original state of facts?

Later the Judicial Committee in *Maritime Nat. Fish Ltd. v. Ocean Trawlers Ltd.* [*infra*, section 3], said:

This case is more analogous to such a case as *Krell v. Henry*, where the contract was for the hire of a window for a particular day: it was not expressed but it was mutually understood that the hirers wanted the window in order to view the Coronation procession: when the procession was postponed by reason of the unexpected illness of King Edward, it was held that the contract was avoided by that event: the person who was letting the window was ready and willing to place it at the hirer's disposal on the agreed date; the hirer, however, could not use it for the purpose which he desired. It was held that the contract was dissolved because the basis of the contract was that the procession should take place as contemplated.

The correctness of this decision has been questioned, for instance, by Lord Finlay L.C., in *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Medulla* (1923), 39 T.L.R. 316 at p. 318, Lord Finlay observes:



It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract.

The authority is certainly not one to be extended: it is particularly difficult to apply where ... the possibility of the event ... was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service ... at the other parties' disposal and are able and willing to do so.

It is worth while noting that in the same volume of reports one of the "Coronation Cases" was decided differently from *Krell v. Henry* by the same Court. *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683 (C.A.), where the defendant had chartered a ship to take a party of persons to see the Naval Review and for a day's cruise around the fleet following the King's Coronation. The Naval Review did not take place and the defendant repudiated the contract. It was held that the venture was at the defendant's risk and that there was not total failure of consideration or subject matter. The defendant could have had the cruise around the fleet although he would not have seen any Naval Review. The plaintiff therefore recovered. ...

In the case which we are considering, the neon sign was constructed for the purposes of the defendant, it was erected on the defendant's premises and was operated for some time. The monthly rental was for the purpose of paying the cost of construction and erection as well as maintenance over a period of 60 months. No part of the contract between the parties became impossible. The defendant certainly gets very much less benefit from the sign, but it is not entirely useless as a daylight sign. The lighting of it, even when legal, is a matter for the defendant. It is true that the defendant does not get an illuminated sign and in that respect the case approaches *Krell v. Henry*; but having regard to the remarks concerning *Krell v. Henry* in the *Trawlers* case, I do not think that I should say that the contract is for an illuminated sign. The *Herne Bay* case was not so very different from *Krell v. Henry*, but it was there held that the charterer took the risk.

[Judgment for the plaintiff.]

## NOTES and QUESTIONS

1. Sir Frederick Pollock commented on the *Herne Bay* case: "In point of fact the fleet was still there, as Stirling L.J. observed, and as the writer of these lines can bear witness, it was very well worth seeing without the review." See "Note" (1904), 20 L.Q.R. 3 at 4.

2. Seller sold land to Buyer and reserved the right to remove from the property within five years a historic barn. One year later, the provincial government designated the barn a heritage property and refused to allow its removal. Does Seller have any remedy? See *Some Fine Investments Ltd. v. Ertolahti* (1991), 107 N.S.R. (2d) 1 (T.D.).

3. The coronation cases are some of the most controversial in the law of frustration. Do you believe that the allocation of risk approach advocated by the authors at the beginning of this chapter can provide determinative results? For further discussions see Posner and Rosenfield, "Impossibility and Related Doctrines in Contract Law: An Economic Analysis" (1977), 6 J. of Legal Studies 83 at 110-111; Reiter, Comment (1978), 56 Can. Bar Rev 98 at 113; Swan, "The Allocation of Risk in the Analysis of Mistake and Frustration" in Reiter & Swan, *Studies in Contract Law* (1980) 181

at 210-212. For a feminist critique of the "cockiness" of Posner's economic analysis see Frug, "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law" (1991-92), 140 U. Pa. L. Rev. 1029 at 1034-41.

4. Do you think that the difference between *Krell v. Henry* and *Herne Bay v. Hutton* can be explained by the fact that Henry was a consumer while Hutton was a business person who was hiring the boat to take other paying consumers to see the fleet? (See Brownsword, "Towards a Rational Law of Contract" in Wilhelmsson, ed., *Perspectives of Critical Contract Law* (1993) 242 at 246-7). Why do you think this fact is not addressed in traditional accounts of the case?

### DAVIS CONTRACTORS LTD. v. FAREHAM U.D.C.

[1956] A.C. 696, [1956] 2 All E.R. 145 (H.L.)

In July, 1946, the plaintiff contractors entered into a building contract to build 78 houses for the defendant municipality within a period of eight months. The contract price was fixed at £92,425. Owing to unexpected circumstances, and without fault of either party, adequate supplies of labour were not available in the post-war market and the work took 22 months to complete. The contractors claimed, in part, that the contract was frustrated and that they were entitled to a sum of money on a *quantum meruit* basis in addition to the contract price.

LORD RADCLIFFE ... I do not think that there has been a better expression of that general idea [of frustration] than the one offered by Lord Loreburn in *Tamplin (F.A.) SS. Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 397 at 403 (C.A.). It is shorter to quote than to try to paraphrase it:

... a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. ... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

So expressed, the principle of frustration, the origin of which seems to lie in the development of commercial law, is seen to be a branch of a wider principle which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties "must have made" their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticized as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed. But it may still be of some importance to recall that, if the

matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances." The legal effect of frustration "does not depend on their intention or their opinions, or even knowledge, as to the event." On the contrary, it seems that when the event occurs "the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provisions as to their several rights and liabilities in the event of its occurrence" [*Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 (H.L.) *per* Lord Watson].

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes 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 it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

There is, however, no uncertainty as to the materials upon which the court must proceed.

The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.

(*Denny, Mott & Dickson Ltd. v. Fraser (James B.) & Co. Ltd.*, [1944] A.C. 265 at 274 (H.L.), *per* Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work was begun shortly before the formal contract was executed and continued, with impediments and minor stoppages but without actual interruption, until the 78 houses contracted for had all been built. After the work

had been in progress for a time the appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed; but the respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case.

That is not in any obvious sense a frustrated contract. But the appellants' argument, which certainly found favour with the arbitrator, is that at some stage before completion the original contract was dissolved because it became incapable of being performed according to its true significance and its place was taken by a new arrangement under which they were entitled to be paid, not the contract sum, but a fair price on quantum meruit for the work that they carried out during the 22 months that elapsed between commencement and completion. The contract, it is said, was an eight months' contract, as indeed it was. Through no fault of the parties it turned out that it took 22 months to do the work contracted for. The main reason for this was that, whereas both parties had expected that adequate supplies of labour and material would be available for completion in eight months, the supplies that were in fact available were much less than adequate for the purpose. Hence, it is said, the basis or the footing of the contract was removed before the work was completed; or, slightly altering the metaphor, the footing of the contract was so changed by the circumstance that the expected supplies were not available that the contract built upon that footing became void. These are the findings which the arbitrator has recorded in his supplemental award.

In my view, these are in substance conclusions of law, and I do not think that they are good law. All that anyone, arbitrator or court, can do is to study the contract in the light of the circumstances that prevailed at the time when it was made and, having done so, to relate it to the circumstances that are said to have brought about its frustration. It may be a finding of fact that at the time of making the contract both parties anticipated that adequate supplies of labour and material would be available to enable the contract to be completed in the stipulated time. I doubt whether it is, but, even if it is, it is no more than to say that when one party stipulated for completion in eight months, and the other party undertook it, each assumed that what was promised could be satisfactorily performed. That is a statement of the obvious that could be made with regard to most contracts. I think that a good deal more than that is needed to form a "basis" for the principle of frustration.

The justice of the arbitrator's conclusion depends upon the weight to be given to the fact that this was a contract for specified work to be completed in a fixed time at a price determined by those conditions. I think that his view was that, if without default on either side the contract period was substantially extended, that circumstance itself rendered the fixed price so unfair to the contractor that he ought not to be held to his original price. I have much sympathy for the contractor, but, in my opinion, if that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable.

Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things

which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself both by a penalty clause for time exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament.

[Viscount Simonds and Lords Morton, Reid and Somervell delivered judgments dismissing the appeal.]

#### NOTE

Lord Radcliffe's test of "radical difference" has been specifically approved in a number of Canadian courts, especially in construction cases. See, e.g., *Peter Kiewit and Sons' Co. v. Eakins Const. Ltd.*, [1960] S.C.R. 361 at 368; *Swanson Const. Co. v. Govt. of Man.* (1963), 40 D.L.R. (2d) 162 at 172, affirmed 47 W.W.R. 640 (S.C.C.); *Elec. Power Equipment Ltd. v. R.C.A. Victor Co.* (1964), 46 D.L.R. (2d) 722 (B.C. C.A.). It does not, however, represent the only modern description of the circumstances in which a court will find a contract frustrated. For example, in the *Hong Kong Fir* case, *supra*, Chapter 7, section 7, Lord Diplock envisaged that an event which deprives a party of "substantially the whole benefit" that it was intended to receive under a contract would relieve that party of its duty of further performance in cases of frustration, as well as where there had been a breach of an innominate term. In *Bell v. Lever Brothers Ltd.*, *supra*, Chapter 9, section 3(a), Lord Atkin contemplated that the "difference in kind" test would apply in the area of frustration as well as mistake.

#### CAPITAL QUALITY HOMES LTD. v. COLWYN CONSTRUCTION LTD.

(1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A.)

EVANS J.A. [delivering the judgment of the court] ...

Under an agreement dated January 15, 1969, the plaintiff, purchaser, agreed to purchase from the defendant, vendor, 26 building lots each comprising parts of lots within a registered plan of subdivision. The date fixed for closing was July 30, 1970. Both parties were aware that the purchaser was buying building lots for the purpose of erecting a home on each lot with the intention of selling the several homes by way of separate conveyances. Under the terms of the agreement it was entitled to a conveyance of a building lot upon payment of \$6,000 and, upon full payment, to 26 separate deeds of conveyance each representing one building lot. It is agreed that no demand for any conveyance was made prior to the date of closing.

When the sale agreement was executed the designated land was not within an area of subdivision control and not subject to any restriction limiting the right

to convey. On June 27, 1970, certain amendments ... came into effect whereby these lands came under the provisions of what is now s. 29 of the *Planning Act*, R.S.O. 1970, c. 349, which in certain circumstances restricts an owner's right to convey and makes necessary the obtaining of a consent from the relevant committee of adjustment designated in the amending legislation. In the absence of such consent no interest in part of a lot within a registered plan of subdivision can be conveyed.

The vendor was accordingly precluded from conveying the 26 building lots in 26 separate deeds without proper consents and while a conveyance to the purchaser of all lots in one deed may have been permissible, the purchaser in any event would be unable to reconvey individual building lots to prospective home buyers as it had intended without complying with the restrictive provisions of the new legislation.

This substantial change in the law, prohibiting and restricting conveyancing of the lands 33 days prior to the anticipated closing date, resulted in some discussion between the parties relative to possible postponement of the closing date in order to devise some method of circumventing the restrictions to which the lands were now subject. No arrangement was made to extend closing. On the agreed date of closing the purchaser insisted that the vendor deliver conveyances for each individual building lot with the consents necessary to effectually transfer the lots. The vendor insisted that it was the responsibility of the purchaser to obtain the necessary consents. On the closing date the balance of the agreed purchase price was tendered by the solicitors for the purchaser but no conveyances were forthcoming in the mode contemplated by the agreement. It is common ground that the purchaser would not withdraw its demand for 26 individual conveyances with consents attached and that the vendor did not provide such conveyances. Following failure to close on the agreed date, the purchaser contended that the vendor was in default and on August 5, 1970, repudiated the agreement and made demand upon the vendor for the return of the balance of the deposit.

Although the statement of facts agreed to by counsel does not state that the relatively short period of time, 33 days, between the effective date of the amending legislation and the stipulated closing date made impossible the obtaining of the necessary consents, the argument indicated that such was the understanding and I have accordingly assumed that the time factor was so limited that the parties were in agreement that it would have been impossible to process the applications for consents prior to the closing date...

Accordingly, I propose to deal with this appeal on the basis of the argument advanced before us, i.e., on the doctrine of frustration and its applicability to contracts involving the sale and purchase of land...

[T]he appellant, vendor, submitted that the supervening legislation which restricted transfer of the lots was a burden falling upon the purchaser. The argument was that upon execution of an agreement for the sale of land the purchaser became the equitable owner of the lands and any amending legislation which affected either zoning or alienation of land was a burden to be assumed by the purchaser. Accordingly, the purchaser was in error in attempting to repudiate the agreement and could not recover the deposit paid.

The respondent, purchaser, took the position that the effect of the new legislation was to make impossible the fulfillment of the terms of the contract; that there was a failure of consideration and that equity would not force the purchaser to take something fundamentally different from that for which it had bargained.

The vendor also argued that the obligation to obtain the consent of the committee of adjustment rested upon the purchaser. I do not agree. Unless otherwise provided in the agreement of sale the vendor is required to convey a marketable title in fee simple. There was no provision in the instant agreement which would permit the vendor to escape from that normal obligation.

That default alone was sufficient to entitle the purchaser to the return of its deposit.

There can be no frustration if the supervening event results from the voluntary act of one of the parties or if the possibility of such event arising during the term of the agreement was contemplated by the parties and provided for in the agreement. In the instant case the planning legislation which supervened was not contemplated by the parties, not provided for in the agreement and not brought about through a voluntary act of either party. The factor remaining to be considered is whether the effect of the planning legislation is of such a nature that the law would consider the fundamental character of the agreement to have been so altered as to no longer reflect the original basis of the agreement. In my opinion the legislation destroyed the very foundation of the agreement. The purchaser was purchasing 26 separate building lots upon which it proposed to build houses for resale involving a reconveyance in each instance. This purpose was known to the vendor. The lack of ability to do so creates a situation not within the contemplation of the parties when they entered the agreement. I believe that all the factors necessary to constitute impossibility of performance have been established and that the doctrine of frustration can be invoked to terminate the agreement. ...

If the factual situation is such that there is a clear "frustration of the common venture" then the contract, whether it is a contract for the sale of land or otherwise, is at an end and the parties are discharged from further performance and the adjustment of the rights and liabilities of the parties are left to be determined under the *Frustrated Contracts Act*. In my opinion, on the facts of this case, the contract was frustrated; the doctrine was applicable and should be invoked with the result that both parties are discharged from performance of the contract and the purchaser is entitled to recover the full amount paid as it is not claimed that the vendor incurred any expenses in connection with the performance of the contract, prior to frustration, which would entitle it to retain a portion of the money paid as provided for in s. 3(2) of the *Frustrated Contracts Act*. Accordingly, the vendor must refund to the purchaser the balance of the deposit money, that is, \$13,980.

[Appeal dismissed.]

### NOTES and QUESTION

1. A section of this case dealing with the frustration of a contract which conveys an interest in land is reproduced *infra*, in section 4 of this chapter.
2. Is there an alternative analysis by which the return of the purchaser's deposit might be justified?

3. In cases such as *Capital Quality Homes*, the date at which the contract was frustrated is clear. In others, the question is more complex. In *Finelvet A.G. v. Vinava Shipping Co.*, [1983] 2 All E.R. 658 (Q.B.D.), a chartered ship, the *Chrysalis*, was docked at the port of Basrah when, on 22nd September 1980, war broke out between Iran and Iraq. On 1st October the ship was ready to leave, but it was prevented from doing so by the Iraqi port authorities and by the risk of damage from the hostilities. On 14th November the charterers cancelled the charter party and the question arose as to when the contract had become frustrated.

Mustill J. found that frustration depended, not on the declaration of war, but on the effect of acts done in furtherance of the war. The court refused to disturb the arbitrator's finding that the contract was not frustrated until 24th November when most informed people took the view that ships would be unable to leave Basrah for several months and probably much longer.

### VICTORIA WOOD DEVELOPMENT CORP. v. ONDREY

(1977), 14 O.R. (2d) 723, 1 R.P.R. 141, 74 D.L.R. (3d) 528 (H.C.)

The plaintiff, Victoria Wood, entered into a contract on 6th April 1973 to purchase from the defendants 90 acres of land bordering the Queen Elizabeth Way in Oakville, with the sale to be completed on 31st October 1973. To the knowledge of the defendants, the plaintiff intended to subdivide and develop the land, but amendments to Ontario planning legislation, which were passed on 22nd June 1973, and regulations filed under the new legislation on 4th August 1973 effectively brought the property within a restricted development area and precluded its subdivision development. The plaintiff sought a declaration that the contract was frustrated and the return of their deposit. They relied, *inter alia*, on the *Capital Quality Homes Ltd.* case.

OSLER J. [distinguishing *Capital Quality Homes*] ... In my view, in the present instance, "the very foundation of the agreement" has not been destroyed. Though it was as I have found well known to the vendor that the purchaser intended to make commercial use of its property by some form of subdivision, the agreement is in no sense made conditional upon the ability of the purchaser to carry out its intention. The "very foundation of the agreement" was that the vendor would sell and the purchaser would buy the property therein described upon the terms therein set out. The only obligations assumed by the vendor were to provide a deed and to join in or consent to any subsequent applications respecting the zoning and to give partial discharges of the mortgage it was taking back under certain circumstances. The only obligation of the purchaser was to complete the cash balance agreed to, execute and give back a mortgage and to pay such mortgage in accordance with its terms. Nothing in the supervening legislation affects, in the slightest degree, the abilities of the parties to carry out their respective obligations.

As it was put by counsel for the Ondreys, a developer in purchasing land is always conscious of the risk that zoning or similar changes may make the carrying out of his intention impossible, or may delay it. He may attempt to guard against such risk by the insertion of proper conditions in the contract and thereby persuade the vendor to assume some of the risk. In the present case he has not done so and, indeed, there is no evidence that he has attempted to do so. "The very foundation of the agreement" is not affected and there is no room for the application of the doctrine of frustration.



Counsel for the Ondreys advanced as a secondary argument the proposition that there is no absolute prohibition against development as now, some four years after the passage of the legislation, it has been shown to be possible to make application to a hearing board set up by the Minister for a recommendation to the Minister that any land affected by the legislation be exempted from such effect. Had I found that the ability to develop the land had formed part of the agreement between the parties, I would not have given effect to this second argument. Under the legislation, no development is permitted and the fact that it may, at some future time, become possible to persuade the Minister *ex gratia* to exempt the lands, would not, in my view, have affected the matter if I had found that development was at the heart of the agreement. ...

[The plaintiffs's action was dismissed and the vendors' concurrent action for specific performance was successful. Affirmed (1978), 22 O.R. (2d) 1, 7 R.P.R. 60, 92 D.L.R. (3d) 229 (C.A.).]

### NOTE and QUESTION

1. Why was the "fundamental character" of the agreement altered in *Capital Quality Homes*, but the "very foundation of the agreement" not destroyed in *Victoria Wood*? For further examples of decisions in which courts have found that an inability to obtain planning changes can amount to frustration, see *Focal Properties Ltd. v. George Wimpey (Canada) Ltd.* (1975), 73 D.L.R. (3d) 387 (Ont. C.A.), affirmed [1978] 1 S.C.R. 2, and *British Columbia (Minister of Crown Lands) v. Cressey Development Corp.*, [1992] 4 W.W.R. 357 (B.C. S.C.). See also, *Amalg. Invt. & Property Co. v. Walker (John) & Sons Ltd.*, [1976] 3 All E.R. 509 (C.A.), in which the purchaser agreed to buy a warehouse for development purposes for £1,700,000. The next day, the building was designated a historic site, which meant that it could not be redeveloped and reduced its value to £200,000. The purchaser's argument of frustration failed, on the ground that the possibility that a building might be so designated was an inherent risk which it had to bear.

2. Farmer agrees to sell to Developer at a price of \$3,000 per acre 160 acres of farmland, situated in a restricted development area adjacent to Metropolis. Between the date of the interim agreement and the scheduled date of closing, the provincial legislature unexpectedly repeals its restricted development area legislation and the value of the land increases to \$8,000 per acre. Does Farmer have any remedy?

### **KESMAT INVT. INC. v. INDUST. MACHINERY CO. & CANADIAN INDEMNITY CO.**

(1986), 70 N.S.R. (2d) 341 (N.S. C.A.)

Industrial Machinery Co. (Industrial) obtained an easement from Kesmat to enable it to build a sewer line across Kesmat's property. In exchange, Industrial undertook to obtain a rezoning and subdivision of Kesmat's lands and to pay Kesmat \$50,000 if it was unsuccessful in doing so. Canadian Indemnity issued a bond in Kesmat's favour in the amount of \$50,000 guaranteeing the performance of Industrial's undertakings.

Industrial met with considerable difficulty in its rezoning application and it became clear that before the application would be granted, Industrial would first have to conduct an environmental study. The cost of the study was estimated at \$25,000 to \$50,000. Industrial did not carry out the study, and failed to obtain

the rezoning. In an action by Kesmat to recover \$50,000 from Industrial and Canadian Indemnity, Glube C.J.T.D. at trial found that the contract was frustrated, *inter alia*, by the requirement of an environmental study. Kesmat appealed.

MACDONALD J.A. [delivering the judgment of the court] ... It is clear from the authorities that hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration in law so as to terminate a contract and relieve the parties thereto of their obligations to each other: see Goldsmith, *Canadian Building Contracts* at p. 105. Courts have, however, interpreted impossibility of performance to encompass not only absolute impossibility but also impossibility in the sense of impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss....

It is common knowledge that the public are becoming increasingly concerned with protecting the environment from pollution, damage and deterioration. Ecologists and environmentalists are constantly drawing attention to the need to conserve our natural resources and to preserve our environment. As Chief Justice Glube found, the requirement of an environmental impact report was not an unknown requirement. It might well be said that even if such requirement had been contemplated by the parties they still would have entered into the contract they did. In any event the requirement of the study was known to Industrial when the last bond extension was obtained.

I have reached the following conclusions based on a consideration of the relevant circumstances against the background of the applicable legal principles.

1. Requirement of an environmental impact report was an intervening event that made more onerous and expensive performance by Industrial of its obligations to Kesmat. The cost of the study, however, based on the evidence, has not been shown to be so onerous or unreasonable so as to render performance of the contract impractical—it simply cannot be said that the cost of the study is so enormous “that no man of common sense would incur the outlay”—per Maule J. in *Moss v. Smith* (1850), 137 E.R. 827 at 831.

2. The requirement of such study or report was not an unheard of request. It was one that ... Industrial, prior to the last extension of both the principal agreement and the bond, knew or ought to have known might be made. It follows that the request for such study or report is not so catastrophic an intervening event as to justify the invocation of the doctrine of frustration. ...

It is clear that the rezoning and resubdivision was not completed in accordance with the terms of the agreement as extended. The appellant contends that there was therefore a default by Industrial which activated the penal provisions of the principal agreement and of the bond.

[Kesmat was found to be entitled to judgment in the amount of \$50,000 against Industrial and Canadian Indemnity. Appeal allowed.]

### 3. Self-Induced Frustration

#### MARITIME NATIONAL FISH LTD. v. OCEAN TRAWLERS LTD.

[1935] A.C. 524, [1935] 2 W.W.R. 606, [1935] 3 D.L.R. 12 (P.C.)

In July 1932, the appellants chartered a trawler, the *St. Cuthbert*, from the respondents for a period of one year, commencing 25th October 1932 at a rate of \$590 per month.

LORD WRIGHT [delivering the judgment of the court] ... When the parties entered into the new agreement in July, 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act ... which in substance made it a punishable offence to leave or depart from any port in Canada with intent to fish with a vessel that uses an otter or other similar trawl for catching fish, except under licence from the Minister: it was left to the Minister to determine the number of such vessels eligible to be licensed, and Regulations were to be made defining the conditions in respect of licences. ...

The *St. Cuthbert* was a vessel which was fitted with, and could only operate as a trawler with, an otter trawl.

The appellants, in addition to the *St. Cuthbert*, also operated four other trawlers, all fitted with otter trawling gear.

On March 11, 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the Regulations, but on April 5, 1933, the Acting Minister replied that it had been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants: he accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers other than the *St. Cuthbert*, and for these three trawlers licences were issued, but no licence was granted for the *St. Cuthbert*. In consequence, as from April 30, 1933, it was no longer lawful for the appellants to employ the *St. Cuthbert* as a trawler in their business. On May 1, 1933, the appellants gave notice that the *St. Cuthbert* was available for redelivery to the respondents; they claimed that they were no longer bound by the charter.

On June 19, 1933, the respondents commenced their action claiming \$590.97 as being hire due under the charter for the month ending May 25, 1933: it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, August, September and October, 1933.

[Lord Wright indicated that he would be inclined to concur with the judgment of the Supreme Court of Nova Scotia in holding the contract was not frustrated because the appellants, being aware of the legislation, took the risk that the necessary licence would not be granted. However, the Judicial Committee disposed of the case on the shorter ground that:] ... in their judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the *St. Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers

they were operating and could, had they willed, have selected the St. Cuthbert as one, in which event a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents, that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the St. Cuthbert if they had so minded. If the case be figured as one in which the St. Cuthbert was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the St. Cuthbert. The essence of "frustration" is that it should not be due to the act or election of the party. ...

... [T]heir Lordships are of opinion that the loss of the St. Cuthbert's licence can correctly be described ... as "a self induced frustration." ... Lord Blackburn in *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 at 53 (H.L.), ... refers to a "frustration" as being a matter "caused by something for which neither party was responsible" ... [I]t cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their own default to excuse them from liability under the contract.

## QUESTIONS

1. In *J. Lauritzen A.S. v. Wijsmuller B.V. (The "Super Servant Two")*, [1989] 1 Lloyd's Rep. 148, affirmed [1990] 1 Lloyd's Rep. 1 (C.A.), Lauritzen owned a large and heavy drilling rig, which was under construction in Japan. Wijsmuller agreed to transport the rig to the Rotterdam area of the North Sea on one of its large semi-submersible, self-propelled barges. The rig was to be delivered to Wijsmuller for carriage between June 20 and August 20, 1981 and the transportation unit was described in the contract as "Super Servant One or Super Servant Two in Wijsmuller's option".

Ultimately, Wijsmuller planned to use Super Servant Two to transport the rig and engaged Super Servant One on other contracts for the period between June and August, 1981. On January 29, 1981, Super Servant Two sank and was declared a total loss. On February 16, 1981, Wijsmuller informed Lauritzen that they would not carry out the transportation of the rig and Lauritzen claimed damages for breach of contract. Wijsmuller pleaded that the contract had been frustrated.

- (a) Should Wijsmuller's defence of frustration succeed?
- (b) If Wijsmuller knew on February 16, 1981, that its defence of frustration might not succeed, what might it have chosen to do?
- (c) What if the Super Servant Two had sunk because of Wijsmuller's negligence?

2. A, a peach grower in the Okanagan Valley, has agreed to sell 100 kilograms of peaches from A's orchard to each of five customers. A severe hailstorm damages the orchard with the result that only 100 kilograms of peaches in total are produced. What should A do? See *Hollinger Consol. Gold Mines Ltd. v. Northern Can. Power*, [1923] 4 D.L.R. 1205 (Ont. C.A.); *Samuel v. Black Lake Asbestos & Chrome Co.* (1920), 58 D.L.R. 270, reversed on other grounds 62 S.C.R. 472. What if A's contract with each customer contained a *force majeure* clause, which absolved A of liability

for failure to deliver in these circumstances? See *J. Lauritzen A.S. v. Wijsmuller B.V.*, [1989] 1 Lloyd's Rep. 148 at 158-59.

3. A agrees to purchase a condominium in a building yet to be constructed by the vendor/developer. The developer then gets into a "war" with the planning authority which ultimately refuses the building permit and down zones the site. Is the contract frustrated? See *Dinicola v. Huang & Danczkay Properties* (1996), 135 D.L.R. (4th) 525 (Ont. Gen. Div.), affirmed on other grounds (1998), 163 D.L.R. (4th) 286 (Ont. C.A.).

#### 4. Frustration and Contracts Conveying an Interest in Land

There has always been considerable controversy in the common law world as to whether contracts conveying an interest in land, and particularly leases, could be frustrated. For a long time there was little Canadian authority on point, but most cases indicated, *obiter*, that Canadian courts would follow the lower English courts and hold that the doctrine did not apply to leases. The following Ontario case contains the first serious discussion of this point by a senior Canadian court.

##### CAPITAL QUALITY HOMES LTD. v. COLWYN CONSTRUCTION LTD.

(1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A.)

The facts of the case are set out *supra*, at p. 678.

EVANS J.A. ... The controversial question that is still undecided by the House of Lords is whether the doctrine of frustration can be applied to a lease of land. Cases involving the destruction of a chattel, the subject of the contract, as in *Howell v. Coupland* (1876), 1 Q.B.D. 258 (C.A.), or the destruction of a music hall, the existence of which was the foundation of the contract, as in *Taylor v. Caldwell*, [*supra*], or those cases in which the performance of the contract has become illegal because of some supervening legislation are to be distinguished from land leases which are considered to be more than contracts, since they create estates in land which give rise to proprietary rights in addition to purely personal rights as found in all commercial contracts. In the development of the modern law of contracts an increasingly wider conception of the doctrine of frustration as a ground of discharge of commercial contracts came into operation but the English Courts have consistently held that the doctrine of frustration has no application when the contract creates an estate in land.

In *Cricklewood Properties & Inv. Ltd. v. Leighton's Inv. Trust Ltd.*, [1945] A.C. 221 (H.L.), Lord Russell of Killowen and Lord Goddard held to the view that the doctrine of frustration cannot apply to a demise of real property. Viscount Simon, L.C., and Lord Wright took the position that the doctrine is modern and flexible and ought not to be restricted by an arbitrary formula. Lord Porter expressed no opinion on the question. ...

In *Cricklewood*, *supra*, the trial Judge would have held the contract to be discharged, had he not been convinced that there was clear authority that the doctrine of frustration could not be applied to a demise of real property. The Court of Appeal affirmed his judgment on the ground that frustration was not

applicable. It was only when the case was considered in the House of Lords that some doubt was cast upon the earlier cases which had come to be regarded as authoritative. Viscount Simon L.C. defined "frustration" as [at p. 228]:

... the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement.

He was of the opinion that the doctrine could apply to a lease of land although he considered that the instances in which it could be successfully invoked were very rare. He stated that the Court of Appeal was in error in concluding that the authorities held that a lease cannot in any circumstances be ended by frustration.

... Lord Wright agreed with Lord Simon and pointed out that the doctrine of frustration is not subject to being constricted by an arbitrary formula. ...

In *Cricklewood*, Viscount Simon L.C., and Lord Wright held against the accepted view that leases were outside the doctrine since a lease in addition to being a contract creates an estate in the land demised for the period of the agreed term. I adopt the reasoning of Viscount Simon L.C., and his conclusion that there is no binding authority precluding the application of the doctrine of frustration to contracts involving the lease of lands. I am also in accord with his observations that the doctrine is flexible and ought not to be restricted by any arbitrary formula. I see no reason why the doctrine cannot be logically extended to contracts involving the purchase and sale of land. If the supervening event makes the contract incapable of fulfilment as contemplated by the parties, then it appears to me illogical and unreasonable to contend that the fundamental object of the contract can be effected because the equitable interest in the land has passed to the purchaser.

.....

I adopt the reasoning of Lord Simon in *Cricklewood*, *supra*, and accept his conclusion that there is no binding authority in England precluding the application of the doctrine of frustration to contracts involving a lease of land. I believe the situation to be the same in Ontario and I am unable to distinguish any difference between leases of land and agreements for the sale of land, so far as the application of the doctrine is concerned. Each is more than a simple contract. In the former an estate in land is created while in the latter an equitable estate arises. There does not appear to be any logical reason or binding legal authority which would prohibit the extension of the doctrine to contracts involving land.

#### NOTE and QUESTION

1. Do the reasons that favour the application of the doctrine of frustration to a lease necessarily support its application to sales of land? See Waddams, *The Law of Contracts*, 3rd ed. (1993), at 248-50.

2. The House of Lords resolved the division of opinion in the *Cricklewood* case by deciding in *Nat. Carriers v. Panalpina (Northern) Ltd.*, [1981] A.C. 675, that in principle a lease could be frustrated. See also, *Turner v. Clark* (1983), 30 R.P.R. 164 (N.B. C.A.).

## 5. Should the Doctrine of Frustration be Expanded: Commercial Impracticality and Social Force Majeure?

It is apparent that the courts have been reluctant to expand the doctrine of frustration because of the threat that it poses for the shibboleth of sanctity of contract. Anglo-Canadian courts have reiterated on many occasions that even a dramatic increase in expense or the fact that performance has become significantly more onerous will not suffice. Bad bargains are not enough. But there are several hints that the doctrine could be expanded.

First, there are long term supply contracts, a phenomenon that has become increasingly common in the twentieth century. In these situations parties may bind themselves to provide goods and/or services (water, fuel or electricity) for many decades. Obviously, such contracts are vulnerable to the possibility that some unanticipated exogenous events (for example, hyperinflation, transformation in the marketplace by the emergence of a price-inflating cartel, or environmental protection legislation) could thwart (at least one of the parties' expectations). With the exception of Lord Denning (*Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.*, [1978] 3 All E.R. 769 (C.A.)), English and Canadian courts have been unsympathetic to such arguments. (For a critique of this absolute prohibition, on the basis of both policy and principle, see Beatson, "Increased Expense and Frustration" in Rose, ed., *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (1996) 121.)

However, in several other jurisdictions there has been greater openness to the possibility of excusing performance on the basis of extreme economic hardship. McBryde, in "Frustration of Contract" (1980), 25 *Juridical Rev.* (N.S.) 1 at 11 draws our attention to an old Scottish case, *Wilkie v. Bethune* (1848), 11 D. 132 where

[a]n employer was bound to pay his servant in potatoes. There was a dramatic rise in the price of potatoes due to the failure of the crop in 1846. If the servant had been paid in potatoes he would have greatly benefitted. However, the court applied an equitable construction to the contract and held the servant entitled, not to his potatoes, but to a sum which would purchase the equivalent of other food.

In the United States there is the doctrine of "commercial impracticality". U.C.C. Section 2-615 and the American Law Institute, *Restatement of the Law of Contracts*, 2nd ed. (1979) 261 both provide that the obligation to perform is excused if "performance as agreed has been made impractical by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." See for example *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916); *Aluminum Co. of America (Alcoa) v. Essex Group Inc.*, 499 F. Supp. 53 (W.D. Pa., 1980); *Florida Power and Light Co. v. Westinghouse Electric Co.*, 826 F.2d 239 (1987). Another example is to be found in *Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW* (1982), 149 C.L.R. 337, where the Australian High Court found that, despite the long list of precedent to the contrary, extreme financial hardship for a builder could ground frustration.

In the light of these cases reconsider *Capital Quality Homes*. Is it truly a situation of impossibility, or is it more accurately an example of commercial impract-

icality? (See Fridman, "The Theory and Practice of Frustration" (1977), 26(2) Chitty's L.J. 37 at 42.)

Commercial impracticality primarily relates to supervening events that affect the relations between two corporations. In some jurisdictions there is a cognate doctrine for consumers who experience a significant change in their financial circumstances that renders their contractual obligations for leases, credit cards or loans significantly more onerous. This is sometimes called social force majeure. Wilhelmsson provides the following introduction to the concept as it has emerged in Scandinavia:

**WILHELMSSON, "SOCIAL FORCE MAJEURE"—  
A NEW CONCEPT IN NORDIC CONSUMER LAW"**

(1990), 13 Journal of Consumer Policy 1, at 7-8

The principle of social force majeure could be applied when the following four conditions are fulfilled:

1. The consumer is affected by some *special occurrence* such as an unfavourable change in his health (physical or mental illness, personal injury), work (unemployment, reduced work, strike and lockout), housing (termination of lease) or family (divorce, death or injury of family member). The list is not exhaustive; other occurrences may be relevant, too.

2. There is a *causal connection* between this occurrence and the consumer's difficulties in paying. If the occurrence has not led to economic difficulties for the person concerned — if he is wealthy and has other resources — he may not invoke the principle of social force majeure.

3. If the consumer *foresaw* the special occurrence when he concluded the contract, he cannot rely on it.

4. If the occurrence was caused by the *fault* of the consumer, he is also prevented from invoking the principle of social force majeure.

There are various legal consequences which may be attached to social force majeure. ...

- Many of the acts, such as the legislation on interest, prescribe that social force should lead to a *mitigation of the sanctions* imposed on a consumer who has not been able to pay on time. It therefore seems quite natural that social force majeure should form a relevant defence against, e.g., the liability to pay damages in case of delay.
- In some cases, when avoidance of a contract would cause economic losses to the consumer, social force majeure should *prevent the other party from avoiding* the contract, at least for some time. Such a consequence would be especially important in the case of permanent contracts concerning necessary utilities like electricity, telephone, and heating.
- In some cases ... one might recognize the right of the consumer to *withdraw* from a binding contract or to *terminate* a long term contract when he is hit by social force majeure.



## QUESTION

Is the following provision of the *Residential Tenancies Act*, R.S.N.S., c. 401 an example of social *force majeure* in the Canadian context?

Early termination upon income reduction

10B Notwithstanding Section 10, where the income of a tenant, or one of a group of the tenants in the same residential premises, is so reduced because of a significant deterioration of a tenant's health that it is not reasonably sufficient to pay the rent in addition to the tenant's other reasonable expenses, or if there is more than one tenant, the tenant may terminate a year-to-year tenancy by giving the landlord

- (1) one month's notice to quit; and
- (2) a certificate of a medical practitioner evidencing the significant deterioration of health.

In light of the ideas of commercial impracticality and social *force majeure* consider the following discussion of the context and impact of the recession of 1981-1983.

## CONKLIN, A CONTRACT

in Devlin, ed., *Canadian Perspectives on Legal Theory*  
(Toronto: Grand Montgomery Publications Ltd., 1991), pp. 213-215

[The author had discussed language as a system of signs, which in the case of law mediates the lawyer's interpretation of facts with the consequences of separating the law from social practices which the sign system does not incorporate.] The possibility that there might be victims beyond or outside of the legal sign system is difficult for Canadian lawyers to fathom because they have been so successfully assimilated into a language that precludes that possibility. First, the sign system induces the belief that a contract is a private matter in that it regulates the private relationships between two parties in contrast to the public matters that concern the state. So, the lawyer demarcates the contract as falling within private law as opposed to public law. Second, the legal sign system reinforces the belief that financial institutions are independent of the state. ... This belief is strong notwithstanding the fact that the state formally creates and regulates financial institutions and notwithstanding the fact that the Minister of Finance is theoretically responsible for monetary policy in Canada. Being considered private institutions independent of the government, we tend to contrast the banker to the police officer. We tend to believe that raw physical force is associated with the criminal code and not with the contract. Third, the sign system of which the contract is only a part induces the belief that, in contrast to prisoners, businesspersons retain their liberty to live freely from physical restraint within society. This freedom from physical coercion is called civil liberty. We are also led to believe that, notwithstanding the enforcement of the contract, borrowers retain their liberty to express themselves, to vote, to travel interprovincially, to assemble in a group, and to associate with others without constraint from the state. The sign system calls this political liberty. The sign system of law, then, induces us to believe that the contract is the epitome of freedom in that it is a private matter involving a private dispute independent of the state. With the help of the sign system in the subject area of constitutional law, we are led to believe that freedom is still retained during the enforcement of the contract.

The recession of 1981-83 in Southwestern Ontario suggests that such beliefs are illusory. When one looks beyond the legal system to empirically oriented studies of the financial industry, to the testimony before legislative committees, to the interviews and statistical studies of the financial industry carried out by respected journalists, to studies in banking and business journals, and to other nonlegal resource material, one is struck by the public issues that envelop the contract. Moreover, one is struck by how the sign system of lawyers misdescribes and even conceals the suffering as practised in Canada.

And yet, the lawyer's sign system concentrated upon the contract as the source of a dispute during the recession of 1981-83. That contract involved two "independent" parties, alone isolated from other human beings, scissored from the indigenous community of fellow farmers and businesspersons, and estranged from the indigenous community at large. The sign system constructed the parties as two atomistic individuals at civil war.

The sign system of the lawyer at the time presupposed, for example, that if individuals were granted fair opportunities to fulfill their duties, they should be able to do so. So, if they could not obtain alternate financing within a few hours or days, then they deserved to have their assets seized. The outcome was deemed a just one. But the public record drawn from outside the lawyer's sign system seems to suggest that the factors triggering many loan calls during the 1981-83 recession were external to the debtor's competence, foreseeability, blameworthiness, and control. The most important factor during the period, for example, was the extraordinarily rapid rise in interest rates beginning in late 1979. The interest rate charged to the preferred customers of the chartered banks climbed from 12.75 percent on February 28, 1979, to 23.5 percent in August 1981 where it remained until September 11, 1981. Trust companies and credit unions, to the extent that they financed small businesses and farms at the time, charged still higher rates. By 1984, the financial institutions had lowered their interest rates to their former level. Farmers and small businesspersons could not have foreseen the rapid and radical escalation of the interest rate. Nor could they have controlled it, notwithstanding the fact that most contracts allowed for a floating interest rate, which the debtor theoretically could have renegotiated into a fixed rate (at a possibly still higher level). Further, regionally declining employment and markets also lay outside the borrower's control. Not infrequently, the very circumstances that brought on the enforcement of one person's contract reverberated throughout the regional economy as a whole. In one industry towns, the enforcement of the dominant company's contract undermined the whole community's self-confidence. This, in turn, affected the lender's expectations about the future economy of a region or industry. And this, in turn, affected how lenders would consider the financial position of other farmers and small businesspersons. ...

Let us take one more example of how the focus upon the contract lopped off a great deal of social practice. A focus upon the contract encouraged the lawyer to consider how the lender could be placed in the *status quo ante* — that is, how could the situation be corrected so as to repair the particular economic loss caused to the lender by the borrower's failure to pay upon demand? This question, in turn, carried with it an isolated time sequence of the two individual

parties leading up to the enforcement of the contract. It lopped off the social and economic conditions leading up to the borrower's decision to take out a loan during the 1970s. At that time, financial institutions and government agencies were rapidly expanding credit. As Donald Fullerton, the President of the CIBC, once acknowledged, this expanding credit constituted "the mistakes of the '70s": "What were we thinking of when we made the loans?" The Central Mortgage and Housing Corporation influenced expectations through loans at below-market interest rates; capital contributions to low income housing and rental construction; loans and grants to municipalities for land assembly, sewage, and water projects; and subsidies for home insulation. Similarly, by March 1979, the Farm Credit Corporation had granted 71,722 outstanding loans totalling 2.7 billion dollars for the purchase of farm equipment, livestock, buildings, and land. And the Export Development Corporation had extended commercial credit for exports and for the creation of large capital projects in Canada by foreign companies. By the end of the 1970s, these four government agencies had flushed 8.7 billion dollars into businesses in Canada. And this was all in addition to the great expansion of loans by financial institutions. Unlimited optimism in a crassly materialistic culture permeated the decisions of farmers and small businesspersons to take out loans. But the contract was read into a preexisting sign system that excluded all these factors from its scope.

For lawyers, the sign system induced them to interpret the circumstances as isolated disputes between two socially atomistic and isolated parties. The sign system projected the judge's role as one of adjudicating that dispute. By focusing upon the contract as the source of all relevant rights and duties, the sign system estranged the two atomistic parties from any connection with other human beings. The sign system just could not allow lawyers to ask whether borrowers' defaults were caused by economic factors outside of their control; whether the financing of small business in Canada allowed for a competition among commercial lenders at the time; whether there was even a semblance of bargaining power between the two "self-sufficient" parties when the lender drew up the initial draft of the contract; whether financial institutions did in fact draw up the contract and, if so, how frequently did borrowers attempt or succeed in amending lenders' drafts; whether particular lenders controlled a relatively large proportion of all borrowing funds in the Canadian economy; whether lenders possessed an expansive and diversified asset basis; whether they effectively lobbied for regulatory protection throughout the 1970s; whether they advised the central bankers of monetary and interest rate policy; and whether they had effectively acted as partners with the farmers and small businesspersons generally since the nineteenth century. The sign system in which lawyers found themselves prevented them from considering such issues as legally relevant to the facts and circumstances of cases. The door to the social world could hardly budge. Its hinges were seized. No light could be detected beyond a lawyer's gaze. And this occurred despite the sign system's professed appeal to the facts and circumstances of each case.

[Footnotes omitted.]

## 6. Anticipating the Unforeseeable: Force Majeure Clauses

While it is true that one may not be able to anticipate the specific impact of unforeseen contingencies, many business people recognize that given the nature of their business there may be some general contingencies beyond their control that might make performance either impossible or more onerous than they expect. To facilitate forward planning and provide for flexibility, many contracts include *force majeure* clauses. Generally speaking, such clauses can provide a variety of options: first, performance can be suspended for a specified period of time; secondly, the contract might be varied; and third, if necessary, there may be an option to terminate the contract without having to pay damages for non-performance. Clearly, *force majeure* clauses are an attempt to allocate risk in the event that an exogenous contingency arises.

Because such clauses are designed to avoid the doctrine of absolute contracts and excuse performance, thereby transferring all risk of loss onto the other party, the courts tend to worry that there might be an inequitable allocation of risk. Consequently, courts are inclined to construe such clauses quite strictly although there is no rule of law to this effect.

### ATLANTIC PAPER STOCK LTD. v. ST. ANNE-NACKAWIC PULP & PAPER CO.

[1976] 1 S.C.R. 580, 10 N.B.R. (2d) 513, 56 D.L.R. (3d) 409, 4 N.R. 539

DICKSON J. [delivering the judgment of the court] This litigation arises out of a contract for the sale by Atlantic Paper Stock Limited and Elliot Krever & Associates (Maritimes) Ltd. to St. Anne-Nackawic Pulp and Paper Company, Ltd. of 10,000 tons of waste paper a year for 10 years, to be used as secondary fibre in the manufacture of corrugating medium at St. Anne's mill. After 14 months, St. Anne advised Atlantic and Elliot Krever it would not accept any more secondary fibre and the latter sued for damages. In defence, St. Anne pleaded non-availability of markets for pulp or corrugating medium with the meaning of the concluding words of cl. 2(a) of the contract, reading:

St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest, or strikes, the destruction of or damages to production facilities, or the non-availability of markets for pulp or corrugating medium.

... Quantum of damages aside, the sole question is whether non-availability of markets for pulp or corrugated medium discharged St. Anne from its obligations under the contract.

St. Anne owns and operates a mill at Nackawic, New Brunswick, which was designed to manufacture pulp and paper. St. Anne is a wholly-owned subsidiary of Parsons & Whittemore, an American company with world-wide interests in the pulp and paper industry. Construction of the mill was started in 1968, and completed in 1970, at a cost of \$72,000,000, of which \$18,000,000 was invested

in the section designed for the manufacture of paper. The mill began to manufacture paper in April of 1970, and bleached hardwood Kraft pulp in June of 1970. The paper manufactured was a semi-chemical medium commonly referred to as corrugating medium, which is used in the packaging and box industry. Corrugating medium is placed between two sheets of what is known as liner board, a product not produced by St. Anne, to form the stuff of which cardboard cartons are made. The raw materials required to produce the type of corrugating medium manufactured by St. Anne included 15% so-called secondary fibre, which is waste paper salvaged from used corrugated cartons and shipping cases.

The contract in issue in these proceedings is dated April 10, 1970, and obligates St. Anne to purchase, on stated terms, exclusively from or through Atlantic and Elliot Krever, all its requirements, maximal 18,000 tons and minimal 10,000 tons, of secondary fibre for its mill. Following upon the execution of this contract, Atlantic and Elliot Krever entered into agreements with the City of St. John and with two New Brunswick breweries for the provision of the secondary fibre needed under the contract with St. Anne. Atlantic and Elliot Krever furnished St. Anne with secondary fibre in accordance with the terms of the contract until they received, without warning, advice by telegram on June 9, 1971, that St. Anne would not accept any more fibre. The paper machine closed down on June 16, 1971, and has since stood idle.

An act of God clause or *force majeure* clause, and it is within such a clause that the words "non-availability of markets" are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. If markets were unavailable to St. Anne, did they become so because of something unexpected happening after April 10, 1970? Was the change so radical as to strike at the root of the contract? Could the company, through the exercise of reasonable skill, have found markets in which to trade? Clause 2(a) contemplates the following frustrating events: an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities. Reading the clause *ejusdem generis*, it seems to me that "non-availability of markets" as a discharging condition must be limited to an event over which the respondent exercises no control. . . .

[Dickson J. then commented that the primary cause of the failure of St. Anne's corrugating medium facility was a lack of an effective marketing plan for the product.] St. Anne's had known prior to the present contract that the U.S. market was foreclosed to it. It then appeared that St. Anne's had greatly overestimated its ability to sell in the Canadian market, which was dominated by integrated companies, with parent companies manufacturing corrugating medium and selling to subsidiaries manufacturing cardboard cartons. In addition in 1970 and 1971, a number of technological and competitive factors caused a decline of perhaps 10% in the export potential to European markets. The trial Judge summed up St. Anne's marketing problems as follows:

Feasibility studies had been done for the defendant, prior to construction and the reports

were optimistic. Needless to say, the predictions on all points have been incorrect so far. The situation at the time of cancellation of the contract herein was substantially the same as at the time of the studies.

The difference between the conclusion of the trial Judge and that of the Appeal Division turned essentially on whether the words "non-availability of markets" meant non-availability of economic markets for St. Anne. Mr. Justice Barry found no such connotation in the language of the clause. The effect of the Appeal Division opinion would be to relieve St. Anne of contractual obligation if St. Anne could not operate at a profit. I doubt that reasonable men would have made such a bargain. It would in my opinion be doing violence to the plain words "non-availability of markets for pulp or corrugating medium" in the context of the entire clause within which the words are found, to permit St. Anne to rely upon its soaring production costs to absolve it of contractual liability. ...

[On the basis of a market survey it] would appear, therefore, that on an average selling price per ton of \$120 St. Anne would lose \$30.29 per ton in June, 1970, and \$66.94 per ton in June, 1971. In the first year of operation St. Anne's mill operated at a loss of \$9,000,000 as against a projected loss of \$782,000. As Mr. Justice Barry said, "the defendant simply priced itself out of any available market existing".

The trial Judge made [the following critical finding of fact]:

... the conditions existing in the market on April 10, 1970, when the parties executed P-1 were and are substantially the same as at the time of cancellation in June, 1971, and at present.

Exhibit P-1 is the contract to which I have referred. He also held:

I find that there is a market for corrugated medium, albeit a declining one, and very competitive market, and certainly, not an economic market at the defendant's cost per ton.

Mr. Wiltshire, senior vice-president of St. Anne, was asked by counsel to state the factors on which the decision to stop production were based. He prefaced his answer by the words: "It was an accumulation of circumstances", and then referred to a change of agents in Germany, failure to get repeat business, competition from bogus medium, unsold inventory of more than half of production, re-evaluation of the Canadian dollar. The factors confirm beyond doubt the presence of many serious marketing difficulties, but, in my opinion, they do not establish, in the face of evidence of a strong demand for corrugated medium throughout the world and of competitors of St. Anne selling to the limit of their respective productive capacities, that markets for corrugating medium were not available to St. Anne.

I do not think St. Anne can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude that the whole St. Anne project for the manufacture of corrugating medium was misconceived. The problems which plagued it proceeded, however, not from non-availability of markets for corrugating medium but from (i) lack of an effective marketing plan, as I have stated; St. Anne spent \$16,000,000 to produce a product without any notion of where the product would be sold, and (ii) inordinate operating costs, aggravated by two subsidiary factors: (a) lack of captive outlets, and (b) failure to produce liner board; customers needed both corrugating medium and liner board, and preferred manufacturers who could offer both. The project, conceived in ephemeral

hopes and not the harsh realities of the market place, resulted in failure for which St. Anne and not changes in the market for corrugating medium during the period April 10, 1970 to June 9, 1971 must be held accountable.

[Accordingly, the appeal was allowed and St. Anne was held liable for damages in the amount of \$108,250.]

## NOTES AND QUESTIONS

1. This case emphasizes the restrictive approach of courts in interpreting clauses that are drafted in an attempt to guard against unexpected events. For a discussion of Canadian cases, which generally exhibit this approach, see *Comment* (1976), 54 Can. Bar Rev. 161.

Why do courts tend to construe *force majeure* clauses strictly? The restrictive approach to the interpretation of such clauses seems to be continued in *Atcor Ltd. v. Continental Energy Marketing Ltd.* (1996), 38 Alta. L.R. (3d) 229 (C.A.).

Atcor and Continental entered into a contract whereby Atcor would supply Continental with natural gas by means of a pipeline operated by a third party, Nova Corporation. The contract contained the following *force majeure* clause:

9. Subject to the other provisions of this paragraph, if either party to this Agreement fails to observe or perform any of the covenants or obligations herein imposed upon it and such failure shall have been occasioned by, or in consequence of force majeure, as hereinafter defined, such failure shall be deemed not to be a breach of such covenants or obligations.

(a) For the purposes of this Agreement, the term "force majeure" shall mean any acts of God, including therein, but without restricting the generality thereof, lightning, earthquakes and storms and in addition shall mean any strikes, lockouts or other industrial disturbances, acts of the Queen's enemies, sabotage, wars, blockades, insurrections, riots, epidemics, landslides, floods, fires, washouts, arrests and restraints, civil disturbances, explosions, breakages of or accidents to plant, machinery or lines of pipe, hydrate obstructions of lines of pipe, freezings of wells or delivery facilities, well blowouts, cratering, pipeline tie-ins, pipeline connections, pipeline repairs and reconditioning, the orders of any court or governmental authority, the invoking of force majeure pursuant to any gas purchase contracts, any acts or omissions (including failure to take gas) of a transporter of gas to or for Seller which is excused by any event or occurrence of the character herein defined as constituting force majeure, or any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome.

Thus the clause explicitly provided that problems with the pipeline would constitute *force majeure*, and further provided that a party could not have the benefit of the *force majeure* clause if the *force majeure* event were within its power or could be overcome by due diligence.

During the course of the contract numerous pipeline problems forced Nova to decrease the amount of natural gas that Atcor was allowed to transport via the pipeline. Atcor drastically reduced its shipments to Continental, declaring *force majeure*, but continued to supply other customers via the Nova pipeline.

At trial, the court ruled that Nova's reduction of service to Atcor constituted *force majeure* under the agreement between Atcor and Continental and that the reduction was not within Atcor's power and could not be remedied by due diligence. Continental appealed, arguing that the pipeline restrictions did not cause Atcor's drastic reductions in supply; rather, they argued that Atcor's decision to direct what natural gas it could ship to other customers was the reason for the curtailment of service. The Alberta Court of Appeal allowed Continental's appeal, ruling that the trial judge erred in focusing only on the *force majeure* event and not on the effects of that event. Although the pipeline restrictions were not themselves within Atcor's power, the court ruled that Atcor was obliged to demonstrate that it could not mitigate the effects of the reductions by other means, provided those means were concordant with reasonable industry practice. The Court of Appeal remitted the case for a new trial, since the trial judge had not considered the largely factual question of whether Atcor could have mitigated the effects of the pipeline restrictions while remaining within the bounds of reasonable business standards.

2. For comprehensive reviews of the law in relation to *force majeure* see Treitel, *Frustration and Force Majeure* (1994) and McKendrick, ed., *Force Majeure and Frustration of Contract* (1991).

3. Does the judicial approach to *force majeure* clauses shed any light on the more general question as to the role of the judiciary in developing the common law of frustration?

## 7. Effect of Frustration

The effect of frustration is to automatically terminate the contract as of the moment of frustration, regardless of the wishes of the parties. Two points should be noted. First, unlike mistake, frustration is not retrospective, it does not render the contract void *ab initio*; rather parties are released from further obligations. Second, unlike a serious breach where the innocent party can choose whether to treat the contract as repudiated or not, frustration does not allow for a power of election. Both parties are automatically discharged from future performance of obligations. However, rights and obligations accrued prior to the frustration remain enforceable. This rule leads to some unfortunate financial consequences and has resulted in legislative intervention in every province but Nova Scotia. The following extract outlines a) the common law position; b) two different legislative regimes.

### ONTARIO LAW REFORM COMMISSION, REPORT ON AMENDMENT OF THE LAW OF CONTRACT

(1987), pp. 279-82

#### (i) *The Common Law Position*

Three principal issues arise in considering what relief should be made available following the frustration of a contract. The first is whether compensation should be allowed for benefits conferred on a party prior to frustration even though the contract does not provide for it and, where the benefit consists of non-pecuniary performance, performance is only partial. The second issue is whether reliance expenditures incurred by the parties in performance of their obligations should be recoverable and to what extent. The third issue is whether a court should be free to examine the surrounding circumstances to determine whether it is appropriate to allocate the reliance losses on some other basis than would otherwise be appropriate because of the implied agreement of the parties, trade usages, or general economic considerations.

The common law answers to these questions are both rigid and unsatisfactory. Briefly, the general position at common law regarding compensation for benefits conferred may be considered under two heads: recovery of monies paid and recompense for non-pecuniary benefits conferred. Turning first to recovery of monies paid, the 1904 case of *Chandler v. Webster* [[1904] 1 K.B. 493] held that money paid under a frustrated contract could not be recovered on the theory that the action for money had and received would not lie unless the contract was void *ab initio*. A frustrated contract was avoided, it was thought, only from the occurrence of the frustrating event. Moreover, obligations accrued before the frustrating event would remain enforceable on the same theory.



The decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [[1943] A.C. 32] overruled *Chandler* and discredited the theory underlying it. In *Fibrosa*, a buyer who had made partial payment before the frustrating event sought recovery. The House of Lords recognized the buyer's right to recover money paid, provided that the seller's consideration wholly failed.

[Viscount Simon stated, at 46-47:

To claim the return of money paid on the ground of total failure of consideration is not to vary the terms of the contract in any way. The claim arises not because the right to be repaid is one of the stipulated conditions of the contract, but because, in the circumstances that have happened, the law gives the remedy.... [I]t does not follow that because the plaintiff cannot sue "on the contract" he cannot sue *dehors* [ie outside] the contract for the recovery of a payment in respect of which consideration has failed.

However, he continued, at 49:

While this result [the return of money paid] obviates the harshness with which the previous view in some instances treated the party who had made a prepayment, it cannot be regarded as dealing fairly between the parties in all cases and must sometimes have the result of leaving the recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connexion with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid but which he now has to return for reasons which are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances...."]

In the absence of total failure of consideration, however, it would seem that restitutionary relief would be denied.

As to recompense for non-pecuniary benefits conferred, in England, recovery for the value of partial performance is made difficult by the rule in *Appleby v. Myers*, [(1867), L.R. 2 C.P. 651 (Ex.)]. This case held that, in the case of non-pecuniary benefits conferred under a contract that has been frustrated, recovery is not available for partial performance of an entire contract: the performing party must perform fully to earn his or her payment.

In Canada, the position of a party who has partly performed should be more promising in the light of the Supreme Court of Canada's embrace of a general doctrine of unjust enrichment in *Deglman v. Guaranty Trust Co. of Canada*, [*supra*, Chapter 4, section 8(c)(iii)]. However, the *Deglman* doctrine only applies (assuming it is applied to frustration cases) to restitutionary claims for benefits conferred. Neither Canadian nor English law offers indemnification to a party who has incurred reliance expenditures in preparation for, or partial performance of, contractual obligations not resulting in benefits conferred on the other party. The loss lies where it falls. Given this rule, the common law courts obviously do not have to concern themselves with any implied agreement between the parties for the allocation of reliance expenditures. The common law rule on the non-recoverability of reliance expenditures is defensible on policy grounds, but it may lead to anomalies. It means, for example, that a party who has prepaid all or part of the price but received no return benefits is entitled to recover his payments in full, while the other party who may have spent as much or more in part performance of his obligations is entitled to nothing.

(ii) *Legislative Developments*

... The principal features of the [Act that applies in Ontario, and the majority of the common law provinces] are these. The Act abolishes the rule<sup>e</sup> in *Chandler v. Webster* by relieving a contracting party from liability to make payments accruing before the date of frustration, but without affecting any claim against him or her for damages, and allows recovery of any payments made before this time. So far as non-pecuniary benefits are concerned, the court may, not must, allow recovery of their value. The recovery of reliance expenditures is still more circumscribed. ... [T]he Act provides that the court may permit the party incurring such expenses to retain so much of any payments received from the other party as is necessary to indemnify him or her for such expenses or to recover them from the other party if monies were payable to the other party before the date of frustration. These limited rights of recovery for reliance expenditures appear to have been animated by the theory that prepayment of the price is intended to protect the other party's reliance interests. The theory has little to commend it and has justly been criticized.

Finally, certain exclusions in the Ontario Act that follow those in the British Act should be noted. The Ontario Act does not apply to maritime contracts, insurance contracts, or to a contract for the sale of specific goods. ...

In 1974 British Columbia enacted a new *Frustrated Contract Act* [R.S.B.C. 1996, c. 166]. The Act was also adopted at the same time by the Uniform Law Conference of Canada as a new *Uniform Frustrated Contracts Act*. The British Columbia Act ("the Act") was based on the recommendations in a Report of the British Columbia Law Reform Commission and was designed to remove the shortcomings in the first Uniform Act. It was largely successful in this objective although, in our view, a number of further improvements are desirable.

The Act introduces three important changes. First, it removes a discretionary element in the first Uniform Act in allowing, as of right, the recovery of compensation for non-pecuniary benefits conferred before discharge of the contract. Second, it provides that reliance losses shall be divided equally between the parties without regard to any prepayments that may have been made under the contract. Third, it recognizes explicitly that the parties may have intended to allocate the risk of loss of reliance expenditures on a basis different from that provided for in the Act, and establishes criteria for determining whether they have done so in fact.

[Footnotes partially omitted.]

## NOTES and QUESTIONS

1. The O.L.R.C. recommended adoption of a modified version of the B.C. legislation. See *Report on Amendment of the Law of Contract* (1987), at 285.

2. For a critique of the approach taken under the Frustrated Contracts Acts and the British Columbia legislation and a consideration of alternative models that have been adopted in New South Wales and Victoria, see Stewart and Carter, "Frustrated Contracts and Statutory Adjustment: The Case for Reappraisal" (1992), 51 *Camb. L.J.* 66. For a discussion of some more imaginative approaches to loss sharing see Trakman, "Winner Take Some: Loss Sharing and Commercial Impracticability" (1985), 69 *Minn. L. Rev.* 471.

3. Citations of other versions of the Frustrated Contracts Act are: R.S.A. 1980, c. F-20; C.C.S.M., c. F190; R.S.N.B. 1973, c. F-24; R.S.N. 1990, c. F-26; R.S.N.W.T. 1988, c. F-12; R.S.O. 1990, c. F.34 as amended S.O. 1993, c. 27, Schd.; R.S.P.E.I. 1988, c. F-16, S.S. 1994, c. F-22.2, R.S.Y. 1986, c. 73, R.S.Y. 1986, c. 73; S.S. 1994, c. F-22.2.

Sections II and V of the Civil Code of Quebec respectively provide for an "exception from liability" and "impossibility of performance":

1470. A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.

A superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.

1693. A debtor is released where he cannot perform an obligation by reason of a superior force and before he is in default, or where, although he was in default, the creditor could not, in any case, benefit by the performance of the obligation by reason of that superior force, unless, in either case, the debtor has expressly assumed the risk of superior force.

The burden of proof of superior force is on the debtor.

1694. A debtor released by impossibility of performance may not exact performance of the correlative obligation of the creditor; if the performance has already been rendered, restitution is owed.

Where the debtor has performed part of his obligation, the creditor remains bound to perform his own obligation to the extent of his enrichment.

Would either of these be relevant in a situation where a tenant has been unable to inhabit an apartment for one month due to a catastrophic ice storm?

4. A lengthy and most useful account of the application of the English Act is provided by the judgment of Robert Goff J. in *B.P. Exploration Co. (Libya) v. Hunt (No. 2)*, [1982] 1 All E.R. 925, affirmed [1982] 1 All E.R. 978 (C.A.), [1982] 1 All E.R. 986 (H.L.). Differences in the wording of the Canadian and English Acts make it impossible to apply Goff J.'s comments directly to problems under the Canadian legislation, but his exploration of the principles which underlie both Acts is useful in answering detailed questions on their applicability.

5. For a recent example of a court unilaterally finding that a contract had been frustrated, even though neither of the parties had argued frustration, and then splitting the losses see *Brunswick Data Inc. v. New Brunswick* (1998), 196 N.B.R. (2d) 263, 501 A.P.R. 263 (Q.B.), reversed [1999] N.B.J. No. 95 (C.A.).

6. What difference would the different forms of Frustrated Contracts Acts make to the following cases?

(a) *Krell v. Henry*, *supra*, at p. 673, in which the would-be renter had made a down payment of £25 for the rooms and promised to pay a further £50, for which the owner sued.

(b) *Taylor v. Caldwell*, *supra*, section 2.

(c) *Capital Quality Homes Ltd. v. Colwyn Const. Ltd.*, *supra*, section 2.

7. Does the fact that some legislative interventions specifically empower a court to exercise its discretion "if it considers it just to do so having regard to all the circumstances" provide any assistance in determining which is the most appropriate theory to explain the doctrine of frustration?