

PART XI – TERMINATION BY FRUSTRATION

I FRUSTRATING EVENTS

A Introduction

1 Basic definition

If, after the formation of a contract, an event occurs with the effect of rendering performance more onerous, less valuable, or impossible, a party may argue that the contract has been frustrated.

In considering whether a contract has been frustrated, there are two heads of analysis: whether a frustrating event has occurred (Part I), and the effect of any resulting frustration (Part II below).

2 Historical origins

The historical origins of this doctrine's recognition in the modern common law lie in the ashes of an English concert hall (*Taylor v Caldwell*, where the razing of a concert hall six days prior to the first performance frustrated the contract for its hire). It was first recognised in Australia in *Hart v MacDonald*.

Today, law acknowledges the possibility of avoidance in certain intervening circumstances. In principle, the doctrine of frustration is applicable to every contract of all types and subject-matters.

3 Theoretical underpinnings

The doctrine of frustration is justified by reference to the additional burden or penalty the frustrating event places upon one or both of the parties to perform. The defining conflict is between classical contract theory and notions of fairness or justice. Classical theorists (and economists) argue that courts should not be able to subvert contractual obligations purely because performance has become more costly or difficult than anticipated because entering into contractual relations entails a certain assumption of risk that the cost of benefit of performance will change. Terminating contractual obligations erodes certainty and undermines the freedom of parties to allocate risk as between them.

For these reasons, early treatments of the doctrine treated a promise to do something as absolute unless otherwise qualified (*Jones*). However, this approach has not been followed since *Taylor v Caldwell*.

In rare cases, the event alleged to frustrate the contract ('the frustrating event') may affect both parties equally, allowing the parties to terminate by abandoning the contract.

4 Relationship to other excuses

a) Mistake

There is some overlap with common mistake (note, however, that while frustration is concerned with events that occur after formation, the mistake enquiry is directed at the situation as it exists at the time of formation). Mistake and frustration can occur concurrently (*Codelfa*).

In *Codelfa*, both parties assumed that their construction could not be prevented by injunctions granted to local residents. In so assuming, the parties made a (common) mistake at the time of formation. After formation, the residents obtaining an injunction could potentially have been a frustrating event. The frustration of the contract would then have been caused by facts happening as a result of a mistake. This analysis may be contrasted with the approach of Brennan J, who concluded that there was no relevant event after the time of formation, and that this was a case of mistake which was subsequently brought to light by the residents.

b) Legality

Changes in law may make performance illegal. Thus, illegality could provide an excuse for avoiding performance. However, the supervening change could also constitute a frustrating event.

c) Contingent conditions

In *Scanlan*, an implied contingent condition is argued as a basis for frustrating the contract; namely, that the contract is liable to be terminated if the frustrating event occurs. This is no longer the most popular way to approach frustration and contingent conditions, however.

A further example of the interaction between contingent conditions and frustration is provided by *Brisbane City Council* (and additionally *Beaton*); there, the contract was expressly or impliedly subject to contingent conditions which were not fulfilled. This gave rise to a prima facie right to avoid. If the failure was significant enough, it would also frustrate the contract.

In a hypothetical, it is important to identify overlap between excusatory and other doctrines that could allow a party to avoid performance. If frustration arises as a possibility, it is also likely that mistake and contingent conditions play a role.

B The Nature of a 'Frustrating Event'

A frustrating event can only occur after formation and has an adverse effect on the performance of a contract. It may make performance more costly, less beneficial, more time-consuming, etc. The issue is how adverse the effect of an event must be before it will be said to frustrate the contract.

The law must affix clearly defined boundaries to the kinds of event regarded as capable of frustrating a contract if the certainty and finality of modern commercial contracts are to be protected from unpredictability. As Latham CJ noted in *Scanlan's New Neon Ltd v Tooheys Ltd*:

Prima facie a promisor takes the risk of an event happening which prevents him or her from performing his or her promise.

The kinds of frustrating event able to overturn this prima facie position are therefore confined.

Potentially anything can constitute a frustrating event. However, several classic examples (originally given in *Henry*) suffice to illustrate the concept (the list is, obviously, non-exhaustive):

- War (contracts affected by the outbreak of war are traditionally regarded as frustrated);
- Natural disaster;
- Industrial action;

- Destruction of premises;
- Cancellation of a project;
- Death or incapacitation of a person;
- Compulsory acquisition of property;
- Changes of law (eg, *Scanlon*).

Several tests have been used by courts to determine whether a given event will frustrate the contract.

1 *Objective justice*

- If it is objectively just to treat the contract as at an end, it will be frustrated
- Rejected by Latham CJ in *Scanlan's*
- This consideration probably still plays an unacknowledged role in the determination

2 *Implied condition*

- Frustration is based on an application of the law of contingent conditions
- Where the contract is impliedly subject to there being no frustrating event of the kind that occurs, its occurrence will frustrate the contract by virtue of the failure of the condition
- Whenever a contract encounters an event alleged to frustrate it, it must be determined that there is an implied condition that it will not occur
- The basis for this implication is typically universal
- In its widest form, the test may be stated as: 'whenever the basis of the contract is destroyed, the contract shall be at an end'
- There are no cases where a condition is implied using a generic term
- It may also have been possible to imply a specific term that the particular event would bring the contract to an end

Scanlan's New Neon Ltd v Tooheys Ltd (1943) HCA:

Facts

- Scanlan's installs and leases neon signs to Tooheys for a period of five years, paid for by monthly rental
- The cost of installation comprises 50-80% of the total rental
- The contract provides that rental is payable 'whether or not the sign shall be used or operated by the lessee'
- All leases are made before the outbreak of WW2, except for four, which are made before Japan entered the war
- After Japan's entry into war (1942), the NSW government prohibits the illumination of signs indefinitely under the *National Security Act 1939-1940* (Cth)
- No longer able to light the Neon signs, Toohey stops paying rental
- Scanlan's sues for rental due

Issues

- Did the outbreak of war frustrate the contract of rental?

Reasoning

- The event alleged to frustrate the contract is the consequence of a change in the law prohibiting illumination

- Tooheys has lost *some* of the benefit of the contract (but not all, since the unilluminated signs still have some value during the day)
- Tooheys *can* still perform – it is just less valuable for them to do so
- The change in law adversely affects the value of the contract for Tooheys
- What is the test to be applied in determining whether an event is frustrating?
 - The objective justice and fairness test is rejected by Latham CJ, who does not decide the case on that basis
 - Even if this is the correct test, it would be unfair to bring the contract to an end
 - Implied conditions – there are two views of implication:
 - Latham CJ and Williams J: specific terms
 - A contingent condition providing for the frustrating event will be inferred to terminate the contract if reasonable parties, turning their minds to it, would have inserted such a condition
 - McTiernan J: looks at the basis of the contract
 - If the frustrating event destroys the substantial reason or basis for the contract, a universal condition comes into operation failure of which (by occurrence of the event) terminates the contract
 - This test works well where it is the physical object matter with which the object is concerned that perishes
 - However, in the case of non-physical or other transference of rights or interests, it becomes difficult to say that a frustrating event has ‘destroyed’ the basis for the contract
 - The implied condition is used as the basis for determining whether the contract was frustrated
 - Frustration is viewed merely as an aspect of the law of contingent conditions
- Was this event self-induced?
 - No; Tooheys was not responsible for the change in laws (the government was)
- Was the event foreseeable?
 - Probably; it was within the parties’ contemplation at the date when the contract was made – whether before or after Japan’s entry into the war
 - The risk of restrictions is a ‘fair business risk’ and at any rate common knowledge; no condition is implied
- Was the risk of restrictions upon illumination allocated to the lessee by the contract?
 - The interpretation of the clause is that it is not implied, not directly relied upon
 - Not directly allocated to or directed at changes in law
 - However, it purports to require payment regardless
- Latham CJ:
 - A woman who commissions a wedding dress but calls off the wedding before it occurs is nevertheless obliged to pay for the dress when completed
 - In that case, the bride bears the risk of the wedding being cancelled
 - (It may also arguably be self-induced!)
 - No frustration would result in such a case

Decision

- Held: no frustration (3:0)

It might also be possible for a non-event (or the failure of an event to eventuate) to constitute a frustrating event (*Beaton v McDivitt* per Mahoney J, though the logic is, with respect, doubtful).

***Beaton v McDivitt* (1987) HCA:**

Facts

- Beaton sues to enforce a promise by the McDivitts to a transfer block of land which is expected to be rezoned within 2 years
- 10 years later, the land is still not rezoned, and there is 'no present prospect' of it taking place

Issues

- Has the contract been frustrated?

Reasoning

- Mahoney J:
 - The contract was frustrated
 - The test used is not expressly articulated, but the implied condition test seems to be applied
 - The relevant frustrating event appears to be the non-occurrence of rezoning
 - This suggests that omissions or 'failures to occur' may constitute frustrating events
 - However, it is hard to see how the 'event' changed anything in respect of performance – it did not make it more difficult or costly for McDivitt to rezone, nor did it produce a situation substantially different from that envisaged (though 10 years compared with 2?)
 - It seems to difficult to say anything *happened* to change the situation
 - No application was made
 - There was no change in circumstances between contract formation and the commencement of proceedings except lapse of time
 - Mahoney J seems to b suggesting that both events and non-events can frustrate a contract
 - Here: nothing happens – an application is neither made, approved, nor even denied
 - Something may be said to have taken place if an application was made and *denied*, but none was made
- McHugh J: *seems* to apply the fundamental different test
 - The rezoning was not essential to the subdivision, so its failure to eventuate need not frustrate the contract
 - The failure to subdivide may also be a possible frustrating (non-)'event'
 - However, frustration 'has not yet been reached'

Decision

- There was a binding contract (no lack of consideration) (2:1, Kirby J diss)
- Mahoney J:
 - The contract frustrated by the non-fulfilment of an implied contingent condition
- McHugh J:
 - The contract was not frustrated because rezoning was not essential to the subdivision
- The action fails

3 Fundamental difference

The currently favoured test is that the event alleged to frustrate the contract must, in order to do so, bring about a situation 'fundamentally different' from that envisaged by the parties at formation. Factors relevant to this determination include the extent to which the event reduces the value to be derived from the contract and that to which it prevents the commercial purpose of the contract being realised.

This test has been endorsed and applied in several authoritative Australian cases; most notably, *Brisbane City Council, Codelfa Constructions*, and *Merton*. This test is inconsistent with the implied condition approach, which it may be assumed has been rejected.

Brisbane City Council v Group Projects Pty Ltd (1979) HCA:

Facts

- 30 October 1975: a deed is created whereby Brisbane City Council ('BCC') agrees to apply for rezoning of the land to enable its development
- Group Projects ('GP') 'in the event of [approval of] the application' agrees to pave roads, provide kerbs, channels, footpaths, contribute to cost of sewerage, water, electricity, parks, bridge invest \$122 600 in Council shares furnish \$200 000 performance bond
- Clause 7:
 - GP's obligations are to remain in force even if it is for any reason 'precluded from benefiting either wholly or partly' from the rezoning, including inability to use the land for a purpose
- 13 November 1976: the State government compulsorily acquires land on which to develop a school
- 25 December 1976: the land is rezoned
- GP sues for declaration that contract terminated on 13 November 1976

Issues

- Did the compulsory acquisition frustrate the contract between BCC and GP?

Reasoning

- GP's promise to make improvements involves performance taking place mostly off the land (developing parks, access ways, sewage, etc)
 - Thus, they are not unable to complete the contract, even if the land is repossessed and they are prevented from accessing the site
- The relevant event argued by GP to be frustrating was the compulsory acquisition of the land by the government
 - Such acquisition adversely impacts on GP's anticipated benefit
 - The purpose of the whole contract was destroyed; their expected gain from the development was reduced to nil
- Majority: approaches from the perspective of non-fulfilment of a contingent condition
 - GP's obligations were subject to the rezoning approval
 - At the time the land was rezoned, it had already been acquired by the government, so the condition was not fulfilled
- Stephen J (Murphy J agreeing):
 - The rezoning condition occurred when the land was rezoned
 - However, the contract was frustrated

- Adopts the fundamental difference test
- The test applied is whether the situation as *eventuated* was 'fundamentally different' to that contemplated at formation as a result of the allegedly frustrating event (the compulsory acquisition)
- Here, the situation is fundamentally different
- GP's purpose was utterly destroyed, though they are still able to perform most of their obligations
- Determining whether the situation is 'fundamentally' different is a matter of degree, and can be difficult
- GP was not responsible for the acquisition, so the event was not self-induced
- The event was not foreseeable (the council, after all, approved the rezoning request)
- Was the risk allocated by cl 7 to GP?
 - Magistrate: yes
 - Stephen J: no, risks were not allocated

Decision

- The contract was terminated (5:0)
 - The contingent condition that the rezoning be approved was not fulfilled (3)
 - The compulsory acquisition created a situation 'fundamentally different' to that contemplated by the parties at the time of formation, resulting in the frustration of the contract (2)

Assessing fundamental difference involves an objective assessment by the court as to the difference that the intervening event has made to the performance of the contract when compared with the counterfactual situation as contemplated at the time the contract was made. This analysis is succinctly encapsulated by the two questions: 'how did the parties contemplate performance would proceed? How large is the difference between this contemplation and what actually happened?'

Having compared the contemplated and actual situations, if the discrepancy is capable of being described as 'fundamental' then the contract will be at an end.

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) HCA:

Facts

- Three clauses in the contract provide as follows:
 - The contractor was deemed to have informed itself fully of the conditions affecting its carrying out of the works. If it did not inform himself fully it was not thereby to be relieved of the responsibility 'for satisfactorily performing the works as required regardless of their difficulty'
 - 'The Engineer shall ... extend the time for completing the works when, in the opinion of the Engineer, the findings of fact justify an extension'
 - 'The operation of all plant and construction equipment shall be such that it does not cause undue noise, pollution or nuisance ... The Contractor shall not be entitled to additional payment if the Engineer requires that measures be taken to reduce noise and pollution'

Issues

- Was the contract frustrated by the injunction preventing the development from proceeding according to schedule?

Reasoning

- The situation after the injunction was granted (the allegedly frustrating event) was fundamentally different to that contemplated
 - Before the allegedly frustrating event, Codelfa could work 24/7
 - After the injunction, they were limited to three shifts each week
 - Thus, it would take twice as long to complete the construction
 - This is a fundamental difference between contemplation and eventuation

- Was the frustrating event self-induced?
 - This requirement is largely ignored by the Court
 - Indeed, it is rarely applied
 - Here, Codelfa was clearly responsible for the noise and activities leading to the injunction, so it may be an issue (though the residents obtained the injunction, not Codelfa)
 - Has Codelfa in fact frustrated the contract themselves? This issue is not explored

- Was the granting of the injunction foreseeable?
 - There will be no frustration if the event 'should have been foreseeable' (Mason J)
 - Here, Codelfa did not and should not have foreseen that the injunction would be granted – they assumed that they were immune from compliance, a belief induced by the State Rail Authority
 - The specifics of local bylaws and injunctive procedures are not reasonably foreseeable to an Italian company (subjectively)

- There was extensive analysis of risks in the contract
 - The three clauses extracted above indicate the express risk allocations
 - Mason and Brennan JJ rely on the clause preventing Codelfa to be responsible for performance of the obligations 'regardless of their difficulty'
 - Brennan J: this implies that Codelfa assumes full responsibility for performance
 - Mason J: none of the clauses cover the kind of contingency that eventuated

Decision

- (4:1) The contract is frustrated because the situation created by the injunction is of fundamental difference to that contemplated
- The case is remitted to an arbitrator in accordance with post-termination provisions set out in the contract

It should be noted that these three tests are really quite similar, and produce mostly the same outcomes where they are applied in tandem. The new test is better able to explain the outcomes in previously decided cases.

C *Risk Allocation*

If the risk of a frustrating event of the kind that does occur is expressly or impliedly allocated to a party by the wording or provisions of the contract, the contract will not be frustrated by its eventuation, and any resulting loss will be allowed to lie where it has been allocated.

There are several common sources of express risk allocations in a contract:

1 Contingent conditions

If performance of a contract is subject to a contingent condition that event X occurs, the condition allocates the risk of that event not occurring to the promisee. For example, a contract for the sale of land that makes the sale conditional upon finance being obtained by the buyer allocates the risk of finance not being obtained to the seller.

2 'Force majeure' clauses

A clause may be inserted that allocates contingencies over which the parties have no control. For example:

*The above sale is subject to strikes, flood, war ... and other contingencies causing delay or non-shipment.*¹

The precise effect of such clauses will vary with their wording. In the case above, the condition allocates the risk of delay or non-shipment to the buyer (since the seller is not obliged to complete the sale if any of the contingencies occur).

3 Assumption of risk

Previously, it was assumed that any unqualified promise an absolute promise (*Taylor v Caldwell*). This view has since been replaced with the more moderate view that only where a specific risk or risks are allocated to a particular party will those events be expressly allocated to that party.

Many clauses in contracts don't explicitly allocate a specific and defined risk. This can give rise to interpretation issues (whether the event that did occur was within the scope of the risk that was allocated). There can also be an implied allocation of risk.

Where contingencies are expressly allocated to a party, risks falling outside the scope of those specified are impliedly allocated to the affected parties. There are two possible extents to which this can occur: first, that only foreseeable risks (ie, those foreseen but failed to be provided for by the parties) will be deemed to have been impliedly accepted by the affected party; second, that all risks not provided for are impliedly allocated.

This latter view is arguably somewhat simplistic, as it assumes that all foreseen events not provided for are allocated to the relevant party. It is, however, quite impossible to provide for every contingency, however likely it may be to occur. There are various reasons why parties may even have foreseen a risk but still failed to allocate it under the contract (not in the least an inability to determine the practical and legal consequences of the event).²

Meriton Apartments is, however, a clear case in which there was an implied assumption of the risk of the frustrating event occurring by the purchaser of land.

Meriton Apartments Pty Ltd v McLaurin & Tait (1979) HCA:

Facts

- McLaurin agrees to sell to Meriton land adjoining Centennial Park, Sydney

¹ *Ringstad v Gollin & Co Pty Ltd (1924) 35 CLR 303* (cited in Seminar Notes at 196).

² Hall, 'Frustration and the Question of Foresight' (1984) 4 *Legal Studies* 300, 304.

- The contract is subject to the approval of the development application by Sydney City Council; this approval is obtained
- However, 'green bans' are imposed by building unions
- Meriton claims that the contract is terminated; McLaurin sues for specific performance

Issues

- Has the contract been frustrated by the green bans?

Reasoning

- The green bans are potentially frustrating
 - Diminished value of land
 - Frustration of purpose (development)
- However, the buyer impliedly bore the risk of green bans
 - There was an express allocation to the seller of the risk of non-approval by Council
 - This impliedly allocates all other risks to the buyer
 - Two views may be taken of the implication
 - Wide view: where some risks are expressly allocated, the other party bears all other, unspecified risks
 - On this view, the risk of the green bans is borne by Meriton
 - Narrow view: if a party is (or should be) aware of a risk and it is not expressly provided for by the contract then that party impliedly assumes it

Decision

- Though the project not being able to go ahead could potentially frustrate the contract, the risk of this happening has been impliedly allocated to the buyer
- Not frustrated

D *Self-Inducement*

The person relying on frustration to avoid performance cannot have been responsible for causing the frustrating event to occur.

E *Foreseeability*

If the event 'was or should have been foreseeable', it cannot constitute a frustrating event at common law. It is unclear why this is a separate requirement additional to the analysis of risk allocation (foreseeability implies that the parties contemplated the possibility of the event occurring and decided to allocate the risk to the relevant party by not providing otherwise), but seems required by the High Court of Australia's more recent decisions.

II EFFECT OF FRUSTRATION

A At Common Law

1 Automatic termination

A frustrated contract is terminated by law. It is not a right conferred upon a party to be exercised at their or the court's discretion; termination is thus automatic upon frustration, and there are no restrictions upon or ways to lose the effect of frustration.

Frustration is prospective, and brings the contract to an end independent of the acts of either party. (There is, however, some discussion about whether a party is able to rely on frustration in certain circumstances due to their conduct.)

2 Orphaned obligations

If terms are formulated to apply beyond termination, frustration will, being prospective, maintain those obligations. For example, an arbitration clause will survive frustration (as in *Codelfa*). However, there is no opportunity provided to adapt the contract to the new situation (unlike under the UNIDROIT provisions).

3 Restitution

If at the point of frustration a party has already partially performed, a party suffering loss may be able to invoke the equitable doctrine quasi-contract or restitution of in respect of:

- a) Money paid under the contract

Where a party has paid money to the other, and there is a 'total failure of consideration', restitution will be possible. For there to be a total failure of consideration, the contract must have been frustrated and the party must have received nothing back from the contract.

Baltic Shipping Co v B (19xx) HCA:

Facts

- The plaintiff is carried by a luxury ocean liner on what is supposed to be a 14 day pleasure cruise
- Unfortunately, the vessel sinks on the 9th day
- Amongst other remedies, the passengers seek restitution of the balance of the fare (\$1 417)

Issues

- Is restitution of the fare possible?

Reasoning

- Here, there is no total failure of consideration, because the passengers received some value from their payment of the fare
- A full 9 days of cruise were provided, so the fact that the full benefit of the cruise was not obtained is irrelevant – there has not been total failure

Decision

- No restitution is possible

However, the requirement that there be 'total failure' of consideration may have since been softened somewhat; in *Roxborough*, the court seems to have severed the good from the failed consideration, apportioning recovery accordingly.

b) Performance partially rendered

It is also possible to obtain restitutionary compensation for benefits transferred prior to frustration. Where work has already been performed or goods already delivered, 'free acceptance of [the] benefit' by the other party entails that they will have to pay for it (*Code/la*).

However, where, as in *Beaton v McDivitt*, there is no imbalance in the loss suffered, there will have been no unjust enrichment and thus no need to make restitution. In *Beaton*, the purchaser paid no rent for the 10 year period, but the vendor received various improvements to the land; the loss and gain in effect cancelled one another out.

B Under Statute

1 Goods Act 1958 (Vic)

In addition to the common law doctrine of frustration, legislation in all Australian jurisdictions also provides that where the subject of a contract for the sale of goods is destroyed prior to its provision to the buyer, the contract is frustrated:

Goods Act 1958 (Vic) s 12:

- (12) 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.

2 Frustrated Contracts Act 1959 (Vic)

Because of uncertainty in the laws of restitution as they apply to frustrated contracts, the *Frustrated Contracts Act 1959* (Vic) sets out remedies and liabilities under a frustrated contract. Note, however, that it does not actually define the doctrine of frustration and is not inconsistent with the operation of common law principles.

In general, all sums paid or payable before the discharge are recoverable or cease to be payable:

s 3 – Adjustment of Rights and Liabilities of Parties to Frustrated Contracts:

- (1) Where a contract has ... been ... frustrated ... and the parties thereto have for that reason been discharged ... the following provisions ... shall ... have effect ...
- (2) All sums paid or payable to any party in pursuance of the contract before the time of discharge shall ... be recoverable and ... cease to be so payable ... Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of

discharge in or for the purpose of the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances ... allow him to retain or ... recover ... the sums so paid or payable, not being an amount in excess of the expenses so incurred.

- (3) Where any party ... has by reason of anything done ... in or for the purpose of the performance of the contract obtained a valuable benefit ... before the time of discharge, there shall be recoverable from him ... such sum (if any) not exceeding the value of the said benefit ... as the court considers just ...

To be recoverable, costs of performance must have been incurred 'for the purpose of performance'. Recovery of such costs cannot exceed the amount owing under the contract. The recoverable amount is thus calculated as follows:

R = Amount of restitution payable to purchaser

P = Amount paid to vendor

E = Expenses reasonably incurred by vendor

$$R = P - E$$

Section 4 essentially grants parties the right to define their own compensatory agenda:

s 4 – Application of this Act:

- (3) Where any contract to which this Act applies contains any provision ... intended to have effect in the ... circumstances ... the court shall give effect to the said provision ...

III COMPARATIVE ANALYSIS

A European Law

The doctrine dates back to Roman law and is still a prominent feature of continental civil law systems. European (and, increasingly, Asian) laws of frustration allow courts to rewrite contracts in order to adapt them to the new circumstances after frustration.

B United States of America

The *Restatement (Second) of Contracts* provides that where performance is made 'impracticable' the contract will come to an end (unless it provides otherwise). The event must not have been the fault of the party seeking termination and its non-occurrence must be a 'basic assumption on which the contract was made' (s 261).

This reflects a pragmatic approach to assessing frustration: if performance is difficult or impossible because of the changed circumstances, the party should not be bound to do so.

However, it is also possible for a contract to be frustrated where the event causes 'a party's principal purpose [to be] substantially frustrated' (s 265). The same requirements as above apply (no fault, no contractual provisions to the contrary, non-occurrence a basic assumption). This provision seems designed to cover situations like that encountered in *Brisbane City Council* where, though performance is possible, the party no longer has any commercial incentive to perform.

It is submitted that the reasons for which an individual party seeks termination on the basis of frustration ought to be less relevant to the enquiry than their effect upon the parties jointly (though they may still be relevant to assessments of fairness and justice). It is only possible to fully appreciate the effects of the allegedly frustrating event on the parties if the entirety of the circumstances are considered, including the effect of termination on the other party and the extent to which the frustrating event benefits or disadvantages that party. Thus, for example, in *Brisbane City Council*, the effect of the compulsory acquisition upon the Council was that the Commonwealth would assume responsibility over development of the site instead of Group Projects. It is conjectured that renegotiating amenities provision with the Commonwealth would not substantially impact upon the Council, whom the acquisition clearly advantages.

C *UNIDROIT Principles of International Commercial Contracts*

Treatment of frustrated contracts under UNIDROIT is significantly more flexible than under Australian law. The contract can be either adapted (rewritten by a court) or terminated, allowing obligations still relevant – despite the frustrating event – to remain in force or be rewritten to suit the altered circumstances.

The circumstances in which a frustrating event will be deemed to have occurred are also broader and more flexible – they can include events become known as well as occurring.

UPICC provisions utilise the same basic requirements of non-inducement, non-foreseeability, risk allocation, and the like.

<p><i>Article 7.1.7</i></p> <p>Force Majeure</p>	<p>(3) Non-performance by a party is excused if due to an impediment <u>beyond its control</u> and could not reasonably be expected to have been taken into account at the time of the conclusion of the contract or have been avoided or overcome.</p>
<p><i>Article 6.2.3</i></p> <p>Effects of hardship</p>	<p>(1) In case of <u>hardship</u> the disadvantaged party is entitled to request renegotiation without undue delay;</p> <p>(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance;</p> <p>(3) Upon failure to reach agreement within a reasonable time either party may resort to the court;</p> <p>(4) If the court finds hardship it may, if reasonable,</p> <p style="padding-left: 20px;">(a) terminate the contract at a date and on terms to be fixed; or</p> <p style="padding-left: 20px;">(b) <u>adapt the contract with a view to restoring its equilibrium.</u></p>

<p><i>Article 6.2.2</i></p> <p>Definition of hardship</p>	<p>There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and</p> <p>(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;</p> <p>(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;</p> <p>(c) the events are beyond the control of the disadvantaged party; and</p> <p>(d) the risk of the events was not assumed by the disadvantaged party.</p>
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IV HYPOTHETICAL

A Exercise 9

- Blum ('B'), the buyer, never occupied the premises bought from Solly ('S'), so there is the possibility that no sums are payable within the terms of the contract, which provide for payment on 'taking up occupation'
 - The extra \$40 000 is thus possibly not payable
 - Interpretation issue
- Has B has made a mistake about the present state of health of his mother, Danka ('D')?
 - Need more facts to determine likelihood of success
- Is it possible to imply a specific term (apply *BP Refinery*) that the contract is subject to D's successful arrival?
 - Probably not – the parties turned their minds to the cooling off period and limit it to 3 months
 - After that period, the risk is at large
- Has the contract been frustrated?
 - Frustrating event: death or incapacity – an acknowledged event
 - Has an adverse impact on B's performance?
 - No – he can still pay
 - However, the contract has lost its purpose
 - It is also less useful now: the flat has been designed for his disabled mother
 - Fairness/justice test?
 - Not part of the law, but ask since still underlies fundamental difference test
 - Fair for B to claim termination?
 - No: S has inserted a cooling off period
 - S behaved impeccably in a commercial deal
 - B *could* have gotten out of the contract if he had doubts, but chose not to
 - Implied condition?

- Universal implication (*Perri*)
 - Fundamental difference?
 - Economic criteria
 - Measure difference in economic terms
 - Here, no frustration of commercial purpose (unlike *Brisbane City Council* or *Meriton Apartments*)
 - B is still receiving a marketable flat
 - Mason and Stephen JJ: foreseeable?
 - Potentially
 - Was the risk allocated to B?
 - The cooling off period expressly allocated risks for that period to S, the seller
 - Beyond that, the risk was impliedly assumed by the buyer, B
 - Frustration is thus unlikely
- Effect of frustration (if established)
 - Can B obtain the \$40 000 deposit back?
 - Has there been a total failure of consideration?
 - For the \$40 000, yes, a failure
 - Recoverable
 - Frustrated Contracts Act
 - \$40 000 is recoverable
 - The further money is not payable
 - S incurred expenses
 - S can retain all or part of the deposit
 - However, did the expenses (the construction) occur before or after frustration?
 - Not clear from the facts – need more information
 - S can only claim expenses that occurred before D's death and those in connection with performance of the contract
 - Must also be just
 - If S can sell the flat elsewhere, it doesn't seem just to retain both the \$40 000 and the potential to make a windfall by selling the flat to another buyer
 - If, however, the flat is not merchantable due to the specific improvements made, costs of construction might be retained