

## **Information Sheet – Frustration of contract**

### **Unless otherwise stated, this Information Sheet applies in Scotland, Republic of Ireland and Northern Ireland as it does in England and Wales**

#### **What is frustration?**

Frustration is when an event occurs after the formation of a contract which either:

1. renders it physically or commercially impossible to fulfil; or
2. transforms the obligation into a radically different obligation from that undertaken at the moment of entry into the contract.

When frustration occurs, this automatically discharges the contract so that the parties are no longer bound to perform their obligations. The significance of automatic discharge is that it happens independently of the choice or election of either party.

#### **So what can qualify as frustration?**

Frustration is a concept that has evolved over the years. The Courts now take the approach of looking at all the facts and circumstances of the case before deciding whether it is in fact a case of frustration.

Generally speaking, the following criteria must be met for frustration of contract:

- The event occurs after the contract was formed;
- It is so fundamental that it goes to the root of the contract and beyond the parties' original intentions;
- It is not the fault of either party; and
- It renders performance impossible, illegal or radically different.

#### **Does death of a party qualify as frustration?**

Generally, the Courts are more likely to rule that a contract has become frustrated upon the death of a party if the contract was personal in nature. Most building or construction contracts will generally not be regarded as personal service contracts (and as such not capable of frustration due to personal incapacity).

However, in [Atwal v Rochester \[2010\] EWHC 2338 \(TCC\)](#), the English High Court ruled that a construction contract was a personal service contract which was frustrated when the contractor became seriously ill (therefore unable to complete the job) because, among other things, the contractor was a sole trader, known personally to (and trusted by) the customer and the contractor's price for the works was substantially below market price.

#### **What other events could qualify as frustration?**

- Destruction, total or partial, actual or constructive, of some specific thing essential to the performance of the contract.
- A subsequent change in law which makes performance illegal.
- An unexpected delay in performance due to an unexpected event or change in circumstances (any such delay must be abnormal and not expected when the contract began).

### When will frustration not be available?

- If the parties have made express provision in the contract for a particular event (for example a **force majeure provision**). Look out for a force majeure provision in your contracts and consider its impact in relation to frustrating events.
- When the alleged frustrating event should have been expected by the parties. It is, though, immaterial that the **possibility** of the frustrating event was within the contemplation of the parties. Expectation here requires something more than a possibility.
- The alleged frustrating event is the fault of one of the parties. The person who relies on frustration, though, is under no obligation to disprove fault on his part in connection with the frustrating event. The onus is on the party seeking performance to prove fault.
- An alternative method of performance is possible.
- The contract is merely more expensive to perform.
- There are changes in economic conditions which may render the contract more onerous than had been contemplated.
- It has been held that, absent a relevant contractual provision, a policy of marine insurance is not affected by a declaration of war, however seriously that may affect the risk.

### Consequences of frustration

This depends on whether the **Law Reform (Frustrated Contracts) Act 1943 (LRA)** applies or not. It **does not** apply in Scotland or in the Republic of Ireland.

The LRA applies to many commercial contracts with the exception of contracts which have excluded its effect, certain shipping contracts, insurance contracts and contracts for specific goods which have perished. The contract must be **governed** by English law and it only applies to those contracts which have become "impossible of performance or been otherwise frustrated". It is worth noting that a contract concluded in Scotland may, by express contractual provision, be governed by English law.

For contracts governed by English law, if the LRA **does not** apply then, if a contract has been frustrated, it is automatically discharged and the parties are excused from their future obligations. Therefore, if a party incurred obligations before the time of frustration, it is no longer bound to perform them and because no party is at fault, neither party may claim damages for the other's non-performance. The law on frustration is broadly similar to this in the Republic of Ireland because the Law Reform (Frustrated Contracts) Act 1943 is not relevant in this jurisdiction.

If the LRA **does** apply then:

- Money paid before the frustrating event can be recovered and money due before the frustrating event, but not in fact paid, ceases to be payable.
- A party who has incurred expenses is permitted, if the court thinks fit, to retain an amount up to the value of the expenses out of any money they have been paid by the other party before frustration; or where money was due and payable at the time of frustration, recover a sum not exceeding the amount for expenses.
- The court may require a party who has gained a valuable benefit under the contract before the frustrating event occurred, to pay a "just" sum for it. This is so whether or not anything was paid or payable before the frustrating event.

For contracts governed by Scots Law:

- Money paid before the frustrating event may be recovered by the *condictio causa data causa non secuta*. The *condictio* is an equitable remedy provided by the Scots Law of unjustified enrichment. It derives from Roman Law and allows a party "to recover a thing given for a specific purpose where that purpose has failed".
- It is generally thought that wasted expenditure falls to be borne by the party who has incurred it. A remedy might, though, be available in certain circumstances under the *negotiorum gestio* (the voluntary management by one person of the affairs of another without the consent or even the knowledge of the other) or perhaps by implied contract.
- The extent to which the *condictio* may apply where a valuable benefit has been gained by one party under the contract before the frustrating event occurred is unclear. The prevailing view is that the court will not make any equitable adjustment beyond ordering simple reversal of enrichment.

## **Conclusion**

In practice, frustration does not occur very often. In its place are force majeure provisions which are often included in the contracts to govern frustrating events and it is always useful to consider the inclusion of a force majeure provision to ensure that you have some control over the consequences of such an event.

The main differences in practice between English law and Scots law in this area are in the consequences of frustration. Contracts concluded in Scotland often provide that they should be governed by English law since the LRA gives greater clarity and certainty on consequences.

Contracts concluded in the Republic of Ireland, on the other hand, are not subject to the LRA and therefore the position is broadly similar to English contracts that are not governed by the LRA.