It is only in the rarest circumstances that a court will deem

The common law doctrine of Frustration generally operates to discharge contractual obligations when, through no fault of either party, a supervening event occurs which renders performance of a contract physically, commercially or legally impossible, or where the obligations of the contract are radically different from those which were originally agreed.

At first glance, it would seem that the guidance is clear; frustration will be invoked in rare occasions that fall under the categories above, however, as no definitive list of frustrating events exists and since the doctrine has developed over the years on a case by case basis, it is far from clear cut as to what constitutes frustration and what does not. There has been much controversy as to when the doctrine should apply, the main problem resting with the courts in deciding when an event is sufficiently frustrating to justify judicial interference and the setting aside of a contract.

According to Furmston, 2 there have been no fewer than five theories advanced over the years in an attempt to clarify and tidy this area up; however, it can be argued there is still some way to go. It is necessary to trace the development of Frustration as a doctrine in order to understand the complexities of its application today. Richards3 contends that during the C19th, freedom of contract and equality of bargaining power were very much in vogue, such that the courts were very reluctant to imply terms, and would only do so where the gravity for their failure to intervene would produce serious consequences.

Historically, court intervention in contracts was used as a last resort and the stance taken was the doctrine of absolute contracts. 4 In Paradine v Jane5

for example, the defendant had been evicted off his leased land by an invading Army for 3 years. The court held that the defendant was still liable for rent, regardless of the intervening event. The court took the view that express provision should have been made for such circumstances; When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may6, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract". 7 In other words, ' come hell or high water' contractual obligations were binding.

This attitude clearly led to injustices, particularly where supervening events were unforeseen and outside of the parties control. As a result, during the C19th the doctrine of frustration evolved to remedy such injustices and exceptions were created. Taylor v Caldwell9 is generally acknowledged to be the first case which heralded the introduction of the doctrine, 10 departing from the absolute rule. Caldwell had contracted to rent a music hall to hold a series of concerts and events. Fire destroyed the hall after the contract had been agreed but before the concerts had taken place, rendering performance of the contract impossible. No provisions had been made for fire. Taylor sued to recover expenses under the principle in Paradine.

The court held that the commercial purpose of the contract ceased to exist and was impossible to perform; thereby excusing both parties from existing contractual obligations. Blackburn J 11 in this case claimed judges could read into the contract an implied term. He stated that; " .. in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance… hat 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".

Treitel12 suggests that Blackburn was making the assumption that the court was only doing what the parties really intended to do themselves13. The ' officious bystander test'14 emerged from Caldwell. 15 Blackburn's view was criticised due to the difficulty for the Courts in ' guessing' at original intentions, and subsequent leading judgements16 have been keen to point out restrictions of this test.

Following Caldwell, the application of frustration gained momentum and appeared in cases where performance was impossible due to many other socio-economic, political or other disabling factors17 aside from destruction of the subject. It emerged in cases where performance was not impossible at all, but where the commercial purpose of the contract was frustrated. 18 For example, in Davis contractors Ltd v Fareham UDC19 a building firm agreed to build 78 houses for local council over 8 months for £92, 450. A serious shortage of skilled labour however, led to the job taking 22 months, incurring further expenses for the builders.

The council paid only the contracted price, whereupon the builders, arguing frustration, sued for an extra £17, 651. The court rejected their claim. Lord Radcliffe20 set out the factors that would justify frustration in his ' radical change in the obligation test'; " ... 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.... It was not this that I promised to do”

On the basis of this case, frustration may only apply where performance would alter the fundamental nature of the contract21. Richards22 asserts that it is not a radical change in circumstances, but obligations, i. e. not hardship or difficulty. Frustration today operates under three broad categories; 23 where an intervening act makes performance impossible, illegal or commercially sterile. Impossibility usually involves destruction of the subject matter preventing performance as in Caldwell, or where the service to be offered or exchanged no longer exists.

However, this is not a foregone conclusion as Treitel 24 suggests, frustration is still capable of applying where the subject matter does exist, but becomes unavailable e. g. through illness or delay; In Robinson v Davidson25 and Condor v The Baron Knights26 both contracts were frustrated by illness. The courts took the view that performing was conditional on the basis of the availability of the parties’ central to the performance, even where there is only a ‘ risk’ that the party will be unable to perform. 7 Delay may frustrate a contract where the commercial venture itself has been defeated, either indefinitely or temporarily. The court has to determine what constitutes a ‘ reasonable’ delay, since performance is expected to be within a ‘ reasonable’ time. 28 In Jackson v Union Marine Insurance Co Ltd29 a long, unavoidable delay in loading a ship amounted to frustration, as it did in Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)30 where only 2 out of the 7 anticipated voyages were possible due to strikes.

Many cases were frustrated due to the outbreak of war, such as Morgan v Manser31 where a music hall artiste was excused from his obligations following conscription, and Metropolitan Water Board v Dick Kerr & Co Ltd32 where a contract formed to construct a reservoir within 6yrs was stopped by the government and the plant requisitioned. Even though this may have been capable of completion at a later date, the court held that it was unfair to hold the parties to their obligations. 33

Supervening illegality is perhaps the most straightforward example of the application of frustration; according to Mulcahy & Tillotson, ‘ there cannot be default in not doing what the law forbids to be done. ‘ Lord MacMillan made this very clear in Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd34 where the court held that the contract for the sale and purchase of timber conflicted with a new law, making performance of the contract illegal. For a contract to be frustrated on grounds of commercial sterility, all purpose central to the contract must be lost, even if the contract itself is not impossible to perform.

Perhaps the most liberal approach here can be illustrated by Krell v Henry36 where a room was hired to watch the procession on the day of King Edward VII’s coronation. The procession was cancelled when the king fell ill with appendicitis and Henry refused to pay for the room. The court in applying Caldwell, agreed the contract was frustrated as the sole purpose of hiring the room (which was on offer at a high price due to the coronation), was to watch the procession. Thus it was the purpose of the contract that had been frustrated, not the value of having hired a room. 37

Another coronation case, Herne Bay Steamboat Co v Hutton38 appears to involve the same frustration as Krell; the defendant hired a boat in order to take passengers to watch the King review the naval fleet. In contrast to Krell however, this contract was not frustrated. The court held that the coronation was the ‘ motive’, not the ‘ sole’ purpose of the contract and despite the King’s indisposition, the fleet was still in itself worthy of viewing. Richards39 asserts that a distinction must be drawn between the object and the motive for the contract and that only the former is capable of being frustrated.

In this case, the commercial value in part remained and frustration could not be applied. This illustrates the courts reluctance to allow parties relief from ‘ bad commercial bargains’ and as Mulcahy & Tillotson suggest, the differing outcomes may also reflect consideration of the relative economic positions and for who should rightfully bear the risks; Krell was a consumer and Hutton a businessman seeking to take advantage of overpriced fares. Proving frustration in relation to land is a grey area, generating conflict as to whether or not a contract is capable of being frustrated if the purpose for taking of the property is destroyed.

The assumption is that leasing of land always has an ulterior purpose, 40 whereby even if the purpose itself is destroyed, the tenant should still be liable by virtue of owning the land. Richards, 41 whilst accepting the logic of rejecting frustration in leases, argues it is illogical not to apply it where the purpose for the lease becomes impossible, particularly as it has been applied in licensing e. g. in Krell. In National Carriers Ltd v Panalpina (Northern) Ltd42 a party entered a 10yr lease, which after 5 yrs was interrupted by road closures for 18 months.

HL held that 18 months was insufficient interruption in purpose over a 10 yr lease to justify frustration. See also Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd. 43 Clarification emerged from Panalpina, with the acceptance that frustration can apply to leases where impossibility as intended does occur. 44 Lord Wilberforce asked; " A man may desire possession and use of land or buildings for some purpose in view and mutually contemplated.

Why is it an answer, when he claims that this purpose is ' frustrated' to say that he has an estate, if that estate is unusable and unsaleable? " While Caldwell served to mitigate the harshness of the absolute rule in Paradine, potential for unjust results on one party remained. In an attempt to remedy such injustices, the courts listed a number or instances where the doctrine will not apply; if there is an absolute undertaking i. e. agreement to honour the contract regardless, or if obligations have become more onerous or less profitable, (as in Davis Contractors Ltd v Fareham UDC 45 and in Bormarin AB v IBM Investments Ltd46 where supervening illegality rendered a contract less advantageous to the purchaser of shares).

In addition, where frustration is self induced or where there is a foreseeable risk the doctrine is no defence. If for example, one party has voluntarily caused or negligently contributed to an event, the claim will fail. This was the case in Maritime National fish Ltd v Ocean Trawlers Ltd48 where a fishing company, on failing to obtain sufficient licences for their trawlers, claimed frustration of a hired trawler contract. The court held that as the company was able to choose which trawlers to apply the licences to, failure to meet its

contractual obligations was self induced, despite the intervening event effectively forcing this choice.

In J Lautitzen AS v wijsmuller BV (The Super Servant Two)49 a contract to transport an oilrig from Japan out to sea failed when one of the two boats owned by the shipping company sank. The other boat had been contracted onto another job and frustration was argued. The court held that the obligations were not impossible, and frustration would not apply as the defendants had chosen to employ the other ship elsewhere. It has been argued that frustration should not be excluded where the ‘ elected action’ due to supervening events, was to choose which contract to breach. 50

The court will not accept frustration where at the time of agreeing a contract, the intervening event was a risk contemplated by the parties that could lead to the contract not being fulfilled, unless it can be shown that the event surpasses that which was expected, 51 as in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (The Fibrosa case)52 where a contract to supply machinery to a polish company could not go ahead due to Germany invading the Polish port, making performance impossible. This contract had contained a war clause, which would normally preclude frustration.

However, the courts held that frustration could apply because the clause had allowed for ‘ delay and inconvenience’ but not the far reaching effects of invasion. The courts have taken a dim view on contracts which ‘ should’ have made provision. For example, in Amalgamated Investment ; Property Co Ltd v John Walker ; Sons Ltd53 the defendants, having advertised a building as ‘

suitable for development', entered into a contract. Neither party had any knowledge of its historical value or architectural interest, however after signing, the building was listed preventing redevelopment and creating huge losses.

The court refused to apply frustration, stating that the developers should have known that listing in old buildings was a common risk. Richards54 suggests that as the effect of frustration is so dramatic and radical, immediately terminating contractual obligations, that the courts seek to limit the doctrine, preferring instead that parties themselves make careful contracts including clauses (Force Majeure)55 to cover for supervening events and to identify who should bear consequential loss. Frustration can still be claimed however, if the clause does not cater for the exact event.

Once frustration is proved, both parties are released from their obligations from the point of the event, but they may still be liable for prior obligations. 56 The House of Lords recognised this injustice in Fibrosa, and allowed recovery of advance payments where there is a total lack of consideration. Following Fibrosa, the Law Reform (frustrated contracts) Act 194357 was passed specifically to deal with the consequences of frustrating events and to provide a fairer means of allocating and distributing loss.

The Act covers three main areas; Recovery of monies paid in advance, for work already completed and for financial reward where a valuable benefit has been conferred58. It includes provisions dealing specifically with liabilities arising from the period when the contract subsisted, between agreement and the frustrating event. . There are exclusions within the act

which are based on well established common law rules that parliament were seeking to preserve. 9 These include severable or divisible contracts, goods carried at sea (unless by charter party), insurance contracts, perishable goods and where arrangements have already been made in respect of supervening events within the contract. In conclusion, frustration operates narrowly and cannot usually be invoked where the parties could have foreseen the relevant event, or could have reasonably provided for the event in the contract itself.

The doctrine may not provide relief where there is evidence of negligence, where performance has become more onerous or less profitable, or where parties are seeking to avoid their obligations under an imprudent commercial contract60. It can be seen from the examples above that frustration is indeed, rarely applied. This is important since it encourages careful planning and drafting of contracts in advance, reduces and allocates risk more fairly and discourages costly litigation.

Any contract involves risk, a fact which cannot be eliminated. It appears that the doctrine of frustration, whilst still not perfect, has been developed by common law and now statute, to prevent overuse and the wasting of court time. The courts do not have the power to amend or modify contracts following supervening events, which would seem to be a much better way forward, using compromise instead of litigation. Frustration perhaps has a very narrow scope for this precise reason.