

# **UNSCRAMBLING THE EGGS OF MODERN FRUSTRATION**

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## INTRODUCTION

Ordinarily failure by one party to perform its contractual obligations will constitute a breach for which it will be liable to the other party in damages. However, sometimes, non-performance is excused. This occurs by virtue of what has come to be known as the doctrine of frustration. In 1936 A.L. Goodhart lamented that “no branch of the law of contract is so difficult to explain or so uncertain in its effects than that dealing with frustration.”<sup>1</sup> Whilst this comment was made nearly 80 years ago, its relevance has not diminished with time. This dissertation’s central ambition is to redress this lack of clarity.

Suppose A (the obligor) contracts with B (the obligee) to perform a service in return for payment. Where subsequent events interfere with the performance of the contract, questions may arise as to the discharge of either A or B. The ‘scrambled’ doctrine of frustration applies a *single* test to determine whether *both* parties to the contract are *automatically* discharged. The ‘unscrambled’ version tackles the issue differently. In certain circumstances, A may be able to successfully plead discharge on the basis that they are incapable of performing (excusable impossibility) *or* that their outstanding obligations have changed in light of the new circumstances to such an extent as to warrant discharge (frustration of adventure). B, on the other hand, may also be discharged from their obligation to pay. However, this cannot rest upon any notion of impossibility (as payment of money is never considered impossible). Rather, B is discharged because they are not receiving the performance for which they contracted (failure of consideration). It is suggested that, by separating out these principles, the law regarding discharge by supervening events will be more comprehensible and certain in application.

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<sup>1</sup> A L Goodhart “Notes” (1936) 56 *LQR* 1 at 7.

Chapter One will outline how English courts in the nineteenth century dealt with questions of discharge by supervening events. It will be established that courts recognised excusable impossibility, frustration of adventure, and failure of consideration as separate doctrines.

Chapter Two will illustrate how these three principles were scrambled together. This took place in two contemporaneous phases. Firstly, failure of consideration was obscured by the perceived need to discharge both parties by the same legal principle. This resulted in the creation of the ‘common object’ test. Secondly, excusable impossibility and frustration of adventure were fused together. The end result was what we now know as frustration: a single principle, discharging both parties, accounting for all cases of discharge by supervening events. How this broad doctrine of frustration applies in the modern context will be illustrated by the recent litigation in *Planet Kids Ltd v Auckland City Council*.

Chapter Three will offer a critique of the ‘common object test’. The notion of commonality in contract is illusory. In reality, the test is little more than judicial discretion veiled in the guise of the parties’ intentions. This discretion leads to considerable uncertainty in determining how the test will be applied. Instead, the reasons for discharging the parties should be separated. This would mean a return of failure of consideration as a reason for discharging the party whose own performance has not been interfered with. It is suggested that this is a far more certain test to apply. Moreover, reformulating the test in this manner will challenge the ‘automatic’ nature of discharge. It is suggested that this is a desirable change.

Chapter Four will focus on the second of the two phases of conflation discussed in Chapter Two; namely, the fusion of excusable impossibility and frustration of adventure. It will be suggested that the two principles ought to be unscrambled. The chapter will illustrate that the conflation has resulted in the formation of an unprincipled and amorphous test for discharge. This is undesirably uncertain; particularly in light of the purposes of contract law. The

chapter will conclude that the framework in the United States, where the two principles are distinct, is preferable.

The courts' use of the term 'frustration' has, over the centuries, become "slovenly".<sup>2</sup> The objective of this paper is to bring certainty and clarity of reasoning back into the law surrounding discharge by supervening events. I suggest that the best way to do so is to unscramble the doctrine in the manner suggested.

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<sup>2</sup> Lord Devlin "The Treatment of Breach of Contract" (1966) *CLJ* 192 at 207.

## CHAPTER ONE

### Discharge by Supervening Events in the Nineteenth Century

Liability for breach of contract is strict. Common law courts, in general, have no qualms about enforcing a contract requiring one of the parties to do the impossible.<sup>3</sup> The party must either perform or pay damages for its failure.<sup>4</sup> With regard to supervening events, the common law's response was no different. *Paradine v Jane* held that a rental contract abided despite the fact that the tenant's possession had been deprived by an invading army.<sup>5</sup> The court enunciated the 'doctrine of absolute contracts':

“...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...”<sup>6</sup>

The basis of such a position is that it is open to parties to contract against the supervening event. Where they fail to do so, “the parties must submit to whatever inconvenience may arise therefrom.”<sup>7</sup> The presumption underlying *Paradine v Jane* remains the default stance of the common law.<sup>8</sup> As Lord Edmund-Davies, centuries later, explained: “it is axiomatic that ... it is, in general, immaterial why the defendant failed to fulfil his [contractual] obligation”.<sup>9</sup> However, this principle is no longer considered to express an absolute value.<sup>10</sup>

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<sup>3</sup> *Eurico Spa v Phillip Brokers (The Epaphus)* [1987] 2 Lloyd's Rep 215 at 218.

<sup>4</sup> *Thornborow v Whitacre* (1706) 2 Ld Raym 1164 at 1165.

<sup>5</sup> *Paradine v Jane* (1647) Aleyn 26. Note that *Paradine* involves a defendant's counter-performance (i.e. payment of rent) not the performance in suit becoming impossible. However, this dictum has subsequently been accepted as the general principle of English law in cases of impossibility of performance (*Shubrick v Salmond* (1765) 3 Burr 1637) and increased onerousness in performance (*Hadley v Clarke* (1799) 8 TR 259).

<sup>6</sup> *Paradine*, above n 5, at 27.

<sup>7</sup> *Touteng v Hubbard* (1802) 3 B & P 291 at 299.

<sup>8</sup> *Grant Smith and Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1920] AC 162 at 169 per Lord Buckmaster: “There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract ... indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule.”

<sup>9</sup> *Raineri v Miles* [1981] 1 AC 1050 at 1086.

<sup>10</sup> G H Treitel *Frustration and Force Majeure* (2<sup>nd</sup> ed, Sweet & Maxwell Ltd, London, 2004) at [1-001].

Courts should not expect contracting parties to expressly provide for every contingency. Requiring them to do so would demand the impossible: infinite knowledge about the present, and future, world.<sup>11</sup> Thus, as Barnett points out:

“We immediately can see that the seductive idea that a contract can ... articulate every contingency that might arise before, during, or after performance is sheer fantasy. *For this reason, contracts must be silent on an untold number of items.*”<sup>12</sup>

Therefore, over time, courts accepted that supervening events could discharge parties' outstanding obligations. This principle is what is now known as frustration. However, nineteenth century lawyers and judges would be unfamiliar with the doctrine of frustration as recognised today.

Nineteenth century courts recognised three separate principles affording discharge in different circumstances. Where a party's own performance had been interfered with by supervening events their non-performance was pardonable *either* on the basis of excusable impossibility or frustration of adventure.<sup>13</sup> On the other hand, where the party whose performance was not directly affected by supervening events sought discharge, the court would determine the issue by asking whether they suffered a failure of consideration.

### **(i) Excusable Impossibility**

Excusable impossibility has its roots in *Taylor v Caldwell*.<sup>14</sup> Caldwell owned Surrey Gardens & Music Hall. He contracted to rent it to Taylor for £100 a day. Taylor was planning to stage a number of concerts on the premises. Before the date of performance, the music hall burned down without fault of either party. The contract made no mention of what was to happen in

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<sup>11</sup> Melvin A Eisenberg “Impossibility, Impracticability, and Frustration” (2009) 1 *JLA* 207 at 212-214.

<sup>12</sup> Randy E Barnett *Contracts: Cases and Doctrine* (New York, Aspen, 2003) at 1027 (emphasis added).

<sup>13</sup> For the purposes of this paper ‘frustration’ will refer to the single doctrine of discharge covering all supervening events cases whereas ‘frustration of adventure’ will refer to the narrower conception.

<sup>14</sup> *Taylor v Caldwell* (1863) 3 B & S 826.



light of such an event. Taylor sued Caldwell for failing to provide the hall as specified in the contract. Caldwell alleged that the fire made performance impossible and this ought to excuse his non-performance.

Blackburn J began by espousing the general principle from *Paradine v Jane*<sup>15</sup> that “where there is a positive contract to do a thing ... the contractor must perform it, or pay damages for not doing it”.<sup>16</sup> However, he noted that *Paradine* was never an absolute rule.

As early as the sixteenth century, courts allowed contracts depending on the particular personality or skill of the performing party to be discharged where supervening events made that party’s performance impossible.<sup>17</sup> For example, a marriage contract was discharged where one party died or became severely ill.<sup>18</sup> Likewise, contracts to play the piano<sup>19</sup> or write a book<sup>20</sup> were held to be discharged where the particular musician or author was rendered incapable of performance. Furthermore, a second exception to *Paradine* existed. In bailment contracts, where the bailed goods perished without fault of the bailee, the bailee was excused from his impossible obligation to return the goods.<sup>21</sup> For example, in *Williams v Lloyd*, the bailee of a horse was not liable for their failure to return it when the horse died without any default on the bailee’s part.<sup>22</sup>

Blackburn J extrapolated a general principle from the particular ratios of these prior cases:

“...in contracts in which the *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. In none of these cases is ... there any

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<sup>15</sup> *Paradine*, above n 5.

<sup>16</sup> *Taylor*, above n 14, at 833.

<sup>17</sup> *Hyde v Dean & Canons of Windsor* (1597) Cro Eliz 552.

<sup>18</sup> *Hall v Wright* (1859) EB & E 746.

<sup>19</sup> *Robinson v Davidson* (1871) LR 6 Ex 269.

<sup>20</sup> *Marshall v Broadhurst* (1831) 1 Tyr 348; *Wentworth v Cock* (1839) 10 A & E 42.

<sup>21</sup> *Coggs v Bernard* (1703) 2 Ld Raym 909.

<sup>22</sup> *Williams v Lloyd* (1628) W Jones 179.

express stipulation that the destruction of the person or thing shall excuse the performance; that the *excuse is by law implied*.”<sup>23</sup>

This passage indicates the confines of where impossibility will discharge further performance. The principle will apply where (a) the contract contains a “given” thing necessary for performance; and (b) where that thing has “perished”. Secondly, the passage highlights how the principle operates; namely by implying the excuse into the contract. It will subsequently be shown that this implication does not involve an assessment of the parties’ actual subjective intentions. However, firstly, the two elements of the principle will be illustrated.

The requirement for a specified thing necessary for performance is illustrated by the cases of *Nickoll v Ashton*<sup>24</sup> and *Ashmore v Cox*<sup>25</sup>. In *Ashmore*, the defendants agreed to sell hemp to be shipped “by sailor or sailors” by a certain date.<sup>26</sup> The outbreak of the Spanish-American war in 1898 prevented the defendants from shipping the goods. However, the court refused to excuse the defendant on the basis of impossibility. Lord Russell held that no ship had been ‘earmarked’ and, thus, there was no specified thing necessary for performance.<sup>27</sup> The defendants were obligated to perform by finding an alternative vessel or pay damages for their failure. The subsequent case of *Nickoll* stands in contrast. A shipowner contracted to ship cotton seed from England to Egypt “per steamship *Orlando*”.<sup>28</sup> The ship became damaged and could not deliver the cotton seed by the agreed date. The majority held that the principle of *Taylor v Caldwell* applied.<sup>29</sup> The particular ship (the *Orlando*) had been specified in the contract as necessary for performance. In fact, during drafting, the words “ship or

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<sup>23</sup> *Taylor*, above n 14, at 829 (emphasis added).

<sup>24</sup> *Nickoll & Knight v Ashton Edridge & Co* [1901] 2 KB 126.

<sup>25</sup> *Ashmore v Cox* [1899] 1 QB 436.

<sup>26</sup> *Ibid*, at 440.

<sup>27</sup> *Ashmore*, above n 25, at 442.

<sup>28</sup> *Nickoll*, above n 24, at 131.

<sup>29</sup> *Ibid*, at 133 per Smith MR and 139 per Vaughn-Williams LJ.

ships” had been replaced by the more specific clause.<sup>30</sup> The contrast between these two cases highlights that the ‘thing’ must be ‘specified’ in order for the impossibility to excuse performance.

The second requirement of the test is that the specified thing must have ‘perished’. This does not necessarily equate to complete physical destruction. The element refers to the continuing ability of the chattel or person to perform its contractual function.<sup>31</sup> Thus, for example, in *Asfar & Co v Blundell* a cargo of dates was said to have ‘perished’ when it became so contaminated with sewage as to “become for business purposes something else”.<sup>32</sup> Likewise, in *Robinson v Davidson* a woman was unable to perform at a concert because she was ill.<sup>33</sup> Whilst she continued to exist as a woman, she was “no longer a piano playing woman” as contemplated in the contract.<sup>34</sup>

Where the supervening impossibility conformed to these two requirements, the court would allow discharge. I suggest that this was achieved by a positively imposed rule of law rather than a process of implication based on the parties’ intentions. This is important because, as will be shown subsequently, discharge arising from frustration of adventure was said to be dependent on the construction of the contract and, therefore, the parties’ intentions.<sup>35</sup>

There are statements in *Taylor v Caldwell* which seem to indicate that Blackburn J was seeking to give effect to what the “parties really thought of the surprising case ... but did not write down”.<sup>36</sup> His Honour stated that the implied term test “tends to further the great object of making the legal construction such as to fulfil the intention of those who enter into the

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<sup>30</sup> *Nickoll*, above n 24, at 131.

<sup>31</sup> *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 18-19.

<sup>32</sup> *Asfar & Co v Blundell* [1896] 1 QB 123 at 128.

<sup>33</sup> *Robinson*, above n 19.

<sup>34</sup> Arnold D McNair “War-time Impossibility of Performance in Contract” (1919) 36 *LQR* 84 at 85.

<sup>35</sup> See *post*, at 12-15.

<sup>36</sup> Brian Langille and Arthur Ripstein “Strictly Speaking – It Went Without Saying” (1996) 2 *LEG* 63 at 66.

contract.”<sup>37</sup> Perhaps in light of these comments, some subsequent cases applied the test in such a manner.<sup>38</sup> However, when read as a whole, the judgment cannot be considered to advocate such reasoning.

Firstly, there are express statements indicating that the term imposed was “a fictitious one, imputed to [the parties] *ab extra* by the law itself.”<sup>39</sup> Blackburn J explicitly stated that “the parties, when framing the agreement, evidently had not present to their minds the possibility of such a disaster, and they made no express stipulation with reference to it”.<sup>40</sup> Thus, as Lord Radcliffe later pointed out, “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.”<sup>41</sup>

This reading of the judgment is further supported by the analogy Blackburn J drew with the Civil law rules on excusable impossibility.<sup>42</sup> Subsequent cases have treated *Taylor v Caldwell* as synonymous with the Civil Law rule. For example, in *Krell v Henry*, the court referred to *Taylor* as an “application in English law of the principle in Roman Law”.<sup>43</sup> The Civil rule, which affords discharge in any case of impossibility, does not turn on subjective intention.<sup>44</sup>

Furthermore, reading Blackburn J’s decision as giving effect to the actual subjective intentions of the parties is a hugely uncertain process. As Lord Hailsham lamented “I have not the least idea what they would have said or whether they would have entered into the lease at all.”<sup>45</sup> Lord Bridge, albeit in the context of the criminal law, highlights the cause of

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<sup>37</sup> *Taylor*, above n 14, at 828.

<sup>38</sup> *Bailey v De Crespigny* (1869) LR 4 QB 180.

<sup>39</sup> Roy Granville McElroy and Glanville L Williams *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge, Cambridge University Press, 1941) at 63.

<sup>40</sup> *Taylor*, above n 14, at 827.

<sup>41</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 728.

<sup>42</sup> *Taylor*, above n 14, at 828.

<sup>43</sup> *Krell v Henry* [1903] 2 KB 740 at 748.

<sup>44</sup> Barry Nicholas “Rules and Terms – Civil Law and Common Law” (1974) 48 *Tul L Rev* 952 at 954.

<sup>45</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 687.

the difficulty: “you cannot take the top off a man’s head and look into his mind to see what his intent was at any given moment.”<sup>46</sup> Thus, “civil obligations are not to be created by, or founded upon, undisclosed intentions”.<sup>47</sup>

Finally, there has been official recognition that the test was separate from the parties’ actual intention. Lord Wright, writing for the Law Revision Committee said of the rule: “it is necessary in the interests of justice to imply a term which was *not in the contemplation of the parties*”.<sup>48</sup> Moreover, in both New Zealand and the United Kingdom, the rule is recognised legislatively with regard to the sale of goods. Neither section turns on the parties’ intentions:

“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 thereby avoided.”<sup>49</sup>

Thus, the principle applies where there is a ‘gap’ in the contract.<sup>50</sup> This begs the question: if the principle did not turn on the parties’ intentions, why did Blackburn J phrase the test as an ‘implied term’? It is suggested that he adopted the phraseology out of respect for *Paradine v Jane* and sanctity of contract. Blackburn J wished to introduce an exception to the rule without impairing its authority.<sup>51</sup> This is summed up clearly by Lord Sands:

“It is a pious fiction – a fiction because it does not correspond with anything that was in the minds of the parties at the time; pious because it seeks to do homage to a very sacred legal principle, the sanctity of contract.”<sup>52</sup>

We will return to the nature of this test in Chapter Four. For now, the point to note is that within the confines described, the courts accepted that discharge was available and operated

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<sup>46</sup> *R v Moloney* [1985] AC 905 at 918.

<sup>47</sup> *Keighley Maxsted & Co v Durant* [1901] AC 240 at 247 per Lord MacNaughten.

<sup>48</sup> Law Revision Committee *Seventh Interim Report (Rule in Chandler v Webster)* Cmd 6009 (London, HMSO 1939) at 6 (emphasis added).

<sup>49</sup> Sale of Goods Act 1908, s 9 (emphasis added). Compare Sale of Goods Act 1979 (UK), s 6.

<sup>50</sup> Hans Smit “Frustration of Contract: A Comparative Attempt at Consolidation” (1958) 58 *Colum L Rev* 287 at 296.

<sup>51</sup> R G McElroy and Glanville Williams “The Coronation Cases I” (1941) 4 *MLR* 241 at 242.

<sup>52</sup> *James Scott and Sons v Del Sel* [1922] SC 592 at 596.

without consideration of the parties' intentions. It will now be shown that, quite separate from this principle, the courts recognised another legal principle excusing a performing party's failure to perform.

## (ii) Frustration of Adventure

Frustration of adventure, as it was originally conceived, allowed for discharge in different situations and for different reasons than excusable impossibility. The principle developed to deal with circumstances where a party sought to excuse their performance because it was *temporarily* impossible. Examples included ports being blockaded<sup>53</sup>, congestion at the docks<sup>54</sup>, or ships running aground<sup>55</sup>. The doctrine, therefore, has a strong "maritime flavour".<sup>56</sup> What is important to note from these early cases is that a party was excused even where "performance did not appear to be physically impossible."<sup>57</sup> In other words, frustration began where impossibility ended.<sup>58</sup>

A comparison between the facts of *Geipel v Smith*<sup>59</sup> and *Nickoll v Ashton*<sup>60</sup> illustrates this. The defendant in *Geipel* was a ship-owner who agreed to transport coal from Newcastle to Hamburg. Importantly, unlike *Nickoll*, no fixed date for delivery was specified. Subsequently, war broke out between France and Germany with the consequence that Hamburg's port was blockaded. As no date for delivery was specified in the contract, performance was only impossible so long as the blockade lasted. Thus, after the war, the defendant could have fulfilled their obligations. This contrasts with *Nickoll* where the perishing of the *Orlando* as at the date of performance meant that adhering to the letter of the contract was literally

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<sup>53</sup> *Geipel v Smith* (1872) LR 7 B 404.

<sup>54</sup> *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125.

<sup>55</sup> *Dahl v Nelson Donkin & Co* (1881) 6 App Cas 38.

<sup>56</sup> Arthur Duncan McNair *Legal Effects of War* (4<sup>th</sup> ed, Cambridge, Cambridge University Press, 1966) at 165.

<sup>57</sup> John Henry Schlegel "Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things – The Doctrine of Impossibility of Performance" (1968-1969) 23 *Rutg L R* 419 at 424.

<sup>58</sup> McElroy and Williams, above n 39, at xxxiv.

<sup>59</sup> *Geipel*, above n 53.

<sup>60</sup> *Nickoll*, above n 24.

impossible. Therefore, it should be clear that the factual scenarios giving rise to issues of frustration were different from those giving rise to issues of impossibility.

In addition to the factual disparity between the principles, the theory underpinning discharge in each was different. Unlike excusable impossibility, which operated as a positive rule of law, whether the party's adventure was 'frustrated' turned on the construction of the contract. In other words, the court asked whether the increased burden would take performance outside what was contemplated the contract. If so, the court allowed discharge by implying a term giving effect to the parties' intentions. The reasoning in *Geipel v Smith*<sup>61</sup> and *Dahl v Nelson*<sup>62</sup> illustrates this.

The strict performance of the shipping contract in *Geipel* was subject to certain exceptions; namely, a restraint of princes clause. The court held that delayed performance caused by the blockade of Hamburg port was clearly covered by the operation of this clause.<sup>63</sup> However, the defendants alleged that even once the blockade was raised their non-performance ought to be excused. Both Cockburn CJ and Blackburn J agreed. Requiring the shipowner to keep "his ship lying idle, possibly rotting" in anticipation of the blockade being lifted would "make the contract ruinous."<sup>64</sup> The added onerousness of performance if the shipowner was still bound to perform would "*frustrate* the very object of such a contract".<sup>65</sup> Therefore, in order to recognise this commercial reality, the court read the contract as containing an implied term stating that the restraint of princes clause not only excused delayed performance but, "after a reasonable time", it relieved the shipowner from performance altogether.<sup>66</sup>

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<sup>61</sup> *Geipel*, above n 53.

<sup>62</sup> *Dahl*, above n 55.

<sup>63</sup> *Geipel*, above n 53, at 410 and 412.

<sup>64</sup> *Ibid*, at 410.

<sup>65</sup> *Ibid*, at 412 (emphasis added).

<sup>66</sup> *Ibid*.

The fact that discharge operated on the basis of the contract, not by a positive rule of law, was made clear by Lord Cockburn:

“I do not think it necessary to consider the larger proposition that ... in the absence of such a stipulation as to unforeseen circumstances, we should imply such a term [i.e. the principle in *Taylor v Caldwell*] – because I base my judgment on an exception which is contained in the terms of the charter-party.”<sup>67</sup>

The same type of implication was operative in *Dahl*.<sup>68</sup> There, a shipowner contracted to carry goods to “London Surrey Commercial Docks or *so near thereto as she may safely get*”.<sup>69</sup> No delivery date was specified, but the contract provided that the shipowner was to proceed “as fast as a steamer can deliver”.<sup>70</sup> The ship arrived at the specified docks but was denied entry as they were overcrowded. They would be delayed by 5 weeks if they were required to wait for dock-space to open up. The shipowner claimed that, on the basis of *Geipel*, such performance was “unreasonable” and outside the contemplation of the contract. Blackburn J agreed; holding that the contract (by providing an alternative method of performance) must be read as requiring completion within a reasonable time.<sup>71</sup> This was supported by the demurrage fee of £30 for each day of delay. This indicated that the 5 weeks delay was worth £1,000 to the shipowners.<sup>72</sup> This was taken as evidence that the parties considered the contract to be subject to a reasonable time limit. Thus, completing the contract would take the obligation on the shipowner outside what was contemplated by the contract.

Although in both *Geipel* and *Dahl* discharge was achieved by virtue of an ‘implied term’, the manner of implication in each was clearly different to that in *Taylor v Caldwell*. In *Taylor* the

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<sup>67</sup> *Geipel*, above n 53, at 410.

<sup>68</sup> *Dahl*, above n 55.

<sup>69</sup> *Ibid*, at 42 (emphasis added).

<sup>70</sup> *Ibid*, at 42.

<sup>71</sup> *Ibid*, at 53.

<sup>72</sup> *Ibid*, at 55.



court “added to the contract a provision which the parties had entirely omitted”.<sup>73</sup> The ‘implied term’ was a fictional one created by the courts.<sup>74</sup> However, in *Geipel* and *Dahl*, the implied term requiring delivery within a reasonable time was based on the construction of the contract.<sup>75</sup> The court merely interpreted the words of the contract, implying terms where that accorded with the normal canons of construction, to ascertain whether performance in the new circumstances was outside the contemplation of the parties.<sup>76</sup>

Importantly, neither *Geipel* nor *Dahl* cited *Taylor v Caldwell*. Even more telling is the fact that Blackburn J (who gave the judgment in *Taylor*) was also on the bench in *Geipel*. Thus, the omission of any reference to *Taylor* indicates that the principles were considered separate excuses for the obligor’s failure to adhere to the contract.

On this basis it is clear that the ‘frustration of adventure’ cases relied “upon an entirely different line of authority from that under *Taylor v Caldwell*”.<sup>77</sup> Discharge in cases of frustration of adventure did not turn on a positive rule of law. The court, in reaching these decisions, was merely giving effect to the intentions of the parties.<sup>78</sup> The following section will illustrate how the final principle (failure of consideration) was considered to discharge the obligee’s obligation.

### (iii) Failure of Consideration

The cases discussed above all have one common feature: it was the party whose own performance had become impossible or more burdensome who was seeking discharge. In *Taylor v Caldwell* the cases cited by Blackburn J in support of his general proposition dealt

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<sup>73</sup> McElroy and Williams, above n 39, at 129.

<sup>74</sup> See *ante* at 8-11.

<sup>75</sup> McNair, above n 34, at 90. Contrast *Andrew Millar & Co v Taylor & Co* [1916] 1 KB 402 where temporary impossibility lasting 15 days did not take performance outside the contemplation of the contract.

<sup>76</sup> McElroy and Williams, above n 39, at 135.

<sup>77</sup> McNair, above n 34, at 90.

<sup>78</sup> William Herbert Page “The Development of the Doctrine of Impossibility of Performance” (1920) 18 *Mich L Rev* 589 at 604.

solely with the performing party's obligations.<sup>79</sup> For example, in *Hyde v Duke of Windsor* the death of an author contracted to write a novel was said to discharge *his executors* from the performance of the now impossible contract.<sup>80</sup> Likewise, in *Geipel* Cockburn CJ held that "it was a sufficient answer *on the defendant's part* that [the blockade] was not likely to be removed within a reasonable time".<sup>81</sup> These cases clearly establish that impossibility and frustration of adventure were seen as excusing the *obligor* from fulfilling their contractual obligations. They say nothing as to what principle operated to discharge the *obligee*. There is a quite distinct group of cases whereby a party is excused where the other party's performance becomes impossible or radically different. The obligee's discharge, in these cases, was achieved on the basis that the consideration provided for their own promise (usually to pay) failed.

*Poussard v Spiers* provides a clear example.<sup>82</sup> The plaintiff was a singer who was unable, because of illness, to perform on the first three nights of a scheduled musical. Had the singer been seeking to excuse her own non-performance, she could have done so on the basis that she was a 'specified person' that had 'perished'.<sup>83</sup> Therefore, as Blackburn J recognised, "no action can lie against him for the failure thus occasioned".<sup>84</sup> However, the singer's performance was not at issue. It was the theatre company who was seeking to be discharged from its obligation to pay the plaintiff. Blackburn J found in favour of the company on the basis that "the *consequent failure of consideration* is just as great as if it had been occasioned by the plaintiff's fault."<sup>85</sup>

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<sup>79</sup> Treitel, above n 10, at [2-039].

<sup>80</sup> *Hyde*, above n 17, at 553.

<sup>81</sup> *Geipel*, above n 53, at 411 (emphasis added).

<sup>82</sup> *Poussard v Spiers* (1876) LR 1 QBD 410.

<sup>83</sup> See *ante* at 7-8; especially *Robinson*, above n 19.

<sup>84</sup> *Poussard*, above n 82, at 414. The case was actually brought by the singer's husband on behalf of the singer herself. Thus, the judgment refers to the plaintiff as 'him'.

<sup>85</sup> *Ibid*, at 414 (emphasis added).

Similarly, in cases of frustration of adventure, failure of consideration operates to discharge the obligee. In *MacAndrew v Chapple* Willes J stated that:

“[A] delay or deviation which ... goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer ... is an answer for [the charterer’s non-performance].”<sup>86</sup>

As we saw, the performing party in frustration of adventure cases was discharged because the obligation had become more onerous than the contract had contemplated.<sup>87</sup> Here, the flipside is the case: the supervening events made performance substantially less valuable to one party.

*Jackson v Union Marine Insurance* provides a good example.<sup>88</sup> There, the plaintiff contracted to ship a cargo of iron rails to the defendant in San Francisco. The defendant needed them for the construction of a railway. Importantly, the plaintiff knew of the defendant’s purpose.<sup>89</sup> The ship was subsequently grounded and the repairs meant that delivery would take eight months longer than otherwise would have been the case. The majority of the court held that the charterer was entitled to refuse to pay because the delay had defeated their “commercial speculation”.<sup>90</sup>

Blackburn J, in *Poussard*, described the principle as a “complete analogy” to that in operation in *Jackson*.<sup>91</sup> As Stannard points out, “in substance, both *Poussard v Spiers* and *Jackson’s Case* involved the same issue; was the defect in the other party’s performance sufficient to justify [that party] refusing to perform?”<sup>92</sup> Another way of putting this principle is to ask “what did [the obligee] buy?”<sup>93</sup> Where what they receive is not what they contracted for, they

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<sup>86</sup> *MacAndrew v Chapple* (1866) LR 1 CP 643 at 648 (emphasis added).

<sup>87</sup> See *ante* at 12-14.

<sup>88</sup> *Jackson*, above n 54.

<sup>89</sup> *Ibid*, at 143.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Poussard*, above n 82, at 414.

<sup>92</sup> J E Stannard “Frustrating Delay” (1983) 46 *MLR* 738 at 741.

<sup>93</sup> *Knowles v Bovill* (1870) 22 LT 70 at 71.

are discharged.<sup>94</sup> This principle recognises an obvious fact: all contracts are conditional. One party only agrees to perform if the other does, or is ready and willing to do so.<sup>95</sup>

What is clear from these cases is that nineteenth century courts treated failure of consideration as operating separately from excusable impossibility or frustration of adventure. This Chapter has argued that the three principles operated discretely and in specific scenarios. However, this clearly delineated approach was not to last.

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<sup>94</sup> McElroy and Williams, above n 51, at 247.

<sup>95</sup> A M Shea “Discharge from Performance of Contracts by Failure of Condition” (1979) 42 *MLR* 623.

## CHAPTER TWO

### A Recipe for Disaster: The Modern Doctrine of Frustration

This chapter provides the core of this paper's thesis. Part One will illustrate how the modern doctrine of frustration, being a *single test* discharging *both parties* in *any circumstances* where supervening events interfere with the contract, developed. Part Two will describe the New Zealand Supreme Court's application of the scrambled doctrine of frustration in *Planet Kids Ltd v Auckland City Council*.<sup>96</sup>

#### (i) How the Eggs Got Scrambled

During the twentieth century the principles discussed in Chapter One were scrambled together. This development took place in two separate, yet largely contemporaneous, stages. The first was the assertion that a single principle operated to discharge *both parties* to the contract. This obscured the operation of failure of consideration. The second was the conflation of frustration of adventure and excusable impossibility into a unified theory of discharge.

##### (a) The 'Common Object' Test

In *Taylor v Caldwell* Blackburn J held that where a specific thing perishes, making performance impossible, "the *parties* shall be excused".<sup>97</sup> However, there are compelling reasons to believe that his Honour meant both parties would be discharged, but by separate principles.<sup>98</sup> Not least is that, as we have seen, his Honour subsequently applied failure of consideration explicitly to discharge the counter-performing party in *Poussard*.<sup>99</sup> However,

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<sup>96</sup> *Planet Kids Ltd v Auckland City Council* [2013] NZSC 147; [2014] 1 NZLR 159.

<sup>97</sup> *Taylor*, above n 14, at 834 (emphasis added).

<sup>98</sup> For further discussion see Treitel, above n 10, at [2-039]; McElroy and Williams, above n 39, at 99-100.

<sup>99</sup> *Poussard*, above n 82, at 414.

the common law courts slowly turned their backs on failure of consideration as a distinct principle of discharge. They did so though the development of the ‘common object test’.

The common object test finds its origins in *Krell v Henry*.<sup>100</sup> The plaintiff in that case had agreed to hire out a room to the defendant for £75 for 2 days. The room was situated overlooking the route of King Edward VII’s coronation procession. As it transpired, the King subsequently took ill and the coronation was cancelled. The case involved the question of whether the defendant, being the obligee, was liable to pay the agreed price even in light of the coronation’s cancellation.

Vaughn-Williams LJ found in favour of the defendant. His Lordship followed *Taylor v Caldwell*. This could not have been a straightforward application as there was nothing preventing the defendants from paying the hire<sup>101</sup> or the plaintiffs from providing the rooms. The impossibility was collateral to the contract.<sup>102</sup> To get around this difficulty, Vaughn-Williams LJ held that *Taylor* applies to the “non-existence” of a “state of things assumed by both contracting parties as the foundation of the contract.”<sup>103</sup> The court saw the viewing of the coronation as a ‘common object’ which was made impossible in light of the supervening events. Therefore, through a “characteristically sloppy English ellipse”, the court found that the principle of *Taylor v Caldwell* applied to discharge both parties.<sup>104</sup>

The ‘common object’ test received “emphatic approval” during the cases arising out of World War I.<sup>105</sup> All the cases discussed whether a charterer was discharged from its obligation to pay where the ship was requisitioned or detained because of the war. Lord Sumner’s

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<sup>100</sup> *Krell*, above n 43.

<sup>101</sup> Payment of money is never considered to be impossible: *Universal Corporation v Five Ways Properties Ltd* [1979] 1 All ER 552; H W R Wade “The Principle of Impossibility in Contract” [1940] 56 *LQR* 519 at 524.

<sup>102</sup> Sir Frederick Pollock “Notes” (1904) 20 *LQR* 1 at 3.

<sup>103</sup> *Krell*, above n 43, at 749 (emphasis added).

<sup>104</sup> J A Weir “Nec Tamen Consumebatur – Frustration and Limitation Clauses” [1970] 28 *CLJ* 189 at 191.

<sup>105</sup> P A Landon “*Krell v Henry*” (1936) 52 *LQR* 168 at 170. See *Horlock v Beal* [1916] 1 AC 486; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435; *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497.

judgment in *Hirji Mulji* illustrates how the ‘common object’ test enabled both parties to be discharged by the same legal principle<sup>106</sup>:

“Evidently it is their *common object* that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides is *common relief from this common disappointment* and an immediate termination of the obligations as regards future performance.”<sup>107</sup>

In later cases this sentiment has been repeated.<sup>108</sup> These statements clearly indicate the judiciary’s inclination to treat the events as ending “not simply the other side’s duty to accept performance, but the contract as a whole”.<sup>109</sup> Moreover, the common object approach is exemplified in the language of both the English and New Zealand legislative provisions on frustration.<sup>110</sup> Both Acts provide that:

“Where a contract ... has become impossible of performance or been otherwise frustrated, and the *parties* [plural] thereto have *for that reason* [singular] been discharged from the further performance of the contract.”<sup>111</sup>

Thus, there can be no doubt that failure of consideration has fallen away as a distinct excuse in supervening discharge cases.<sup>112</sup> Chapter Three will offer a critique of this development.

### (b) A ‘One Test Fits All’ Approach

At roughly the same time as the ‘common object’ test was developing, the principles of excusable impossibility and frustration of adventure were being whisked together.

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<sup>106</sup> By this time courts had merged the hitherto separate principles of excusable impossibility and frustration of adventure: see *post* at 20-23.

<sup>107</sup> *Hirji Mulji*, above n 105, at 507 (emphasis added).

<sup>108</sup> See *Occidental Worldwide Investment Corp v SKIBS A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Lloyd’s Rep 293 at 326 where Kerr J held that *both* parties must consider the condition or event in question as the foundation of the contract in order for frustration to apply.

<sup>109</sup> Andrew Tettenborn “From Chaos to Cosmos - Or is it Confusion?” [2002] 2 *WEB JCLI* at 10.

<sup>110</sup> H G Beale (ed) *Chitty on Contracts: General Principles* (31<sup>st</sup> ed, London, Sweet & Maxwell, 2012) at [23.071]; Marcus Roberts “Frustration in New Zealand’s Supreme Court: A Return of Failure of Consideration?” [2014] 3 *LMCLQ* 305 at 311.

<sup>111</sup> Law Reform (Frustrated Contracts) Act 1943 (UK), s 1(1) and Frustrated Contracts Act 1994, s 3(1) (emphasis added).

<sup>112</sup> Treitel, above n 10, at [2-039]; *National Carriers*, above n 45, at 687.

Eventually, “under pressure of the war cases”, these two separate principles coalesced.<sup>113</sup> Ever since, courts have seen frustration as a *single* principle covering *all* instances of discharge by supervening events.<sup>114</sup> The primary culprit for this unhappy union was the House of Lords’ decision in *Tamplin’s Case*.<sup>115</sup>

The facts of *Tamplin* may be shortly stated. A steamship was chartered for five years to be used as an oil tanker. The charterers were to pay a fixed monthly hire. The contract contained an express exception for “restraint of princes, rulers and peoples”. In February 1915 the vessel was requisitioned for use as a troopship in World War I. Interestingly, it was not the charterer who sued to excuse its performance (being payment of the hire fee). Rather, the ship-owner wanted to escape the contract as they would be paid compensation by the British government at a higher rate than the charter fee. The charterer expressed its willingness to keep the contract alive in hope that it would secure use of the ship after the war ended. The House of Lords held, by a bare majority, that the shipowner could not discharge the contract.

Of more importance than the result was the principle applied by the House of Lords. Clearly, *Tamplin* was not a case of total impossibility; but rather the “perfect case of delay”.<sup>116</sup> Therefore, the relevant principle to be applied was frustration of adventure which, of course, turned on the construction of the contract.<sup>117</sup> However, all five judges saw the principle of *Taylor v Caldwell* as applicable.<sup>118</sup> Lord Loreburn explicitly stated that this test was the appropriate one even in cases like *Geipel* and *Dahl*:

“[T]he 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

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<sup>113</sup> McNair, above n 34, at 87.

<sup>114</sup> Treitel, above n 10, at [2-044].

<sup>115</sup> *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397.

<sup>116</sup> Schlegel, above n 57, at 425.

<sup>117</sup> See *ante* at 12-14.

<sup>118</sup> McElroy and Williams, above n 39, at 158.



the contract ... When the question arises in regard to commercial contracts as happened in *Dahl* ... [and] *Geipel v Smith* ... the principle is the same.”<sup>119</sup>

This is an almost direct reproduction of Blackburn J’s ratio in *Taylor v Caldwell* reproduced above.<sup>120</sup> Thus, the House of Lords treated delay (and therefore frustration of adventure) as merely “a specific instance of the doctrine of *Taylor v Caldwell*”.<sup>121</sup> Innumerable courts, including the House of Lords<sup>122</sup> and Privy Council<sup>123</sup>, have treated *Tamplin* as authority for such a proposition. Therefore, in the words of McElroy and Williams, the unification of the principles may be termed “The Tamplin Fallacy”.<sup>124</sup> It is fallacious because the principles were not synonymous. As Oliver Wendell Holmes pointed out, the common law does not “get a new and single principle by simply giving a single name to all the cases to be accounted for.”<sup>125</sup>

However, in spite of this, from this point onwards the common law recognised “one single, fused doctrine of frustration”.<sup>126</sup> This omnibus concept covers “the entire doctrine of discharge by a supervening event”.<sup>127</sup> This is reflected in the wording of the *Frustrated Contracts Act 1944* which applies where a contract “has become impossible of performance or otherwise frustrated”.<sup>128</sup> This indicates that impossibility is considered a sub-category of the broader principle of frustration. The implications of this conflation will be assessed in

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<sup>119</sup> *Tamplin*, above n 115, at 403-404.

<sup>120</sup> See *ante* at 6-7.

<sup>121</sup> Schlegel, above n 57, at 425.

<sup>122</sup> *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154; *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221; *British Movietonews v London and District Cinemas* [1952] AC 166; *Davis Contractors*, above n 41.

<sup>123</sup> *Attorney General of Trinidad and Tobago v Gordon Grant & Co Ltd* [1935] AC 532; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108.

<sup>124</sup> McElroy and Williams, above n 39, at 158.

<sup>125</sup> Oliver Wendell Holmes Jnr. *The Common Law* (Boston, Little Brown and Co, 1881) at 204.

<sup>126</sup> Michele de Gregorio “Impossible Performance or Excused Performance? Common Mistake and Frustration after Great Peace Shipping” (2005) 17 *KCLJ* 69 at 78.

<sup>127</sup> James P Nehf (ed) *Corbin on Contracts* (Newark, LexisNexis, 2001) Vol 14, § 74.1.

<sup>128</sup> *Frustrated Contracts Act 1944*, s 3(1) (emphasis added). Compare *Law Reform (Frustrated Contracts) Act 1943* (UK), s 1(1).

Chapter Four. This chapter will now illustrate the application of the single theory with reference to the recent New Zealand Supreme Court decision in *Planet Kids*.

## **(ii) The Doctrine in Action: *Planet Kids Ltd v Auckland City Council***

Planet Kids Ltd operated a childcare facility on land leased from the Auckland City Council. The Council wished to use the land for a roading project. Therefore, it sought to acquire the lease pursuant to the Public Works Act 1981. After initially opposing the acquisition, Planet Kids entered into a full and final settlement contract with the council. However, before the date of settlement, the premises were destroyed by fire. This terminated Planet Kids' lease agreement.<sup>129</sup> The Council alleged that, without a lease to surrender, the settlement agreement was frustrated. Importantly, the Council's performance was not impossible. There was nothing preventing them paying the agreed amount of compensation.<sup>130</sup>

Ellen France J, in the Court of Appeal, identified two ways in which the Court could construe the common object of the settlement contract.<sup>131</sup> The first was as a means of ensuring Planet Kids' business shut down "so that the Council could obtain and use the land".<sup>132</sup> If that interpretation was accepted, "the contract is not frustrated. It is immaterial that there was no lease to surrender because the intention was to remove the business and that goal has been achieved."<sup>133</sup> On the other hand, the contract could be construed as a "contractual means of implementing the Council's powers under the Public Works Act". On this basis, the lease's

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<sup>129</sup> Pursuant to clause 40.1 of the lease contract they had with the Council (in their capacity as landlord).

<sup>130</sup> *Planet Kids*, above n 96, at [174] per Young J. His honour claimed he was "not aware of any impossibility of performance cases where frustration has been alleged by the party who is able to perform". However, as Chapter One illustrated, there have been many cases where a party has sought to escape their obligations on the basis that the other party's performance has been affected by supervening events. For example, *Poussard v Spiers*, above n 82, was a case where the theatre company sought to excuse their performance on the basis that the singer's performance was impossible. Therefore, with respect, his honour's statements are erroneous.

<sup>131</sup> *Planet Kids Ltd v Auckland City Council* [2012] NZCA 562; [2013] 1 NZLR 485 at [51].

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*, at [53].

surrender forms ‘the common object’ and its cancelation *would* amount to frustration.<sup>134</sup> The Court of Appeal, agreeing with the High Court, preferred this second interpretation.<sup>135</sup>

The Supreme Court unanimously found in favour of Planet Kids. The majority judgment (delivered by Glazebrook J) and that of Elias CJ are examples of the scrambled doctrine. They applied a single test (the multi-factorial test) to determine whether the ‘common object’ of the contract was frustrated. Justice William Young’s separate opinion will be considered further in Chapter Three.

Elias CJ and Glazebrook J saw it as axiomatic that the effect of frustration was to “kill the contract and discharge the parties from further liability under it”.<sup>136</sup> On this basis “it is the common object of the contract that must be frustrated” not merely “the individual advantage which one party or the other might have gained from the contract”.<sup>137</sup> In contrast to the lower courts, the Supreme Court claimed the importance of the lease should not be “exaggerated”.<sup>138</sup> Read as a whole, the “main focus” of the agreement was “certainty of outcome, timing and amount of compensation”.<sup>139</sup> The Court continued, saying “this purpose of certainty was not thwarted by the fire but was, for all practical purposes, fulfilled before the date of the fire.”<sup>140</sup> For this reason, the court held the contract was not frustrated.<sup>141</sup>

In addition to illustrating the ‘common object’ approach, the Supreme Court’s decision epitomised the scrambling of frustration of adventure and excusable impossibility. Perhaps by

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<sup>134</sup> *Planet Kids*, above n 131, at [54]. This was the interpretation preferred in the High Court: *Planet Kids Ltd v Auckland City Council* HC Auckland CIV-2011-404-1741, 16 December 2011 at [21].

<sup>135</sup> *Planet Kids*, above n 96, at [55].

<sup>136</sup> *Ibid*, at [9] citing *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1 at 8.

<sup>137</sup> *Ibid*, at [9] per Elias CJ citing *Hirji Mulji*, above n 105, at 507.

<sup>138</sup> *Planet Kids*, above n 96, at [93].

<sup>139</sup> *Ibid*, at [95].

<sup>140</sup> *Ibid*, at [96].

<sup>141</sup> *Ibid*, at [164].

virtue of this being the first case of frustration to come before the Supreme Court<sup>142</sup>, the court undertook a discussion of the appropriate test to be applied. The Court endorsed the multifactorial approach to frustration posited by Rix LJ in *The Sea Angel*.<sup>143</sup> This test assesses whether performance is “radically different” in light of:

“the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk ... at least as far as these can be ascribed mutually and objectively, then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.”<sup>144</sup>

This is reminiscent of the construction approach adopted in *Davis Contractors* whereby the court asks whether the contract is “on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.”<sup>145</sup> The additional factors taken into account merely recognise the more liberal approach modern courts take to contractual interpretation.<sup>146</sup>

However, Rix LJ’s test in *The Sea Angel* was not simply based on the construction of the contract. His Lordship asserted (and the Supreme Court agreed<sup>147</sup>) that the decision of whether or not to apply the doctrine must be measured against the demands of justice.<sup>148</sup> Thus, after undertaking the multifactorial assessment of the parties’ intentions, justice acts as a “reality check”.<sup>149</sup> If the conclusion reached does not accord with the justice of the case “it is probably a good indication of the need to think again.”<sup>150</sup> In the words of Elias CJ “the

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<sup>142</sup> *Nielsen v Dysart Timbers Ltd* [2009] NZSC 43; [2009] 3 NZLR 160 concerned whether an offer had lapsed. The court discussed frustration only by analogy to this point: at [30] Tipping and Wilson JJ and [58] per McGrath J.

<sup>143</sup> *Planet Kids*, above n 96, at [9] and [62].

<sup>144</sup> *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547; [2007] 2 Lloyd’s Rep 517 at [111].

<sup>145</sup> *Davis Contractors*, above n 41, at 720-721 per Lord Reid.

<sup>146</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 525.

<sup>147</sup> *Planet Kids*, above n 96, per Elias CJ at [9] and Glazebrook J at [61]-[62].

<sup>148</sup> *The Sea Angel*, above n 144, at [113].

<sup>149</sup> *Ibid*, at [132].

<sup>150</sup> *Ibid*.

need to remedy injustice to the parties is the ultimate measure in assessing frustration.”<sup>151</sup>

Thus, the multifactorial test is a hybrid approach operating partially on the basis of the parties’ intentions and partially on external considerations of justice.<sup>152</sup>

This chapter has discussed how the three principles of discharge discussed in Chapter One were merged into the modern doctrine of frustration we are familiar with today. The application of this scrambled doctrine has been illustrated with reference to the series of judgments in *Planet Kids*. Aside from pointing out the erroneous reasoning which allowed the hitherto separate principles to be conflated, the chapter has deliberately left aside any normative analysis of the doctrine. Such an assessment will be undertaken in the following chapters.

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<sup>151</sup> *Planet Kids*, above n 96, at [9] citing *The Sea Angel*, above n 144, at [112].

<sup>152</sup> Alice Poole “Frustration” [2014] 3 *NZLJ* 53 at 55.

## CHAPTER THREE

### Critiquing & Replacing the ‘Common Object Test’

It may be recalled that, in the words of Lord Sumner, it is the “common object which is frustrated, not merely the individual advantage which one party or the other might have gained from the contract.”<sup>153</sup> This chapter will firstly illustrate why this approach is flawed. In short, it is illusory to speak of a ‘common object’ in contract. The application of that test turns on judicial discretion and, therefore, leads to considerable uncertainty. The chapter will suggest that this problem is mitigated if the principles discharging the parties are split and failure of consideration is reinstated in this branch of the law. The chapter will conclude by illustrating another, quite separate, benefit of adopting this framework. Rather than dissolving the contract automatically, the principle would operate at the election of the prejudiced party. This is a preferable position.

#### (i) In Search of the Illusory ‘Common Object’

Treitel claims that Lord Sumner’s common object approach accords with common sense. He gives the example of a contract for the sale/purchase of a car. In such a case, he claims that “the common object of the parties ... can be described as the exchange of the car for the price”. It is nonsensical to describe the transaction as comprising of two distinct purposes; with the obligor intending to receive the price and the obligee to receive the car.<sup>154</sup> He continues to say that “contracting parties quite commonly have the same object in view, even though they expect to benefit from it in different ways.”<sup>155</sup>

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<sup>153</sup> *Hirji Mulji*, above n 105, per Lord Sumner at 507.

<sup>154</sup> Treitel, above n 10, at [2-043].

<sup>155</sup> *Ibid.*

However, there has been criticism of this approach in academic<sup>156</sup> and judicial<sup>157</sup> fields. The principal objection is that contracting parties do not always share the same aim. Thus, ascribing a ‘common object’ to them is “fictitious and dangerous.”<sup>158</sup> The judgment of Latham CJ in the High Court of Australia, for example, complained that:

“*Contracting parties as such are not partners. They are engaged in a common venture only in a popular sense. They do not share profits or losses. There is no one particular thing to be selected from the various objects of the parties which can be fairly described as the common object of both parties. Each party expects certain individual advantages from the performance of the contract.*”<sup>159</sup>

It is suggested that the view of Latham CJ is preferable to that of Treitel and Lord Sumner. With respect, proponents of the common object approach fail to recognise that certain events can prejudice the object of one party and not the other.<sup>160</sup>

For example, in *Scottish Navigation Co v Souter*, the charterers hired the *Dunolly* from the shipowners but, subsequently, the ship was detained by Russian authorities.<sup>161</sup> In such a case, the object of the charterer is obviously undermined. They cannot use the ship for the purposes they intended. However, “the owner’s only object is to earn freight”; the utility (or lack thereof) to the charterer is not their concern.<sup>162</sup> Therefore, the detention did not obstruct the attainment of the owner’s purpose at all. Similarly, in *Jackson*, Baron Cleasby pointed out that a delay, during which the market rate for freight rises, will benefit the charterer yet be detrimental to the shipowner. The object of the ‘seller’ (being the attainment of the highest

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<sup>156</sup> J W Carter *Carter’s Guide to Australian Contract Law* (2<sup>nd</sup> ed, Australia, Butterworths, 2011) at [20.19]; Roberts, above n 110, at 309-310; *Corbin on Contracts*, above n 127, at § 74.2; Julie Ward “Frustration of Contract: *Brisbane City Council v Group Projects Pty Ltd and Another*” [1981] 9 Syd LR 461 at 471.

<sup>157</sup> See, for example, *Hudson v Hill* (1874) 43 LJCP 273 at 279.

<sup>158</sup> Weir, above n 104, at 191.

<sup>159</sup> *Scanlan’s New Neon Ltd v Tooheys Ltd* [1943] HCA 43; (1943) 67 CLR 169 at 197 (emphasis added).

<sup>160</sup> Smit, above n 50, at 287: “However, in most, if not all, situations in which frustration of purpose has been found present, clearly the purpose of only one of the parties to the contract was frustrated.”

<sup>161</sup> *Scottish Navigation Co Ltd v Souter* [1916] 1 KB 675.

<sup>162</sup> *Ibid*, at 681. Note, “freight” in shipping contexts means “the consideration by a carrier for the carriage of goods from A to B”: M N Howard “Frustration and Shipping Law – Old Problems, New Contexts” in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (London, Lloyd’s of London Press, 1991) at 114.

price) will be compromised if they are held to the contract, yet the object of the ‘buyer’ (to get as good a bargain as possible) is advanced.<sup>163</sup> This is true even in Treitel’s simple car example. The fact that the parties have different objects is obvious in light of the fact that the case is being litigated. If both parties had a ‘common object’, why would one party insist on performance and the other seek to escape? Their dispute proves the existence of the parties’ disparate objectives.<sup>164</sup>

Therefore, attempts to find a contract’s ‘common object’ are fruitless. Simply put, there is none. That is not to say that a single event will never frustrate the object of both parties. For example, where a ship sinks and therefore cannot be used by the charterer *or* be remuneratively employed by the shipowners, both parties’ objects will clearly be defeated.<sup>165</sup> However, this is not frustration of a common object. It is frustration of two separate objects by the same event.<sup>166</sup> However, courts nonetheless endeavour to find such a shared objective. It is suggested that in doing so, they ‘find’ something that was never there to begin with. This process of judicial contract making leads to considerable uncertainty.

This vagueness is highlighted by the various judgments in *Planet Kids*. Not only did the courts find different common objects; their differences in opinion reversed the outcome of the case. It may be recalled that the Court of Appeal recognised that there were two plausible interpretations of what the contract’s common object was. After discussing both, Ellen France J concluded that the High Court’s interpretation was correct.<sup>167</sup> On appeal, the Supreme Court disagreed with the conclusion reached in the lower two courts. The object of the contract was ‘certainty of resolution’ and this had not been defeated by the fire. This illustrates the uncertainty of the approach. The test clearly gives the court a high degree of discretion as to

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<sup>163</sup> *Jackson*, above n 54, at 131.

<sup>164</sup> McElroy and Williams, above n 39, at 143; Schlegel, above n 57, at 441; Stannard, above n 92, at 747.

<sup>165</sup> This is the fact scenario in cases like *Taylor v Caldwell*, above n 14. In that case, the hall’s destruction meant that Taylor could not use the hall for his concert but Caldwell could not rent it out either.

<sup>166</sup> McElroy and Williams, above n 39, at 142.

<sup>167</sup> *Planet Kids*, above n 131, at [51].



what ought to be taken into account when determining what the parties considered to be their common purpose. In light of this, Wilson and Fong claim that the decision as to whether the contract is discharged “precedes the reasoning.”<sup>168</sup> In other words, the court “looks through the contract’s words to ascertain the point behind the contract” and thereafter “decides the case according to the point rather than the words”.<sup>169</sup>

This runs contrary to the desire for certainty in contract law. Porter illustrated this point, albeit in the context of agency, clearly: “on questions of commercial law ... [it] is even more important that the rule be uniform and certain that it be the best one that might be adopted.”<sup>170</sup> The soundness of a law of contract turns on “its certainty and the ease with which it can be stated to parties by counsel, in advising them”.<sup>171</sup> The ‘common object’ test allows the court to determine what they consider to be the ‘best’ result that could be adopted, then morph the rule to fit that conclusion. This process is very difficult to predict with any degree of certainty, and therefore is eminently undesirable in the law of contract.

## **(ii) A More Certain Approach: The Return of Failure of Consideration**

This lack of clarity is not necessary. If we look back to *Taylor v Caldwell* we know that both parties are excused from their respective performances. However, this need not be by virtue of the same principle:

“We know that Caldwell is not to pay damages; we know also that Taylor is not to pay the fee. There are different reasons for these two consequences –

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<sup>168</sup> Jennifer Wilson and Nixon Fong “Frustration and Risk Allocation” [2013] *NZLJ* 273 at 275.

<sup>169</sup> Andrew J Morris “Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases” (1997) 56 *CLJ* 147 at 157.

<sup>170</sup> James C Porter “Liability of Principal for Fraud of Agent Committed for Agent’s Behalf” (1923) 8:3 *St Louis Law Review* 180 at 183.

<sup>171</sup> Joseph H Beale “What Law Governs the Validity of a Contract” (1909) 23 *Harv L Rev* 260 at 263. See also *Di Santo v Pennsylvania* 273 US 34 at 42: “It is usually more important that a rule be settled than it be settled right.”

for the first, that Caldwell has not broken any promise; for the second, that Taylor did not get what he promised to pay for.”<sup>172</sup>

It is submitted it is far clearer to determine discharge in this manner than by attempting to discharge both under the common object test. For example, recall the case of *Krell v Henry*. Vaughn-Williams LJ held that “the subject of the contract was rooms to view the coronation procession and was so to the knowledge of both parties”.<sup>173</sup> Thus, if one applies the ‘what did he buy’ test from *Knowles*<sup>174</sup>, it is clear that Henry purchased a room to view the coronation. In light of the cancellation, what Henry purchased was no longer what he would have received. This “went to the root of the matter”<sup>175</sup> for the defendant and, therefore, amounted to a failure of consideration.<sup>176</sup> Many commentators agree with this characterisation of the case.<sup>177</sup> However, the case was actually decided on the basis that the occurrence of the coronation was the objective of *both* parties to the contract. This approach is anomalous when compared with how other jurisdictions tackle the issue.

In the United States, the Restatement (Second) of Contracts 1981 (“The Restatement”) maintains a stark division between the parties’ respective obligations. A party in the shoes of Krell (the obligor) will have their performance excused on the basis of impracticability<sup>178</sup> or frustration<sup>179</sup>. The distinction between these two principles will be the subject of Chapter Four. In contrast, Henry (the obligee) would have to establish that he suffered a failure of consideration. This is covered by two sections in The Restatement.

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<sup>172</sup> Weir, above n 104, at 191.

<sup>173</sup> *Krell*, above n 43, at 751.

<sup>174</sup> *Knowles*, above n 93, at 71.

<sup>175</sup> *MacAndrew*, above n 86, at 648.

<sup>176</sup> Cf *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683. In that case, the defendant sought to escape a contract to hire a boat to view the naval fleet and review marking Edward VII’s coronation. The consideration did not substantially fail in light of the coronation’s cancellation because the defendant could still have viewed the naval fleet even though they could not view the naval review.

<sup>177</sup> McElroy and Williams, above n 51; de Gregorio, above n 126, at 75.

<sup>178</sup> American Law Institute *Restatement of the Law of Contracts* (2nd ed, St Paul, Minnesota, 1981) § 261; *Transatlantic Financing Corp v United States* 363 F 2d 312 at 315. For the position of impracticability in English law see Treitel, above n 10, at [6-020]-[6-047].

<sup>179</sup> *Restatement*, above n 178, §§ 265 and 269.

Firstly, the obligee can establish that the obligor's non-performance (even if it was excusable)<sup>180</sup> resulted in a "material failure ... to render any such performance due at an earlier time."<sup>181</sup> Where the obligor's failure is sufficiently material<sup>182</sup> the obligee's 'counter-performance' (usually being the payment of money) will be excused. Likewise, pursuant to Article 2 of the Uniform Commercial Code 2002, "delivery [i.e. performance] is a condition ... unless otherwise agreed, to [the buyer's] duty to pay".<sup>183</sup> Secondly, the obligee could allege that events, whilst not rendering performance impossible or even more difficult, mean that their "principal purpose is substantially frustrated".<sup>184</sup> This section would clearly cover the situation in *Krell v Henry*.<sup>185</sup> Unlike the English approach, where the court searches for a common contractual purpose, US courts would assess whether the external event defeated the purchasing party's principal purpose and, therefore, whether they suffered a failure of consideration.

The US case of *Earn Line SS Co v Sutherland SS Co Ltd* illustrates the division in reasons for discharge.<sup>186</sup> It is of particular interest as its factual matrix mirrors the WWI-charterparty cases discussed above, yet applies very different reasoning.<sup>187</sup> The charterers hired the *Claveresk* (owned by Englishmen) to carry coal between Cuba and the United States. The shipowners then received word that the ship was to be requisitioned by the British government for use in WWI. Learned Hand J, among other considerations, had to determine whether the charterer was entitled to refuse to pay the stipulated rate. The decision, according to his Honour, "depends upon the failure of consideration of the covenant to pay hire, not

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<sup>180</sup> *Restatement*, above n 178, § 268: "A party's failure to render or to offer performance may ... affect the other party's duties under the rules stated in §§ 237 and 238 even though the failure is justified under the rules stated in this chapter."

<sup>181</sup> *Ibid*, § 247.

<sup>182</sup> *Jacob & Youngs v Kent* 230 NY 239.

<sup>183</sup> Uniform Commercial Code 2002 (US), § 2-507(1).

<sup>184</sup> *Restatement*, above n 178, § 265.

<sup>185</sup> See *ante* at 19.

<sup>186</sup> *Earn Line SS Co v Sutherland SS Co Ltd* 254 F 126.

<sup>187</sup> See *ante* at 20: *Hirji Mulji*, above n 105; *Bank Line*, above n 105; *Horlock*, above n 105.

upon the impossibility of performance of the covenant” because “the requisition did not prevent [the charterer’s] continued performance of the covenant”.<sup>188</sup> Whilst the charterer was unsuccessful, the case illustrates clearly the division between the reasons for discharge. An even clearer statement can be found in the subsequent case of *Kowal*:

“The one party is excused from his contractual duties on grounds of impossibility of performance, and the other party is excused because of failure of consideration.”<sup>189</sup>

This division is also maintained in the UNIDROIT Principles of International Commercial Contracts 2010. Article 6.2.1 provides that “hardship” may excuse performance. Importantly, ‘hardship’ occurs where “the cost of the party’s performance has increased *or* because the value of the performance a party receives has diminished.”<sup>190</sup> Thus, the parties’ obligations and expectations are considered separately. However, any attempts to resuscitate failure of consideration have been strongly repelled by English courts.<sup>191</sup>

Lord Hailsham, in *National Carriers v Panalpina*, undertook an extensive review of the various theories which have been said to underpin frustration.<sup>192</sup> In the course of doing so, his lordship claimed that failure of consideration cannot be the appropriate principle. His Lordship noted that many cases “which have followed *Taylor v Caldwell* have occurred during the currency of a contract partly executed on both sides, when no question of *total* failure of consideration can possibly arise.”<sup>193</sup> If the requirement was for a *total* failure of consideration, then clearly the principle would be an undesirably restrictive test. Moreover, it would fail to explain (and in fact obviously contradict) many cases in which partial

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<sup>188</sup> *Earn Line*, above n 186, at 131.

<sup>189</sup> *Kowal v Sportswear by Revere Inc* 22 NE 2d 778 at 781.

<sup>190</sup> UNIDROIT Principles of International Commercial Contracts 2010, art 6.2.1.

<sup>191</sup> Contrast *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66 per Diplock LJ: Frustration occurs where “events deprive the party who has further undertakings still to perform of *substantially the whole benefit* which it was the intention of the parties as expressed in the contract that he should obtain as consideration for performing those undertakings” (emphasis added).

<sup>192</sup> *National Carriers Ltd*, above n 45.

<sup>193</sup> *Ibid*, at 687 (emphasis added).

possibility of performance had not prevented a finding of frustration.<sup>194</sup> However, there are two reasons why this objection should not be considered unassailable.

Firstly, this objection is based on terminological habit rather than logical hostility.<sup>195</sup> Failure of consideration is typically referred to in the context of restitutionary claims for the recovery of money on the basis that the recipient has not performed the agreed service.<sup>196</sup> Traditionally, in the context of such claims the failure of consideration must be *total*.<sup>197</sup> As Birks points out “old habits die hard. The phrase ‘total failure of consideration’ is one [on] which common lawyers cut their teeth.”<sup>198</sup> Thus it is not altogether surprising to see this terminology in Lord Hailsham’s judgment. However, the fact that consideration is traditionally required to be total in restitution says nothing of the requirements in contract. In fact, the law of contract recognises that partial failures of consideration are sufficient to avoid contractual obligations elsewhere. For example, in New Zealand law, a party may cancel a contract where a breach “*substantially* reduces the benefit” they agreed to receive under the contract.<sup>199</sup> Likewise, in the law of contractual mistake, relief is available where the mistaken belief results in “a benefit or obligation *substantially* disproportionate to the consideration therefor”.<sup>200</sup> Neither of these principles demand the consideration to have completely failed. There is no reason to demand the same in cases of discharge by supervening events.

Secondly, the rule requiring that consideration to have totally failed is now heavily qualified and criticised in restitutionary contexts. An in-depth discussion of the arguments for and

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<sup>194</sup> For example, in *Taylor v Caldwell*, above n 14, the fire only destroyed the Surrey Music Hall. It left the surrounding grounds and pavilions untouched. Thus, in this foundational case, there was not a *total* failure of consideration.

<sup>195</sup> Treitel, above n 10, at [2-043].

<sup>196</sup> See *Fibrosa Spolka Akcyjna v Fairbairn, Lawsons Combe, Barbour Ltd* [1943] AC 32; *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373.

<sup>197</sup> *Hunt v Silk* (1804) 5 East 449; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912.

<sup>198</sup> Peter Birks “Failure of Consideration” in F D Rose (ed) *Consensus ad Idem: Essays in Honour of Guenter Treitel* (London, Sweet & Maxwell, 1996) at 179.

<sup>199</sup> Contractual Remedies Act 1979, s 7(4)(b)(i) (emphasis added).

<sup>200</sup> Contractual Mistakes Act 1977, s 6(1)(b)(ii) (emphasis added).

against partial failure of consideration is beyond the scope of this dissertation.<sup>201</sup> However, for present purposes, it is sufficient to note that the rule is not afforded the same degree of authority as it used to attract. As Stadlen J held “the law is not an ass ... An unthinking application of an arbitrary rule [demanding failure of consideration to be total] would be in danger of defeating the object of the jurisdiction which itself is to prevent people from enjoying contractual benefits without paying for them.”<sup>202</sup> Thus, even if failure of consideration must be treated uniformly across the law, there are strong reasons to suggest the stipulation that failures must be total is in the process of being watered down.

Interestingly, this appears to be what William Young J’s separate opinion in *Planet Kids* sought to do. His Honour departed from the ‘common object approach’ illustrated by Glazebrook J and Elias CJ. Instead, his judgment focused on the “logically anterior” question of whether the fire would entitle the Council to cancel the contract pursuant to the Contractual Remedies Act 1979.<sup>203</sup> His Honour reasoned that if the Council was precluded from cancelling the contract, and Planet Kids was therefore able to insist on performance, there is little scope for the Council to argue frustration.<sup>204</sup> Section 7 of the Contractual Remedies Act 1979 entitles a party to cancel a contract where (a) the other party breaches a term which is “expressly or impliedly agreed ... [to be] essential to him”<sup>205</sup>; or (b) the effect of the breach would be to “substantially reduce the benefit”<sup>206</sup> or “increase the burden”<sup>207</sup> of the contract to the cancelling party. On the facts, his Honour held that the chattels, plant and formal surrender of the lease were “a matter of indifference to the Council”.<sup>208</sup> Therefore, the consequences of the fire did not amount to a breach of an essential term or substantially

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<sup>201</sup> See generally Lord Robert Goff and Gareth Jones *The Law of Restitution* (6<sup>th</sup> ed, Sweet & Maxwell, 2002) at [19-007]-[19-009]; Birks, above n 195.

<sup>202</sup> *Giedo van der Garde*, above n 196, at [236].

<sup>203</sup> *Planet Kids*, above n 96, at [176].

<sup>204</sup> Compare *Hong Kong*, above n 191, at 66 where the issue of frustration was assessed in a similar manner.

<sup>205</sup> Section 7(4)(a).

<sup>206</sup> Section 7(4)(b)(i).

<sup>207</sup> Section 7(4)(b)(ii).

<sup>208</sup> *Planet Kids*, above n 96, at [179].

reduce the benefit of the contract to the Council.<sup>209</sup> On this basis, William Young J concluded that there was “no credible basis” to plead frustration.<sup>210</sup>

It is worth noting that William Young J’s analogy between failure of consideration and cancellation is not perfect. Factors other than the extent of the failure in performance are relevant to the determination of whether breach is sufficiently “substantial” to warrant cancellation.<sup>211</sup> The court must balance the injured party’s interests in cancellation as against the potential prejudice this would cause to the party in breach.<sup>212</sup> These considerations cannot apply in cases where neither party is in breach (as is often the case where frustration is at issue).<sup>213</sup>

However, bearing this difference in mind, William Young J’s method is commendable in that it represents a shift towards a more certain approach to discharge. It does not seek to ascribe a fictitious common object to the parties. Rather, it respects the fact that the parties have different aims under the contract and assesses the issue accordingly.

### **(iii) Challenging the Assumption of Automatic Discharge**

Modern judges and lawyers take it as self-evident that frustration operates “forthwith, without more, and automatically”.<sup>214</sup> As pointed out by Lord Wright in *Denny Mott* “it does not depend, as does rescission of contract ... on the choice or election of either party”.<sup>215</sup> Thus, it can be alleged by any party regardless of whether they have been harmed by the events in

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<sup>209</sup> *Planet Kids*, above n 96, at [180].

<sup>210</sup> *Ibid*, at [181].

<sup>211</sup> Jack Beatson “Increased Expense and Frustration” in F D Rose (ed) *Consensus Ad Idem: Essays in Honour of Guentur Treitel* (London, Sweet & Maxwell, 1996) at 124.

<sup>212</sup> Edwin Peel *Treitel on the Law of Contract* (13<sup>th</sup> ed, London, Sweet & Maxwell, 2011) at [18-026]-[18-036].

<sup>213</sup> E Allan Farnsworth *Contracts* (Boston, Little Brown & Company, 1982) at § 9.9.

<sup>214</sup> *Hirji Mulji*, above n 105, at 501.

<sup>215</sup> *Denny, Mott & Dickson Ltd v James B Foster & Co Ltd* [1944] AC 265 at 274.

question. Bingham LJ held this was “not open to question”.<sup>216</sup> However, the failure of consideration approach challenges this proposition.

According to the orthodox position, a party whose own performance remains unaffected cannot simply abide by its obligations. As the quote from Lord Wright above illustrates, there is no option to ‘affirm’ frustration as one can in cases of breach.<sup>217</sup> Thus, for example, in *Howell v Copeland* disease ravaged 120 tonnes out of the 200 tonnes of potatoes the grower contracted to provide.<sup>218</sup> The court found that, on the basis of *Taylor v Caldwell*, the grower was excused from performance. However, McElroy and Williams ask the question, what if the purchasers had agreed to purchase the 80 tonnes that survived? Would the grower be obliged to provide them?<sup>219</sup> On the basis of the rule in *Hirji Mulji* and *The Super Servant Two* the answer is clearly no. Once the doctrine of frustration is said to apply, then the contract is dissolved. Frustration operates to “kill” the contract.<sup>220</sup>

However, under the failure of consideration approach the conclusion is not so drastic. Roberts explains this conclusion:

“If one views ... that the promisee is released from its obligations due to a substantial failure of consideration, then there does not seem to be any reason to disallow the promisee from claiming the remaining unaffected obligations of the promisor [be performed] ... [T]he contract is frustrated in such circumstances ... due to *an election by the promisee*.”<sup>221</sup>

This proposition is supported by the case of *Sainsbury v Street*.<sup>222</sup> There, the facts mirror McElroy and Williams’ hypothetical question based on *Howell v Copeland*. The plaintiffs agreed to buy 275 tonnes of barley from the defendants. Due to bad weather, the actual yield

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<sup>216</sup> *The Super Servant Two*, above n 136, at 8.

<sup>217</sup> Contractual Remedies Act 1979, s 7(5).

<sup>218</sup> *Howell v Copeland* (1876) 1 QBD 258.

<sup>219</sup> McElroy and Williams, above n 39, at 25.

<sup>220</sup> *Bank Line*, above n 105, at 452.

<sup>221</sup> Roberts, above n 110, at 312 (emphasis added).

<sup>222</sup> *H R and S Sainsbury Ltd v Street* [1972] 1 WLR 834.



of the crop was only 140 tonnes. The defendant sold this (at a higher rate) to a third party. The plaintiffs conceded that the defendant was not liable for the shortfall<sup>223</sup> but claimed that the seller was obliged to deliver the 140 tonnes that was harvested at the agreed rate. MacKenna J agreed with the plaintiff; the buyer had the right to waive the condition that the seller should deliver the whole amount or none at all.<sup>224</sup> This, as Goldberg points out, indicates that “the frustration of the contract was held to depend on the election of the disadvantaged party”.<sup>225</sup>

It is submitted that, although this clearly contradicts dicta of the highest authority<sup>226</sup>, this conclusion is justifiable. Obviously, in the case of supervening illegality or total impossibility the court should not (and would not) insist on performance at the request of the promisee.<sup>227</sup> However, it is suggested that there is no good reason why a promisee ought not to be able to insist on partial performance where some of the contract remains capable of completion. Thus, a rule similar to § 269 of The Restatement ought to apply:

“Where only part of an obligor’s performance is impracticable, his duty to render the remaining part is unaffected if: (a) it is still practicable for him to render performance that is substantial ... or (b) the obligee, within a reasonable time, agrees to render any remaining performance in full...”<sup>228</sup>

To take *Planet Kids* as an example, had it been Planet Kids trying to escape the contract on the basis that the lease’s termination made completing the contract impossible, the Council could have ‘affirmed’ because “substantial performance” was still capable of being rendered.

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<sup>223</sup> Clearly, the crop was a ‘specified thing’ which had ‘perished’ pursuant to *Taylor*, above n 14.

<sup>224</sup> *Sainsbury*, above n 222, at 839.

<sup>225</sup> G D Goldberg “Is Frustration Invariably Automatic?” (1972) 88 *LQR* 464 at 466.

<sup>226</sup> See *The Super Servant Two*, above n 136, at 8.

<sup>227</sup> Stannard, above n 92, at 752.

<sup>228</sup> *Restatement*, above n 178, § 269.

The only caveat on this is that it could not make performance unduly more burdensome and, thus, amount to frustration of adventure.<sup>229</sup>

Moreover, such a rule would preclude a party from wriggling out of its obligations by pleading frustration in order to gain a windfall.<sup>230</sup> Various English decisions have exhibited an aversion to such a claim without expressly denying its possibility. For example, in *Tamplin* (as we have seen) the shipowner claimed the contract was frustrated by the requisition in order to receive the higher rate of compensation offered by the government. Their claim was rejected.<sup>231</sup> The court in *Metropolitan Water Board* felt that, although the House of Lords did not expressly say so, the decision reached was largely influenced by their unwillingness to grant a windfall in such circumstances.<sup>232</sup> Likewise, in *Tsakiroglou v Noblee* the seller would have made a windfall had frustration been allowed because the market price of the goods under the contract had risen. The claim, however, failed.<sup>233</sup> Finally, in *Planet Kids*, the Council (if the High Court and Court of Appeal decisions had stood) would have received all the benefits under the contract without incurring any of the costs.<sup>234</sup> The merits of the case, as evidenced by Glazebrook J's discussion of 'hardship', were against the Council.<sup>235</sup> However, this decision was reversed by the Supreme Court. Allowing frustration to discharge a party in such circumstances is undesirable. In the words of McLauchlan:

“[The party could] escape its obligations by invoking what can only be described as a pure technicality in circumstances where, for all practical purposes, it had achieved everything it set out to achieve.”<sup>236</sup>

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<sup>229</sup> See *post* at 57-58 and *ante* at 12-14.

<sup>230</sup> Stannard, above n 92, at 745.

<sup>231</sup> *Tamplin*, above n 115.

<sup>232</sup> *Metropolitan Water Board v Dick, Kerr* [1918] AC 119 at 129.

<sup>233</sup> *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93.

<sup>234</sup> *Planet Kids*, above n 96 at [124]: “It cannot constitute hardship to the Council ... if it is called upon to perform its obligations under a contract voluntarily entered into.”

<sup>235</sup> *Ibid*, at [122]-[125].

<sup>236</sup> David McLauchlan “Frustration in the Court of Appeal” (2013) 44 *VUWLR* 593 at 608.

Clearly, as the above cases illustrate, the courts have an aversion to allowing discharge in such circumstances. If the contract were treated as being discharged at the election<sup>237</sup> of the party prejudiced by the supervening event, rather than discharged automatically, this undesirable consequence would be naturally avoided.

This chapter has outlined two benefits of treating each party as discharged by virtue of a separate legal principle. Firstly, it alleviates the need to refer to an illusory conception of contracting parties as partners. Rather, the court can focus on the individual advantages each seeks to gain from the contract. When they do not receive that benefit their non-performance is excusable. This is a much clearer and certain process. Secondly, treating discharge in this manner challenges the ‘sledgehammer’ nature of frustration. Rather than killing the contract, the principles give the party prejudiced an option to rescind. It has been contended that this is a desirable shift for the law to have made. The following chapter will discuss how the obligor, whose own performance has been impaired by supervening events, ought to be able to plead discharge.

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<sup>237</sup> This terminology was used in *Parker v Arthur Murray Inc* 295 NE 2d 487 at 489.

## **CHAPTER FOUR**

### **Unscrambling Excusable Impossibility and Frustration of Adventure**

This chapter turns a critical eye to the principle which ought to discharge a party whose own performance has been hindered by supervening events. The dissertation suggests that the omnibus concept of frustration which covers all cases of supervening discharge should be ‘unscrambled’ into its two composite parts: excusable impossibility and frustration of adventure. This Chapter will begin by illustrating the problems plaguing the conflated principle. In short, the test is overly discretionary and lacks a coherent theoretical foundation. This leads to considerable uncertainty in application. This is particularly unpalatable in a contract law context. The Chapter will then turn its attention to remedying these problems. It will be suggested that splitting the doctrines (as the United States courts have done) will improve the situation. Firstly, replacing the flexible multifactorial test with two tailored tests will result in a greater degree of clarity in application. Secondly, it will enable the courts to clearly identify the precise principle underlying each rule. Thus, by resetting the doctrines on sound theoretical foundations, they will be more comprehensible.

#### **(i) Pragmatism over Principle in the ‘One Test Fits All’ Approach**

The amalgamation of excusable impossibility and frustration of adventure has had two effects on the development of the doctrine. Firstly it has contributed to a sense that the test for frustration is, and must be, tempered with a large degree of judicial discretion. Secondly, it obscured the underlying principle affording discharge.

As noted above, the first impact of the conflation was the attraction of highly flexible tests. New Zealand courts have discussed ‘frustration’ where a contract’s performance has become

illegal<sup>238</sup>, wholly<sup>239</sup> or temporarily<sup>240</sup> impossible and substantially more expensive<sup>241</sup> in light of supervening events. Moreover, cases have dealt with extraordinary factual scenarios: recent decisions have had to confront political crises<sup>242</sup>, natural disasters<sup>243</sup> and economic melt-downs<sup>244</sup>. Thus, the doctrine is seen as having to react to “infinitely variable factual situations”.<sup>245</sup> In light of this, judges have assumed that the test for frustration must be “flexible and [is] not subject to being constricted by an arbitrary formula”.<sup>246</sup> In fact, Rix LJ even went so far as to say the circumstances of the cases “can be so various as to defy rule-making.”<sup>247</sup> Therefore, tests have to be flexible enough to adapt to fit the particular case before the court. The judgment in *Planet Kids*, in keeping with this tradition of flexibility, stressed the need for judgment in assessing issues of frustration:

“The test is inherently imprecise as to the degree or extent that an event affects the foundation on which the parties contracted. Application of the test calls for judgment.”<sup>248</sup>

It was this perceived need for flexibility which attracted the Supreme Court to the ‘multifactorial’ test. It takes numerous factors into account then uses ‘justice’ as a reality check.<sup>249</sup> None of these are considered determinative.<sup>250</sup> This gives the judge an extensive arsenal of factors, none of which compel a decision one way or the other, to determine how to decide the issue.

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<sup>238</sup> *Oggi Advertising Ltd v Harrington* [2010] NZAR 577.

<sup>239</sup> *Oldfield Asphalts Ltd v Grovedale Cool Stores (1994) Ltd* [1998] 3 NZLR 479; *Planet Kids*, above n 96.

<sup>240</sup> *Zhang v Zhai* [2014] NZHC 1026; [2014] 3 NZLR 69.

<sup>241</sup> *The Power Company Ltd v Gore District Council* [1997] 1 NZLR 537.

<sup>242</sup> *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] 2 CLC 534 (counter-terrorism); *Waterfront Capital Trustee 1 Ltd v Hannover Finance Ltd* HC Auckland CIV-2009-404-6241, 11 August 2010 (Fijian coup).

<sup>243</sup> *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2012] NZHC 2954 (Christchurch earthquake).

<sup>244</sup> *Classic Maritime Inc v Lion Diversified Holdings Bhd* [2010] 1 CLC 445 (2008 economic crisis).

<sup>245</sup> *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at 162-163.

<sup>246</sup> *Cricklewood*, above n 122, at 241.

<sup>247</sup> *The Sea Angel*, above n 144, at [110].

<sup>248</sup> *Planet Kids*, above n 96, per Glazebrook J at [59].

<sup>249</sup> *Ibid*, at [9] per Elias CJ and [61] per Glazebrook J; *The Sea Angel*, above n 144, at [132].

<sup>250</sup> *The Sea Angel*, above n 144, at [110] per Rix LJ: “In the course of the parties’ submissions we heard much to the effect that such and such a factor ‘excluded’ or ‘precluded’ the doctrine of frustration ... [and] that such and such a factor was critical ... I am not much attracted by that approach...”

The second impact was the muddying of the theoretical basis of discharge. Chapter One illustrated that nineteenth century courts saw each doctrine of discharge as being underpinned by a separate juristic foundation. Excusable impossibility was based on a positive rule of law whereas frustration of adventure was really an exercise in contractual construction.<sup>251</sup> However, over the last century, once the doctrines were scrambled together, the juristic basis of the unified concept has become unclear.<sup>252</sup> There has been a “plethora of judicial opinions on the basis underlying the doctrine” with none ascending to universal acceptance.<sup>253</sup> In essence, according to Burrows, Finn and Todd the debate has revolved around whether “courts strive to give effect to the supposed intention of the parties or whether they act independently and impose a solution that seems reasonable and just.”<sup>254</sup>

However, many academics have concluded that the theoretical debate is irrelevant, or simply too difficult, and have abandoned the search for a unifying principle.<sup>255</sup> As Posner explained, many see “the field [as] too broad and diverse to be adequately understood within a single theoretical framework.”<sup>256</sup> Perhaps the most strident criticism comes from Atiyah who described the debate as a “famous and futile controversy”.<sup>257</sup> Some in the judiciary have followed suit:

“[The various theories] shade into one another and ... a choice between them is a choice of what is most appropriate to the particular contract under consideration.”<sup>258</sup>

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<sup>251</sup> See *ante* at 8-14.

<sup>252</sup> *Chitty on Contracts*, above n 110, at [23-007].

<sup>253</sup> Stannard, above n 92, at 738. See generally McNair, above n 56, at 166-177; Treitel, above n 10, at [16-006]-[16-013]; *National Carriers*, above n 45, at 687-690 per Lord Hailsham.

<sup>254</sup> John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3<sup>rd</sup> ed, LexisNexis NZ Ltd, Wellington, 2007) at 784.

<sup>255</sup> See Treitel, above n 10, at [16-013]; P S Atiyah *An Introduction to the Law of Contract* (5<sup>th</sup> ed, Clarendon Press, Oxford, 1995) at 239.

<sup>256</sup> Richard A Posner and Andrew M Rosenfield “Impossibility and Related Doctrines in Contract Law: An Economic Analysis” (1977) 6 *JLS* 83 at 84.

<sup>257</sup> P S Atiyah “Judicial Techniques and the English Law of Contract” (1987-8) 2 *Ottawa L Rev* 337 at 360-361.

<sup>258</sup> *National Carriers*, above n 45, per Lord Wilberforce at 693. See also *Brisbane City Council*, above n 245, at 162-163; *Planet Kids*, above n 96, at [49] and [62].

As we have seen, Glazebrook J in *Planet Kids* adhered to this pragmatic trend. The judgment contains an admirable review of the theories that have been advanced by judges and academics over the years.<sup>259</sup> However, her Honour repeated the claim that the theories may not be “mutually inconsistent ... [or have] any practical importance”.<sup>260</sup> On this basis her Honour, in espousing the relevant test to apply, claimed that any of the theories discussed “may also provide assistance in some cases”.<sup>261</sup> The nature of the multifactorial test further illustrates this pragmatic, rather than principled, attitude. As noted above, the test is a hybrid ‘intention-cum-justice’ approach.<sup>262</sup> It sits on both sides of the historical debate as to what constitutes the appropriate principle underlying discharge identified by Burrows.<sup>263</sup>

Therefore, both in terms of defining a specific test for frustration and ascertaining the juristic basis underpinning discharge, the courts have opted for flexibility over specificity. This pragmatic approach, it is submitted, is objectionable.

## **(ii) The Problems with an Unprincipled and Flexible Approach**

Rix LJ, in *The Sea Angel*, noted that frustration needs an “overall test” lest it “descend into a morass of quasi-discretionary decisions”.<sup>264</sup> However, the ‘multifactorial’ test is so broad that this ‘descent’ is more than a hypothetical danger. The test leaves various important questions unanswered: “Is there any sort of priority between [the factors]? Are all of equal weight? Should all be canvassed in every case? Do the factors ... represent an exhaustive list?”<sup>265</sup> Moreover, the extent to which ‘justice’ as a reality check may influence the answers given to these questions is left dangerously undefined. Even Sir Robin Cooke, a champion for judicial

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<sup>259</sup> *Planet Kids*, above n 96, at [49]-[57].

<sup>260</sup> *Ibid*, at [58].

<sup>261</sup> *Ibid*, at [62].

<sup>262</sup> See *ante* at 25-26.

<sup>263</sup> Burrows et al, above n 254, at 784.

<sup>264</sup> *The Sea Angel*, above n 144, at [110].

<sup>265</sup> Rex Ahdar “Frustration of Contract in the New Zealand Supreme Court” (2014) 42 *ABLR* 249 at 253.

discretion, admitted that “an avowed discretionary approach would not necessarily make the law any more certain.”<sup>266</sup>

This level of uncertainty is unacceptable. Overly pragmatic rules run the risk of turning the judicial system “into a sort of arbitration process ... [where] law and principle are largely discarded” in favour of ad hoc assessments “designed to achieve justice in the particular circumstances of the case”.<sup>267</sup> The problem with such loose approaches is that they “provide little more than single instances of solutions”.<sup>268</sup> This is because the extent of discretion afforded means the rule’s application to particular factual contexts can no longer be predicted.<sup>269</sup> Thus the court sacrifices its hortatory function (which enables the functioning of a consistent legal system) in order to achieve fairness in particular cases.<sup>270</sup>

Compounding this uncertainty is the lack of a settled principle underpinning discharge. The multifactorial test advocated rests partially on the parties’ intentions and partially on external considerations of justice. This is problematic. In short, “if we are not sure of the basis of the doctrine we are unlikely to be able to predict with any degree of certainty the circumstances in which the courts will invoke it”.<sup>271</sup> Thus, clearly, the test elevates pragmatism over principle; individualised fairness over certainty of application. It is suggested that this is particularly inappropriate for a contract law doctrine.

Legal “rules have a background or practical point”.<sup>272</sup> It is outside the scope of this dissertation to investigate the complex relationship between ‘rules’ and the ‘principles’ which

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<sup>266</sup> Sir Robin Cooke “Remoteness of Damages and Judicial Discretion” [1978] *CLJ* 288 at 300.

<sup>267</sup> Patrick Atiyah “From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law” (1980) 65 *Iowa L Rev* 1249 at 1250-1251.

<sup>268</sup> *Brisbane City Council*, above n 245, at [29]; see also *Ooh! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd* [2011] VSCA 116 at [66].

<sup>269</sup> Ian MacNeil “Uncertainty in Commercial Law” (2009) 13 *Edin LR* 68 at 69.

<sup>270</sup> Atiyah, above n 267, at 1249.

<sup>271</sup> Ewan McKendrick “Frustration and Force Majeure – Their Relationship and a Comparative Assessment” in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (London, Lloyd’s of London Press, 1991) at 33-34.

<sup>272</sup> Morris, above n 169, at 160.



underlie them.<sup>273</sup> However, for present purposes, what is important to note is that certainty's importance (as a principle in the law) moves on a continuum. Some areas of the law elevate the principle of justice or fairness above that of certainty; whereas others do the opposite.<sup>274</sup> The rules regarding when a child should be relocated provide a good example of the principle of justice trumping that of certainty. The court, in determining a child relocation case, is 'guided' by "checklists of non-prioritised, non-exhaustive factors that will be applied according to how the particular judge sees the facts."<sup>275</sup> This is because the principles underpinning family law are generally directed more toward individualised justice than predictable certainty.<sup>276</sup> However, in contract law, the principle of certainty is "the most indispensable quality".<sup>277</sup>

The common law of contract "prefers freedom to fairness, letting the parties be the judge of [what is fair]."<sup>278</sup> Contract law's focus on certainty "looks beyond itself to other goals".<sup>279</sup> Humans are, as Bridgeman points out, "planning creatures".<sup>280</sup> The law of contract plays an important role in this planning process because "it is axiomatic that commercial men look to the law for certainty and predictability when ordering their affairs."<sup>281</sup> Comprehensible and consistent rules facilitate parties being able to conduct business without fear of unforeseen legal complications.<sup>282</sup> Thus, insistence on unambiguous commercial rules results in greater

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<sup>273</sup> See Ronald Dworkin "Is Law a System of Rules?" in Ronald Dworkin (ed) *The Philosophy of Law* (Oxford, Oxford University Press, 1977) at 38-65.

<sup>274</sup> John Braithwaite "Rules and Principles: A Theory of Legal Theory" (2002) 27 *Australian Journal of Legal Philosophy* 47 at 52.

<sup>275</sup> Mark Henaghan "Relocation Cases – The Rhetoric and the Reality of a Child's Best Interests – A View from the Bottom of the World" (2011) 23 *CFLQ* 226 at 227.

<sup>276</sup> John Eckelaar "Trust the Judges: How Far Should Family Law Go?" (1984) 47 *MLR* 593.

<sup>277</sup> *Bunge Corporation, New York v Tradax Export S.A., Panama* [1981] 1 WLR 711 per Lord Wilberforce at 715.

<sup>278</sup> Weir, above n 104, at 192.

<sup>279</sup> Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 *CLJ* 39 at 40.

<sup>280</sup> Curtis Bridgeman "Contracts as Plans" [2009] *U Ill L Rev* 341 at 366.

<sup>281</sup> Howard, above n 162, at 122.

<sup>282</sup> Harold Dubroff "The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic" (2006) 80 *St John's L Rev* 559 at 567; See also Carolyn Edwards "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues" (2009) 77 *UMKC* 647 at 654-655.

economic efficiency and activity.<sup>283</sup> It is for this reason that certainty is so fundamental in contract law. As Lord Mansfield put it: “in all mercantile transactions the great object should be certainty ... it is of more consequence that a rule should be certain, than whether the rule is established one way or the other.”<sup>284</sup> Contracting partners would rather have clear and predictable rules, even if they are restrictive or detrimental, than have them be subject to judicial discretion.<sup>285</sup> The obvious reason for this is that flexible or discretionary rules are less predictable than regimented approaches. As Smillie puts it, “individualised justice” comes at the price of certainty.<sup>286</sup>

This section has suggested that, whilst not the only important consideration, there is no principle more central to the law of contract than certainty. However, the pragmatic approach advocated in *Planet Kids* gives the judge discretion to apply an amorphous test, based on unclear principles, in light of the particular circumstances of the case. This is particularly objectionable given that ‘frustration’ challenges the most basic supposition of certainty in contract; namely, that “contracts, when entered into freely and voluntarily, shall be held sacred and enforced by Courts of Justice”.<sup>287</sup> The following section will seek to redress this lack of clarity by unscrambling the unified doctrine of frustration.

### **(iii) Bringing back Certainty: Liberating the Doctrines with Help from the United States**

This section advocates splitting the broad doctrine of frustration into two distinct principles: excusable impossibility and frustration of adventure. Each principle will apply a different test and be underpinned by a different legal theory. By distilling the principles in this way their

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<sup>283</sup> John Smillie “Is Security of Contract Worth Pursuing? Reflections on the Function of Contract Law” (2000) 16 *JCL* 148 at 148.

<sup>284</sup> *Vallejo v Wheeler* (1774) 98 ER 1012 at 1017.

<sup>285</sup> Ahdar, above n 279, at 52.

<sup>286</sup> Smillie, above n 283, at 152.

<sup>287</sup> *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 per Lord Jessel at 465.

application will be clearer. This would mean a return to the position adopted by UK courts in the nineteenth century.<sup>288</sup> However, in order to illustrate how such a split operates in a modern context, the United States' position on discharge will be discussed. It will be suggested, a few distinctions apart, this position ought to be transplanted into UK and New Zealand law.

(a) *Separate Tests: Objective Impossibility vs. Materially More Burdensome*

The “introductory note” to Chapter 11 of The Restatement states that “three distinct grounds for discharge ... must be distinguished”.<sup>289</sup> The first is where events have “destroyed the value to him of the other party’s performance”.<sup>290</sup> This is a form of failure of consideration and was discussed in Chapter Three.<sup>291</sup> The other two “distinct grounds” determine when supervening events will result in the performing party being discharged. There is a stark division drawn between what is termed ‘impracticability’ and another concept dubbed ‘temporary impracticability’. It is this division which I submit ought to be reinstated in New Zealand.

Discharge by supervening impracticability is set out in § 261 of The Restatement. The standard of ‘impracticability’ is obviously wider in scope than ‘impossibility’. This divergence from the English terminology occurred in the case of *Transatlantic Financing Corporation v United States*.<sup>292</sup> There the court held that “a thing is impossible when it can only be done at an excessive and unreasonable cost”.<sup>293</sup> However, in English courts, the

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<sup>288</sup> See, *ante* at 5-17.

<sup>289</sup> *Restatement*, above n 178, Introductory Note to Chapter 11.

<sup>290</sup> *Ibid*, § 265.

<sup>291</sup> See *ante* at 32.

<sup>292</sup> *Transatlantic Financing*, above n 178.

<sup>293</sup> *Ibid*, at 315. See also *Mineral Park Land Co v Howard* 172 Cal 289 where a contract to transport gravel from a property was discharged because of the additional cost of having to drain the property using extremely expensive techniques. The “prohibitive cost” meant that the contract was “to all fair intents ... impossible” at 293.

equation of impracticability and impossibility has been strongly refuted.<sup>294</sup> For example, in *Tenants (Lancashire) Ltd* Lord Loreburn held that discharge on this basis was a “dangerous contention” that should not be recognised unless the parties expressly provided for that type of excuse in their contract.<sup>295</sup> It is suggested that there is good reason for this unwillingness. Despite US courts’ insistence on a very high threshold to allow impracticability to discharge<sup>296</sup>, it remains a slippery concept which should not be included in New Zealand law. However, the section, absent the acceptance of impracticability, still illustrates the specific context in which impossibility ought to operate.

The rule is said to apply where performance is objectively, rather than subjectively, impossible.<sup>297</sup> As Comment (e) to the section explains “the difference [is] between ‘the thing cannot be done’ and ‘I cannot do it’.”<sup>298</sup> Insolvency and lack of funds are perfect illustrations of subjective impossibility.<sup>299</sup> The basis for their exclusion is that a party generally assumes the risk for their own inability to perform.<sup>300</sup> Goodrich CJ illustrated the difference between the types of impossibility humorously in *Fast Inc v Shaner*:

“If an elderly judge, for good consideration, promises to run 100 yards in 10 seconds and then fails to perform, he can hardly be held to puff out the defence that he could not possibly run that fast.”<sup>301</sup>

The objective nature of ‘impracticability’ is evidenced by the following three sections of The Restatement. These include supervening death or incapacity of a person necessary for

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<sup>294</sup> Treitel, above n 10, at [6-020]-[6-047].

<sup>295</sup> *Tenants (Lancashire) Ltd v C S Wilson & Co Ltd* [1917] AC 495 at 510; see also *Blackburn Bobbin Co v Allen* [1918] 1 KB 540 at 551.

<sup>296</sup> *Jennie-O Foods v United States* 580 F 2d 400; *Huffman Towing Inc v Mainstream Shipyard* 388 F Supp 1362.

<sup>297</sup> Walter H E Jaeger (ed) *Williston: A Treatise on the Law of Contracts* (3<sup>rd</sup> ed, New York, Lawyers Co-Operative Publishing Co, 1978) § 1932.

<sup>298</sup> *Restatement*, above n 178, Comment (e) to § 261. See also *Smith Engineering Co v Rice* 102 F 2d 492.

<sup>299</sup> *Heyward v Goldsmith* 269 F 946; *Smith Engineering*, above n 298.

<sup>300</sup> *Freeto v State Highway Commission* 166 P 2d 728 at 762.

<sup>301</sup> *Fast Inc v Shaner* 183 F 2d 504 at 506.

performance (§ 262)<sup>302</sup>; supervening destruction of a specific thing necessary for performance (§ 263); and supervening prohibition or prevention by law (§ 264). These sections are reminiscent of the categories of case, and eventual unifying principle, discussed by Blackburn J in *Taylor v Caldwell*.<sup>303</sup>

In contrast, The Restatement recognises that temporary interference with performance (what this dissertation has termed ‘frustration of adventure’) is a distinct legal principle from impracticability. § 269 of The Restatement provides that temporary impracticability:

“suspends the obligor’s duty to perform ... but does not discharge his duty ... unless his performance after the cessation of the impracticability ... would be *materially more burdensome* than had there been no impracticability.”<sup>304</sup>

The standard of ‘materially more burdensome’ should be familiar to English lawyers. The language is reminiscent of the test of Lord Radcliffe in *Davis Contractors*:

“[F]rustration occurs whenever ... 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.”<sup>305</sup>

However, it is suggested that this principle should extend beyond mere cases of delay. There is no principled reason why temporary impossibility may discharge whereas impossibility in method of performance may not.<sup>306</sup> Thus, provided that performance would be materially

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<sup>302</sup> Where the contract requires personal performance the performance is both objectively *and* subjectively impossible: *Williston*, above n 297, § 1932; see *Robinson*, above n 19; *Farnon v Cole* 259 Cal App 2d 855.

<sup>303</sup> See *ante* at 6-7.

<sup>304</sup> *Restatement*, above n 178, § 269 (emphasis added).

<sup>305</sup> *Davis Contractors*, above n 41, at 729 (emphasis added). Affirmed in *National Carriers*, above n 45, at 688 and 717; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724 at 751-752; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 357.

<sup>306</sup> *Schlegel*, above n 57, at 436-438

more burdensome than that contemplated in the contract<sup>307</sup>, discharge may be awarded where events interfere with the method of performance.<sup>308</sup>

Recognising a distinction between the tests is appropriate from a logical perspective. As Patterson points out, the factual scenarios involved in each case require different analytical processes:

“[The Restatement] recognise the two as distinct, because in some kinds of cases they clearly are. For instance, the impossibility which prevents delivery of 1,000 out of 5,000 bushels of apples from the seller’s orchard is different in effect from that which prevents delivery of the entire 5,000 for a month beyond the delivery date.”<sup>309</sup>

What Patterson means is that where performance is rendered impossible, it is irrelevant to ask whether performance would be materially more burdensome or materially different. Performance, being the completion of the terms of contract, cannot be achieved no matter how much extra time or money would be required. In contrast, where performance is temporarily impossible, it *does* make sense to ask whether the delay has altered the obligation. In other words, the terms of the contract *can* be achieved, but this may be in a sense outside of that required by the contract.<sup>310</sup>

Moreover, by splitting the two tests in this regard, the problems with the ‘multifactorial’ process discussed above are mitigated. Whilst each test is not infallibly certain, such a standard is an unrealistic standard to hope to achieve.<sup>311</sup> The separation does, however, achieve the less glamorous goal of reducing the level of uncertainty caused by case-by-case

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<sup>307</sup> See *post* at 57-58 and *ante* at 12-14.

<sup>308</sup> For example in the “Suez Cases”: *Tsakiroglou*, above n 233; *Albert D Gaon & Co v Societe Interprof. Des Oleagineux Fluides Alimen.* [1960] 2 QB 348; *Ocean Tramp Tank Corp v V/O Soufracht (The Eugenia)* [1964] 2 QB 226; Harold J Berman “Excuse for Non-Performance in Light of Contract Practices in International Trade” (1963) 63 *Colum. L. Rev.* 1413; O C Giles “Breach of Contract or Frustration?” (1964) 27 *MLR* 351.

<sup>309</sup> Edwin W Patterson “Temporary Impossibility of Performance of Contract” (1961) 47 *Virginia Law Review* 798 at 799.

<sup>310</sup> Lord Devlin above n 2, at 207.

<sup>311</sup> MacNeil, above n 269, at 78.

discretionary approaches as exemplified by the multifactorial test.<sup>312</sup> In addition to providing separate tests, the United States sees the two doctrines as resting on discrete theoretical foundations.

### (b) *Separate Juristic Bases for Discharge*

In contrast to the extensive academic and judicial debate over the appropriate theoretical foundation of frustration in English courts, the position in the United States is comparatively well settled and uncontroversial.<sup>313</sup> Excusable impossibility (or impracticability) rests upon a positive rule of law whereas discharge after temporary impossibility turns on the construction of the contract. This, as will be apparent, mirrors the manner in which the doctrines operated in the nineteenth century as discussed in Chapter One. The relative clarity provided by the US position is a far cry better than the ambiguity of the English and New Zealand approach.

§ 261 of The Restatement outlines the basis on which discharge is afforded in cases of impracticability:

“Where, after a contract is made, a party’s performance is made impracticable without his fault by the *occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made*, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary.”<sup>314</sup>

Obviously the court cannot override a contract which has provided for the event’s occurrence.<sup>315</sup> Thus, as The Restatement points out, this principle operates only where there

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<sup>312</sup> Ahdar, above n 279, at 56.

<sup>313</sup> For the debate in England, see *ante* at 43-44. See generally Paula Walter “Commercial Impracticability in Contracts” (1987) 61 *St John’s L Rev* 225. In particular this article illustrates that the debate over the theory underpinning discharge is uncontroversial in the US.

<sup>314</sup> *Restatement*, above n 178, § 261 (emphasis added). See also Uniform Commercial Code 2002 (US), § 2-615(a): “Delay in delivery or non-delivery in whole or in part by a seller ... is not a breach of his duty under a contract for sale if performance as agreed has been made *impracticable* by the occurrence of an event the non-occurrence of which was a *basic assumption* on which the contract was made...”

<sup>315</sup> *Restatement*, above n 178, comment (c) to § 261. See also *ACG Acquisition XX LLC v Olympic Airways SA (in liquidation)* [2012] EWHC 1070 (Comm); [2012] 2 CLC 48 at [184]: Discharge not available where event is

is a “gap” in the contract.<sup>316</sup> Where this is so, provided that the event was not caused by one of the parties, the court must step into the shoes of the reasonable man to determine whether the supervening events contradicted a “basic assumption” of the parties.<sup>317</sup> This ‘basic assumption’ standard has been affirmed by the US Supreme Court.<sup>318</sup>

Importantly, the ‘basic assumption’ test does not fall victim to the same problems as the ‘common object’ test criticised in Chapter Three. Parties clearly share common interests and assumptions. For example, in Treitel’s example, the car’s continued existence is obviously important to both parties.<sup>319</sup> However, the problem with the common object test is that it ascribes a common *purpose* or *objective* to the parties in addition to their shared interests.<sup>320</sup> The ‘basic assumption’ test merely recognises that the car is material to both parties but in different ways.

The language used here is clearly reminiscent of the basis of discharge enunciated by Blackburn J in *Taylor v Caldwell*.<sup>321</sup> As outlined in Chapter One, the court does not seek to ascertain whether the parties *subjectively* considered the non-occurrence as a “basic assumption” of the contract. This is a fallacious and highly uncertain test to apply.<sup>322</sup> On this

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expressly provided for because to do so would “reverse the allocation of risk on which the parties ... had agreed.”

<sup>316</sup> *Restatement*, above n 178, Introductory Note to Chapter 11.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Texas Co v Hogarth Shipping Co* 256 US 619 at 629-630: “[W]here parties enter into a contract *on the assumption that some particular thing essential to its performance will continue to exist* and be available for the purpose ... the contract must be regarded as subject to an implied condition that, before the time for performance and without the default of either party, the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.” (emphasis added).

<sup>319</sup> Treitel, above n 10, at [2-043].

<sup>320</sup> See *ante* at 27-30.

<sup>321</sup> *Taylor*, above n 14, at 829: “...in contracts in which the 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. In none of these cases is ... there any express stipulation that the destruction of the person or thing shall excuse the performance; that the excuse is by law implied.”

<sup>322</sup> See *ante* at 8-10.



basis, Farnsworth prefers the “candid” admission that the court is acting independently of the parties’ intentions.<sup>323</sup> This process was elucidated by Lord Radcliffe:

“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 ... is and must be the court itself.”<sup>324</sup>

Thus, the assessment of what constituted a “basic assumption” is an objective one carried out by the court. This same principle underlies the law of ‘common mistake’.<sup>325</sup> The Court in *Bell v Lever Bros Ltd* stated that where it is to be “inferred from the terms of a contract or its surrounding circumstances” that a contract is based on an assumption “and that assumption is not true, the contract is avoided.”<sup>326</sup> As Smith points out, it would be a strange quirk of law if different processes of reasoning applied where an assumption was rendered untrue five minutes *before* contracting as opposed to if it was rendered untrue five minutes *after* the contract was formed.<sup>327</sup> For this reason The Restatement includes “existing impracticability” (§ 266) in the same chapter as “supervening impracticability” (§ 261); with both turning on the application of the objective ‘basic assumption’ test.<sup>328</sup> There are two factors which will be of particular importance in making this objective assessment.

The first is the nature of the contract. Lord Wright, in *Joseph Constantine*, pointed out that discharge in *Taylor v Caldwell* was achieved because “*by the nature of the contract* it was apparent that the parties contracted on the basis of the continued existence of the music

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<sup>323</sup> Farnsworth, above n 213, at § 9.6.

<sup>324</sup> *Davis Contractors*, above n 41, at 728.

<sup>325</sup> Contractual Mistakes Act 1977, s 6(1)(a)(ii).

<sup>326</sup> *Bell v Lever Bros Ltd* [1932] AC 161 at 225.

<sup>327</sup> J C Smith “Contracts – Mistake, Frustration and Implied Terms” 110 *LQR* 400 at 401: “If A contracted to hire his theatre to B and the theatre, without the fault or knowledge of either party was destroyed (a) five minutes before they signed the agreement [or] (b) five minutes after they did so, it would be a strange law which did not apply the same basic principles to the two situations.”

<sup>328</sup> Farnsworth, above n 213, deals with both in the same chapter see § 9 “Failure of a Basic Assumption: Mistake, Impracticability and Frustration”.

hall.”<sup>329</sup> This was because the contract specified that performance was to take place in that building.<sup>330</sup> Similarly, in *Courturier v Hastie* the contract specified the particular goods to be sold.<sup>331</sup> Thus, when those goods perished, it was obvious that this event contradicted a basic assumption of the parties (being the continued existence of the goods).<sup>332</sup> The imposition of a term discharging performance in light of these events gave effect to what “the parties themselves would [as reasonable men] have inserted ... had they foreseen what was to happen.”<sup>333</sup>

Secondly, whether the event was foreseeable or foreseen will be important.<sup>334</sup> Where an event is unforeseeable it will indicate that it was a ‘basic assumption’ that the event would not happen.<sup>335</sup> In contrast, where an event is foreseen, or even foreseeable, and the parties make no provision for it, then the parties can be taken to have accepted the risk of that event occurring. In other words, the contract’s silence as to the event indicates the parties’ intention that discharge should not be forthcoming in such scenarios.<sup>336</sup> For example, in *Karelybflot AO v Udovenko* the employment contracts of fishermen were not frustrated when the ships on which they were working were forfeited.<sup>337</sup> The reason for this was that the employer knew of the possibility of forfeiture but did not include provision for this risk in the contract. Thus, the Court of Appeal held that they must be taken to have assumed the risk of forfeiture themselves.<sup>338</sup> Superseding such deliberate silences is an affront to sanctity of contract and the parties’ allocation of risks. As Lord Denman CJ put it:

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<sup>329</sup> *Joseph Constantine*, above n 122, at 182 (emphasis added).

<sup>330</sup> *Ibid.*

<sup>331</sup> *Courturier v Hastie* (1856) 5 HL Cas 673.

<sup>332</sup> *Ibid.*

<sup>333</sup> D M Gordon “Krell v Henry” (1936) 52 *LQR* 324 at 325.

<sup>334</sup> *Karelybflot AO v Udovenko* [2000] 2 NZLR 24; *Planet Kids*, above n 96, at [158].

<sup>335</sup> *Restatement*, above n 178, Introductory Note to Chapter 11.

<sup>336</sup> Maree Chetwin “Frustration and Earthquakes” [2010] 11 *NZLJ* 419 at 420.

<sup>337</sup> *Karelybflot*, above n 334.

<sup>338</sup> *Karelybflot*, above n 334 at [38]. Compare *Glidden Co v Hellenic Lines Ltd* 275 F 2d 253 and *Freeto*, above n 300, where one party tried, and failed, to include a term relating to the event’s occurrence. Affording discharge there would clearly reallocate the risks under the contract.

“[Implication where an omission is deliberate] adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorised, as well as liable to great practical injustice in application.”<sup>339</sup>

However, courts should not rely on a mechanistic use of foreseeability as a bar to discharge. Firstly, the degree of foreseeability must be high as, to a greater or lesser extent, almost any event is foreseeable.<sup>340</sup> Secondly, foreseeability does not necessarily mean that the parties contemplated the risk and chose not to excuse performance in light of it.<sup>341</sup> For example, the lack of express reference to the event in the contract could merely illustrate that the parties considered the chances of the event occurring as being so remote as to not warrant express provision.<sup>342</sup> Thus, as Glazebrook J put it in *Planet Kids*, “a foreseen event will generally exclude the operation of the doctrine, but [this] inference ... can be excluded by evidence of contrary intention.”<sup>343</sup> Finally, whilst an event might be foreseen in abstract, the scale and impact of the particular event might not be.<sup>344</sup> For example, whilst earthquakes are generally conceivable<sup>345</sup>, the extent and ongoing nature of the Christchurch earthquakes (arguably) takes them outside the ambit of what is considered foreseeable.<sup>346</sup> However, taking these concerns into account, foreseeability is still a useful touchstone in assessing whether an event was a ‘common assumption’ of the parties.

Thus, where it is objectively clear that the parties *contracted on the basis that an event would not occur* (be it the death of a person, destruction of a thing or some other disruptive occurrence), and that event renders performance *objectively impossible*, the court will step in

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<sup>339</sup> *Aspdin v Austin* (1844) 5 QB 671 at 684.

<sup>340</sup> J A McInnis “Frustration and Force Majeure in Building Contracts” in Ewan McEndrick (ed) *Force Majeure and Frustration of Contract* (London, Lloyd’s of London Press, 1991) at 153.

<sup>341</sup> *Eastern Air Lines Inc v McDonnell Douglass Corp* 532 F 2d 957 at 992.

<sup>342</sup> Leon E Trakman “Frustrated Contracts and Legal Fictions” (1983) 46 *MLR* 39 at 43; *Mishara Construction Co Inc v Transit-Mixed Concrete Corporation* 310 NE 2d 363 at 367.

<sup>343</sup> *Planet Kids*, above n 96, at [158].

<sup>344</sup> C G Brown “The Doctrine of Impossibility of Performance and the Foreseeability Test” (1975) 6 *Loy U L Rev* 575.

<sup>345</sup> *Hawke’s Bay Electric-Power Board v Thomas Borthwick and Sons (Australasia) Ltd* [1933] NZLR 873.

<sup>346</sup> Chetwin, above n 336, at 420.

and discharge the contract. Doing so achieves a just result because holding the parties to the contract in such a situation would bind them to a contract which they, as reasonable people, would never have made.<sup>347</sup>

In contrast to this positive rule, whether US courts afford discharge in cases of temporary impracticability turns on the construction of the contract. It will be recalled that the test for discharge is where the supervening events will make a party's performance "materially more burdensome".<sup>348</sup> In making this assessment the court considers "whether the delay has seriously upset the allocation of risks *under the agreement of the parties*".<sup>349</sup>

The case of *Village of Minneota v Fairbanks Morse & Co* provides a good example.<sup>350</sup> In 1940 Fairbanks contracted with the municipal council of Minneota to construct a power plant and distribution system. World War II then broke out meaning performance was rendered illegal until the war finished (a delay of over five years). The court held that this delay warranted discharge because performance, after the delay, would have "compelled [the defendant] to render performance substantially different from what it contracted to do".<sup>351</sup> The court based this finding, largely, on an addendum to the contract. This stipulated that the agreement would be null and void if ongoing litigation resulted in a third party being granted an exclusive franchise right to supply power to the council for a period of five years. The court held this clause to indicate that a delay of five years would, however so caused, be unreasonable.<sup>352</sup> Thus, requiring performance in spite of such a delay would be substantially different from that contemplated under the contract. The similarities between this sort of

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<sup>347</sup> McElroy and Williams, above n 39, at 66; *Hirji Mulji*, above n 105, at 510.

<sup>348</sup> *Restatement*, above n 178, § 269.

<sup>349</sup> *Ibid*, Comment (a) to § 269 (emphasis added).

<sup>350</sup> *Village of Minneota v Fairbanks Morse & Co* 31 NW 2d 920.

<sup>351</sup> *Ibid*, at 926.

<sup>352</sup> *Ibid*, at 924.

reasoning and that in *Geipel v Smith* and *Dahl v Nelson* discussed above ought to be apparent.<sup>353</sup>

This chapter has highlighted the manner in which the obligor can be discharged under US law. The Restatement clearly delineates two separate doctrines: supervening impracticability and temporary impracticability. The standard of impracticability aside, this chapter has suggested that the unscrambled US method is otherwise a better system than the ‘multifactorial’ approach applied in New Zealand and England. The discretionary test would be replaced by two more specific, and therefore predicable, frameworks. Furthermore, the theory underpinning each would be clearly settled. This, although not achieving perfect clarity, is more certain and therefore a more desirable framework. Indicative of this is the relative lack of academic critique on supervening discharge in the United States.<sup>354</sup> Moreover, by strictly confining where the court may discharge a contract independently from the parties’ intentions to cases of excusable impossibility, sanctity of contract is protected to a greater degree than in the multifactorial test.<sup>355</sup>

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<sup>353</sup> See *ante* at 12-14. See also *Autry v Republic Products* 180 P 2d 888 at 891: “temporary impossibility ... operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden upon the promisor.”

<sup>354</sup> The preeminent English and New Zealand contract law texts all contain discussions and debate over which theory underpins the doctrine of frustration: see Treitel, above n 10, at [16-006]-[16-016]; *Chitty on Contracts*, above n 110, at [23-007]-[23-008]; Michael Furmston, Geoffrey Chevalier, Cecil Herbert and Stuart Fifoot (eds) *Cheshire, Fifoot and Furmston’s Law of Contract* (16<sup>th</sup> ed, Oxford, Oxford University Press, 2012) at 714-717; Burrows et al, above n 254, at 784-787. In contrast, the US texts contain no comparable debate: see generally *Corbin on Contracts*, above n 127, at § 74; *Williston*, above n 297, at § 1932; Farnsworth, above n 213, at § 9.5-§ 9.9 and Walter, above n 313.

<sup>355</sup> McEloy and Williams, above n 39, at xxxvii.

## CONCLUSION

This paper can, roughly, be divided into halves. The first half explored how the law of frustration developed. Chapter One highlighted that three related, yet distinct, principles arose in the nineteenth century which acted as exceptions to the court's otherwise rigid adherence to the doctrine of absolute contracts. Chapter Two discussed how the divisions between these principles were subsequently eroded. It is here that the courts introduced the germ that eventually contaminated this entire area of the law. In the words of William Page: "it is usually a mistake to call a thing that which it is not".<sup>356</sup> However, this is precisely what courts did at the dawn of the twentieth century. The unhappy union of the three principles resulted in the 'scrambled doctrine' of frustration that we are familiar with today. Its application was recently, and archetypally, illustrated by the majority of the New Zealand Supreme Court in *Planet Kids*.

The second half of the dissertation embarked on a normative analysis of the doctrine. Chapters Three and Four highlighted that, contrary to Occam's Razor, singularity has not resulted in simplicity or certainty. The paper advocated what initially appears to be a more complicated system but which I submit would be clearer and more predictable. What was a singular amorphous doctrine has been reformulated into a set of structured and defined tests backed by comprehensible theories. In essence, the three doctrines discussed in Chapter One would be reborn; the eggs unscrambled out of the mush.

It is openly acknowledged that the reforms advocated would contradict case law of the highest authority (not least the New Zealand Supreme Court) as well as various legislative provisions. However, as Lord Atkin famously stated:

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<sup>356</sup> Page, above n 78, at 614.

“When the ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred.”<sup>357</sup>

This paper has suggested that the “difficult subject” of frustration is unacceptably uncertain.<sup>358</sup> Whilst not professing to completely cure the lack of clarity in this area of law, the unscrambled approach advocated would reduce the present uncertainty and better protect the principle of sanctity of contract. Thus, rather than justice acting as a catalyst for change, Judges should not let the “ghosts of the past” stay their hands in bringing much needed clarity to this important part of contract law.

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<sup>357</sup> *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29.

<sup>358</sup> *W J Tatem Ltd v Gamboa* [1939] 1 KB 132 at 136.

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