

Diagram 7B

A contract is frustrated by the happening of an unforeseeable event, for which neither party is responsible, which makes the contract radically different from the one that the parties originally entered. The aftermath is simple if the contract is executory; that is, if neither party has started performing the contract. The contract simply disappears and each party is released from his or her obligations.

Things get trickier when the contract is *partly* executed; that is, if one or both parties have started performing the contract. What happens on frustration to the losses and gains resulting from that performance? Diagram 7B summarizes the impact of the Law Reform (Frustrated Contracts) Act 1943, on the pre-existing common law.

- 1 Take the example of a contract where party A is to pay £50,000 in exchange for 10 musical performances from party B. The parties start to perform, and then the contract is frustrated by some unforeseen disaster befalling the concert venue or the band.
- 2 The relevant factors to be taken into account are:
 - A1: any sum that A has already paid B,
 - A1*: any sum that A already owes B but has not yet paid,
 - A2: A's expenses which is now wasted as a result of the frustration, e.g. in advertising the concerts,
 - B1: the value of any benefits B has already conferred on A and the impact of the frustrating event on that benefit (e.g. if it reduces it or wipes it out altogether), and lastly,
 - B2: B's wasted expenses, e.g. in preparing for the concerts.
3. The first question is: can A recover any payments he has made to B?
4. At Common Law, the general approach was to let losses lie where they fell. So, A couldn't recover any payments made. An exception was recognized in the *Fibrosa* case of 1943: A *can* recover his payment but only if there has been a 'total failure of consideration' from B. That is, if A has received *nothing* of the *performance* that he was entitled to under the

contract from B. But if this is the case, A can recover *all* of his payment irrespective of B's losses.

5. In the same year, the Law Reform (Frustrated Contracts) Act completely changed the picture. Under section 1(2), A can recover his payment *without* having to prove 'total failure of consideration'.
6. And, the amount A can reclaim can be reduced to take into account B's 'just expenses' in performing the contract, if it is 'just to do so in all the circumstances'. But, note that no account is taken of A's wasted expenses over and above A's payments to B.
7. The Act does not say *how* B's 'just expenses' should be calculated. There are 3 options:
 - First, if we let B deduct *all* his expenses from the sum to be returned, then we are putting *all* the loss from the frustration on to A.
 - Second, we could let B deduct *half* his wasted expenses, but this still does not address the imbalance of taking *no* account of A's wasted expenses.
 - Third, we could allow the courts a *broad discretion* to do justice in the circumstances. This was the approach adopted in the *Gamerco* case, where the band (Guns'n'Roses) was required to return £412,000 it received from the promoters when the contract was frustrated before any concerts were given. The band was not allowed to deduct *any* of its wasted expenses of £50,000 from that sum. This seems fair since the promoters had wasted a further £450,000 due to the frustration.
8. In *BP v Hunt*, Mr Justice Goff said that actions under the Frustrated Contracts Act were *restitutionary* in nature. Its purpose is not to apportion the wasted expenses between the parties, but to respond to unjust enrichment when a contract is discharged by frustration. But, the Act does allow *limited* loss apportionment when it recognizes B's 'just expenses'. It's limited because B can only off set his expenses up to the sum that he has been paid. If he has spent more than he has been paid, that is just too bad. *Unless*, B shows that A owes him another payment.

9. At Common Law, if A owes B a sum but hasn't yet paid it, A must still pay it, even *after* the frustrating event. Under the Act, A need not pay this. But B *can* claim it as part of his 'just expenses'. If B has already received some payment, then he must show that his 'just expenses' exceeds this in order to get at the sum owing from A but not yet paid. If B *has not* received any payment at all, B can make a fresh claim against the sum payable. Again, if B's expenses exceeds the sum paid and payable, that is too bad. He must shoulder that loss.

10. What about B's *claim* for **non-money benefits** conferred in performance of the contract? The common law did not any such a claim; losses lay where they fell.

11. But under section 1(3) of the Frustrated Contracts Act, B can claim what's called a '**just sum**'. This can get rather complicated, as *BP v Hunt* shows. Mr Justice Goff presented it as a two stage process:

At **stage 1** we must work out the *value of the benefit received* by A. This is the upper limit of any award determined at stage 2 - the 'just sum' that B should get.

At stage 1 with *goods*, we assess it at its market value. With *services*, we have to value the end product if there is one (e.g. the house built). Only if there is no end product (e.g. a violin performance), do we value the services themselves.

If the performance has not been completed, it may be difficult to value (e.g. half a hair cut is not worth half of a whole haircut), so some discretion or judgment has to be exercised here.

12. The frustrating event may reduce or completely destroy the benefit that B transfers to A, such as when a house built has burnt down. Mr Justice Goff says that we must take this into account at stage 1. But, this is no consistent with the actually working of the Act which makes it one of the factors to be taken into account at stage 2 when the court assesses the 'just sum' to be awarded to B. Putting this factor in at stage 2 means that even if the frustrating event *does* completely destroy the benefit, B may still get something. The court must also take into account:

- The *value* of B's services and expenses. In *BP v Hunt*, the court took this as the value that the *contract* put on B's services. This means that section 1(3) claims will usually amount to a proportion of the contract price which corresponds to the proportion of the contractual performance up to the date of frustration.
- A's expenses in performing the contract, including any claim that A may have under section 1(2) for the sums paid to B.
- The assessment of the 'just sum' should be made as at the date of frustration.
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13. In sum, B's section 1(3) award will be a sum not exceeding B1 (the value of the benefit conferred on A) after taking account of:

- B1: The effect of frustration on that value;
- B2: The contract valuation of B's expenses and services;
- A1: Any payments from A to B;
- A2: A's wasted expenses.