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FORCE MAJEURE AND FRUSTRATION

AN OVERVIEW OF THE CASE LAW

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1 Force Majeure

1.1 Context

In this age of Covid-19 many contractors are scrutinising their contracts to identify a provision affording them relief from obligations which have become impossible to perform or where the contracts containing those obligations have become uneconomic because of the impact of the virus. Routinely, a force majeure clause will be invoked to meet the challenge.

The expression “force majeure” is not a defined expression or term of art in Australian or English law and it is rare for the expression to appear otherwise than as a heading to a clause. There is no doctrine of force majeure corresponding to French law. The expression is conventionally used to identify a clause in a contract which provides relief either by way of suspension or on occasions cancellation of obligations following the occurrence of one or more of a catalogue of events specified in the clause which prevent, delay or hinder performance. Typically, the clause requires:

(i) that the occurrence of the event is beyond the reasonable control of the party affected; and

(ii) that the affected party must take reasonable steps to minimise the effects of the event.

Whether such a clause is effective to afford relief to a contractor in any given situation turns upon the proper construction of the clause in its application to the event or events which have occurred. This process of construction is governed by the principles of Australian law relating to the construction of contracts generally. These principles are reviewed below.

1.2 Construction principles: an overview

(a) Background

In *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[1], Gibbs J set out the cardinal principle informing the interpretation of contractual language. His Honour said at 109:

> *If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.*

The initial question is whether the words employed by the parties are ambiguous or "susceptible of more than one meaning".[2] Ambiguity may be apparent on the face of a contractual document or it may otherwise be revealed by a consideration of factual context. The supplementary question is whether context may be utilised to reveal an ambiguity or only to resolve an ambiguity.

In *Maggbury Pty Ltd v Hafele Australia Pty Ltd*[3], Gleeson CJ, Gummow and Hayne JJ said at 188:

> *Interpretation of a written contract involves, as Lord Hoffmann has put it: "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". That knowledge may include matters*

[1] (1973) 129 CLR 99
[2] Mason J in *Codelfa v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352
[3] (2001) 210 CLR 181

of law, as in this case where the obtaining of intellectual property protection was of central importance to the commercial development of Mr Allen's ironing board. (footnotes omitted)

This passage confirms two points. First, that the process of contractual interpretation is objective and, secondly, that background and context is always relevant to the process.

Before considering the admissibility of extrinsic evidence in the construction process, there are a number of important preliminary concepts which need to be addressed.

(b) The meaning of ambiguity

It has long been recognised in Australian law that there is a line between the grammatical meaning of words and their legal meaning or effect. This distinction was noted by Isaacs J in the early decision of the High Court in *The Life Insurance Company of Australia Limited v Phillips*[4]. His Honour J said:

> *A document purporting to be a contract may be ambiguous. But the term "ambiguity" is itself not inflexible. It may arise from doubt as to the construction in their totality of the ordinary and in themselves well-understood English words the parties have employed. That is true construction. Or it may arise from the diversity of subjects to which those words may in the circumstances be applied. That is rather interpretation of terms. Or again, it may arise from obscurity as to the full expression in ordinary language of some abbreviated term or arbitrary form that has been adopted. That again is interpretation of terms. Very different consequences attach according as the ambiguity rests in construction or in interpretation. …*
>
> *The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law. The "meaning of the words" is what I call interpretation, whether the words to be interpreted into ordinary English are foreign words or code words or trade words or mere signs or even ordinary English words which on examination of surrounding circumstances tum out to be incomplete. Their effect when translated into complete English is construction. If that distinction be borne in mind very little difficulty remains.*

In the later decision of the New South Wales Court of Appeal in *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*[5] Priestley JA said at 657:

> *What I mean by "not ambiguous" for present purposes is not having two or more plausible meanings when the context of the words in the document is taken into account in light of the knowledge any ordinarily intelligent reader of the document would bring to the reading of it.*

And in *Mainteck Services Pty Ltd v Stein Heurtey SA*[6], Leeming JA noted:

> *[83]… the approach endorsed in Woodside avoids the difficulty of identifying what is meant by "ambiguity", itself an ambiguous term, whose perception "differs from one judicial eye to the other": B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd (1994) 35 NSWLR 227 at 234.*

(c) Grammatical meaning and legal meaning

In *Zhang v ROC Services (NSW) Pty Ltd*,[7] Leeming JA (Macfarlan JA and Sackville AJA agreeing) lucidly identified the three stages of the construction process. His Honour said:

> *[53] Where as here the issue is the construction of a complex contractual provision, the starting point is to determine the literal or grammatical meaning or meanings of the clause. Secondly, one then determines the legal meaning of the clause. Thirdly, one applies that legal meaning to the facts as found by the court.*
>
> *[54] The first phase, determining literal or grammatical meaning, is a matter of English, not a matter of law. It does not turn on evidence. In many cases, there will be no great difficulty*

[4] (1925) 36 CLR 60
[5] (1987) 8 NSWLR 642
[6] [2014] NSWCA184
[7] [2016] NSWCA 370

determining the literal or grammatical meaning, and in some accounts of the process of construction, this stage is omitted. But sometimes determining the literal or grammatical meaning will be difficult. One reason for that may be that the clause disregards ordinary rules of grammar … Another reason may be that the clause is long and complex and the grammar difficult and indeed ambiguous.

In respect of the ascertainment of grammatical meaning his Honour said:

[70] It should not ordinarily be necessary to resort to formal authoritative works in order to identify the grammatical meaning (or meanings) of contractual language. Being able to use and comprehend the nuances of formal English is essential for any competent legal practitioner. What is more, it is well understood that competent speakers apply and understand the subtle rules of grammar even though they may not realise it (adjective order is perhaps the most familiar instance: no competent English speaker would report buying a "silk second-hand green shirt").

In *Zhang* the Court was concerned with the construction of an obscure exclusion in a motor vehicle policy of insurance as follows:

(8) for any liability for death or bodily injury arising out of or in any way connected with a defect in Your Motor Vehicle or in a Motor Vehicle, but in Queensland only if it causes loss of control of the vehicle whilst it is being driven;

In commenting on the rival submissions of the parties his Honour made the following somewhat critical observation:

[55] Despite a vigorous and sustained exchange of submissions that cl 2(b)(8) was, or alternatively was not, ambiguous, no party undertook what seems to me to be the appropriate starting point, which is a grammatical parsing of this complicated English sentence. It will be seen that once the clause has been parsed, some of the parties' submissions fall away.

His Honour also made the following observations on the resolution of ambiguity:

[77] As already observed, grammatical ambiguity may be and often is resolved by meaning. This reveals that there is not a sharp line dividing the threshold stage of ascertaining grammatical or literal meaning and the subsequent stage of determining legal meaning. However, generally it will be vital to bear in mind the range of potential meanings which the clause is capable of sustaining, and to have some appreciation for how natural or strained those potential meanings are, at the time one turns to the balance of the contract and the surrounding circumstances and purpose and object.

[78] There is however a sharp distinction between giving legal meaning to a contractual provision, and applying that legal meaning to the facts in a particular case. It has long been established that extrinsic evidence may be adduced at the application stage, at least in some cases. This is what Isaacs J referred to in Bacchus Marsh Concentrated Milk Co Ltd (in Liq) v Joseph Nathan & Co Ltd (1919) 26 CLR 410 at 427 when speaking of adducing extrinsic evidence "not to alter the contract but to identify its subject". Latham CJ referred to "latent ambiguity" in construing a legacy "to my nephew John" where the testator had two nephews named John: Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348 at 356-367.

(d) The iterative process

In *Zhang*, Leeming JA having referred to United Kingdom Supreme Court authority, considered the third stage of the construction process, namely applying legal meaning to the facts of an individual case. Relevantly, his Honour said:

Where there is more than one available legal meaning, a court looks at the text, context and purpose, with a view to determining which potential meaning best accords with those considerations. Sometimes, text, context and purpose all point in the same direction, and all support the same conclusion as to the legal meaning of the contractual provision; that was the case in Victoria v Tatts Group Ltd [2016] HCA 5; 90 ALJR 392 at [51] and [75]. Sometimes, as here, text, context and purpose point in different directions. But it remains necessary to assess the potentially available legal meanings against those matters.

His Honour returned to this theme in *MetLife Insurance Ltd v RGA Reinsurance Company of Australia Ltd*[8] in which he said:

> *[100] It is necessary, in any case of construction of a commercial contract, to test both competing constructions against text, context and purpose. The process was stated by the High Court in Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17 at [16]:*
>
> > *"preference is given to a construction supplying a congruent operation to the various components of the whole".*
>
> *[101] More recently, Lords Neuberger and Mance have described the iterative process of "checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences": Re Sigma Finance Corp (in administrative receivership) [2009] UKSC 2; [2010] 1 All ER 571 at [12]; Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900 at [28].*

Leeming JA's analysis was endorsed by Gleeson JA in the recent decision of the New South Wales Court of Appeal in *XL Insurance Co SE v BNY Trust Company of Australia Limited*[9].

(e) Text, context and purpose

Between 2014 and 2017 the High Court addressed the principles of contract interpretation in five decisions.

First, in *Electricity Generation Corporation (t.as Verve Energy) v Woodside Energy Ltd*[10] French CJ, Hayne, Crennan and Kiefel JJ. In their joint reasons said:

> *[35] Both Verve and the Sellers recognised that this court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in Re Golden Key Ltd, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".*

Secondly, in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[11] French CJ, Nettle and Gordon JJ in their joint reasons said:

> *[46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.*
>
> *[47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.*
>
> *[48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.*

[8] [2017] NSWCA 56
[9] [2019] NSWCA 215
[10] (2014) 251 CLR 640
[11] (2015) 256 CLR 104

> *[49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.*
>
> *[52] These observations are not intended to state any departure from the law as set out in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales and Electricity Generation Corporation v Woodside Energy Ltd. We agree with the observations of Kiefel and Keane JJ with respect to Western Export Services Inc v Jireh International Pty Ltd.*

Thirdly, in *Victoria v Tatts Group Ltd*[12], the Court in relation to the constructional issue in that case said:

> *[51] The phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time). That construction is supported by reference to the text, context and purpose of cl 7 of the 1995 Agreement.*
>
> *[63] The question posed by the Court of Appeal did not reflect the context in which the question arose or the purpose of the 1995 Agreement. That context and purpose should have led to a different answer.*

Fourthly, in *Simic v New South Wales Land and Housing Corporation*[13] Gageler, Nettle and Gordon JJ in their joint reasons said:

> *[78] There was also no dispute about those principles of construction. The proper construction of each Undertaking is to be determined objectively by reference to its text, context and purpose.*

In *Simic* their Honours referred to both *Woodside* and *Mount Bruce Mining* in support of their proposition.

Fifthly in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*[14], Kiefel, Bell and Gordon JJ in their joint reasons said:

> *[16] It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.*

Subsequently, in *Win Corporation v Nine Network Australia Pty Ltd*[15], Barrett AJA having referred to Mason J's "true rule" (or proposition) in *Codelfa* and the statement of the High Court in *Mount Bruce Mining* said:

> *[59] A potential tension that inheres in this proposition is that to recognise words as bearing a "plain meaning" is merely to state a conclusion arrived at by some process of interpretation which cannot, as a matter of logic, exclude context. As Leeming JA noted in Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633 ; [2014] NSWCA 184 at [77], to state that a legal text is "clear" does no more than recognise that "there is nothing in the context which detracts from the ordinary literal meaning". It therefore becomes clear that the notion that it may first be necessary to consider context when construing a contract is not inconsistent with Mason J's "true rule". On this footing, it does not follow that the task of assessing whether a phrase or expression is ambiguous or susceptible of more than one meaning must be undertaken without regard to evidence of surrounding circumstances. This position corresponds with the approach of the High Court in Victoria v Tatts Group Ltd where the relevant contract was construed by reference to its text, context and purpose without any*

[12] [2016] HCA 5
[13] [2016] HCA 47 (7 December 2016)
[14] [2017] HCA 12
[15] [2016] NSWCA 297

anterior finding of ambiguity as a precondition to a consideration of surrounding circumstances as an aid to discovering or elucidating context and purpose. (emphasis added)

1.3 The interpretation of force majeure clauses

There are two important decisions of the Australian Courts which deal with the interpretation of force majeure clauses.

The first is *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324.

The facts of this case were conveniently summarised by Basten JA in *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235.

The defendants were joint venturers seeking to sell coal out of Newcastle, New South Wales to a Philippine company, National Power Corporation. A sales a contract was entered into on 20 March 2004. On the same day, the defendants agreed to charter a ship from the plaintiff in order to transport the coal to the Philippines, with delivery to be effected during a specified period between 26 April and 8 May. By 14 April, the defendants were satisfied that National Power Corporation had reneged on the contract and sought to cancel the charter party. The plaintiff treated the cancellation as repudiation, which it accepted and sought damages for breach. The defendants argued that the failure by the purchaser to perform the sales contract excused them from performance of the charter party, pursuant to a force majeure clause. The contractual provision stated that neither party *shall be liable for any failure to perform … its obligation under this charter party … where the party is being … prevented from doing so by reason of any force majeure event*. Such an event was defined to include the following:

> *(e) Any other cause, whether or not of the nature or character specifically enumerated above, which is beyond the control of such party.*

In rejecting the defendant's reliance on force majeure, Kiefel J (as her honour then was) said:

> *60 Impractability of performance is not generally recognised as a ground of discharge of a contracting party's obligations: E McKendrick, Force Majeure and Frustration of Contract, 2nd edn, LLP, London, 1995 at pp 24-25; G Treitel, Frustration and Force Majeure, Sweet and Maxwell, London, 1994 at par 6-021. To the extent that it has been accepted as a ground by American courts, Treitel at par 6-020 observes that they have become increasingly reluctant to regard the increased cost or difficulty of performance as sufficient for this purpose. The assertion that force majeure 'includes every event which is beyond the control of the parties' (see L D'Arcy, Schmitthoff's Export Trade: The Law and Practice of International Trade, 9th edn, Sweet and Maxwell, London, 1990 at p 199) has been regarded as too wide: McKendrick at p 8 footnote 41. In PJ van der Zijden Wildhandel N.V. v Tucker [1975] 2 Lloyd's Rep 240 the sellers were entitled to cancel the contract if they did not effect shipment in time by reason of war, flood, fire or storm or 'any other cause beyond their control'. This was held not to protect them when their supplier let them down, since the event did not prevent them from performing by other means.*
>
> *61 There is no doctrine in English law which corresponds with the doctrine of force majeure in French law. The use of the words in contracts have required English and Australian courts to give them some meaning. The characteristics by McKendrick at pp 24 – 25, which have been recognised by the courts as constituting a force majeure event have regard to something which is:*
>
> *(a) irresistible;*
> *(b) unforeseeable;*
> *(c) external to the person claiming discharge; and has*
> *(d) made performance impossible and not merely more onerous or difficult*
>
> *(and see Treitel at par 12 – 017). In the present case (a) (b) and (d) are not present.*
>
> *62. In any event the submission for Dartbrook and Anglo Coal ignores the need to construe each force majeure clause by reference to its words, having due regard to the nature and general terms of the contract: Lebeaupin v Richard Crispin and Co [1920] 2 KB 714 per McCardie J. Here the objective of Dartbrook was to load the specified cargo of coal. The obligation was not dependant upon the existence of a particular purchaser, as previously discussed, and could be fulfilled without a sale to National Power. Clause 45 requires that Dartbrook be* ***prevented*** *from performing that obligation before it is excused. The clause itself gives examples of what may amount to prevention. It includes 'hindrances of whatsoever nature in mining production' with the rider that they not be caused by the actions of Dartbrook itself. The requirement that Dartbrook be prevented from performance, in*

practical terms, implies causation between the event and the inability to perform. Some force majeure clauses have been recognised as operating in this way (see Treitel at par 12 – 019). Nothing in National Power's refusal to proceed with its contract prevented Dartbrook from providing coal for delivery to Masinloc in accordance with the charter. The 'practical' considerations, to which Dartbrook and Anglo Coal point, are indicative of matters which may affect a party which considers itself to be at risk of loss. Proceeding with the charterparty may not have been to their advantage, but there was nevertheless a choice open with respect to performance. They were not prevented from performance. They considered it not be in their interests to do so and chose not to perform.

In *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235, Basten JA in reference to Kiefel J's observations said:

224 Care must be taken in adopting the characteristics identified in McKendrick (1995). The book is a collection of essays edited by Mr McKendrick. The chapter relied upon by Kiefel J was written by Professor Nicholas and is entitled "Force Majeure in French Law". As noted by William Swadling in the first chapter of the book, "The judicial construction of force majeure clauses" (at p 7):

> *"Although there is no general doctrine of force majeure in English law parties often use the words force majeure in their contracts, thus forcing the English courts to attribute to them some meaning. And though Donaldson J, in Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd [1968] 1 Lloyds Rep 16 at 28, remarked that 'the precise meaning of this term, if it has one, has eluded lawyers for years', the words have been considered in a number of cases. One caveat should, however, be entered at this stage. It is rare for the words force majeure to appear in a contract otherwise than as part of a longer list of exceptions and, as McCardie J pointed out in Lebeaupin v Richard Crispin & Co [1920] 2 KB 714 at 720, the words should be construed in each case with a close attention to those which precede or follow them, and with a due regard to the nature and general terms of the contract."*

This caution is of particular relevance in the present case, where the words "force majeure" do not appear in the clause itself, but only in the heading.

225 Secondly, the reliance on PJ van der Zijden Wildhandel repays further consideration. In that case Donaldson J was concerned with a dispute arising from the non-delivery of "Chinese frozen rabbits". The question was whether the seller was excused because its own supplier had not performed, on the basis that such non-performance was a cause beyond the control of the seller. In relation to the principle to be applied, Donaldson J stated (p 242, col 1):

"[Counsel for the sellers] goes on to submit that the words 'any other causes beyond their control' are not to be limited in their meaning by the application of the ejusdem generis rule and a consideration of the specifically enumerated perils which go before. … Again, for the purposes of this case, I am quite content to accept this, and it may indeed be right that this clause is not to be construed narrowly and that the words 'any other causes beyond their control' are to receive their wide and literal meaning."

Donaldson J then noted that the onus lay on the defaulting sellers to bring themselves within the clause and continued:

> *All that they have been able to show was that the imports of Chinese frozen rabbits into Holland were at all material times much smaller in quantity than the amount called for under these contracts. They have quite failed to obtain any finding from the arbitrator that they were unable to buy in Chinese frozen rabbits from some supplier other than the one with whom they have a contract. Unless they can do that, they are unable to show that they were prevented from fulfilling their contract by a cause beyond their control.*

226 His Lordship continued, no doubt obiter, that if "suddenly the Americans develop an overwhelming desire to eat Chinese frozen rabbits in consequence of which the price of Chinese frozen rabbits c.i.f. America rose steeply", it could be anticipated that shippers would divert the commodity to the United States, "but it would be the duty of the sellers in those circumstances to buy in from the United States market and to procure the reshipment of the frozen rabbits c.i.f. Rotterdam".

It is important to emphasise that in construing a force majeure clause the onus of establishing that the clause applies to particular facts which rests with the party seeking to rely on the clause.

1.4 Exception clauses

Another form of clause which deals with risk allocation for supervening events is the exceptions clause. It is structured somewhat differently from a force majeure clause although on the surface it has the hallmarks of force majeure. The exceptions clause seeks to protect a

party from a liability for breach of contract while a force majeure clause operates to suspend performance while the effects of a force majeure event continue. The conceptual distinction between the two forms of clause was recently considered by the English Court of Appeal in *Classic Maritime Inc v Limbungan Makmur SDN BHD*[16].

The case involved a long term contract of affreightment between the plaintiff shipowner and the defendant who was an iron ore miner in Brazil. The contract was made in June 2009 and provided for shipments of iron ore pellets from Brazil to Malaysia.

On 5 November 2015 a dam burst in the industrial complex in which the iron ore mine was situated. This event halted production at the mine. As a result it was impossible for the mine owner to ship iron ore pellets between November 2015 and June 2016. During that period five shipments were contracted to have taken place.

In the subsequent action by the shipowner for damages for breach of contract the trial judge found that even if the dam had not burst, it was more likely than not that the charterer (ie: the mine owner) would not have been ready, willing and able to supply cargo for the five contracted shipments. In other words, the charterer would have defaulted in any event. It was noted by the trial judge that the charterer made no arrangements for the supply of the cargo.

The affreightment contract contained the following clause.

> *32 EXCEPTIONS: Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting From: Act of God, act of war, act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people; embargoes; seizure under legal process, provided bond is promptly Furnished to release the Vessel or cargo; floods; frosts; fogs; fires; epidemics; quarantine; Intervention of sanitary, customs or other constituted authorities; Blockades; Blockages; riots; insurrections; civil commotions; political disturbances; earthquakes; Landslips; explosions; collisions; strandings, and accidents of navigation; accidents at the mine or Production facility or to machinery or to loading equipment; accidents at the Receivers' works, Port, wharf or facility; or any other causes beyond the Owners', Charterers', Shippers' or Receivers' Control; always provided that any such events directly affect the performance of either party under This Charter Party. If any time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).*

The charterer contended that clause 32 constituted a force majeure clause and, therefore, its application did not depend upon whether the charterer would, in fact have been able to perform but for the dam burst. This submission was rejected both by the trial judge and by the Court of Appeal although with different approaches.

The trial judge noted:

> *"81. There appears to me to be an important difference between a contractual frustration clause and an exceptions clause. A contractual frustration clause, like the doctrine of frustration, is concerned with the effect of an event upon a contract for the future. It operates to bring the contract, or what remains of it, to an end so that thereafter the parties have no obligations to perform. An exceptions clause is concerned with whether or not a party is exempted from liability for a breach of contract at a time when the contract remained in existence and was the source of contractual obligations. It is understandable that a contractual frustration clause should be construed as not requiring satisfaction of the 'but for' test because that is not required in a case of frustration. …"*

Relevantly, in the Court of Appeal, Males LJ said:

> *36 Accordingly I approach the construction of clause 32 without any predisposition as to the construction which should be adopted and without any need to avoid what are said to be the unfair consequences of adopting one or other of the rival constructions. It is simply a matter of construing the words of the clause*

[16] [2019] EWCA Civ 1102

> *37 As what matters is the language of the clause, the citation of cases dealing with very differently worded clauses is in my judgment of limited if any assistance, although the enthusiasm and diligence of counsel on both sides have demonstrated that it is possible to find examples of decided cases which fall, at least arguably, on one or other side of the line. Accordingly I do not think it would be profitable to examine the cases relied upon (Cowden v Corn Products Co Ltd (1920) 2 Ll L R 344, Brightman & Co v Bunge y Born Ltda SA [1924] 2 KB 619 and [1925] AC 799, Ross T Smyth & Co Ltd v W.N. Lindsay Ltd [1953] 1 WLR 1280, The Furness Bridge [1977] 2 Lloyd's Rep 367 and the GAFTA soya bean meal cases referred to below). It is better to concentrate on the terms of clause 32.*

His lordship proceeded to analyze the key features of clause 32 and concluded that it was an exceptions provision and not a force majeure clause. Accordingly, the charterer (mine owner) had to satisfy the "but for" test to secure immunity from liability for damages for breach of contract by failing to ship the iron ore pellets.

His lordship noted the following important aspects of the clause.

First, it is a general exceptions clause of mutual application.

Secondly, the words *loss or damage to cargo* necessarily refer to a particular cargo, here there was no cargo. The same consideration applies to the words *failure to…load, discharge or deliver the cargo*.

Thirdly, the words *resulting from* together with the requirement that the events in question *directly affect the performance of either party* import a causation requirement.

Thus, to secure the benefit of clause 32 the charterer (mine owner) must establish on a balance of probability that but for the dam burst it would have performed its contractual obligations in relation to the relevant five contract shipments.

1.5 The doctrine of frustration at common law

The occurrence of a post contractual supervening event which renders contractual performance impossible, such as a change in law, may attract the common law doctrine of frustration. However, to the extent that the frustrating event is covered by a force majeure clause there is no room for the operation of the common law doctrine. However, the application of the doctrine does not require the new situation to be "unforeseen" or "unexpected" or "uncontemplated". Thus, in *The Eugenia*[17], Lord Denning MR said:

> *The only thing that is essential is that the parties should have made no provision for it in their contract.*

In *Ardee Pty Ltd v Collex Pty Ltd*[18], Palmer J after citing Lord Denning MR noted:

> *44 the question is, has the contract provided or what is to happen in the event which has actually occurred?*

However, the Court of Appeal of Victoria in *OOH! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd*[19] considered the distinction in terms of risk allocation between an event which is foreseeable and an event which was actually foreseen. Relevantly, Nettle J said:

> *72 A number of the single instance decisions to which Stephen J referred in Brisbane City Council were concerned with application of the doctrine of frustration in circumstances where a supervening event was foreseeable or foreseen at the time of entry into the contract. As Lord Wright said in Maritime National Fish Ltd v Ocean Trawlers Ltd, where a supervening event is not only foreseeable but actually foreseen at the time of entry into a contract, it is more difficult to conceive of the parties as having entered into the contract on the basis of a common understanding that the event could not occur during the life of the contract. Where, however, a supervening event, although foreseeable, was not foreseen at the time of entry into the contract, the fact that it was foreseeable*

[17] [1964] 2QB 226
[18] [2001] NSWSC 836
[19] [2011] VSCA 116

may not be of much significance unless the degree of foreseeability is particularly high.

73 Consequently, as later cases demonstrate, it is important to be precise about the nature and degree of foresight. So far as foreseen events are concerned, the parties to a contract may have foreseen an event but not foreseen the nature or extent of it. In The Sea Angel, Rix LJ gave as an example, based on The Nema,[20] a case where the possibility of an industrial strike was foreseen, and actually provided for in the contract, but lasted so long as to go beyond the risk assumed under the contract. It was held to have frustrated the contract. Cheshire and Fifoot's Law of Contract suggests that in some cases it may also appear that, 'Failure to provide expressly for an event that was foreseen [is] due to … a deliberate decision to leave matters to be sorted out by the parties, or by the law'.

74 In the case of foreseeable but unforeseen events, the nature and extent of foreseeability is critical. Since most events are foreseeable in one sense or another, the parties to a contract will not ordinarily be taken to have assumed the risk of an event occurring during the life of the contract unless the degree of foreseeability of that event is very substantial. Hence, as the position is summarised in Chitty on Contracts:

> *Much turns on the extent to which the event was foreseeable. The issue which the court must consider is whether or not one or other party has assumed the risk of the occurrence of the event. The degree of foreseeability required to exclude the doctrine of frustration is … a high one: 'foreseeability' will support the inference of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur or… 'one which the parties could reasonably be thought to have foreseen as a real possibility'.*

The following general points should be noted.

First, the test for frustration in Australian Law is set at high bar and is not easily satisfied. This is considered in more detail in section 1.6 below.

Secondly, the effect of frustration at common law is the immediate and automatic discharge of the contract. The consequence of discharge at common law is the loss lies where it falls. However, this rigorous principle has been ameliorated by legislation in Victoria and New South Wales and also by a limited application of the remedy of restitution on a total failure of consideration.

Thirdly, a self-induced frustration does not constitute frustration at common law.[21]

1.6 The test for frustration

The *High Court in Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 endorsed the test for frustration enunciated by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 in which his Lordship said (page 729):

> *... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.... It was not this that I promised to do.*

Subsequently, Lord Roskill in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] AC 724 having noted the earlier cases on frustration said (at 751-752):

> *The question in these cases is not whether one case resembles another, but whether applying Lord Radcliffe's enunciation of the doctrine, the facts of the particular case under consideration do or do not justify the invocation of a doctrine, always remembering that the doctrine is not lightly to be invoked to release contracting parties of the normal consequences of imprudent commercial bargains*

1.7 Codelfa considered

In brief compass the facts are as follows.

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[20] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (HL) [1982] AC 724.

[21] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 254

On 21 March 1972 the Commissioner for Railways for New South Wales entered into a contract with Codelfa, an Italian corporation, for the construction of the eastern suburbs railway. Codelfa was required to commence construction within 60 days after being given notice to proceed. The contract provided that the work be completed within 130 days of the notice. A construction program was prepared on the basis that Codelfa be permitted to work on a three shift continuous basis six days a week without restriction as to Sundays. A notice to proceed was duly issued. During the course of construction residents of the suburb of Woollahra obtained injunctions restraining Codelfa from working more than two shifts a day. The injunctions cause Codelfa to incur significant additional costs.

In the post tender negotiations the problem of noise and nuisance associated with blasting operations was discussed and resolved on the basis of Codelfa's understanding that it would enjoy statutory immunity from any liability in nuisance. This understanding proved to be incorrect. Further, the ability to work on a continuous three shift a day basis was not an express term of the contract. The Arbitrator made the following findings:

> *The Parties to Contract ESR 1005 each entered into such Contract on the common and mutual understanding and on the basis that:*
>
> *(a) the works the subject of the Contract should and would be carried out by the Contractor on a 3-shift continuous basis six days per week and without restriction as to Sundays, and*
>
> *(b) the work to be performed was inherently of a noisy and disturbing nature and the work or substantial parts thereof was to be carried out in close proximity to areas of residential neighbourhood, and*
>
> *(c) no Injunction or other Restraining Order could or would be granted against the Contractor in relation to noise or other nuisance arising out of the carrying on of the said works on such basis.*

Codelfa sought recovery for the additional costs on alternative basis:

> First, a breach of an implied term; or
>
> Secondly, a quantum meruit following a discharge of the contract by reason of frustration.

The High Court rejected the first basis but accepted that the contract was discharged by frustration. Accordingly, Codelfa was entitled to a quantum meruit.

Mason J in applying Lord Radcliffe's test for frustration concluded at 363:

> *Performance by means of a two shift operation, necessitated by the grant of the injunctions, was fundamentally different from that contemplated by the contract.*

Aickin J said at 383:

> *In my opinion the grant of the injunction produced frustration in the true sense of that term. It had become unlawful to perform the work in a manner which would have complied with the requirement of the contract, a requirement well known to both parties. The fact that both parties to the contract had an understanding of the law which led them to believe that the performance of the contract on the three-shift basis could not be interfered with by any private or public litigant seeking to restrain a nuisance caused by the performance of the work, does not prevent the application of the doctrine of frustration.*

In his dissenting judgment, Brennan J said at 408:

> *…The significance of the granting of the injunction, it was submitted, "was that it destroyed the concept of immunity of the project around which the contract had been constructed". But it cannot be said that when the parties discovered that Codelfa was amenable to the ordinary jurisdiction of the court to restrain a public nuisance a fundamentally different situation was created to which the contract did not apply. The correction in the minds of the parties of their common legal error produced no new situation either in fact or in law: it merely revealed to the parties the mistake under which they laboured when they entered into the contract. The discovery of a mistake as to a legal restriction which at all material*

times affects the manner in which a contract might be performed is a different thing from a supervening circumstance which arises in the course of its performance and affects the circumstances in which the contract is to be performed.

It was not contended by Codelfa that that mistake affected the formation of the contract. Codelfa contended that the granting of an injunction on 28 June 1972 was a supervening frustrating event. It is well to recall the limits upon the doctrine of frustration. In British Movietonews Ltd v. *London and District Construction Cinemas Ltd.*[25] *Viscount Simon said*:

> *"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."*

