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FRUSTRATED CONTRACTS

The common law 'doctrine of frustration' allows a contract to be discharged on the occurrence of certain events beyond the control of the parties which would make the performance of the contract impossible. As the doctrine is a departure from the traditional view that contractual promises are absolute, its application in law must satisfy strict legal tests in order to be successful. It requires an event to occur that is firstly unforeseen and one which significantly alters the relationship between the contracting parties.

CATEGORIES OF FRUSTRATION

Although not exhaustive, the following are five situations where the doctrine of frustration has been successfully applied.

- 1. Where the subject matter of the contract ceases to exist:** In *Taylor v Caldwell (1863) 3 B & S 826*, a hall which was hired to host a series of concerts burnt down before the concerts could commence. Both parties were relieved of their obligations as the contract was held to be frustrated.
- 2. Non-occurrence of events - the purpose of the contract has become impossible to attain:** In *Krell v Henry [1903] 2 KB 740* a flat was rented for the purposes of viewing the King's coronation procession. The procession was cancelled due to the King's illness and the contract was discharged as the sole purpose for which it was rented ceased to exist.
- 3. Death or incapacity of a party where the contract involves obligations of a personal nature:** In *Robinson v Davison (1871) LR 6 Ex 269*, a contract by a pianist to perform on a specific day was held to be frustrated when the pianist became too ill to perform.
- 4. Delay and obstruction of performance:** Where caused by external events, delay and/or obstruction may be held to be frustration if the delay is so long, or

the obstruction so extreme that it would make the result of the contract fundamentally different from what had been contemplated.

- 5. Performance is rendered illegal by legislation:** If a change in legislation that comes into effect after the creation of the contract renders its performance illegal, the contract is held to be discharged.

FRUSTRATED CONTRACTS ACT 1944 ('FCA')

The doctrine of frustration is supported in New Zealand by the FCA, which addresses the effect of the discharge of obligations on the areas of the contract already fulfilled. It confers three major benefits on parties that are supplementary to the common law doctrine.

1. It provides the right to a party to recover money paid in consideration of the contract despite payment being made before the date of frustration, and
2. It allows a party to claim compensation for work done and/or expenses incurred for the purposes of a contract up until the date of frustration, and
3. It permits the benefits received up to the date of frustration to be taken into account when determining the recovery of monies paid or expenses incurred.

The FCA can be contracted out of by including within the contract provisions addressing the event of frustration. In such instances, the provision will apply instead of the FCA.

The doctrine of frustration and FCA are examples of options or resolutions that may be available to a party following the breakdown of a contract. Legal advice may assist in identifying resolutions of a dispute or breakdown through remedies available outside the contract.



CHILD SUPPORT CHANGES

Hon. Peter Dunne, Revenue Minister has advised that legislation is being introduced to Parliament to change the way child support is calculated.

The Child Support Scheme ('the scheme') in New Zealand was established by the Child Support Act 1991. The purpose of the scheme is to provide a backstop for parents who are unable to reach a private agreement regarding financial contributions and care arrangements for their children. The scheme currently provides financial support to over 210,000 children across the country.

In recent years with evolving social norms, the scheme has been criticised as failing to recognise the needs of today's families due to it being based on outdated assumptions. A review of the scheme undertaken by the IRD in 2010 demonstrated the strong belief held by many parents that the current system was unfair. Specific areas of concern were the way in which child support was calculated, the assessment of income, and motivation for payment.

Greater public and social expectations of parents sharing the responsibility for the financial and emotional well being of their children has also demanded the scheme be updated to reflect such expectations, whilst at the same time encouraging parents to satisfy their child support obligations.

CHANGES TO THE SCHEME

The two main objectives of the amendments to the Child Support Scheme are:

1. To promote the welfare of children, predominantly through recognising that children are disadvantaged when child support is not paid or not paid promptly, and
2. To improve fairness by way of reflecting social and legal changes that have developed since the scheme's introduction in 1992.

Key areas of proposed change include:

Shared Care: The qualifying threshold for shared care that deems both parents as having equal care responsibilities is likely to be reduced from 40% of nights per year to a tiered system beginning at 28%. This change addresses concerns about the failure of the current scheme to recognise contributions of some parents who, while substantially involved in the care of their children, do not satisfy the 40% night test.



Parents' Income: The assessment of income used to determine the level of child support payment due will be based on the combined income of both parents. This change is based on the assumption that the financial responsibility for raising a child should lie with both parents.

Definition of Income: Income will continue to be taxable income but tax losses will be excluded. Certain trust income will also be captured within the scope of income for the purposes of child support. The change seeks to improve the scheme's fairness and veracity by ensuring the definition more accurately reflects the real income of parents.

Compulsory Deductions: Payments will be deducted automatically from the parents' salary/wages to ensure payments are made, and made on time.

Changes to Penalty and Write-Off Rules: Rules related to penalties and write-offs are due to become less punitive so as to encourage parents to resume child support payments following a default. This change also recognises financial hardships that some paying parents may be experiencing.

The first changes are expected to come into effect from 1 April 2013.



SNIPPET

WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 ('the Act') applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.

If you have any questions about the newsletter items, please contact me, I am here to help.

