Frustration: Navigating the Bramble Bush

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Abstract
The law of frustration is tantalizingly simple when it comes to stating it, but incredibly hard when it comes to applying. One would be getting the wrong end of the stick if one were to treat various judicial statements surrounding the doctrine as axioms to be applied in a rule-like manner. Doing so would wrongly lead to a disproportionately large number of ‘false positives’. The purpose of this article is two-fold. First, it seeks to give heuristic short-cuts to anticipate a common law judge’s approach to a frustration case which is poorly captured in definitions and formulae. It seeks to do so by focussing on the ‘tacit knowledge’ used by lawyers. Second, it seeks to get to the heart of why frustration claims are so rarely successful by elucidating its doctrinal underpinnings.

The Bramble Bush

Contract law, for the most part, flies under the radar of popular imagination. Unlike constitutional law, criminal law--and occasionally even tort law--which bristle with popularly celebrated cases, contract law is thought to be too arid, technical and sterile to invoke such emotive interest. But much of that was to change with COVID-19. Paradoxically, however, it was a highly technical and especially perplexing branch of contract law, namely, the law relating to ‘frustration’ which was to be cast into
the limelight. The terms ‘frustration’ and ‘force majeure’ made their way into popular parlance as there was an unprecedented scramble in online fora and webinars to unscramble these doctrines. However, to paraphrase the Roman poet Horace, all that moving of mountains produced little more than a mouse—and is unlikely to produce anything more. For one, the COVID-19 pandemic is unlikely to lead to an avalanche of successful frustration claims. This underwhelming result is completely in line with what followed other earlier unforeseen contingencies of a serious magnitude, such as the two World Wars or the Suez crisis, neither of which produced any sizeable number of frustrated contracts. Academic consensus is that confines of frustration are ‘narrow’, its invocation rare, and that it is ‘difficult to persuade the court to apply it’. Any understanding of the law of frustration must begin with this sobering smidgen. For another, the law of frustration is tantalizingly simple when it comes to stating it, but incredibly hard when it comes to applying—or correctly applying, at any rate. There are three divisions into which frustration cases fall: (1) Impossibility of performance; (2) Illegality of performance and; (3) ‘Frustration of object’ underlying performance. Of these, impossibility and illegality are fairly straightforward in their application. The trickiest cases, by far, are those of ‘frustration of object’ and it is precisely here that one finds a great deal of theory-spinning and logic-chopping. The article seeks to diagnose what causes this dissonance between the two lives of frustration: one on paper and the other, in action. The article then seeks to propose a heuristic short cut which makes it easier to help predict outcomes in frustration cases. This has two pay offs. For one, it helps the perplexed student navigate through the ‘bramble bush’ of tests and doctrine in this area—to borrow Karl Llewellyn’s phrase. For another, diagnosis of the problem and its proposed solution hold great lessons on how one approaches theory construction in the common law.

Consider the ‘watchword’ of the modern law of frustration due to Lord Radcliffe: ‘Non haec in foedera veni. This translates to ‘It was not this that I promised to do’. One would be getting the wrong end of the stick if one were to treat this as an axiom and sought to apply it in a rule-like manner to detect applications of the doctrine. Indeed, that is how the student is primed to approach this. However, as Patrick Atiyah warns us, its application is typically explained by ‘illustration rather than further definition’. Indeed, Lord Radcliffe himself, pointed out, the test for frustration ‘is not always expressed in the same way’. The principal reason for ‘frustration’ being a particularly challenging concept to grapple with is that the numerous judicial tests articulated over the years for detecting frustration—‘radically different’, ‘going to the

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1 Peel (2015:19–006); The only point on which this pandemic might be a little different is that the imposition of lockdowns makes it ‘illegal’ to do a number of actions in many parts of the world therefore engaging the ‘illegality’ and ‘impossibility’ rules in more cases than previous catastrophes did. These are not as narrowly applied by courts as ‘frustration’.

2 Kötz (2017: 287).

3 McKendrick (2014: 33).

4 Davis Contractors Ltd. v Fareham Urban District Council [1956] AC 696, 729 (Per Lord Radcliffe: it would have to be a ‘thing radically different from that which was undertaken by the contract’.)

5 Smith (2006: 185).

6 [1956] AC 696, 726.
foundation of the contract’, ‘common purpose of the parties being defeated’ etc—all seek to operate in an axiom-like fashion. Reading definitions and trying to apply them like axioms to cases would suggest that frustration should apply to a large number of cases indeed. But, as we will see later in the paper, that is not the way in which common law courts go about this doctrine.

The article is not meant to provide a summary of the jurisprudence relating to frustration; nor does it seek to give first order accounts of leading frustration cases. Rather, this article attempts a second-order or jurisprudential analysis of the doctrine of frustration. This translates to two goals. First, it seeks to give heuristic short-cuts to anticipate a common law judge’s approach to a frustration case which is poorly captured in definitions and formulae. Second, it seeks to get to the heart of why frustration claims are so rarely successful. Since the point of this article is to provide a heuristic shortcut to frustration cases and aid in the better anticipation of when frustration is likely to be found by a court, the emphasis of the doctrine will be on English cases which are the fount of the doctrine in the rest of the common law world.

Tacit Knowledge: A Way Out of the Bramble Bush

Understanding ‘frustration’ necessitates somewhat of a reorientation of our epistemological viewpoint as legal scholars. This is not nearly as radical as it sounds. The common law is full of concepts such as ‘reasonableness’, ‘proximate cause’ and the like, although fiendishly difficult to define or capture in axioms, lawyers converge on picking out extensions of, with remarkable ease.7 Despite difficulty in definition, common lawyers can more often than not, agree on specific instantiations of such concepts. The reason they are able to do that is they have with long years of experience developed a kind of ‘tacit knowledge’ or ‘aesthetic sense’ which resists being reduced to a set of rules.8 The key to tacit knowledge is appreciating the difference between ‘knowing how’ and ‘knowing that’.9 While there are rule-bound spheres of activity where the participants may ‘know that’—which is to say, identify and articulate the rules constituting the field and comport their conduct to them, there are also spheres, where the participants might ‘know how’ without ‘knowing that’. In other words, they may know how something is to be done without being able to identify or articulate the rules or standards that constitute the activity. Consider the epistemology of one of the clearest cases of tacit knowledge, namely, language acquisition. As Michael Oakeshott has shown us, language acquisition is not to be understood in terms of mastery of a fixed set of utterances, but rather, as the sensibility to anticipate what is likely to pass muster with a group of language users.10 Theorists of the common law such as A.W.B. Simpson have said very similar things about the

7 Swaminathan (2020: 265). As Zimmerman rightly puts it, some of it might come across as ‘abracadabra’ to the uninitiated: Zimmermann (1996: 581).
8 Swaminathan (2019: 46).
9 Ryle (2009, First Published 1949: 14–48). Hayek also used this distinction to mark the uniqueness of the common law process.
10 Oakeshott (1975: 120).
epistemology of the common law. They make a persuasive case that the common law ought to be understood as the collective tacit knowledge of the legal profession. It involves knowing the apt response to the case at hand. The apt response to the case in hand, in turn, is to be understood as anticipating what is likely to pass muster with the legal community.

Here, in dealing with ‘frustration’, we are in the presence of one such area, better tackled by tacit knowledge rather than rules and definitions. As I have argued elsewhere, areas of law dominated by tacit knowledge are often the graveyards of ‘Euclidean’ theory which starts out with one principle (apex principle) that is meant to explain all of the area. Little wonder then, that a number of ‘theories’ purporting to elucidate the basis of frustration have been offered in the case law—and all have had chequered careers.

What is likely to work in such areas is an approach that is agnostic to Euclidean theory and seeks to capture the collective intuitions of the legal profession in that area. In other words, a heuristic shortcut—a guide which allows lawyers access to theoretical insight, enough to predict outcomes accurately in cases while letting the theorists slog it out endlessly on the ultimate principles and axioms. Indeed, there are legal scholars who have stressed on the importance and utility of tacit knowledge as a heuristic shortcut in understanding an area of law, which cannot be understood on the basis of axioms and apex principles.

Consider, for instance, Mindy Chen-Wishart’s approach to undue influence in contract law which too relies on tacit knowledge to navigate a complex area of law. Undue influence has proved resistant to Euclidian accounts with apex principles. Defendant-sided and claimant-sided accounts of undue influence which seek to understand all the law of undue influence on the basis of an apex principle: defendant’s wrongdoing on the former type of accounts and impairment of claimant’s consent on the latter type of accounts. Judicial attempts at articulating an organizing principle—whether it be the principle of ‘inequality of bargaining power’ or the principle of ‘economic duress’—have not fared much better. They have had to be hedged with broad caveats and unending defeasibility conditions that greatly diminish the predictive power of the formula they offer in predicting outcomes in real cases. The search for apex principles for undue influence, as Chen-Wishart argues, is hardly illuminating and consequently debates here, have hit a cul-de-sack with ‘no way out’. Rather than start out theory construction with an apex principle and then move to the cases, Chen-Wishart recommends theory construction by appeal to the law ‘in the messy detail of the cases’. This, again necessitates the kind of epistemological reorientation alluded

11 Simpson (2009: 193–205).
12 See Simpson Legal Theory (1973: 95). A similar view is also found in Baker (2001: 64–70).
13 Swaminathan (2019: 46).
14 Beale (2018: 23–009); they ‘shade into one another’.
15 Lloyds Bank v Bundy [1975] QB 326.
16 Pao On v Lau Yiu Long [1980] AC 614 (Privy Council).
17 Chen-Wishart (2006: 252–259). In another paper Chen-Wishart highlights the role played by tacit knowledge in Singaporean law in lending a local trajectory to the doctrine of undue influence: Chen-Wishart (2013: 13).
to earlier. Starting out from this point, one can capture the intuitions which seem to vary on the dynamics of the case—the nature of the underlying relationships, the nature of the transaction and the factors motivating the demand. Such elements which pull lawyers’ and courts’ intuitions in their direction are rarely spelt out in the decisions, but seasoned lawyers do, nevertheless manage to glean them from cases and also rely on them as indicators for anticipating judicial behaviour. This approach gets to the heart of the tacit knowledge at play here by identifying factors that have resonated with the court and are likely to do so in cases in the future. This paper seeks to attempt a similar treatment of frustration that goes to the heart of the tacit knowledge doing the work in frustration decisions. The heuristic short-cut which this article uses in frustration cases is that of ‘common mistake’—which, as we shall see later, helps us reliably anticipate how a common law court will treat a frustration claim.

It is worth putting in a note here that Euclid is not merely being invoked as a convenient label for discussing an approach to theory construction in the common law world which this article is opposed to. As it happens, the approach to theory construction under criticism here does actually trace its ancestry back to Euclid—particularly the idea of rules deriving logically from an apex principle. The idea got a major fillip when it was taken up by Descartes and held up as the model that any ‘science’ ought to live up to. Any body of knowledge according to Descartes could be termed as ‘science’ only if its rules were capable of being deduced from some axiom or apex principle.\(^{18}\) This Cartesian move had a profound influence on the shape that legal theorizing took in Europe. The idea was that since law was a science, just like in any other science, one could deduce ‘more geometrico’ all the rules of a legal system from ‘axiomatic principles’.\(^{19}\) This is also the philosophical foundation of the civil law codes. The idea was that the judge could reliably deduce answers from a code and apply it to any situation that might present itself in a fool proof fashion.\(^{20}\) This also influenced legal systematization on the Continent. In 1762, Robert Joseph Pothier’s *Traite des Obligations* sought to arrange all of contract law along Euclidian lines. He advocated a version of the will theory on which all rules of contract law could be deduced logically from one apex principle: namely, the will of contracting parties.\(^{21}\) In the 19th century, when there was a wave of rationalization and systematization that swept the English law, it is to the Continent—particularly the Euclidian method—that they turned for guidance.\(^{22}\) Pothier was particularly influential. In this wave of systematization, the English law got a number of doctrines that it did not have until the end of the 18th century such as ‘offer and acceptance’, ‘frustration’ and ‘mistake’. These were directly borrowed from the civil law world—Pothier in particular. In the foundational frustration case of *Taylor v Caldwell*, Blackburn J openly borrows the idea from Pothier. Hence, the impulse to transact with given axioms and definitions is deep rooted in this area of law—making the use of the Euclidian label particularly apt. This might also go some way towards making sense of the claim made here that

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\(^{18}\) Wedberg (1982: 7–32).

\(^{19}\) Caenegem (1992: 118). Gordley (2013: 165–194).

\(^{20}\) Berkowitz (2005).

\(^{21}\) Hoeflich (1986: 106); See also Perillo (2005: 267).

\(^{22}\) Ibbetson (1999: 220).
the doctrine of ‘common mistake’ holds the key to unlocking the mysteries of the doc-
trine of frustration. The tests for frustration and common mistake closely mirror each
other, which allows us—even if this may sound counterintuitive at first blush—to use
one as a proxy for the other; particularly when the tests for frustration are extremely
opaque and leave much to be desired when it comes to clarity. The cases of ‘frustra-
tion of object’ closely mimic the logic of ‘common mistake’ (fundamental mistake)
cases with a result that applying this test serves as a handy predictive mechanism.23
Here we will deviate from the common academic practice of keeping mistake and
frustration separate24 and seek to understand frustration cases (only those in the third
category of ‘frustration of purpose’) through the lens of mistake.

There are other distinct advantages to taking this route in addition to the superior-
ity of its predictive power. Firstly, frustration of object or purpose is only too easy to
misunderstand, for in a large number of cases which come up before courts, the object
of one of the parties to that contract would have taken a hit; but it takes the ‘common
object’ or ‘common purpose’ to be knocked out for there to be frustration, which is
much rarer. As Viscount Haldane had put it, the change ought to be ‘so sweeping
that the foundation of what the parties are deemed to have had in contemplation has
disappeared’ such that ‘contract itself has vanished with that foundation.’25 This idea
of ‘common object’ or ‘common purpose’ are particularly challenging to follow in
the absence of the heuristic shortcut proposed here. Secondly, the language of ‘rad-
cal difference’ (per Lord Radcliffe) is inherently vague and could easily be mistaken
to apply to cases of ‘commercial impracticability’ which on a spectrum are nowhere
near the English law’s criteria of frustration.26 The language of ‘It was not this that
I promised to do’ which is the modern watchword of frustration has its equivalent in
mistake. As Mindy Chen-Wishart points out, indeed, mistake too, can be summed up
by pointing out ‘I did not agree to that.’27

Secondly, there are a number of cases where even a lawyer, let alone the layperson,
is likely to treat as involving ‘radical difference’ which do not meet the threshold of
‘radical difference’ Consider, for instance, the Suez cases, which involved seller’s
having to circumnavigate Africa, increasing their travel time and distance manifold.
Nevertheless, courts did not treat these as cases of frustration.28 Anchoring frustra-
tion to common mistake keeps us from being misled by the vagueness of these terms
and finding too many ‘false positives’ for frustration.

Finally, ‘mistake’ and ‘frustration’ are twins conjoined at birth. Both of them came
into English law in rapid succession in the middle of the 19th century having been
imported from civil law and having as their provenance the ‘will theory’.29 The inau-

23 Smith (2006: 185).
24 Treitel (2015: 19–121.
25 Tamplin SS v Anglo Mexican Petroleum [1916] 2 AC 397, 406–407.
26 Treitel (2015: 19–033). The US law, however, recognizes ‘commercial impracticability’ (Sects. 2–615
Uniform Commercial Code.)
27 Chen-Wishart (2012: 252).
28 The Suez cases are discussed in the following section.
29 The doctrine at its inception was known as impossibility. The term frustration came to be used after
Jackson v Union Marine Insurance in 1874. On the evolution of the notion see: Simpson (1975); and
gural frustration (impossibility) case of Taylor v Caldwell rested the decision on the idea of a continued common assumption of the parties about the existence of the hall (which was destroyed by fire hence making the contract incapable of performance). This idea continues to feature prominently in later cases where the logic of impossibility was extended to ‘frustration of purpose’ cases—the question whether parties have contracted ‘on the footing that a particular thing or state of things would continue to exist’. Had the hall already been destroyed unbeknownst to parties, at the time of entering the contract, the contract would be void for common mistake. If the parties’ assumptions about a contract turn out to be different ‘from the state of things at the time of formation’ the case is regulated by the doctrine of mistake. If the parties’ assumptions turn out to be different from ‘state of things as they turned out to be’ frustration kicks in. The only difference pertains to timing of the event.

Before we proceed further with understanding how ‘common mistake’ illuminates our understanding of frustration of purpose, a word might be in order on ‘common mistake’. The doctrine of ‘common mistake’ is engaged when both parties to the contract have made the same mistake in relation to a matter that is fundamental to the contract. The clearest case of common mistake is one where the parties are mistaken as to the ‘existence’ or ‘identity’ of the subject matter. As opposed to this, if the mistake is that of quality, the courts are slow to set it aside on the grounds of common mistake. If the mistake pertains to only one of the parties of the contract, it would be a unilateral mistake—which does not vitiate a contract. The locus classicus on this point is the decision of the House of Lords in Bell v Lever Brothers Ltd. The company Lever Brothers paid the Chairman and Vice Chairman of one of the group entities it was selling, compensation for terminating their contract of employment. But it emerged later that the Chairman and Vice Chairman had clandestinely conducted dealings in breach of their contract with Lever Brothers, a fact, if known by Lever Brothers at the time, would have prompted them to terminate the contracts without the payment of any compensation. A majority of the House of Lords held that the agreement was not vitiated by common mistake as the mistake pertained to the quality of the subject matter, rather than its identity. This is a distinction which will illuminate a great deal for us when it comes to frustration of object.

Applying the Heuristic Tool

In what follows we shall outline the basic principles underlying the law in this area. For reasons, discussed earlier, the focus here will be on English law. What is known as the doctrine of frustration encompasses: (a) impossibility; (b) illegality and (c)

Ibbetson (1999: 220–244).

30 Taylor v Caldwell [1863] 122 ER 309.
31 Tamplin [1916] 2 AC 403, 404.
32 Chen-Wishart (2012: 251).
33 ibid.
34 McKendrick (2012).
35 [1932] AC 161.
frustration of purpose. Frustration pleas are most successful when it comes to impossibility and illegality. Impossibility and illegality, as we shall see, are relatively easier to identify and the clearest to apply; unsurprisingly, then, cases here tend to be the most successful.

**Illegality**

Illegality is perhaps the easiest of the lot. Supervening prohibition of the *very act* promised in the contract will make the contract void for illegality. In the leading English case of *Fibrosa Spolka Ackcyjna v Fairbairn, Lawson Combe Barbour Ltd*, the contract was discharged since the port of delivery came to be occupied by the enemy. Another case could serve as an illustration, subject to an important caveat. In *Metropolitan Water Board v Dick Kerr*, where early on in a six-year reservoir construction contract, builders were ordered by the Government to cease construction and dismantle the works on account of the World War, the contract was held discharged. The caveat: as Lord Dunedin pointed out, this was not a ‘clean case of illegality’ where the period of illegality coincides with the period of the contract. Accordingly, a case of this kind would be pushed into the third category and assessed for ‘frustration of purpose’. We shall return to this case under that category. The illegality here is one that arises under the law governing the contract. English law also recognizes that illegality in the place of performance can frustrate a contract.

**Impossibility**

The *clean* cases of impossibility, again, are relatively simple to pick out. The cleanest instance would be the total destruction of subject matter. The landmark case of *Taylor v Caldwell*, which inaugurated this field in English law, was a case of impossibility caused by the destruction of subject matter. The hire of music hall for a concert along with gardens surrounding it was discharged by the destruction of the hall by accidental fire.

The cognate of ‘destruction’, when it comes to personal services is death or incapacitating illness. Hence, these too would be examples of impossibility. If A contracts with B to perform at a theatre and is dead or too ill to stir on the day of the performance, we should have the cognate of destruction, namely, unavailability, and the contract should be discharged. As Crowder J interjected to point out, a contract to paint a picture is discharged by blindness as is (as Pollock CB pointed out in the same case) a contract to write a book by the insanity of the author. When it comes to the *use* of something, unavailability would have the same consequences as destruction. For instance, the requisition of a ship in *Bank Line Ltd v Arthur Capel & Co* dis-

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36 [1943] A.C. 32.
37 [1918] A.C. 119.
38 *Ralli Brothers v Compania Naveria Sota y Aznar* [1920] 2 KB 287.
39 [1863] 122 ER 309.
40 *Robinson v Davison* [1871] 2 LR269.
41 *Hall v Wright* [1859] 120 ER 695.
charged the charter party.\textsuperscript{42} The strict equivalent of destruction here, would be when the duration of unavailability coincides or is lesser than the duration of the contract. Where this is not the case, we enter the territory of ‘partial unavailability’ which would have to be adjudged under the third category for ‘frustration of purpose’.

**Frustration of Purpose**

The trickiest cases of the lot arise where there is a ‘frustration of object’ or ‘frustration of purpose’. Frustration of object or frustration of purpose was traditionally not a category familiar to English law. In fact, before *Taylor v Caldwell*, the common law rule—going back all the way to *Paradine v Jane* (1647)—was that change in circumstances would not discharge contractual obligations. *Taylor v Caldwell* was the case which was to set in motion a change in this position of law. It must be noted, however, that *Taylor v Caldwell* was a case of ‘impossibility’, involving as it did, the destruction of subject matter. Blackburn J, relying on Pothier and the Digest held that ‘the Music Hall having ceased to exist, without fault of either party, both parties are excused’. It is, however, important to note that *Taylor v Caldwell* had nothing to say on what happens when the object or purpose of the parties becomes impossible.\textsuperscript{43}

That was a category inaugurated by Bramwell B in *Jackson v Union Marine Insurance* in 1874.\textsuperscript{44} This might explain why s. 56 of the Indian Contract Act, 1872 which was drafted between 1866 and 1872, provides for ‘illegality’ and ‘impossibility’, but has nothing to say about ‘frustration’.\textsuperscript{45}

Returning to *Jackson v Union Marine Insurance*, the case revolved around whether the delay of over six months caused by the ship having run aground discharged a ship’s charter for immediate dispatch to San Francisco. The majority opinion of Bramwell B held that the case was analogous to *Taylor*. The dissenting opinion of Cleasby B did not find it so; he read *Taylor* as a case of destruction of subject matter and since there was no destruction of subject matter here, there could be no discharge. Bramwell B’s majority opinion read *Taylor* as falling into a category that would lend itself to be extended—namely, one where notion of the object of the parties comes into play. This paved the path for Bramwell B to subsume *Taylor* under a broader rationale of ‘frustration of object’. Once the principle of frustration of object is seen as justifying the outcome in *Taylor*, it was found good enough to justify the discharge

\textsuperscript{42} [1919] A.C. 435.
\textsuperscript{43} Simpson (1975: 271).
\textsuperscript{44} [1874] L.R. 10 C.P. 125.
\textsuperscript{45} S. 56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Accordingly, the draft code (1866) had illustrations about destruction (clause 28, illustration c on destruction of hall) and incapacity (clause 25, illustration b on singer losing voice through illness) & (clause 28, illustration d on blindness of painter). In 1871, *Robin v Davison* was decided which extended the rule to cases of temporary incapacity in a person which is to say a person being ‘too ill’ (piano player being too ill to perform). *Robinson v Harman* seems to be the source behind illustration (e) of Sect. 56 (actor being ‘too ill to act’). The final Act dropped the permanent incapacity illustrations of ‘blindness’ and ‘losing voice’ presumably, since the illustration of a lesser incapacity would have, in any case, covered it.
of the contract in Jackson. But even after Jackson, the notion of frustration of object was slow to catch on. The leading text writers did not take any cognizance of it. In fact, even as late as the turn of the twentieth century, in the famous coronation cases, frustration of object was far from being taken for granted as a separate category. Later, in the coronation case of Krell v Henry,46 where the issue was whether a contract was discharged when the coronation which formed the basis of the parties entering into it, did take place, Vaughan Williams CJ had to pointedly repel the defendant’s argument (which invoked Taylor) that the contracts could only be discharged for destruction of subject matter. He did so by pointing out that Jackson had ‘extended’ Taylor analogically. It is only after Krell v Henry that ‘frustration of object’ became cemented in English law as a ground for discharge of contract.

But this is where the puzzle of ‘frustration’ begins. This trajectory of ‘frustration’ creates an illusion in the textbook bound student that there is an axiom of ‘frustration of object’, going back all the way to Taylor which lends itself to being extended analogically, endlessly. However, English law has consciously not extended ‘impossibility’ and ‘frustration of purpose’ cases to cases of ‘commercial impracticability’ where the commercial purpose for which the contract is entered into is radically altered. By contrast, the Uniform Commercial Code (UCC) of the United States of America has extended this line of case law to ‘commercial impracticability’.47 Someone inclined to supporting this might do so upon a reading of Jackson and Krell in a way that supports the principle of ‘commercial impracticability’. After all, it is not too far-fetched to extend ‘frustration of object’ to the frustration of the ‘commercial objective’ of the contract. It might not even be that much of a stretch to read the rationale of ‘common object’, ‘commercial object’ any other similarly broad rationale into Taylor v Caldwell which can then be extended to a wide sweep of cases.48 But doing this would be to completely ignore the tacit knowledge underlying these cases and doing the work in this area.

This brings us to the heart of this article—providing a heuristic shortcut for ‘frustration of object’ cases. ‘Frustration of object’ are cases where it remains ‘possible’ (in the strict sense of the term) to perform the contract in some sense of the term, but there is either a diminution in the value of such performance for the promisee or increase in the cost or onerousness of performance for the promisor. What this calls for is that ‘the common object has to be frustrated’ and ‘not merely the individual advantage’ that one of the parties might have gained out of it, as per Lord Sumner in Hirji Mulji v Cheon Yeu SS.49 The supervening event should strike at something ‘regarded by both contracting parties as the foundation of the contract’.

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46 [1903] 2 KB 740.
47 Sects. 2–615 Uniform Commercial Code.
48 Northern Indiana Public Service Co. v. Carbon County Coal Co [1986] 799 F.2d 265 (7th Cir.). This an extension of Posner’s extra judicial writing; see discussion in Halpern (1987: 1161).
49 [1926]: AC 497, 507.
50 Krell v Henry [1903]: 2 KB 740, 750 (per Vaughan Williams CJ).
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ishing is also used by Viscount Haldane in *Tamplin SS*. What makes these cases tricky is the element of ‘common object’. Understanding this as a replica of ‘common mistake’ makes it a whole lot easier. As we have already seen earlier, straightforward cases of destruction of property are classified as cases of mistake depending on the timing of the destruction and Blackburn J in *Taylor v Caldwell*, treated it as a common assumption of the parties that the subject matter shall continue to exist. There are a few aspects of this, which we could visit in turn.

Firstly, let us consider the idea of ‘common object’. It happens often that one party’s object for entering into a contract is defeated, but for this doctrine to be engaged, what needs to be defeated is the ‘common object’. The coronation cases illustrate this neatly. In *Krell v Henry* the agreement to rent an apartment overlooking the Pall Mall to view the coronation procession was held to be discharged upon cancellation of the procession. Vaughan Williams LJ held that this was not a contract to rent an apartment *simpliciter*, but was made by both parties on the assumption that it was for viewing the coronation and as such, it was ‘regarded by both the contracting parties as the foundation of the contract’. This, as Vaughan Williams LJ pointed out, was to be contrasted with a case where a cab is engaged to drive someone to the Epsom derby race on a specific day. This contract is not discharged if the race is called off because happening of the race is not the ‘foundation of the contract’ for both the parties. This mimics the logic of mistake—a unilateral mistake, regardless of how fundamental it is does not discharge the contract. It is this principle that is dispositive of the famous Suez crisis cases where the closing of the Suez canal, which more than doubled the travel distance to Europe (around Africa) and increased freight by over a quarter, was held not to be ‘radically different’. According to Viscount Simonds in *Tsakiroglou v Noblee*; the buyers did not attach any importance to the route, although the sellers, clearly did. Without this heuristic tool to unpack the idea of ‘radical difference’, even the seasoned lawyer might be at a loss in understanding why having to circumnavigate Africa, thereby, vastly increasing distance and travel time does not amount to something ‘radically different’ from what the parties had undertaken.

Secondly, the notion of ‘common foundation’ goes some distance towards making sense of the significance of ‘source of supply’ in the common law which might otherwise come across as odd. When the source of the goods is not specified, the contract is not frustrated when the supplier lets down the seller, even if it is the sole seller. That is because the salience of the supply from the seller was for only one of the parties, not common to both. A clear illustration of failure of common object is *Howell v Coupland*, where parties contracted for 200 tons from portions of potato crop grown

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51 *Tamplin* [1916] 2 AC 403, 406–407.
52 [1903] 2 KB 740, 750.
53 ibid.
54 *Tsakiroglou v Noblee Thorl* [1962] AC 93, 115.
55 *CTI Group Inc v Transclear SA* (The Mary Nour) [2008] EWCA Civ 856; [2008] 1 Lloyd’s Rep. 179.
56 *Intertradex SA v Lesieur Torteaux SARL*[1978] 2 Lloyd’s Rep. 509.
on the defendant’s land and blight destroyed the crops. The common object was potato grown on the defendant’s land, hence the contract was frustrated. This again mimics the logic of mistake. Where there is no source of supply specified, but one party relies on a source that subsequently fails, the situation is akin to a unilateral mistake by a party, which does not suffice to discharge the contract.

Thirdly, the notion of ‘common foundation’ read in light of the notion of ‘common mistake’ is perhaps the most reliable way to make sense of the distinction drawn in frustration cases between a ‘radically different’ contract and a contract which has become merely more onerous to perform. The key to ‘common mistake’ is a difference between mistake as to identity of goods and mistake as to quality as stated in Bell v Lever Brothers Ltd. We should expect to find the same distinction playing a part here. Except that quality could be replaced by the terms of the contract including its consideration; and identity could be replaced with whether—leaving aside the particulars of the terms for the moment—this is a kind of contract the parties would have entered into. This explains why ‘frustration of object’ claims succeed so rarely. It effectively requires that the change in circumstances make the subject matter of the contract of a different kind than what the parties had entered into. Some cases help illustrate this. One is the case of Davis v Fareham Urban District Council, from which we get Lord Radcliffe’s celebrated language of ‘radical difference’ adverted to earlier. Where a construction contract that lasted 22 months instead of 8 and had a 20% price escalation due to labour shortage, it was held not to be ‘radically different’ from the original and hence, not frustrated. As Lord Radcliffe noted, the ‘job proved to be more onerous, but it never became a job of a different kind from that contemplated in the contract’. Again, in the words of Lord Radcliffe, ‘common object’ is thought to be implicated where the change in circumstances is of a kind ‘radically different from that which was undertaken by courts’. What would be a contract of a different kind? The other case which illustrates this is Asfar v Blundell where a contract for freight was discharged when the cargo of dates sunk and deteriorated. Here, technically the dates were not ‘destroyed’ but retained some residual value as a raw material for distillation. Rejecting the argument that deteriorated dates were still dates, Lord Esher MR noted, ‘the ingenuity of the argument might commend itself to a body of chemists, but not to businessmen’ in whose eyes, these were no longer dates but something with a different identity. By contrast, if something is regarded as merely impacting the quality as opposed to identity, the contract is not discharged.

57 [1874] L.R. 9 Q.B. 462.
58 Thames Valley Power Limited v Total Gas and Power [2005] EWHC 2208 at [50] (‘the fact that a contract has become expensive to perform, even dramatically more expensive’ does not frustrate the contract).
59 [1932] AC 161.
60 [1956] AC 696.
61 ibid. at 723.
62 ibid. at 729.
63 [1896] 1 Q.B.
As Christopher Clarke J (as he then was) put it, in *Thames Valley Power Limited v Total Gas and Power*, ‘the fact that a contract has become expensive to perform, even dramatically more expensive’ does not frustrate the contract.\(^64\) Another good illustration of this principle is found in *Tandrin Aviation Holdings v Aero Toystore* when a contract to purchase a jet was held to be not frustrated by the ‘unanticipated, unforeseeable and cataclysmic downward spiral of the world’s financial markets’ during the global financial crisis of 2008–2009.\(^65\)

**Fourthly,** the ‘common object’ rule explains why agreements to ‘hire’ something are not that easily frustrated. *For one*, the two parties typically have quite different purposes when it comes to the hiring of something (Vaughan Williams LJ’s Epsom cab example). Often, there is *some purpose* to which the hired thing may be put—‘it is immaterial that he cannot use it for the particular purpose that he had in mind’.\(^66\) This principle was dispositive of another famous coronation case, *Herne Bay Steamboat Company v Hutton*.\(^67\) Here, the agreement to hire a steamship to view the naval review and cruise around the fleet was not discharged by the cancellation of the navel review. Stirling LJ held that since it was still possible to cruise around the fleet, the contract was not frustrated.\(^68\) It is some version of this argument that seems to be doing the normative work in common law’s approach to leases. Although, it might still be possible for a lease to be frustrated, it would, in practice, be very rare.\(^69\)

### An Epilogue on Force Majeure Clauses

The foregoing discussion on frustration—and the high threshold of discharging a contract—might go some way towards explaining the essence and utility of force majeure clauses in contract law. ‘Frustration’ operates as a default legal response to supervening unforeseen circumstances. The law does, however, allow parties to make their own provisions in the contract for contingencies. Such provisions have come to be known as *force majeure* clauses. Although their label has been borrowed from the French equivalent of the English doctrine of frustration, one should be careful to note that the similarities end there.\(^70\) Where a force majeure clause does apply, and makes full provision for the event in question, it pre-empts the court’s invocation of the doctrine of frustration.\(^71\) When the clause does not apply either because of under-inclusion or the event being one of a kind that it could not foresee, the court’s

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\(^{64}\) [2005] EWHC 2208 at [50].

\(^{65}\) [2010] EWHC 40 at [38] (Hamblen J) (original emphasis).

\(^{66}\) Atiyah (2006: 186).

\(^{67}\) [1903] 2 KB 683.

\(^{68}\) ibid. at 692.

\(^{69}\) *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.

\(^{70}\) *Lebeaupin v Richard Crispin and Company* [1920] 2 KB 714.

\(^{71}\) See *Bank Line Ltd v Arthur Capel Ltd* [1919] AC 435, 455.
jurisdiction to invoke frustration if not pre-empted. Why might parties bother to draw up force majeure clauses in their contracts rather than let the default rule take its own course?

Firstly, the doctrine of frustration is by its nature, a narrow one. It requires a failure of ‘common purpose’ which is, in practice, not that easily found. Contracts might become unwieldy for one of the parties at a significantly lower threshold. This is why force majeure clauses come in handy, in lowering the bar for discharge. A whole universe of non-frustrating events are force majeure events. In other words, it is to allow for cases that mimic ‘unilateral mistake’—and have salience for one party—to lead to a discharge of contract.

Secondly, the doctrine of frustration operates in an all-or-nothing manner. Frustration puts an end to the contract, tout court. Courts do not have the liberty to seek pragmatic solutions to make the contract work for parties. Frustration, therefore, is too blunt a tool for businesspeople. Force majeure clauses can apportion the costs between parties in a more workable fashion. Moreover, as McKendrick points out, courts are more liberal in countenancing commercial impracticability scenarios enumerated in force majeure clauses than when wielding jurisdiction under the frustration rule. This is again, because ‘frustration of object’ mimics the logic of common mistake and is very hard to find in practice.

Thirdly, seen from a businessperson’s point of view, the whole fasciculus of tests and principles constituting frustration must come across as rarefied mumbo jumbo that renders it difficult to anticipate beforehand which way a court is going to move in a given case. One of the functions of force majeure clauses is to let parties know where they stand, even whilst not in periligged company. Hopefully, this heuristic shortcut makes their task somewhat easier.

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