

UNEXPECTED ENDINGS: FRUSTRATION AND TERMINATION

- *A clear guide to messy law*

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by

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Jonathan Seitler QC is Deputy Head of Chambers and one of the nine property litigation QC's in Wilberforce Chambers. He has recently won the Legal 500 Award for Real Estate, Environment and Planning Silk of the Year to add to the Chambers & Partners Real Estate Silk of the Year Award which he won on three separate occasions, in 2007, 2010 and 2015 (getting therefore to keep the trophy).

Jonathan is immensely popular not just for an ability to work hard and deliver it swiftly and accurately (and with just about the right level of detail) but also for his skills in winning the confidence, and settling the nerves, of even the most hot-headed client.

Although, of late, it has somewhat become the fashion, Jonathan is a touch too sensitive for a self-deprecatory bio.

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THE ENDINGS TABLE

	Frustration	Abandonment	Contract Set Aside (Rescission ab initio)	Termination for Renunciation or Repudiatory Breach (confusingly can also be called rescission for breach)	Surrender by Implied Agreement
Essence	Looking at it with a 'multi-factoral approach', a supervening event of neither party's fault which the contract makes no provision for so significantly changes the nature of the deal from Day 1 reasonable expectations that it's unfair to uphold it.	The court infers that the parties have mutually abandoned their contract / property right by reason of there having been a long period of inactivity on both sides.	This is really a post completion remedy. The formation of the contract is undermined retrospectively by a vitiating factor such as fraud, mistake or misrepresentation.	An innocent party (Ian) accepts a statement by the guilty party (Glyn) of an intention no longer to perform or accepts Glyn's breach of condition (not warranty) or innominate term, which deprives Ian of substantially the whole of the benefit of the contract.	An unequivocal act is so inconsistent with the continued existence of the arrangement that both parties are treated as having agreed to treat the arrangement as at an end.
Effect:	Both parties are discharged from further performance. The Law Reform (Frustrated Contracts) Act 1943 has effect.	The legal rights are treated as over. There are no extant obligations.	It's as if the contract/lease never existed. Everyone is put back as far as possible to Day 1 (though deceit and misrep carry their own rights to claim damages, if there are any, <i>restitutio in integrum</i> having occurred as far as possible.	Ian can <i>accept</i> it → both parties are discharged from further performance & Ian entitled to damages for breach (subject to mitigation) <i>OR</i> Ian can <i>ignore</i> the repudiatory breach → seek specific performance / injunction or the full contract price (without mitigation).	The legal rights are treated as over. There are no extant obligations.
Test:	Has the supervening event created such a fundamental change of circumstances as to say: " <i>this was not the bargain which these parties made and their bargain must be treated as at an end</i> "? Is it a case of " <i>non haec in foedera veni</i> ". (I didn't promise to do this)	Has the party seeking to establish abandonment shown that the other party so conducted himself as to entitle him to assume, and did assume, that the contract was agreed to be abandoned <i>sub silentio</i> ?	Misrep: Has Ian been induced to enter the contract by Glyn's fraudulent representation? (if it is negligent or innocent, damages in lieu lie). Mistake: Has there been a fundamental common misapprehension?	Does Glyn's breach go to the root of the contract? <i>If</i> Standard Conditions apply, is there " <i>fraud or recklessness</i> " or does Ian have to accept " <i>property differing substantially (in quantity, quality or tenure)</i> " from what he expected?	Is the conduct of both parties such that it is clear that they have unequivocally offered and accepted the end of the legal relationship such as to render it inequitable for the either party to say it remains on foot?
Law to look at:	<i>Krell v. Henry</i> [1903] 2 KB 740; <i>Herne Bay Steam Boat Company v. Hutton</i> [1903] 2 KB 683 <i>National Carriers v Panalpina</i> [1981] AC 675 <i>The Sea Angel</i> [2007] EWCA Civ 547	<i>The Splendid Sun</i> [1981] Q.B. 694. (For easements) <i>Moore v Rawson</i> (1824) 3 B&C 332 <i>Lester v Woodgate</i> [2010] EWCA Civ 199	<i>Bell v Lever Bros</i> [1932] AC 161 HL. Misrepresentation Act 1967	<i>White and Carter v McGregor</i> [1962] AC 413 HL. <i>Johnson v Agnew</i> [1980] AC 367 (HL) <i>Woodar v Wimpey</i> [1980] 1 WLR 277 (for Leases) <i>Hussein v Mehlmán</i> [1992] 2 EGLR 287	<i>Oastler v Henderson</i> (1877) 2 QBD 575 at 579 <i>Artworld Financial Corp v Safaryan</i> [2009] L & TR 20
Beware!	The English prefer to "Keep Calm and Carry On".	The non-user needs to be egregious and inexplicable other than by an inference of abandonment. No need for it is enough to explain the non-user instead.	The right to rescind can be lost by affirmation, lapse of time or the acquisition of third party rights.	If you treat the contract as discharged having wrongfully alleged a repudiatory breach you are yourself in repudiatory breach (unless in good faith relying on an express term): <i>WVW</i> .	There needs to be a pinpointable offer to end the arrangement and an acceptance of that offer and a meeting of minds in that regard. Silence and inaction is not enough.
Ease / 10	We'll see.	1	6	8	3