

**The Top 10 ways of getting out of  
Slam-dunk contractual obligations.**

by  
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# 10. *Frustration*

## Frustration =

- 1) Supervening event
- 2) that's neither party's fault
- 3) which is unprovided-for by the contract
- 4) which creates an unforeseeable radically different deal that it's unfair to hold the parties to.

# Radically different =

*Sea Angel:*

*Rix LJ: “there has to be a break in identity between the contract as contemplated ... and its performance in the new circumstances ...”*

*Non haec in foedera veni*

Rix LJ In the *Sea Angel*:

*“... the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties knowledge, expectations, assumptions and contemplations ... at any rate so far as these can be ascribed mutually and objectively and then the nature of the supervening event and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances”*

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## **9. *Laches***

## Laches = Prejudicial delay

1) *Lazard Brothers & Co v Fairfield Properties Co (Mayfair) Ltd* (1977)  
121 S.J. 793

2) *Taylor v Crotty* [2006] EWCA Civ  
1364

## ***8. Hardship***



## Hardship (not for the faint- hearted)

- 1) *Patel v Ali* [1984] Ch. 283
- 2) *SC Johnson & Son Inc v Hillshire Brands Co* [2013] EWHC 3080 (Ch)
- 3) *Blomley v Ryan* (1954) 99 C.L.R. 362
- 4) Mistakes that amount to 'hardship amounting to injustice': *Tamplin v James* (1880) 15 Ch. D. 215

## *7. Dirty hands*

## Dirty Hands

- 1) *Quadrant Visual Communications v Hutchison Telephone* [1993] B.C.L.C. 442
- 2) *Pateman v Pay* (1974) 232 E.G. 457

## ***6. Misdescription***

## Misdescription = error in the terms

- 1) Degrees of misdescription & abatement: *Donnelly v Weybridge Construction Ltd* [2006] EWHC 2678 (TCC)
- 2) Standard conditions & Consumer Rights Act 2015

## ***5. Implied term***

## Implied term:

*Marks & Spencer plc v. BNP Paribas  
Secs. Servs. Trust Co. (Jersey) Ltd*  
[2016] AC 742

For a term to be implied, it must be:

## Implied term:

- 1) Reasonable and equitable;
- 2) Necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- 3) So obvious that “it goes without saying”;
- 4) Capable of clear expression;
- 5) Not contradict any express term of the contract.’



## ***4. Mistake - rectification***

# Mistake and rectification

- 1) Void and voidable
- 2) Common and unilateral mistake.
- 3) There's scope for unilateral mistake to be the next big thing.

# Mistake and rectification

- 1) 'drastic' – *The Nai Genova* [1984] 1 Lloyd's Rep 353 at 365 col 2 save for three exceptions;
- 2) Burrows & Peel: '*Contract Terms*' pp 87-90. The '*wide scope of unilateral mistake .....*'.

## Classes of knowledge

*Baden v Societe Generale* [1983] BCLC 325,  
403. Peter Gibson J

- 1) Actual knowledge
- 2) Shutting eyes to the obvious
- 3) Failing to make enquiries a reasonable and honest person would make
- 4) Knowledge of circumstances which would indicate the facts to a reasonable and honest person
- 5) Knowledge of circumstances which would put a reasonable and honest person on inquiry

### ***3. Claimant's default***

# Claimant's default

A claimant who seeks to enforce a contract must show

- 1) That it has performed, or has been ready and willing to perform, all material terms and conditions;
- 2) That it is ready and willing to perform all terms and conditions remaining to be performed;
- 3) That it is not in breach.

## *2. Misrepresentation*

# Misrepresentation

- 1) False statement of fact prior to the contract (not a term);
- 2) Upon which D has relied;
- 3) Which would justify rescission: the right to rescind under the Misrepresentation Act 1967 is a matter of the Court's discretion - section 2.2.



# 1. *Estoppel*

## Estoppel: types

- 1) Estoppel by representation
- 2) Promissory estoppel
- 3) Proprietary estoppel
- 4) Estoppel by convention
- 5) Estoppel by deed
- 6) Estoppel by record

## Estoppel: common elements

- 1) The person making the statement, giving the promise, providing the assurance or adopting the assumption intends it to be taken seriously
- 2) The statement, promise, assurance or assumption is in fact acted upon by C (reliance)
- 3) In a way which makes it unconscionable for D to go back on it, C would suffer detriment if D were allowed to.

## Estoppel: remedy

- 1) The aim is to ensure that C's reliance interest is protected so that C is compensated for the detriment (s)he suffers.
- 2) Subject to changes in circumstances, the equity is satisfied by removal of the detriment.
- 3) You therefore cannot look only at the gain to D.

*Davies v Davies* [2016] EWCA Civ 463;

*Guest v Guest* [2020] EWCA Civ 387

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That's all folks