



CASE NOTE

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THE FRUSTRATION IN MARRIAGE BREAKDOWN — *FINLAYSON, FINLAYSON AND GILLAM* [2002] FAM CA 898

The decision in *Finlayson, Finlayson and Gillam* ('*Finlayson*') is a salient reminder of the capacity for legal issues other than family law issues to be encountered in the family law jurisdiction. Amongst the many issues raised in this case was that of contract law: Can the dissolution of a marriage be an event that frustrates a contract entered into between the spouses and their parents? Murray J of the Family Court of Australia¹ held that it can. At first instance in *Finlayson*, her Honour found that a marriage breakdown was sufficient to frustrate both a contract for purchase of real property and a loan contract which enabled that purchase. The Full Family Court, however, disagreed — Lindenmayer, Finn and Boland JJ set aside the trial judge's orders. The decision is particularly interesting for its exploration of the intersection of contract and family law. This case note is confined to the issue of frustration of contract raised in *Finlayson*.

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¹ This action commenced in the SA Supreme Court but was transferred to the Family Court of Australia under cross-vesting legislation in place at the time.

I THE FACTS

G and C ('the spouses') commenced cohabitation in or about May 1990, married in January 1992, and separated in 1994. There were no children resulting from the marriage.

In June 1990, C's parents ('the parents') purchased a property at Dulwich, South Australia ('the property') for \$260,000. The spouses cohabited in the property for a period before they were married, paying a nominal rent. In 1991 the parents carried out renovations to the property, spending approximately \$120,000. C (the wife) contributed approximately \$1,100 to the renovations.

After their marriage the spouses spent sometime overseas and then returned to reside in the property, along with the wife's brother and other tenants. They continued to pay a nominal rent to the parents. In 1993, following a considerable period of negotiation, it was agreed between the spouses and the parents that the spouses would purchase the property² for an agreed purchase price of \$285,000.

On 25 June 1993, the spouses signed a loan agreement with Westpac to borrow \$135,000 ('the bank loan'). The funds borrowed from Westpac were secured by a second mortgage over the property granted by the parents. Notwithstanding this, all parties regarded the loan repayments as the responsibility of the spouses, and in July 1993, approximately \$51,000 was paid by the spouses in reduction of the bank loan.

On 8 July 1993, the parties entered into an agreement for sale of the property ('the land contract'). Pursuant to the terms of the land contract the spouses paid a substantial deposit (funded by the Westpac loan) of \$135,000. The land contract also provided for settlement to occur not later than two years after the exchange of contracts. The following day, the spouses and the parents entered into another agreement. This agreement provided for a loan of \$150,000 from the parents to the spouses on settlement of the purchase of the property ('the loan contract').

After the parties separated on 25 January 1994, the husband continued to reside in the property until early April 1994. On 7 April 1994 the husband lodged a caveat over the property. Murray J found that the relationship between the husband and the wife and parents deteriorated soon after this time. Her Honour also found that the husband did not contribute financially to the property after he left. At the time of separation the balance of the spouses' debt to Westpac stood at \$68,664 including accrued interest.

² There were other financial aspects to the relationship between the husband and wife and the parents arising out of employment arrangements made between the parents and their business which need to be considered here.

II THE ISSUE

The parent's argument was that the land contract was frustrated by the breakdown of the marriage and that the spouses had no equitable interest in the property.

Originally in contract law, parties to a contract were bound absolutely to its obligations, even though external circumstances may have intervened to render performance of the contract impossible.³ The basis for this strict rule was that parties can always protect themselves from external events by making express provision in the contract. However, over time, this rule came to be ameliorated by the development of the doctrine of frustration.

Two statements of the doctrine of frustration are important for understanding the scope of the contemporary doctrine. The first can be found in *Davis Contractors Ltd v Fareham Urban District Council*,⁴ where Lord Radcliffe said:

The law recognises 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.

The second can be found in *National Carriers Ltd v Panalpina (Northern) Ltd*⁵ where Lord Simon said:

[Frustration] takes place when there supervenes an event (without the fault of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance.

A frustrating event, therefore, is one that renders performance radically different from that contemplated at the time the contract was executed; occurs without the fault of either party; and is not provided for sufficiently in the contract. If the parties might reasonably have contemplated the radical change of circumstances but made no provision for that event in the contract, frustration may not be available.

In *Codelfa Construction Pty Ltd v State Railway Authority of NSW*⁶ ('*Codelfa*'), the High Court recognised that a supervening event that defeats a common assumption

³ *Paradine v Jane* (1647) Aleyn 26

⁴ [1956] AC 696, 729.

⁵ [1981] 1 All ER 161, 175.

of the parties can constitute frustration. In that case, after expressing approval for the definition of Lord Radcliffe in *Davis Contractors* cited above, Mason J referred to the fact that

there are numerous cases that illustrate the proposition that a contract will be frustrated when the parties enter into it on the common assumption that some particular thing or state of affairs essential to its performance will continue to exist or be available, neither party undertaking responsibility in that regards, and that common assumption proves to be mistaken.⁷

In ascertaining what common assumption may exist it is legitimate to look to extrinsic evidence in the form of surrounding circumstances.⁸ Where a contract is held frustrated, the parties are discharged from all future obligations under the contract. However, accrued rights and obligations remain enforceable.⁹

Frustration is a relatively unremarkable argument in relation to commercial contracts. But can the breakdown of a marriage constitute an event that causes the performance of a loan contract to be something that is ‘radically different’ from what the parties originally envisaged?

III THE FIRST INSTANCE DECISION

At first instance, Murray J concluded that the irretrievable breakdown of the marriage between the spouses frustrated the loan contract. This in turn left the parties in a fundamentally different situation, thereby frustrating the land contract. Her Honour declared the parents to be the legal and equitable owners of the Dulwich property, and found that the only property of the spouses arising from the agreements between them and the other parties was a chose-in-action for the return of their deposit (less the amount still owing under the mortgage to secure the bank loan they took to provide it) paid under the land contract. Her Honour calculated this to be about \$66,000. Her Honour then made orders under s 79 of the *Family Law Act* for proceedings between the spouses on this basis.

Murray J noted that a contract for the sale of land will usually be frustrated only when there has been a supervening change of circumstances which prevents the vendor from being able to give good title. Her Honour acknowledged that was not

⁶ (1982) 149 CLR 337.

⁷ Ibid 357.

⁸ Ibid 358.

⁹ In order to ameliorate the general rule that where a contract has been frustrated, the loss lies where it falls, some States have introduced legislation. See, for instance, *Frustrated Contracts Act* 1959 (Vic); *Frustrated Contracts Act* 1978 (NSW), and *Frustrated Contracts Act* 1988 (SA).

the case here. Nevertheless, Murray J proceeded to make findings about what the parties contemplated at the time of entering the contract by looking at the extrinsic evidence relating to the surrounding circumstances, in accordance with *Codelfa*. Her Honour found that the mother intended to provide the property as a home for her daughter primarily and not for the husband solely, and preferably for the daughter and husband jointly.

In essence, her Honour concluded that the contracts were frustrated because they were inextricably entwined as part of a 'purchase scheme', as all the parties contemplated that the land contract would be completed by the spouses with the aid of the loan contract. She concluded that the continuation of the marriage was a state of affairs essential to the performance of what she described as the 'extremely generous terms of the loan agreement'. Applying the test approved by the High Court in *Codelfa*, that a contract will be frustrated when performance of the contract is radically different from performance in the circumstances which it contemplated, she found that the breakdown of the marriage had led to circumstances radically different from those contemplated by both contracts, and in particular by the loan contract.

On the issue of foreseeability, Murray J found that the fact that the mother might have foreseen the possible breakdown of the marriage and its consequences for the completion of the two contracts (particularly as they related to the purchase of a matrimonial home for the spouses) did not prevent the frustration of the loan agreement. Her Honour relied on statements in *Jennings and Chapman Ltd v Woodman Matthews and Co*¹⁰ and commentary by Greig and Davis¹¹ to conclude that frustration may apply even though the event which frustrated the contract was one which both parties may have realised might happen. She agreed with Greig and Davis' view that while foresight may be important, it ought not to be decisive, as it may be unreasonable to throw the burden of the continued operation of the contract on one of the parties where no provision was made for a risk, albeit a contemplated risk. Murray J concluded that it would be unreasonable in the circumstances of this case to throw on the parents the burden of the continued operation of the loan agreement and therefore held the contract to be frustrated.

IV THE APPEAL DECISION

G appealed against Murray J's decision on the basis that the trial judge erred in holding the land contract was frustrated by the breakdown of the marriage and that the parties had no equitable interest in the property. The grounds of appeal required

¹⁰ [1952] 2 TLR 409, 413.

¹¹ D W Greig and J L R Davis, *The Law of Contract* (1987) 1317 [in the decision this reference is erroneously cited as 1315].

the court to consider whether either or both the land or loan contract had been frustrated, and in the event that neither one nor both had been, whether there were other grounds for determining that the contracts were discharged.¹²

In relation to the frustration issue, the Full Court summarised the arguments made by the husband and the wife on the issue of frustration and then addressed the following questions:¹³

- (a) *Was the land contract frustrated by frustration of the loan contract (putting to one side for one moment the question of whether the loan contract was frustrated)?*

The court's answer to this question was 'no'. It rejected C's contention that the two contracts were 'interdependent', if that term were used to suggest that each contract was conditional on performance of the other. The loan agreement may have been factually dependent upon the land contract being performed but the reverse was not true. Although not likely, the land contract could be performed without the loan contract being performed. The court pointed to the fact that the land contract was not made 'subject to finance' as is common, and that there was no reference in the land contract to arrangements about finance. They concluded, therefore, that the trial judge erred to the extent that she found that the land contract was frustrated by the loan contract being frustrated.

- (b) *Was the land contract frustrated independently of the 'frustrated' loan contract as a result of the irretrievable breakdown of the relationship between the parties?*

The answer to this question was also 'no'. The court found no explicit determination by Murray J that the land contract was frustrated, but stated at para 164 that they were proceeding

on the basis that the trial judge was of the view that, even if she were wrong in her conclusion that frustration of the loan agreement frustrated the land contract (as we have held her to be) the latter contract was itself frustrated by the breakdown of the marriage of the spouses.

¹² As the matter was remitted for retrial, the court did not consider what remedies might be appropriate in the event that the contracts should be found not to have been discharged, and the implications of any contractual relief granted for s 79 orders.

¹³ Counsel for the parents did not submit argument on the question of frustration, but sought to support the trial judge's finding that the spouses had no legal or equitable title to the property on other grounds.

The court proceeded therefore on the basis that her Honour took the view that the land contract itself was frustrated by the breakdown of the marriage.

In essence, the court decided that the land contract was not frustrated for two reasons. First, there was no common assumption by the parties that marriage between the spouses would continue. Second, the court was of the opinion that, even if there were such an assumption, a continuation in those circumstances was not essential to the performance of the contract.

With respect to the second reasons, the court had regard to the express terms of the contract in relation to the issue of what the parties intended (or did not intend). In particular, there was nothing in the land contract to restrict the assignment of rights and obligations; marriage was not referred to in the land contract; and the parties were not described as spouses.¹⁴ The court referred, at para 158, to the fact that

[t]he land contract could have been made conditional upon the formation of the loan agreement, as many contracts for the sale of land are made 'subject to finance'. However, it was not. There could have been a recital in the land contract referring to some antecedent oral agreement, undertaking or representation by the vendors as to the provision to the purchasers of the partial finance for the completion of the contract, but there was not. The land contract contains no mention of any collateral agreement or arrangement whatsoever about finance.

Further, the court in *Finlayson* took account (at para 170 of their judgment) of the evidence of C's mother that at the time of entering into the land sale agreement, she was having serious concerns about the likelihood of the marriage lasting.

The court held that the evidence did not support a finding that there was a common mistaken assumption that the marriage would endure. First, one of the parties had foreseen the particular event that did in fact occur. Second, unlike in *Codelfa*, there had been no representations by either of the spouses that could have led the mother to reject the possibility of a breakdown of the marriage.¹⁵

The court's second reason for finding the land contract was not frustrated was that any common assumption that the spouses would continue to be married,

¹⁴ It is an interesting feature of this case that it was C's brother, a solicitor, who drew up both the loan contract and the land contract.

¹⁵ In contrast, in *Codelfa*, the finding of the arbitrator was that the frustrating event was not foreseen. If its possibility had even been considered by *Codelfa*, it would have rejected it on the basis of the Authority's representations.

if it did exist, was not essential to the contract. This contract was simply one for the sale and purchase of real estate at an agreed 'market price' determined by 'an independent valuer'. In the court's view there was nothing, either in the land contract itself or in the surrounding circumstances revealed by the evidence, to answer the question why the continuation of the marriage should be seen as essential to the performance of the contract.

The court considered that Murray J may have mistakenly and erroneously had regard to what the parties did in relation to the contract following the breakdown of the marriage and to the attitudes expressed by them to the contract and the property in the course of the proceedings. The common assumption must, of course, be ascertained as at the time the contract was formed.

In view of their conclusions on the first two questions their Honours considered it unnecessary to decide a third question, namely:

- (c) *Whether the loan contract, as distinct from the land contract, had been frustrated.*

V THE SIGNIFICANCE OF THE DECISION

Finlayson is of interest because of the factual circumstances in which the claim was made that a contract for the sale of land had been frustrated. In the writers' view, the Full Court was correct to find that the land contract had not been frustrated. Even if the view of Greig and Davis is accepted, so that foresight by C's mother that the marriage might not last did not of itself defeat the claim of frustration, in this case the parents failed to establish that the contract was based on a common assumption that the spouses remain married. The assumption they alleged could not be ascertained from the words of the contract nor from any extrinsic evidence as to the parties' intentions.

The second reason for the Full Court's decision, that continuation of the marriage was not essential to the land contract, is consistent with the courts' general reluctance to extend the doctrine of frustration to contracts for the sale of land. Underlying this reluctance is the fact that a contract for the sale of land confers an equitable interest on the purchaser — the very issue at stake in *Finlayson*. Equity will regard the purchaser of the land as having an equitable interest only if and in so far as specific performance of the contract might be granted.¹⁶ Consequently, a contract for the sale of land will only be frustrated where a supervening event prevents the vendor from transferring title to the land so that specific performance

¹⁶ *Cooney v Burns* (1922) 30 CLR 216, 232 (Isaacs J).

is not available.¹⁷ The inability of a purchaser to use or develop land in an intended manner is treated as a risk assumed by the purchaser and not as a frustrating event.¹⁸ Applied to this case, the parties each bore the risk that the house on the land would not be used by G and C as a married couple. This factual situation typifies what Carter and Harland mean when they say that disappointed expectations are not to be equated with frustrated intentions.¹⁹ While at one level it may be that the breakdown of the marriage defeated the parties' intentions, it does not follow that it should result in the defeat of the spouse's equitable interest in the land.

Although, ultimately, the Full Court did not decide whether the loan agreement was frustrated in the circumstances, the writers suggest that it could not have been found to be frustrated in these circumstances. While the particular facts of every case are critical to the decision in each case that frustration is claimed, a finding that a contract has, as a matter of law, been frustrated will depend on the proper construction of the contract and the application of well-settled legal principles. The writers suggest that while the breakdown of a marriage may be agreed to by the parties as grounds for rescission or termination of a contract, it is unlikely ever to amount to a frustrating event.

This case is a salutary reminder of the need to make provision for foreseeable contingencies in preparing contracts. There may be a need for great delicacy when preparing contracts that involve domestic relationships, but family lawyers are no strangers to that exercise. The *Family Law Act* provisions relating to prenuptial agreements between intending spouses²⁰ may in time make this a more commonplace exercise.

¹⁷ For example, where the land is resumed by government after the sale but before the land is conveyed (this has been applied to a resumption of less than all of the land, see *Austin v Sheldon* [1974] 2 NSWLR 661).

¹⁸ For example, *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments Pty Ltd)* (1976) 133 CLR 671 (ban on proposed development of land).

¹⁹ J W Carter and D J Harland, *Contract Law in Australia* (4th ed, 2002) 768.

²⁰ Section 90B *Family Law Act 1975* (Cth).

