A practical guide to ending contracts early

Parts 1–3 | 2026

MACFARLANES

Frustration

It is a fundamental principle of English law that contracts have binding force. English law is a popular choice of governing law for contracts because of the certainty it provides in ensuring that obligations freely entered into will be upheld, or an appropriate remedy will be granted for their breach – save for in exceptional circumstances.

Driven by recent geopolitical events, we have seen an increase in parties seeking ways to avoid unfavourable contractual terms, or end contracts entirely, without the express right to do so. In this three-part series, we highlight some of the key ways in which parties attempt to do this and examine the current status of English law in each area.

In Part One, we cover the law of frustration.

What is frustration?

Frustration is a common law doctrine which brings a contract to an end if an unforeseen event occurs outside of the control of the contracting parties, and either:

- makes the contract impossible to continue to perform; or
- transforms the obligation to perform into something so radically different from what was contractually agreed that it has become, in effect, a completely different obligation.

To determine whether a contract has been frustrated, one must first identify what the parties' contractual obligations are, as a matter of construction of the contract. The next step is to assess what the impact of the alleged frustrating event is on those obligations including how, if at all, the parties can perform those obligations in the new circumstances. The final question is whether the obligation as intended under the contract, and the obligation as it will be performed now, are fundamentally different. As the House of Lords put it, "the question is whether the contract which [the parties] did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."[1]

Key to the doctrine is that the frustrating event must not have been contemplated (or foreseeable as a serious possibility) and must be outside the control of any of the contracting parties. Self-induced frustration (i.e. where a party's own acts render its further performance impossible) will not terminate a contract. As discussed further below, foreseeability and control are often where assertions of frustration fail.

What is the effect of frustration at common law?

A frustrated contract is automatically discharged, and the parties are relieved of all future obligations. In effect, from the date of frustration, the contract is terminated. Technically, this does not require either party to make a choice or take an action (subject to any specific terms in the contract). In practice, however, the party who believes the contract to be frustrated will often need to notify the counterparty that this is the basis on which they are (not) proceeding.

Frustration does not mean the contract never existed and the parties will not be restored to their pre-contractual positions. Any obligations or liabilities incurred prior to the frustrating event must still be fulfilled (unless those obligations or liabilities were frustrated themselves).

Perhaps most significantly, damages are not available for breaches of frustrated contracts after the frustrating event because neither party is considered to be in default. Generally, the approach the courts take to a frustrated contract is that each of the parties must bear their own losses – the party paying for a service, for example, would therefore only pay for the service that has been performed up to the point of frustration.

This position is subject to both statute (see below) and case law[2] which provides that if there is a total failure of consideration (i.e. no service under the contract is ever performed), then the party paying for the service may be able to recover any money paid in advance. However, if the services have been even partially performed, then any money paid in advance may not be recoverable, subject to the Law Reform (Frustrated Contracts) Act 1943.

1 Davis Contractors Ltd v Fareham Urban District Council [1956] A.C. 696

2 Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] A.C. 32

The impact of the Law Reform (Frustrated Contracts) Act 1943 (LRA)

The LRA applies to any English law contract which has become impossible to perform provided the contract does not specifically exclude it.

Where the LRA applies, s.1(2) provides that:

- any money already paid before the frustrating event may be recoverable. Any money due but not paid before the frustrating event will not be payable; and
- a party who has incurred expenses in performing the contract up to the point of frustration may be able to recover those expenses, although this is entirely at the court's discretion. If ordered, this recovery can either be deducted from money already paid to date, or claimed from the party receiving the benefit of the contract.

Under s.1(3), the court can similarly order a party to pay a reasonable sum for the receipt of any "valuable benefit" at the time of the frustration. This is particularly important as it ensures that a service-provider can reclaim something for services already provided in certain circumstances, although again, this is at the court's discretion.

Difficulties with establishing frustration

We have seen an increase in parties alleging frustration, seemingly driven by geopolitical events. Clearly, these are events beyond the control of most contracting parties and could potentially frustrate a contract.

However, whether a particular contract has been frustrated will depend to a great extent on the terms and wider context of that contract. The bar for establishing that there has been a frustrating event is high.

The following recent cases illustrate some of the difficulties with alleging frustration:

- **If the parties appear to have anticipated and provided for what would happen in the frustrating circumstances that have ultimately arisen (or equivalent circumstances), the contract is not frustrated**. *Salam Air SAOC v Latam Airlines Groups SA* [2020] EWHC 2414 (Comm) – the court held that the Covid-19 pandemic was not a frustrating event for an aircraft lease. The lessee had agreed to pay the lease of various aircraft even if the aircraft were destroyed. Thus, even though the pandemic grounded flights, the fact that the lessee had specifically agreed to continue to pay for their lease in a similar (although not equivalent) situation where flights would be impossible suggested that such an event may have been in contemplation of the parties at the time the contract was entered into.
- **Performance becoming slower, more difficult or more expensive than originally anticipated will not frustrate a contract**. *Barclays Bank PLC v VEB.RF* [2024] EWHC 1074 (Comm) – the court concluded that sanctions did not impede the defendant's access to justice in the context of an arbitration agreement. The Russian defendant argued that the performance of the arbitration clause under the agreement (whereby any dispute was to be resolved via arbitration in England) was radically different given the effect of sanctions (including arguing it would be difficult to obtain legal representation or for witnesses to attend any hearings in England). The court found this not to be the case as, although there may be delays, it would nevertheless still be possible to arbitrate.
- **Foreign law illegality is not a frustrating event under English law**. *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 355 (Ch) – the lessee's incapacity (or potential incapacity) as a matter of EU law to continue to hold an English law lease of premises in Canary Wharf was not a frustrating event. The UK's (then anticipated) departure from the EU did not make it impossible to perform the lease, notwithstanding that the lessee was an EU entity that would no longer be able to operate from the UK if and when the UK did leave the EU.

It is also important to note that commercial decisions regarding the deployment of resources to satisfy one contractual obligation over another will not amount to frustrating events, even if the underlying circumstances are not the fault of the party alleging frustration. This is demonstrated in *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C., where the Privy Council considered whether a contract was frustrated because a fishing trawler had not been adequately licensed. The owner of the trawler had only been granted licenses by the government for three of its five vessels. The court held that this was not a frustrating event, because although the provision of licenses was outside of the owner's control, it had made the commercial decision not to apply one of its three licences to the relevant trawler. It was the manner in which the owner had chosen to conduct its business which had caused the trawler to be unlicensed, and that was clearly something within the owner's control. Although there may have been logical reasons for its decisions, the owner could not rely on the absence of a licence as a frustrating event.

Alternative performance

A contract will not be frustrated if it provides for alternative ways in which it can be performed when faced with what may otherwise be a frustrating event, provided such performance is not radically different from that originally contemplated. For example, clauses which oblige the parties to perform insofar as reasonably possible, or which oblige them to take alternative or additional steps to achieve performance, may prevent a contract being frustrated.

Similarly, before giving notice of a frustrating event, parties should be aware of any other obligations that they may have under the contract to try to overcome the impact of a frustrating event. For example, if a party was contractually obliged to enter discussions with the other party to try to determine an alternative solution, then the court would expect to see evidence of these discussions before accepting that frustration has occurred.

Interaction with force majeure clauses

Analysis of whether a contract has been frustrated often also involves consideration of whether a contract's force majeure provisions have been engaged, and it is important to understand the key differences between the two concepts.

- Force majeure clauses release parties from liability or obligation under a contract when a specified event or circumstance beyond their control occurs. Although the events specified are generally extraordinary and/or unexpected, they are specified in the contract itself. That means that they are not unforeseen by the parties, which means they generally cannot be relied on as frustrating events.
- While frustration results in automatic discharge of the contract, the result of a force majeure event must be specified in the contract. Therefore a force majeure event may not necessarily result in termination. Generally, force majeure clauses are easier to invoke than frustration, but this is only a relative measure: disputes over the engagement (or not) of a force majeure clause are common.

In the next part of this series, we will consider the common law doctrine of termination for repudiatory breach.

Repudiatory breach

In Part Two of our series on the ways in which parties attempt to avoid unfavourable contractual terms, or end contracts entirely, without the express right to do so, we cover contract termination at common law, also known as termination for repudiatory breach.

What is a repudiatory breach?

At common law, a contract can be terminated by Party A if their counterparty, Party B, has committed, or has indicated that it will commit, a repudiatory breach. The right to terminate for repudiatory breach arises at common law in every contract unless clearly and expressly excluded - and judicial commentary suggests such an exclusion would need to be extremely clear indeed.

Once terminated, both parties are released from further performance of the contract (unless expressly provided otherwise in the contract itself). However, rights that have accrued under the contract (such as causes of action for damages) prior to the termination will remain enforceable.

The doctrine therefore provides contracting parties with a potential route of escape from a contractual relationship. If Party A does not wish to continue to perform its obligations under a contract, it can be released from its obligations if it can establish that Party B is in repudiatory breach – even where there is no express termination clause in the contract itself.

When does the right to terminate arise?

To exercise its termination right, Party A must establish a repudiatory breach by Party B i.e. a refusal either to perform the contract at all, or to perform a contractual obligation that goes to the heart of the contract. The classic statement is whether the breach deprives the party alleging breach "of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain".[1] However, establishing this in practice may be more difficult than expected. For example, even long delays in making payments may not necessarily be considered a repudiatory breach.

Often, Party B has not yet breached the contract, but has indicated, by words or conduct, that it intends to while performance is still due. This can still give Party A the right to terminate, provided that (as with an actual repudiatory breach), Party B's intention is either not to perform at all, or not to perform an obligation that goes to the heart of the contract. However, this does require certainty that Party B intends to repudiate the contract. The Court of Appeal has stated that the test for this can be simply stated as "whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."[2] The utility of this for Party A is that there is no need to wait for the time for performance: anticipatory repudiation entitles it to terminate and to recover damages immediately by accepting the repudiation.

Whether a breach is considered repudiatory will be judged at the time of termination and not at the time of the breach. This means that, if remedial action is taken between the time of breach and the point of termination, the right to terminate on the basis of that breach could be lost.

The Court of Appeal has explained that "a breach of contract, although serious, may be capable of remedy. If it is remedied before the injured party purports to exercise a right of termination, then the fact that the breach has been remedied is an important factor to be taken into account. Likewise, if there is delay in performance of an ongoing obligation it may well be possible for the delay to be made up by faster performance".[3]

The effect of a repudiatory breach: a matter of choice

A repudiatory breach does not automatically result in the end of a contract. The party alleging breach has a choice as to whether it wants to accept the breach and bring the contract to an end, or to affirm (i.e. continue) the contract and continue to require performance. This will require considering whether keeping the contract on foot is commercially appropriate. If the party alleging breach decides to accept the repudiation by communicating that it is ending the contract, this will result in the automatic termination of the contract and the discharge of further obligations. The communication can be through words, written notice or conduct, so long as it is clear and unequivocal.

The Court of Appeal has issued a recent reminder of the importance of this communication in *Advanced Multi-Technology for Medical Industry & Ors v Uniserve Limited* [2025] EWCA Civ 1212. A buyer of facemasks had committed a repudiatory breach by purporting to terminate a contract by email without grounds to do so. However, the seller failed to communicate acceptance of the repudiation. As a result, the contract continued for all purposes and the seller remained bound by its obligations to deliver the facemasks. When the seller subsequently failed to perform its obligations, the buyer was entitled to terminate for that failure, and the seller had no claim for damages against the buyer.

1 Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisaha Ltd [1962] 2 Q.B. 26 at [66]

2 Eminence Property Developments Ltd v Kevin Christopher Heaney [2010] EWCA Civ 1168

3 Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd [2013] EWCA Civ 577

Damages may also be sought for losses caused by the breach of contract, whether the party alleging breach affirmed or terminated the contract. The calculation of damages will normally involve assessing the difference between a contract's value as performed in comparison with the value that would have been derived by the innocent party had the breach not taken place.

In addition, if they have elected to terminate, the party alleging breach may be able to claim 'loss of bargain' damages, which means that as well as damages to compensate the losses caused by the breach up until the time of termination, they may claim for the loss of the breaching party's future performance of its contractual obligations. This is potentially valuable as it can incorporate loss of future profits on the contract.

Where a party alleging breach chooses to affirm the contract, they may apply for equitable remedies of specific performance or an injunction to compel performance. However, these can be difficult to obtain depending on the relevant circumstances.

Risks of terminating for repudiatory breach

There are a number of strategic questions which arise when considering whether to elect to terminate for repudiatory breach.

Most fundamentally, the party alleging breach will need to carefully assess whether their claim of a repudiatory breach is legally sound. Wrongly claiming a repudiatory breach can itself constitute a repudiatory breach. This can result in a counterclaim and associated damages. Common areas in which repudiatory breach is wrongly asserted include misinterpreting termination provisions[4], incorrectly following termination procedures, or confusing a repudiatory breach with a 'merely' material breach.

The party alleging breach also needs to ensure that they do not inadvertently affirm the contract (and therefore lose the right to terminate). While it is possible for a party to reserve its rights so that it can take time to consider its options, it may be deemed to have impliedly affirmed the contract if it takes too long. The time that can be taken before impliedly affirming the contract will depend on the wider context and circumstances but could in theory be as little as a few hours or days. Continuing to perform its own obligations under the contract can also amount to affirmation by the party alleging breach.

Conclusion

Identifying a repudiatory breach and weighing up the consequences of terminating a contract on the basis of one, requires a careful and nuanced analysis of the contract terms, the nature of the obligations, and the likely fallout of ceasing to perform. Although the doctrine provides a potential avenue of discharging a contract without the express right to do so, it is not without its complexities, and the burden of proof will fall on the party alleging breach to satisfy a court that it was entitled to terminate its contract.

In the next and final part of this series, we will consider misrepresentation, mistake and illegality.

4 Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)

Misrepresentation, mistake and illegality

This is the third and final part of our series on the ways in which parties may attempt to avoid unfavourable contractual terms, when their contract does not contain an express right to do so. Having previously considered termination at common law and frustration, this final part considers misrepresentation, mistake and illegality.

Misrepresentation

A misrepresentation occurs where one party makes an untrue statement of fact or law which induces the other party to enter a contract, causing that other party to suffer loss. The innocent party may have the right to rescind (i.e. set aside and unwind) the contract as a result.

There are three types of misrepresentation:

1. fraudulent misrepresentation – where the untrue statement is knowingly or recklessly false;
2. negligent misrepresentation – where the untrue statement is made carelessly; and
3. innocent misrepresentation – where the untrue statement is not fraudulent or negligent.

The law of misrepresentation is lengthy and complex and beyond the scope of this article. However, there are some important points of emphasis when considering whether the right to rescind the contract may arise:

- **The statement must be one of fact or law, not merely an opinion**. A statement of opinion or a promise about future intentions will not generally amount to a misrepresentation, even if it ultimately proves to be wrong. However, where someone states an opinion that they do not genuinely hold, this may itself constitute a false statement of fact about their true state of mind.
- **The misrepresentation must have played a part in the innocent party's decision to enter the contract**. It need not have been the only reason, but it must have had some real influence.
- **The right to rescind may be lost in certain circumstances**. Even where a misrepresentation is established, the right to rescind can be extinguished: where the innocent party affirms the contract by continuing to act under it after discovering the misrepresentation; where too much time has elapsed since the innocent party became aware of the misrepresentation; where it is no longer possible to restore the parties to their pre-contractual positions; or where a third party has since acquired rights in good faith.
- **Only a fraudulent misrepresentation gives an absolute right to rescind the contract**. Otherwise, the court has a discretion to award damages instead of rescinding the contract. This is more likely where the misrepresentation is minor and the consequences of unwinding the contract would be disproportionate to the wrong suffered.
- **Contracts frequently contain clauses attempting to restrict or exclude liability for misrepresentation**. These restrictions/exclusions can take various forms, and their effect will depend on the wording of the contract and the relevant circumstances. That said, any clause purporting to exclude liability for fraudulent misrepresentation will be automatically unenforceable as a matter of public policy.

The court granted rescission for fraudulent misrepresentation in the recent and high-profile case of *Patarkatsishvili v Woodward-Fisher* [2025] EWHC 265 (Ch). The claimants purchased a large London townhouse for £32.5m. The seller had not disclosed a serious clothes moth infestation in replies to pre-contract enquiries, despite knowing of the problem from pest control reports. The court found that this amounted to a fraudulent misrepresentation, rejected the seller's defences of delay, affirmation, and impossibility of unwinding the sale, and ordered rescission of the sale contract and damages.

Mistake

A contract can be voided for a mistake which is fundamental to the subject matter of the contract and makes performance impossible or radically different from what the parties intended.

English law recognises three types of mistake:

1. common mistake – where the same mistake is made by both parties;
2. mutual mistake – where each party is mistaken but in different ways; and
3. unilateral mistake – where only one party is mistaken, and the other party takes advantage of that.

The precise test for each type of mistake differs, as do their consequences. The key point in practice will often be whether the mistake is sufficiently serious as to call into question the very basis on which the parties contracted. Many contracts contain minor errors or leave (sometimes considerable) scope for interpretation which may differ between the parties. However, the English courts very rarely void contracts for mistake, preferring instead to uphold the contract by determining how its express and any implied terms are to be interpreted or, in rare cases, rectifying (i.e. correcting) its terms.

Illegality

Where performing a contractual obligation requires a party to do something illegal (or contrary to public policy), this may provide that party with a way of avoiding the consequences of not performing that obligation. Those circumstances do not bring an end to the relevant contract, but they provide a defence for the defaulting party because the courts will not enforce a contract (or tortious duty) which requires unlawful acts.

The English courts can consider whether the law of illegality will apply of their own volition, whether or not the defence is raised by a party. The courts will consider a range of factors, including the underlying purpose of the law or policy in question and the proportionality of the consequences for each party (*Patel v Mirza* [2016] UKSC 42). Ultimately, the key issue will be whether allowing the claim in the circumstances would undermine or be inconsistent with the law or policy in question.

The court has a wide discretion, as demonstrated in the following examples:

- *Grondona v Stoffel & Co* [2020] UKSC 42, in which the claimant had committed mortgage fraud, but made a claim for professional negligence against their solicitors for their conduct in the course of the mortgage procurement. The court refused the solicitors' illegality defence on the basis that it would not seriously deter the illegal action in question (i.e. it would not make the commission of mortgage fraud less likely), but would undermine other public policy concerns (i.e. solicitors' duties to their clients).
- *Okedina v Chikale* [2019] EWCA Civ 1393, where an employer argued that the illegality defence applied to a claim by an employee who did not have the required immigration status to work legally. The court refused to apply the defence, holding that it was not Parliament's intention to render an employment contract entirely unenforceable in all situations where there could be illegal working. Instead, public policy required there to be certain contractual remedies available against employers in cases of poor treatment.
- *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, in which an illegality defence was successful against a claim for medical negligence (which, it was asserted, led to the claimant being convicted of manslaughter due to a lack of proper care for her paranoid schizophrenia). The Supreme Court held that the illegality doctrine meant that the claimant could not be compensated for losses suffered as a result of her own criminal act.

An important practical point is that the English courts will generally only determine whether performance would be illegal by reference to what would be illegal under English law, and not by reference to any other law. There is, however, a limited exception where a contractual obligation necessarily requires actual performance (and not merely preparatory steps to perform) in a place where it would be unlawful. The exception was recently applied in *Beneathco DMCC v RJ O'Brien Ltd* [2025] EWHC 3079 (Comm), where a Dubai-based derivatives trader sought the return of $16.5m held by its broker after being designated with US sanctions. The court found that returning the funds would have involved a US correspondent bank processing the payment unlawfully, meaning that the obligation to return the funds was suspended.

Conclusion

Ending a commercial contract early is unlikely to be straightforward if the contract does not contain an express termination right. English law starts from the premise that contractual agreements will be upheld. The main non-contractual routes for bringing a contract to an end – frustration, repudiatory breach, rescission for misrepresentation, mistake and illegality – are narrow, fact-sensitive and can be risky to rely on.

The first practical step is always to review the contract carefully. Check the details of any provisions relating to termination, along with any notice procedures, cure periods, force majeure clause, alternative performance obligations, and exclusion clauses.

Before stopping performance or sending a termination notice, a party should identify the precise legal basis for termination, assessing whether the facts meet the relevant threshold for any of the routes discussed in this series. It will also be important to consider the commercial context – what are the financial and operational consequences of both terminating and of getting termination wrong? If termination is desired, legal advice is likely to be necessary.

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