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The Doctrine of Equitable Adjustment in Scots Contract Law: Addressing Non-performance of Contractual Obligations Following a Change of Circumstances

Helena Wilson

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1. Introduction

> ‘[I]n contracts, the first regard is had to the thing expressly mentioned in the agreement; when this cannot be obtained, it is sufficient to give an equivalent; but whatever happens, all imaginable care is to be used, that the other party suffer no prejudice.’ … It is obvious that neither of these attempted solutions of the difficulty [to enforce the contract or undertake partial restitution] can be productive of complete justice. … At best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice.[1]

This statement by the Scottish House of Lords judge Lord Macmillan, given in his judgement in an English appeal to the House of Lords, highlights a key issue also encountered by the Scottish legal system and its body of contract law. This is, namely, how to approach a party’s non-performance of their contractual obligations resulting from a change of circumstances, when the contracting parties cannot come to an agreement on how to move forwards, for example by adjusting their obligations or identifying a remedy. Where performance is simply not possible, enforcement of the obligations, for example via specific implement in Scots law, is not a viable solution. To this effect, Lord Macmillan concluded that, due to the pitfalls of the established choices of solutions in English law, an ‘equitable accommodation’ must be the way forwards. This conclusion aligns with certain ideas about the way in which Scots contract law ought to approach the issue of non-performance in relation to changed circumstances. Essentially, these ideas reflect the potential shortcomings of force majeure clauses in contracts and the doctrine of frustration as the habitually applied and firmly established (yet, as will be demonstrated, limited) solutions in Scots contract law. They also lay the groundwork for the implementation of a new, proposed solution: the doctrine of equitable adjustment.

[1] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) 59 (Lord Macmillan). Lord Macmillan references text in: SF von Pufendorf, *Of the Law of Nature and Nations*, vol 3 (first published 1673, L Litchfield 1703) 225.

Force majeure clauses are customarily included in commercial contracts. These clauses constitute an agreement about the circumstances in which a party's non-performance of their contractual obligations will not constitute a breach of contract. They also enable parties to agree on what the legal outcomes will be in such circumstances. Essentially, force majeure clauses are an *ex-ante* mechanism for parties to agree at the outset on which solutions are to apply when difficult circumstances arise. There is a major pitfall of force majeure clauses, however. Not all contracts contain a force majeure clause and, where there is a clause, not all changes of circumstances are certain to have been anticipated by the parties when formulating the clause. Either possibility would leave parties without an applicable force majeure clause, and without a prior agreement about what to do in the changed circumstances if a party cannot perform.

The Scots law doctrine of frustration derives from common law and applies to contracts without an (applicable) force majeure clause, and where parties are unable to come to their own agreement about what to do in light of the changed circumstances. The doctrine applies automatically upon the occurrence of a frustrating event, when its requirements are met, and has the effect of releasing parties from their future contractual obligations towards one another.[2] The court determines whether the change of circumstances experienced by the parties would constitute a frustrating event. A benefit of frustration is that it prevents parties from being tied to contracts that are no longer effective or feasible. That said, frustration is not always desirable for the parties, especially in a commercial setting where continuation of the parties' business activities may be more useful. Further, even where the effect of frustration is desired by a party, there are particular requirements that must be met in order for the contract to be frustrated. As such, there are a number of situations to which frustration does not apply.

Where specific implement cannot be granted, or frustration or a force majeure clause is inapplicable, payment of damages for breach of contract by the non-performing party may be the only remaining remedial mechanism. This is a purely monetary

[2] *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1, 8 (Bingham LJ); WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.04; HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.64.

remedy, however, and may not be the most effective means of providing parties with a proper solution to their difficulties. This is especially the case for commercial parties, whose relationship concerns the achievement of mutually profitable business transactions, for whom a more practically orientated solution may be more suitable.

Considering the above, specific implement, force majeure clauses, the doctrine of frustration and payment of damages for breach of contract are useful tools in Scots contract law. However, they are only useful in the right conditions, and are not always applicable or suitable mechanisms.

With a primary focus on commercial contracts, this thesis will examine the doctrine of frustration and force majeure clauses more deeply in the following two chapters, and subsequently evaluate these mechanisms in order to identify and review a gap between them. It will then propose the doctrine of equitable adjustment as a solution to this gap. To make the case for this proposed mechanism in Scots contract law, the thesis will explain the way in which the doctrine aligns with the underlying principles of Scots contract law, and discuss rent abatement in commercial leasing as a legal foundation for development of the doctrine of equitable adjustment. The thesis will then bring together the previous chapters as pieces of the puzzle, to present a completed picture of the way in which the proposed doctrine of equitable adjustment could be implemented in practice.

Particular challenges that will be faced in making the argument for the doctrine of equitable adjustment include that it has been difficult to identify a legal basis for it in Scots law. There is no sweeping statutory law imposing the doctrine as a contract law remedy in Scotland, and Scottish courts have not been overwhelmingly accepting of the doctrine when it has been argued in modern cases. There is said to be no authority for a doctrine of equitable adjustment in Scots law, and that to recognise it in case law would be to introduce hitherto unknown concepts to Scots law.[3] Additionally, there is hesitation about whether it would indeed be beneficial for

[3] '[T]he proposition that the court can equitably adjust a contract on the basis that its performance, while not frustrated, is no longer that which was originally contemplated is not part of Scots law. To hold otherwise would be to undermine the principle enshrined in the maxim pacta sunt servanda which lies at the root of the whole of the law of contract': *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, 2013 SC (UKSC) 169, [48] (Lord Hope).

the courts to use equitable adjustment as a mechanism to address non-performance of contractual obligations resulting from changes in circumstances. In short, there lies a question about the extent to which the doctrine of equitable adjustment does and should exist in Scots contract law.

Debate about equitable adjustment has resurfaced recently, following the case of *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc*.[4] As such, there now exists a diversity of opinions about, and strong reasoning in favour and critical of, the doctrine of equitable adjustment. The topic has also become particularly pertinent, as changes of circumstances affecting commercial parties' inability to perform have been encountered in global commerce, including in Scotland specifically. Changes of circumstances including Brexit, Covid-19, the UK cost of living crisis, the energy crisis, the supply chain crisis and more recently the war in Ukraine have curtailed the possibility for parties to perform their contractual duties in many instances. As a result, clarifying the possibilities for the doctrine of equitable adjustment in Scots contract law is of practical rather than purely academic importance.

With this increased relevance, there are multiple aspects of the doctrine to consider, including: the current, established mechanisms in Scots contract law to address changes in circumstances; interpretation of contracts in Scots contract law; Scots contract law's jurisprudence and history; the balance between related legal concepts such as the principles of freedom and sanctity of contract, and equity; allocation of risk in contracts; the role of the court; and the value of the doctrine's application in practice. It is intended that all aspects of the debate can be discussed in this thesis in an effective way, to ultimately address the question of the extent to which the doctrine of equitable adjustment has a basis to exist in Scots contract law. To this effect, throughout the work, the thesis will bring together and analyse existing arguments, as well as new suggestions. It will look to recent social and legal developments, as well as to relevant points of Scots law's history, and the development and crystallisation of key legal concepts in Scotland. Undertaking a comprehensive exploration of the debate in this way, also from a societal and

[4] [2013] UKSC 3, 2013 SC (UKSC) 169.

commercial perspective, will achieve a well-rounded and detailed understanding of the doctrine of equitable adjustment, and its place in Scots contract law.

2. Frustration

There are several aspects to consider in order to gain a deeper understanding of the Scots law doctrine of frustration. These include the development of the doctrine, the understanding of frustration in modern Scots contract law, overarching challenges with the application of the doctrine, and specific challenges with the application of the doctrine.

2.1. Development of the doctrine of frustration

Historically, the doctrine of frustration developed via common law in Scotland and England. This development occurred differently in these two jurisdictions, however. Lord Cooper notes that 'the juridical principles on which the maturing doctrine now rests have been approached in Scotland from an individual standpoint and have been evolved by a different process of reasoning against a different legal background'.[5] That said, he does concede that '[w]ith certain important exceptions … the expositions contained in the numerous decisions of the House of Lords in English Appeals and of the Judicial Committee of the Privy Council would in the main be accepted in Scotland'.[6] Indeed, the modern concepts of frustration in Scots and English law closely resemble each other in several regards, and English cases have been crucial for shaping the definition of frustration in modern Scots law cases. Essentially, as a mixed legal system, Scotland has been influenced by English common law in its doctrine of frustration, as well as by civil and canon law.[7] That said, despite some similarities between the frustration of modern English and Scots law, the historical and developmental differences between them remain highly important, and should not be underestimated. In this light, two schools of thought

[5] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 124.
[6] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 124.
[7] 'During the formative period of modern Scots law the chief source of inspiration was found in the Roman Law of the later Commentators – a model which was rarely slavishly copied, but which has left a deep and permanent mark on many chapters of our law.': Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 124. The impact of Scotland's mixed legal system on the underlying principles of Scots contract law is fully discussed below in: '6.1. The mixed nature of the Scottish legal system'.

about what constitutes the basis of frustration in Scots law have emerged, having been initially identified and discussed by Lord Cooper.[8]

2.1.1. The first understanding

The first understanding of the doctrine of frustration in Scots law is presented by Lord Cooper as being the question of how best to readjust the position of the parties.[9] This understanding is heavily influenced by civil and canon law, particularly the *rebus sic stantibus* doctrine, a name that derives from the dictum '*contractus qui habent tractum succesivum et dependiam de future rebus sic stantibus intelliguntur*' (contracts with acts to be performed successively in the future will be understood to rely upon the condition that circumstances remain the same).[10] *Rebus sic stantibus* makes 'the validity of a contract depend on the continuance of the circumstances obtaining at the time of its formation'.[11] From this came the understanding that, where a change of circumstances severely affects the parties' ability to fulfil their contractual obligations (where circumstances do not remain the same), the contract cannot continue to bind the parties. This is because one party has 'been unintentionally enriched at the expense of the other', and the court is faced with the 'question how the relations of two parties should be equitably readjusted'.[12] Lord Cooper notes that, in Scotland, '[f]rustration of contract was thus a by-product' of this process, which could 'sever the initial contractual tie' where this would be the most suitable answer to the question.[13]

[8] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957); LJ Macgregor, 'The Effect of Unexpected Circumstances in Contract Law in Scotland and Louisiana' in EC Reid and VV Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 250.
[9] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 124.
[10] AT Saliba, 'Rebus Sic Stantibus: A Comparative Survey' (2001) 8 Murdoch University Electronic Journal of Law <www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2001/18.html> accessed 27 October 2021; LJ Macgregor, 'The Effect of Unexpected Circumstances in Contract Law in Scotland and Louisiana' in EC Reid and VV Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 273.
[11] K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, Oxford University Press 1998) 518; LJ Macgregor, 'The Effect of Unexpected Circumstances in Contract Law in Scotland and Louisiana' in EC Reid and VV Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 273.
[12] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.
[13] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.

Lord Cooper indicates that Thomas Craig's writings in the early 17th century foreshadowed this understanding of frustration in Scots law.[14] Craig used principles of Scots law to justify an example of a vassal forfeiting a feu, including *condictio causa data causa non secuta* and *naturalis aequitas*.[15] *Condictio causa data causa non secuta* applies to 'situations where A is enriched because B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration'.[16] *Naturalis aequitas* refers to notions of equity.[17] Craig's application of these principles to achieve the result of a feu being forfeited is recognised by Lord Cooper as constituting 'what is in essence the modern' doctrine of frustration, at least on this civil law-influenced understanding.[18] Such an approach, Lord Cooper believes, 'has been the Scottish view for more than three hundred years'.[19] It seems that this has persisted; almost forty years after Lord Cooper's work, the Stair Memorial Encyclopaedia comments that 'the best explanation for the operation of the doctrine, and the one which most closely approximates to what the Scottish courts do, is that having regard to the true construction of the contract, the court will do what is just in the light of the circumstances'.[20] The focus is therefore on the power of the courts to achieve a fair outcome, following proper consideration of the parties' contract.

An element at the forefront of this understanding of frustration is the centrality of civil and canon law in frustration's development in Scotland, and the shift away from common law influence. The greater influence of civil and canon law is, according to Lord Cooper, particularly evidenced by the difference in approach to post-frustration remedies – the way in which the parties' positions are equitably readjusted by the court. In England, losses were deemed to lie where they fall until the Law Reform

[14] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 124-25. Although McBryde has since traced it further back to the 16th century: WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 6. This was based on Scottish case law records in Balfour's Practicks: J Balfour, *Practicks: Or, a system of the more ancient law of Scotland* (first published 1754, PGB MacNeill ed, Stair Society 1962-1963) vols 21-22. Hereafter 'Balfour, *Practicks'*. This was also the earliest instance found by the author, see: '7.1. 16th and 17th centuries'.
[15] T Craig, *Jus Feudale* (first published 1655, L Dodd ed, Stair Society 2017) vol 64, III.v.23. Hereafter 'Craig, *Jus Feudale*'.
[16] *Shilliday v Smith* 1998 SC 725, 727 (Lord Rodger P).
[17] Equity is evaluated and defined in detail in: '5.1.1. The component of equity: shaping the nature of the doctrine'.
[18] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.
[19] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 132.
[20] ADM Forte, 'Frustration', *Stair Memorial Encyclopaedia* (1995) vol 15, para 880.

(Frustrated Contracts) Act 1943 was enacted.[21] In Scotland, however, this does not apply, and there is no similar Scottish legislation. The law of unjustified enrichment applies, which is based on the *condictio causa data causa non secuta*, and sometimes *quantum meruit* is used to determine the amount that one party should pay the other to rebalance their positions.[22] Thus, '[w]ith such a different underpinning structure, and a completely different historical development, it seems likely that further differences may exist.'[23]

In a nutshell, this historical understanding of frustration describes a broad, underlying principle in Scots contract law in relation to non-performance caused by a change of circumstances. This principle constitutes the power of the court to readjust the position of the parties in an equitable manner after due consideration of the contract.

2.1.2. The second understanding

The second understanding of the doctrine of frustration relates to tacit resolutive conditions as an elaboration of the *rebus sic stantibus* doctrine. MacQueen and Thomson have written about tacit resolutive conditions extensively in order to provide an explanation for the *rebus sic stantibus* doctrine that is consistent with Scottish legal principles.[24] In this understanding of frustration, the parties are released from obligations of future performance where a supervening event makes such performance impossible, illegal or radically different.[25] This is because these

[21] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 128.
[22] Stair J Dalrymple, Viscount, *The Institutions of the Law of Scotland [1681, 1693]* (Edinburgh University Press 1981) I.vii.7. Hereafter 'Stair, *Institutions*'. AM Bankton, *An Institute of the Laws of Scotland in Civil Rights* (first published 1751, WM Gordon ed, Stair Society 1993-1995) vols 41-43, I.viii.21. Generally hereafter 'Bankton, *An Institute*'. GJ Bell, *Principles of the Law of Scotland* (Oliver and Boyd 1833) paras 28-29, 530. Hereafter, 'Bell, *Principles*'. Note that Erskine's language on this point indicated that he held a different position, but this has been disregarded and put down to being a mistake or referring to a very particular set of circumstances, and not reflecting the general rule: J Erskine, *An Institute of the Law of Scotland* (Edinburgh 1773) III.i.10. Hereafter 'Erskine, *An Institute*'. This was noted in: *Cantiere San Rocco SA v Clyde Shipbuilding & Engineering Co* 1923 SC (HL) 105, 118-19 (Lord Shaw); *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12.
[23] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[24] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.67. Also: HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 12-14.
[25] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.67.

each have a correlating resolutive condition – contractual obligations cannot be impossible, illegal or radically different. A party's 'fulfilment of a resolutive condition brings the obligation to an end', meaning that once one of these resolutive conditions is fulfilled, the contract is frustrated.[26]

The tacit resolutive conditions approach is very much dependent on the context of the contract, which the court would use to assess whether the contract continues to apply despite the changed circumstances. Understanding the context of the contract through construction of its terms and wording is especially important given that the necessity or obviousness of a condition is something that can be disputed by the parties.

This understanding of frustration resembles what Lord Cooper describes as 'any scientific account of the developed doctrine of frustration' where 'the subject would almost invariably be treated as one of the methods by which contractual obligations are discharged'.[27]

2.2. The understanding of frustration in modern Scots contract law

The understanding of the doctrine of frustration currently adopted by Scottish courts is the second understanding. This can be demonstrated through two cases, which were instrumental in shaping the modern definition of frustration.[28]

The first case is *James B Fraser & Co v Denny, Mott & Dickson*,[29] a Scottish appeal to the House of Lords, where the court considered whether all of the obligations contained in the given contract were frustrated. The agreement, formed in 1929, related to the trade of timber and lease of property, with the property of the respondents being leased to the appellants for use as a timber yard, and the respondents being obliged to purchase red and white pine wood exclusively from the

[26] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 4.65.
[27] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.
[28] LJ Macgregor, 'The Effect of Unexpected Circumstances in Contract Law in Scotland and Louisiana' in EC Reid and VV Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 267-68.
[29] 1943 SC 293; 1944 SC (HL) 35.

appellants. The contract contained an option for the appellants to purchase or take on a long lease of the timber yard, according to certain terms and conditions. It also provided for voluntary termination of the agreement by each party. After war broke out in 1939, the Control of Timber (No. 1) Order came into effect. This regulated trade of red and white pine wood, making it unlawful for the appellants to sell this wood to the respondents at the contractually agreed price. The appellants' stock quickly depleted, and it became impossible for them to supply the respondents with wood at all. As such, the parties' inability to perform was directly caused by the Order and the outbreak of war.

The question before the court was whether only the trading obligation in the contract was frustrated, or whether the other obligations were frustrated too. It was held that all of the contractual obligations were frustrated, based on construction of the contract – the wording of the clauses made it apparent that the contractual obligations were not intended to be severable for the purposes of frustration. After noting the flexibility of the doctrine of frustration and that its application 'must depend on the circumstances of the particular case', Lord Wright remarked that the doctrine of frustration 'is invented by the Court in order to supplement the defects of the actual contract'.[30] As such, the court would need to rely on, 'on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and, on the other hand, the events which have occurred … to decide what is the true position between the parties'.[31] The use of construction to assess the apparent intention of the parties when they created the contract, and the focus on the importance of circumstances remaining the same in order for the contract to operate effectively, are interesting aspects of this judgement. Further, it is clear that frustration is indeed being 'treated as one of the methods by which contractual obligations are discharged' rather than it being a broader consideration of the way in which to readjust the positions of the parties.[32]

[30] *James B Fraser & Co v Denny, Mott & Dickson* 1944 SC (HL) 35, 43 (Lord Wright). Note the word 'invented', which will be further discussed in: '8.3.2. The courts are well placed to apply the doctrine'.
[31] *James B Fraser & Co v Denny, Mott & Dickson* 1944 SC (HL) 35, 43 (Lord Wright).
[32] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.

The second significant case is *Davis Contractors Ltd v Fareham UDC* ,[33] an English appeal to the House of Lords. This concerned an unexpected delay in the demobilisation of troops, which meant that the appellants were unable to perform their contractual obligation to build 78 houses for the respondents within an allotted time period, due to the delayed availability of labour. The appellants pled that the unexpected delay had frustrated the contract, and that they were entitled to be paid on a *quantum meruit* basis, rather than by reference to the contractually agreed price.

What is useful to note about the case at this stage is Lord Reid and Lord Radcliffe's comments on frustration. Lord Reid took particular interest in the earlier speech of Lord Wright, focussing on the importance of 'the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made', rather than 'adding any implied term', which may not be realistic as to what the parties would have thought to be obviously or necessarily implied.[34] For Lord Reid, the question is whether the contract is, 'on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end'.[35] This places emphasis on the express terms of the contract, on the nature and context of the contract, and on the extent to which circumstances have changed.

Lord Radcliffe prefaced his comments on frustration with an acknowledgement of the many descriptions and explanations of frustration that appear in various cases and by a number of judges. He specified which of these cases he finds to be particularly useful, amongst which was *James B Fraser & Co v Denny, Mott & Dickson*.[36] Similarly to Lord Reid, Lord Radcliffe took inspiration from Lord Wright's judgement in that case, remarking that the relevant 'materials upon which the court must proceed [include]… the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have

[33] [1956] AC 696.
[34] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 720-21 (Lord Reid).
[35] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 721 (Lord Reid).
[36] 1944 SC (HL) 35.

occurred'.[37] Building on this, Lord Radcliffe provided his ultimate definition of frustration, that it:

> occurs whenever the law recognizes 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. Non haec in foedera veni. It was not this that I promised to do.[38]

The comments by Lord Reid and Lord Radcliffe on frustration provide valuable insight into their understanding of frustration in English law, and represent the rejection of an implied terms approach by all of the judges in this case. Whilst none of the judges made explicit that they were following what would in Scotland be described as a tacit resolutive conditions approach (which makes sense, given that this was an English case), this is in effect what they were doing. As such, a Scots lawyer can best understand their approach from a doctrinal perspective as being based on tacit resolutive conditions.

The comments by Lord Reid and Lord Radcliffe also convey the connection between the understanding of frustration that they adopted and Lord Wright's understanding of frustration in Scots law.[39] The connection between the Scottish and English definitions of frustration provided by the two cases continues to be important. This can be seen by considering, for example, *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners*,[40] an Outer House decision of the Court of Session that was decided two years after the English appeal to the House of Lords. Lord Guest provided an explanation of frustration in Scots law which particularly emphasised the speeches of Lords Wright, Radcliffe and Reid as described above. Referencing Lord Wright and Lord Radcliffe, Lord Guest noted that '[t]he materials

[37] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729 (Lord Radcliffe), citing *James B Fraser & Co v Denny, Mott & Dickson* 1944 SC (HL) 35, 43 (Lord Wright).
[38] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729 (Lord Radcliffe).
[39] 'The seeds of this approach were … sown in the speeches of Lords Wright and Porter in [the] earlier Scottish House of Lords case, *James B Fraser & Co v Denny, Mott & Dickson* 1944 SC (HL) 35.': LJ Macgregor, 'The Effect of Unexpected Circumstances on Contracts in Scots and Louisiana Law' in VV Palmer and EC Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 251.
[40] 1958 SLT (Notes) 12.

upon which the Court must proceed are the terms and construction of the contract read in the light of the then existing circumstances, and on the other hand the events which have occurred'.[41] He also directly adopted Lord Radcliffe's definition of frustration.[42] Further, Lord Guest noted that Lord Reid considered frustration to depend on 'whether the basis of the contract was overthrown', which is 'a question of fact to be decided on' the terms, nature and circumstances of the contract.[43] This case signifies the continuation of Scottish courts' adoption of the tacit resolutive conditions approach to frustration, which became the established modern Scots law approach as a result of the two House of Lords cases that have been discussed.[44]

2.3. Overarching challenges with the application of the doctrine of frustration

There are a number of overarching challenges with the application of the doctrine of frustration in Scots law, including its severe effect, disputability about the necessity or obviousness of a tacit resolutive condition, and parties' responsibility for the occurrence of a supervening event preventing performance.

With regard to the severe effect of frustration in modern Scots law, it has already been explained that, when a contract is frustrated, the parties are released from their obligations of future performance. This means that the parties are no longer bound to their previously agreed rights and duties relating to those obligations of future performance. Frustration may be undesirable for one of the contracting parties who would prefer enforcement of the contract as it stands, as its severe effect would prevent them from continuing to use the contract as a framework for their business activities with the other party. Indeed, Lord Justice Bingham has commented that as 'the effect of frustration is to kill the contract and discharge the parties from further

[41] *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12, 12-13. Citing: *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729 (Lord Radcliffe).
[42] *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12, 12.
[43] *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12, 12. Citing: *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 719 (Lord Reid).
[44] Further on the fact of this continued approach by Scottish courts, see: LJ Macgregor, 'The Effect of Unexpected Circumstances on Contracts in Scots and Louisiana Law' in VV Palmer and EC Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 251.

liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended'.[45]

Fortunately, rather than immediately considering whether the doctrine of frustration applies, the court will first consider whether the contract covers the risk that has materialised, for example through a force majeure clause. Such a clause may provide for remedies to be applied that do not have as severe an effect as frustration. Additionally, if it does provide for the parties to be released from their obligations of future performance, then it is at least clear that the parties intended such an outcome when they bound themselves to the contract.

If the contract does not cover the risk that has materialised, then frustration may be constituted if its requirements are met.[46] As such, it may be that the court construes an event causing a change of circumstances to frustrate the contract despite there being a *prima facie* force majeure clause, where this clause does not cover the particular risk that materialised.[47] Further, where there is no force majeure clause, there is no pre-agreed remedy that provides for a softer effect than the doctrine of frustration. These considerations pose a challenge for a contracting party seeking enforcement of the contract and wishing to avoid the severe effect of frustration.

The second challenge with the application of the doctrine of frustration is the disputability about the necessity or obviousness of a particular tacit resolutive condition. Whether there is a tacit resolutive condition that has been fulfilled which frustrates the contract depends on the construction of the express terms of the contract, the nature and context of the contract, and the extent to which circumstances have changed. Each contracting party may have different ideas about the existence and fulfilment of tacit resolutive conditions of the contract, depending on how they individually interpret these factors. This creates a challenge in relation to both parties' certainty about whether frustration applies as a result of the changed circumstances.

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[45] *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1, 8 (Bingham LJ).
[46] *Gillespie v Howden* (1885) 12 R 800. For a more recent Scottish case, refer to: *Scottish Coal Co Ltd v Trustees of Fim Timber Growth Fund III* [2009] CSOH 30, 2009 SCLR 630.
[47] *Bank Line v Capel & Co* [1919] AC 435.

The third challenge relates to a party's responsibility for the occurrence of a supervening event preventing performance. Where a party cannot perform due to their own fault, frustration does not apply. In such instances, the party is liable for material breach of contract.[48] The extent of this responsibility can be demonstrated with an example. A party who undertook to transport an oil rig using one of their two suitable barges, and specifying which barge it would use in the contract, was considered to have caused self-induced frustration when the specified barge sank before transportation of the oil rig was performed.[49] Rather than considering whether the sinking of the specified barge constituted a frustrating event, the court focussed on the fact that the party chose to make the other barge unavailable by excluding its use in the contract. The court saw this voluntary exclusion as constituting the event that prevented the party from performing their obligations as set out in the contract. This example demonstrates the high threshold for frustration that a party defending on the basis of frustration must meet.

A subsequent consideration is whether frustration applies when a supervening event is caused by a party's negligence, as opposed to their deliberate action or omission. In England, negligence seems to be treated similarly to deliberate actions or omissions, and the doctrine of frustration does not apply.[50] In Scotland, however, the answer is less immediately clear, as there is no Scottish authority on this point. There is a possibility that negligence does not prevent the application of frustration in Scots law.[51] This possibility exists as a result of the fact that the point is already controversial in English law, and that an argument of potestative conditions could potentially be made.[52] Potestative conditions exist where their 'accomplishment depends on the voluntary act of one of the parties'[53] and 'are those which it is

[48] *Maritime National Fish v Ocean Trawlers Ltd* [1935] AC 624; *Scottish Coal Co Ltd v Trustees of Fim Timber Growth Fund III* [2009] CSOH 30, 2009 SCLR 630, [26] (Lord Hodge); *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), [2019] 2 WLUK 275, [201]-[207]; HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.75.
[49] *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1. Note that this case has been described as controversial: HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.75.
[50] *Williams v Lloyd* 82 ER 95; *Taylor v Caldwell* 122 ER 309, 313-14.
[51] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) paras 4.69-4.74, 5.76.
[52] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) paras 4.69-4.74, 5.76.
[53] WM Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, W Green 1929) 276, 279. Referencing: Erskine, *An Institute*, III.iii.85.

entirely within the power of a party or the parties to fulfil'.[54] In this light, there would be a distinction between the deliberateness of a party's action or omission, and the negligence of a party to act or omit to act. On this basis, negligence may be treated differently to deliberate acts or omissions in Scots law. The lack of clarity on this point is a further challenge, both for the party seeking enforcement of the contract as it stands, as well as the one defending on the basis of frustration.

2.4. Specific challenges with the application of the doctrine of frustration

There are three key types of frustration, which reflect the different tacit resolutive conditions forming the basis of the modern Scots contract law approach to frustration: supervening impossibility, supervening illegality and radical alteration. These types of frustration, and the specific challenges associated with them, can be explained as follows.

2.4.1. Supervening impossibility

Whilst a contract in which parties agree to impossible obligations is void according to traditional doctrine, supervening impossibility occurs when the subject matter of the contract is destroyed after the contract has been formed, to make performance factually or legally impossible.[55] Supervening impossibility derives from *casus* in Roman law, which unilaterally released a party whose performance had become impossible from their obligations, without bringing all future obligations of performance to an end.[56] Supervening impossibility is comparably wider than *casus*, and also refers to *rei interitus*, which occurs when 'the subject matter of a contract is destroyed and that destruction renders performance of the contract impossible'.[57]

[54] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 4.69.
[55] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) paras 5.68, 6.2.
[56] WW Buckland, 'Casus and Frustration in Roman and Common Law' (1933) 46 Harvard Law Review 1281, 1284-85.
[57] ADM Forte, 'Impossibility: Rei Interitus', *Stair Memorial Encyclopaedia* (1995) vol 15, 885. See also: Stair, *Institutions*, I.vii.7; Bankton, *An Institute*, I.viii.21; Erskine, *An Institute*, III.i.10, III.iii.15; Bell, *Principles*, paras 28-29, 530.

Rei interitus has been expanded by the courts from covering actual destruction of property, to also covering constructive destruction.[58] This was accomplished through reasoning by analogy to equate actual destruction of property with constructive destruction of property.[59] This broadened the focus in *rei interitus* to the existence of the subject matter of the contract, with this existence being a tacit resolutive condition for the continuation of the contract. The broadening of frustration to apply to constructive destruction may be a challenge for a party seeking enforcement of the contract, as the other party has more scope to defend on the basis of frustration.

Tangible examples of events of supervening impossibility that amount to (constructive) frustration can be listed, in order to provide an overview of the scope of frustration.[60] These examples include the destruction of property by fire or overblowing by sand,[61] death or extreme ill health of a party,[62] stranding of a vessel,[63] and requisition of property.[64] However, parties should not expect the court to find that frustration has occurred solely because a similar event has previously been held to frustrate a contract. In a previous English case, the court made clear

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[58] *London and Edinburgh Shipping Co Ltd v The Admiralty* 1920 SC 309, 1920 1 SLT 222; *Tay Salmon Fisheries Co Ltd v Speedie* 1929 SC 593, 1929 SLT 484; *Mackeson v Boyd* 1942 SC 56, 1942 SLT 106; WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.36. For brief insight into the facts of the latter two cases: in *Tay Salmon Fisheries*, military bylaws were promulgated that had the effect of making it very difficult for tenants to exercise their right to fish on in the stream that they had leased for this purpose. This was due to the area of land being requisitioned by the military, and the tenants therefore having limited time to fish and being required to put up and take down their nets frequently, an arduous and lengthy process. The court drew an analogy between the extreme difficulty in exercising the fishing rights and actual destruction of subject matter as part of *rei interitus*. As such, the contract was held to be constructively frustrated, and neither party was obliged to perform future obligations. This judgement was supported by *Mackeson v Boyd*, in which the contractual obligation of the defendant to provide the plaintiff with a furnished mansion house had become extremely difficult to perform from a practical perspective, as a result of the military's requisition of the mansion house when war broke out. It was reasoned that the subject matter of the lease had been destroyed, even though the mansion house itself had not. As a result, the contract was held to be constructively frustrated.

[59] HL MacQueen, '"Coronavirus" Contract Law in Scotland' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 499.

[60] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 228-29; ADM Forte, 'Impossibility: Rei Interitus', *Stair Memorial Encyclopaedia* (1995) vol 15, 885; G Jackson, 'Building Contracts', *Stair Memorial Encyclopaedia* (reissue, 2012) 100; D Bain, C Bury and M Skilling, 'Landlord and Tenant', *Stair Memorial Encyclopaedia* (2nd reissue, 2021) 185, 203.

[61] In relation to fire, refer to: *Taylor v Caldwell* 122 ER 309; *Leitch v Edinburgh Ice and Cold Storage Co Ltd* (1900) 2 F 904, 8 SLT 26; *Cantors Properties (Scotland) Ltd v Swears & Wells Ltd* 1978 SC 310, 1980 SLT 165. In relation to sand, refer to: *Lindsay v Home* (1612) Mor 10120.

[62] WM Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, W Green 1929) 360-61.

[63] *Nickoll and Knight v Ashton, Edridge & Co* [1901] 2 KB 126, CA.

[64] *Tay Salmon Fisheries Co v Speedie* 1929 SC 593, 1929 SLT 484; *Mackeson v Boyd* 1942 SC 56, 1942 SLT 106.

that frustration would not apply to the stranding of a vessel if they believed that there was another possible method to perform.[65] Similarly to *The 'Super Servant Two'*,[66] this case illustrates the high requirements for frustration that must be met by a party defending against enforcement of the contract as it stands on the basis of frustration.

There are also events that have been deemed expressly not to amount to frustration. Such events include the loss of a licence,[67] refusal of a licence[68] and closure of a transportation route where another (far less favourable) route was available.[69] These examples demonstrate the limitations of the doctrine, as a party defending on the basis of frustration would be unsuccessful in such circumstances.

2.4.2. Supervening illegality

The second type of frustration is supervening illegality. This differs from illegality, whereby agreements to perform illegal activities are unenforceable. Supervening illegality involves performance of obligations that become illegal due to a change of circumstances, rather than being illegal from the outset. Notably, whilst earlier cases in Scotland concerned supervening impossibility, especially with regard to *rei interitus*, cases began to increasingly concern, for example, emergency legislation passed in wartime which made certain contractual obligations illegal.[70] This gave way to supervening illegality in the doctrine of frustration, as '[i]t is plain that a contract to do what it has become illegal to do cannot be legally enforceable [and t]here cannot be default in not doing what the law forbids to be done'.[71]

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[65] *Nickoll and Knight v Ashton, Edridge & Co* [1901] 2 KB 126, CA.
[66] *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1.
[67] *Donald v Leitch* (1886) 13 R 790; *Hart's Trustees v Arrol* (1903) 6 F 36.
[68] *Howden Ltd v Irving* (1950) 66 Sh Ct Rep 107, 114; *Union Totalisator Co v Scott* 1951 SLT (Notes) 5.
[69] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL.
[70] *Cantiere San Rocco SA v Clyde Shipbuilding & Engineering Co* 1923 SC (HL) 105 is the prime example of supervening illegality in Scots law, indeed relating to emergency legislation, and can be briefly explained for background interest as follows. The pursuers were an Austrian company that agreed in a contract with the respondents, a Scottish company, that the respondents would build a number of marine engines for them, in return for payment in instalments. After the outbreak of war, which the parties had not provided for in their contract, only one instalment had been paid and the respondents had not begun work on the engines. The war meant that performance of the contractual obligations became illegal under common law. The pursuers later sought repayment of the first instalment. The House of Lords held that the contract was frustrated, and the parties were released from obligations of future performance. The pre-paid instalment fell to be repaid under the equitable doctrine of the *condictio causa data causa non secuta*.
[71] *James B Fraser & Co v Denny, Mott & Dickson* 1944 SC (HL) 35, 272 (Lord Macmillan).

The challenge with supervening illegality is that parties cannot readily anticipate which activities will become illegal in the future, especially if it is the result of an acute change of circumstances such as the outbreak of war. It is also not something that the parties can readily avoid, even with a force majeure clause. This is because the particular activities that become illegal during wartime are generally decided upon at a governmental level, and is something that the parties have no control over.

2.4.3. Supervening radical alteration

The third type of frustration, supervening radical alteration, is also described as commercial frustration.[72] This entails that 'there can be no obligation to perform in circumstances so altered that performance, if given, would in substance be the performance not of the original contract, but of a different contract, and one to which the parties have not consented'.[73] Supervening radical alteration is useful where cases fall under neither supervening impossibility nor supervening illegality, yet a change of circumstances nonetheless affects performance to a similarly critical extent.

Supervening radical alteration may bring ideas of economic difficulty to mind. However, what may seem 'commercially impossible' to a party (for example, an unexpected, sharp increase in the costs required for performance, which they are unprepared or unable to pay) does not mean that the contract is frustrated.[74] This is because such a party would mean 'that it will be more profitable to … pay damages than to go on with their contract', and frustration should not be used as a means to avoid paying damages where they are due.[75] Equally, if a party realises that they have entered into what could be described as a 'bad bargain', then they cannot use frustration to escape their obligations.[76]

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[72] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.71.
[73] WM Gloag and RC Henderson, *The Law of Scotland* (HL MacQueen, RD Mackay and C Anderson eds, 15th edn, W Green 2022) para 11.16.
[74] *Hong Kong and Whampoa Dock Co v Netherton Shipping Co Ltd* 1909 SC 34; ADM Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom' [1986] Juridical Review 1.
[75] *Hong Kong and Whampoa Dock Co v Netherton Shipping Co Ltd* 1909 SC 34, 40 (Lord MacLaren).
[76] 'The unexpected turn of events which rendered the contract more onerous than had been contemplated was not a ground for allowing the contractors to recover upon the basis of quantum

Another potential form of supervening radical alteration that comes to mind is delay. However, delay is unlikely to be a successful ground for frustration. Previously, a court found frustration not to apply as a result of delay, even where that delay was caused by the unlawful detention of property that was required for the party to perform their obligations.[77] Similarly, the case of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[78] held that frustration of contract as a result of delay is not possible when a non-performing party has another possible means of performing that they do not use, even in cases that this alternative method is highly commercially unfavourable.[79] Very recently, it was held that ‘’. Essentially, there is a difference between a change of circumstances making ‘performance of the contractual obligations more expensive or onerous or [causing] hardship’, and a change of circumstances making ‘performance impossible or fundamentally different from what, on an objective construction of the contract, the parties contemplated when they contracted’.[80]

The high threshold for radical alteration is a challenge for a party defending on the basis of frustration. In recent times, delays and economic difficulties have become a particularly acute problem in global commerce, making the high threshold an especially significant challenge.[81]

2.5. Interim conclusion

There are two different understandings of frustration in Scots contract law that have developed. The first concerns the notion of the court’s ability to readjust the parties’ positions. The second understanding, relating to tacit resolutive conditions as a

meruit’: *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12, 12 (Lord Guest).
[77] *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119; *The Sea Angel* [2007] EWCA Civ 547.
[78] [1962] AC 93, [1961] 2 All ER 179, HL.
[79] Indicating similar, high requirements for frustration as in the cases of: *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1; *Nickoll and Knight v Ashton, Edridge & Co* [1901] 2 KB 126, CA.
[80] *Robert Purvis Plant Hire Ltd v Farquhar Brewster* [2009] CSOH 28, [14] (Lord Hodge).
[81] PO Gourinchas, ‘Global Economic Growth Slows Amid Gloomy and More Uncertain Outlook’ (*IMF Blog*, 26 July 2022) <blogs.imf.org/2022/07/26/global-economic-growth-slows-amid-gloomy-and-more-uncertain-outlook/> accessed 24 August 2022.

mechanism for discharging contractual obligations, is the one that is adopted modern Scots contract law.

There are several difficulties and limitations of the doctrine of frustration as it is understood in modern Scots contract law. The primary challenge is the severity of frustration; parties are no longer bound by the contract and are released from their obligations of future performance. If the severity of the effect of frustration is sought to be avoided by a party, inserting a contractual clause to cover possible risks that may materialise is paramount. This would allow them to enforce the contract as it stands in court, if the other party does not perform because of a change of circumstances and renegotiation between the parties is unsuccessful. The non-performing party may, however, use frustration as a basis for their defence, and therefore desire the severe effect of frustration. They would therefore dispute the meaning and application of such a clause.

In these situations, both parties may encounter several hurdles. Overarching examples of these would be the disputability about the necessity or obviousness of a tacit resolutive condition, that the non-performing party cannot have caused frustration through their deliberate actions or omissions, and the lack of clarity in Scots law about whether a party's negligence is treated in the same way as deliberate actions and omissions. There are also specific hurdles for each type of frustration. In some instances, the threshold for frustration is very high, in others the doctrine has been broadened, and contracting parties cannot gain much clarity by reviewing previous court decisions because they are very case specific or even contradictory.

Consequently, the doctrine of frustration is ineffective or undesirable in a number of situations. However, it is one of the few established mechanisms for addressing non-performance following changed circumstances in modern Scots contract law. As such, the question arises as to whether a different mechanism can be identified that can fill these gaps. The answer may come from considering the two understandings of frustration together. Whilst these have different approaches to frustration, both are based on the *rebus sic stantibus* doctrine. In order to reconcile the two understandings, it may be useful to focus on this shared component.

The author would suggest that the first understanding of frustration is a broad, underlying concept in Scots contract law, in which Scottish courts have the power to readjust the positions of the parties to address non-performance following a change of circumstances. The second understanding of frustration, being based on tacit resolutive conditions, aligns the *rebus sic stantibus* doctrine with Scots law principles, and is one specific manifestation of the broader, underlying concept embodied by the historical understanding of frustration. Consequently, whilst both concepts use the word 'frustration' as a descriptor, it may be useful to think of the historical understanding as 'the courts' power of readjustment' instead of 'frustration', in order to easier distinguish it from the second understanding of frustration. This allows for reconciling the two concepts. It also leaves space for other legal mechanisms that are specific manifestations of the courts' power of readjustment, which can fill the gaps of frustration whilst fitting harmoniously alongside it in the Scottish legal system. What such a mechanism might look like is considered later in this thesis, when the doctrine of equitable adjustment is proposed and discussed. Beforehand, however, the mechanism of force majeure clauses is discussed, to help complete the overview of the currently established, frequently applied mechanisms in Scots contract law, which address non-performance resulting from changes of circumstances.

3. Force Majeure Clauses

As with the doctrine of frustration, there are a number of elements to be considered in order to understand the role of force majeure clauses in Scots contract law more deeply. Various cases, both Scottish and English,[82] that consider these elements of force majeure clauses will be discussed, in order to draw conclusions about the difficulties and limitations of force majeure clauses as a mechanism to address non-performance resulting from changed circumstances.

3.1. Origin and development

3.1.1. Origin

The phrase 'force majeure' is described by McBryde to have come from French law; more specifically art 1148 of the Napoleonic Code.[83] McBryde has linked usage of this phrase in English and Scottish contractual clauses addressing supervening events to the case of *Matsoukis v Priestman & Co*.[84] Earlier cases discuss contractual clauses that refer to an 'Act of God' or the Latin 'vis major', rather than 'force majeure'.[85] Judicial analysis has mentioned the phrase 'force majeure', but to refer to frustrating circumstances generally, without these correlating to a particular contractual clause.[86] The apparent ambiguity and interchangeability of these phrases may reflect the fact that the phrase 'force majeure' does not have 'any technical meaning' in Scots law.[87]

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[82] McBryde frequently relies on English cases in his discussion of force majeure clauses, and they are useful to aid in understanding the likely position of Scots law in a number of matters: WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) paras 21.13-21.18.
[83] *Matsoukis v Priestman & Co* [1915] 1 KB 681, 685-86 (Bailhache J); WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.14. 'No damages shall be due when, as the result of superior force [force majeure] or accident, the debtor has been prevented from delivering or doing what he has bound himself to deliver or to do, or has done what was prohibited', now art 1218 since the reform of the French civil code in 2016.
[84] [1915] 1 KB 681, 685-86 (Bailhache J).
[85] *Nichols v Marsland* (1876) 2 Ex D 1; *Nugent v Smith* (1876) 1 CPD 423.
[86] *The Boucau* [1909] P 163.
[87] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.15.

3.1.2. Development

Contractual clauses covering risks that may potentially materialise are now commonly referred to as force majeure clauses.[88] They detail the parties' agreement about what will occur, including what the legal outcomes will be, should supervening events affect their ability to perform their obligations. Force majeure clauses operate by establishing that there is no breach of contract if a party's obligations cannot be performed for at least one of the reasons that it sets out, rather than excusing the non-performing party from their breach by excluding or limiting their liability.[89] A caveat to force majeure clauses is that they cannot cover illegal activities.[90]

Force majeure clauses have become routine in commercial contracts.[91] In Scotland, this routineness is especially true for maritime contracts and those relating to the oil industry.[92] Force majeure clauses being commonplace in commercial contracting seems to have come about as a response to the limitations and difficulties of the doctrine of frustration; they present a means by which parties can pre-emptively avoid such limitations and difficulties, as the doctrine of frustration cannot apply to supervening events already addressed in a contract.[93] Indeed, as Lord Simon remarked, '[t]here can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance, notwithstanding that the supervening event may occur'.[94]

The place of force majeure clauses in commercial contracting may have been further cemented more recently, as a result of Covid-19, after which increased focus has been applied to including (effective) force majeure clauses in contracts. Indeed, this

[88] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.13.
[89] GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12.022.
[90] 'An express provision cannot exclude frustration by supervening illegality if this would be contrary to public policy': WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.18. Relying on: *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260.
[91] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.13.
[92] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.15; E Hondius and C Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press 2011) 171.
[93] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.13; GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12.002.
[94] *Joseph Constantine SS Line Ltd v Imperial Smelting Co Ltd* [1942] AC 154, 163 (Lord Simon); GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12.002.

was placed under the spotlight by a great many legal practitioners, whose advice to contracting parties in light of the pandemic heavily focussed on the value of force majeure clauses to aid in navigating challenges of non-performance resulting from changed circumstances.[95]

3.2. Formulation of the clause

Unlike the doctrine of frustration, force majeure clauses are the product of the parties' agreement. As such, a contract may not necessarily include a force majeure clause, especially if it is an oral contract or one concluded by the parties' conduct.[96] When force majeure clauses are included, because they are the product of the parties' agreement, they can be tailored to the nature of the contract, the parties' contractual relationship and the parties' overarching objectives. For example, if parties anticipate a particular change of circumstances, they can ensure that the force majeure clause allocates the risk of it materialising between the parties. That said, where standardised contracts are used by parties, as is common in construction and consumer contracts, there may be limited or no opportunity to tailor the clause. For example, a consumer purchasing a train ticket has limited or no opportunity to negotiate with the provider about what the legal outcomes will be if certain supervening events occur. Nonetheless, standardised clauses will usually be reflective of the typical changes of circumstances faced by parties in that industry or contractual relationship. For example, standardised force majeure clauses for construction contracts apply to delay in performance caused by labour or material shortages, as these are common experiences in the construction industry. Further, force majeure clauses contained in consumer contracts and standard form contracts

[95] A Nelson, 'Law and Regulation of Force Majeure in Scotland' (*CMS Expert Guides*, 16 March 2020) <cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/scotland> accessed 15 April 2022; E Jones, 'Will Covid-19 Trigger a Force Majeure Clause?' (*Pinsent Masons Out-Law Guides*, 26 March 2020) <www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause> accessed 15 April 2022; D Gourlay, 'Covid-19: A Force Majeure Event?' (*MacRoberts Knowledge Hub*, 17 April 2020) <www.macroberts.com/knowledge-hub/covid-19/covid-19-a-force-majeure-event/> accessed 15 April 2022; S Goldie, J Oyston and R Campbell, 'Force Majeure and Frustration' (1 May 2020) <brodies.com/insights/commercial-contracts-and-outsourcing/force-majeure-and-frustration/> accessed 15 April 2022; S Harrison, 'Five Things to Know about Force Majeure and Contract Frustration' (*Burness Paull Insights*, 19 October 2020) <www.burnesspaull.com/insights-and-events/news/five-things-to-know-about-force-majeure-and-contract-frustration> accessed 15 April 2022.

[96] Such contracts are recognised in Scots law, as writing is not required for the formation of a contract except in certain cases: Requirements of Writing (Scotland) Act 1995, s 1(1).

are ‘subject to a “fair and reasonable” test under s.17 of the Unfair Contract Terms Act 1977, so far as they enable a party to render no performance or substantially different performance from that which the consumer or customer reasonably expected’.[97]

Further on the formulation of force majeure clauses, they may be ‘finite’, providing specific examples of what risks they do or do not cover, or ‘non-exhaustive’, being phrased in an open-ended way. Non-exhaustive clauses may end with phrases similar to ‘and other events beyond the reasonable control of the impacted party’ following a list of specific examples.[98]

3.3. Interpretation of contracts and force majeure clauses

When examining a force majeure clause, the court will take care to interpret which risks the parties apparently intended the clause to cover, ensuring that it gives primacy to the parties’ intentions as they were expressed in the contract at the time.[99] This is in line with the process of interpretation in Scots law, and the five conditions required for a court to imply a term in a contract.[100] Further, a court can only ‘rectify an agreement if it is satisfied that the agreement fails to express accurately the common intention of the parties when it was made’, having ‘regard to all the relevant evidence’.[101]

In that light, the formulation of a force majeure clause is an important consideration in the court’s interpretation.[102] Whether a clause is finite or non-exhaustive may

[97] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.17. Note that the Unfair Terms in Consumer Contracts Regulations 1999 are now replaced by the Consumer Rights Act 2015 pt 2.
[98] Practical Law Commercial Transactions, ‘Force Majeure Clauses: Key Issues’ (2022) 5-6.
[99] Practical Law Commercial Transactions, ‘Force Majeure Clauses: Key Issues’ (2022) 6.
[100] Namely that ‘(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “ it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract’: *BP Refinery (Westernport) Pty v Shire of Hastings* (1977) 180 CLR 266; *Marks & Spencer v BNP Paribus Securities Services* [2016] AC 742, [2015] 3 WLR 1843. Relied on in the recent Court of Session case: *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, [2022] 7 WLUK 290.
[101] *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, [2022] 7 WLUK 290. Referencing: Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8(1)(a).
[102] McBryde points to a number of existing materials with guidance on this: WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.16. This includes: BJ Cartoon, ‘Drafting an

indicate a difference in the apparent intentions of the parties. A finite clause may indicate an intended narrowness of scope, and a materialised risk that is not a listed example in the clause may seemingly not have been intended by the parties to be covered by the clause. A non-exhaustive clause may demonstrate the parties' intention for the clause to have a wider scope. As a result, the court may accord broader meanings to the clause's wording, or be more likely to determine that the clause applies to a risk that materialises which was not listed as an example. In either case, the courts will employ a narrow interpretation of force majeure clauses where the literal meaning of a word would result in the clause covering a supervening event that they do not believe could have been in the contemplation of the parties at the time.[103] As such, the objective novelty of a supervening event influences whether the court can interpret it to have been in the contemplation of the parties at the time.

3.4. Covid-19 as a case study of interpretation of force majeure clauses

The Covid-19 pandemic provides a useful case study for understanding how different formulations of force majeure clauses, included either before or after the occurrence of a novel supervening event, would be interpreted by the courts.

3.4.1. Contracts formed prior

For force majeure clauses in contracts formed before the Covid-19 pandemic, where a pandemic is a listed example in the clause, there is a chance that a court may not interpret the Covid-19 pandemic as being covered by the clause. Even if the parties could anticipate the possibility of the disease itself, the unprecedented scale of Covid-19 and its resultant novelty in this regard may entail that the court does not find that the parties had intended the clause to apply to it. After all, a similarly narrow

Acceptable Force Majeure Clause' [1978] Journal of Business Law 230; D Yates, 'Drafting Force Majeure and Related Clauses' (1990) 3 Journal of Contract Law 186; M Furmston, 'Drafting of Force Majeure Clauses— Some General Guidelines' in E McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995); A Berg, 'The Detailed Drafting of a Force Majeure Clause' in E McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995); E McKendrick and M Parker, 'Drafting Force Majeure Clauses: Some Practical Considerations' (2000) 11 International Company and Commercial Law Review 132.

[103] GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12.009.

interpretation was previously adopted in a decision of the Probate, Divorce and Admiralty Division:[104] *The Penelope*.[105]

In this case, the court interpreted the word 'strike' in the parties' force majeure clause as being inapplicable to the general UK-wide strike of 1926.[106] The reasoning for this was that 'the strike provisions in the charter contemplated an interruption of work due to a local withdrawal of labour and not the total impossibility of any export of coal for upwards of eight months'.[107] As such, the force majeure clause was held not to cover the actual risk that materialised.

Additionally, a recent English case held that 'a force majeure clause in a contract for the sale of a vessel for the purpose of its being scrapped at an Indian demolition yard was not triggered by temporary restrictions imposed by the Indian government in response to the COVID-19 pandemic', because these restrictions caused delay rather than impossibility.[108]

Considering these cases, there is a chance that courts will narrowly interpret 'pandemic' in a force majeure clause.

Such narrowness of interpretation was, however, not present in a recent Scottish case, which found that a force majeure clause stating that acts:

> outside the reasonable control of either party including without limitation … chemical, biological … contamination; the acts of any public authority or imposition of any embargo, sanction or similar action … and other difficulties including failures of suppliers

[104] Its modern equivalent being a decision of the Queen's Bench Division of the High Court of Justice: 'Probate, Divorce and Admiralty Division', *Oxford Dictionary of Law* (10th edn, Oxford University Press 2022).
[105] [1928] P 180. This was tentatively approved in: *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 754.
[106] GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12.009.
[107] *The Penelope* [1928] P 180.
[108] *NKD Maritime Ltd v Bart Maritime (No 2) Inc* [2022] EWHC 1615 (Comm), [2022] 6 WLUK 283.

applied to the Covid-19 pandemic.[109] Though pandemics were not specifically referred to, events of a similar nature were listed, particularly with reference to biological contamination and acts of public authorities. By finding the clause to apply to the Covid-19 pandemic, a narrow interpretation of the force majeure clause as in *The Penelope* is not apparent.

A recent English case, *European Professional Club Rugby v RDA Television LLP*, also does not indicate a narrow interpretation.[110] The case considered a force majeure clause where an epidemic (rather than a pandemic) was a listed example, and the clause also applied to 'any circumstances beyond the reasonable control of a party affecting the performance by that party'. The contract was made on 11 May 2018, clearly prior to the outbreak of Covid-19. After the occurrence of the Covid-19 pandemic, one of the parties failed to perform, and a dispute arose about whether the force majeure clause could apply. The court determined that the word 'epidemic' referred also to pandemics because:

> in the context of use of that word in the definition of a Force Majeure Event and in any event because the Pandemic was a circumstance "… beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement …".

The court further found that the phrase 'any circumstances beyond the reasonable control of a party affecting the performance by that party' was all-encompassing. Following this interpretation of the force majeure clause, the court found that it indeed applied to the Covid-19 pandemic. This case interestingly demonstrates a broad interpretation of 'epidemic' as a listed example, which seemingly contradicts *The Penelope*,[111] a decision by a court of equivalent hierarchy in the English system, as well as *NKD Maritime Ltd*,[112] also a Queen's Bench decision.

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[109] *Billy Graham Evangelistic Association v Scottish Event Campus Ltd* 2021 SLT (Sh Ct) 185, [2021] 2 WLUK 227.
[110] [2022] EWHC 50 (Comm), [2022] 1 WLUK 285. Note that an appeal is currently outstanding for this case.
[111] *The Penelope* [1928] P 180.
[112] *NKD Maritime Ltd v Bart Maritime (No 2) Inc* [2022] EWHC 1615 (Comm), [2022] 6 WLUK 283.

A recent case in Scotland indicates a broad interpretation of a force majeure clause.[113] It concerned a force majeure clause contained in a contract formed before the Covid-19 pandemic, which did not list any examples of risks covered. Rather, the clause referred to 'unavoidable and extraordinary circumstances', constituting 'a situation beyond our control, the consequences of which could not have been avoided even if all reasonable measures had been taken'.[114] In the case, a local council contracted with NST for NST to provide a school trip in return for payment, which was made in advance of the scheduled trip. When Covid-19 broke out, the council contacted NST to discuss potentially cancelling the trip, and NST later informed the council that they were indeed cancelling the trip. The council claimed a refund for the amount paid, which NST refused, arguing that the council had made the cancellation and was not entitled to a refund as per the cancellation and force majeure clause of their contract. The judge, Sheriff Cameron, interpreted this clause broadly, and read it:

> as a contractual embodiment of the rule laid down by the House of Lords in the classic Scottish case of *Cantiere San Rocco v Clyde Shipbuilding & Engineering Co* 1923 SC (HL) 105, that the economic imbalances left by the non-completion of a frustrated contract were to be equitably redressed by way of the law of unjustified enrichment.[115]

It was held that, on this basis, the council was entitled to a refund.

Overall, there seems to be a general trend towards a less strict approach to the interpretation of force majeure clauses. However, some cases conflict each other in terms of the narrowness of approach adopted, and therefore harder conclusions can only be drawn from analysing a larger number of cases, which is currently not possible.[116]

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[113] *Dumfries and Galloway Council v NST Travel Group Ltd* [2021] 4 WLUK 156, 2021 GWD 13-186.
[114] *Dumfries and Galloway Council v NST Travel Group Ltd* [2021] 4 WLUK 156, 2021 GWD 13-186.
[115] HL MacQueen, 'The Covid Pandemic 2020-2022 and Scottish Contract Law' (*Edinburgh Private Law Blog*, 1 February 2022) <blogs.ed.ac.uk/private-law/2022/02/01/the-covid-pandemic-2020-2022-and-scottish-contract-law/> accessed 15 August 2022; HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 6.
[116] 'Academic speculation that there might be a rash of cases about the impact of Covid and lockdown on the performance – or non-performance – of contracts has not yet been borne out': HL MacQueen,

3.4.2. Contracts formed after

For force majeure clauses in contracts formed after the Covid-19 pandemic, where a pandemic is a listed example in the clause, the Covid-19 pandemic may be interpreted as falling within the scope of the clause. This is because the now-gained knowledge of the likelihood and significant effects of pandemics means that they are foreseeable. Further, the widespread understanding of the Covid-19 pandemic's detrimental commercial impact means that courts can expect commercial parties to have intended their force majeure clause to apply to other pandemics, even those equally severe in effect and scale.

However, where there is a finite clause that does not list pandemics, or a clause that refers to unforeseeable circumstances, future pandemics may not be interpreted as being covered by the clause. Pandemics are no longer unforeseeable, and commercial parties could be expected to anticipate similar events to Covid-19 arising in future. Thus, these formulations may cause a court to interpret the parties' intention as being that pandemics are not covered by the clause. Overall, changes in circumstances that are widely experienced or experienced by the particular parties in a given case may affect the way in which court interprets the force majeure clause because they provide relevant evidence of the parties' apparent intentions when drafting the clause.[117]

3.5. Interim conclusion

There are a number of important points that can be made about force majeure clauses. As they are the product of the parties' agreement, they might not be included in contracts, especially those that are oral or concluded by the parties' conduct. Where such clauses are included, their wording and formulation are of direct importance to their interpretation by the court, and therefore to their effectiveness in different circumstances. This potentially makes case law difficult to

'The Covid Pandemic 2020-2022 and Scottish Contract Law' (*Edinburgh Private Law Blog*, 1 February 2022) <blogs.ed.ac.uk/private-law/2022/02/01/the-covid-pandemic-2020-2022-and-scottish-contract-law/> accessed 15 August 2022.

[117] *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, [2022] 7 WLUK 290.

rely on for parties, as previous decisions are very much case-specific and dependent upon the particular formulation of the force majeure clause. Further, the courts seem to adopt a highly narrow approach to interpretation in some cases, and a broader one in others. Whilst the recent cases considering the Covid-19 pandemic generally indicate a broader interpretation, these cases are few in number, so may not reflect the approach that would be taken in future cases with similar facts, and may also not reflect the approach that would be taken in those concerning other changes of circumstances.

4. Between Frustration and Force Majeure – A Gap to be Bridged?

This chapter will reflect on the two previous chapters on frustration and force majeure clauses. From this, it will make an evaluation of the wider legal landscape of Scots contract law, and determine that the established mechanisms available to parties do not suitably address non-performance resulting from changed circumstances. As such, there is a gap in these mechanisms. This chapter will consider whether or not this gap is negligible, and therefore whether or not a response is required. Subsequently, the chapter will consider what the ideal nature of such a response would be.

4.1. Reflecting on the previous chapters

The two previous chapters have discussed the doctrine of frustration and force majeure clauses in Scots contract law, as mechanisms to address non-performance of contractual obligations following a change of circumstances. Force majeure clauses are the product of the parties' agreement and detail what will occur, including what the legal outcomes will be, should supervening events affect a party's ability to perform their obligations. Where there is no (applicable) force majeure clause in parties' contracts, the doctrine of frustration may apply, if the requirements are met.

On this background, the way in which these mechanisms are applied in practice can be summarised. When a change of circumstances occurs which causes one party to not perform their contractual obligations, the parties may have a force majeure clause in their contract. If the parties are in agreement that the clause covers the risk that has materialised, they will follow the procedure and apply the remedies provided for. If they disagree about the meaning and application of the force majeure clause, or where there is no force majeure clause, they will often attempt to renegotiate to come to an agreement about their obligations and what the legal outcomes will be. Only if this fails will the parties go to court. They will either argue a different meaning and application of the force majeure clause, or one party will seek enforcement of

the contract as it stands, through specific implement or payment of damages for breach of contract, whilst the other defends on the basis of frustration.

When parties go to court, the limitations and difficulties of force majeure clauses and frustration identified in the previous two chapters become important. These limitations and difficulties create a gap in Scots contract law, which contracting parties in a number of situations could fall into.[118]

It seems that the limitations and difficulties of force majeure clauses exist because the clauses are the product of the parties' agreement and an *ex-ante* mechanism, meaning that parties need to have 1) included a force majeure clause in their contract, 2) anticipated the risk that has materialised and 3) have an effectively formulated force majeure clause that clearly allocates that risk between the parties, which the court will interpret in the intended way, if a party attempts to argue that the risk is covered by the force majeure clause in court.

Unlike force majeure clauses, the doctrine of frustration could be described as an *ex-post* mechanism. Where there is no applicable force majeure clause that allocates the risk that has materialised, frustration applies automatically upon its requirements being met. However, these requirements have a high threshold, preventing frustration from applying to a number of situations. The reason for this high threshold is that 'the effect of frustration is to kill the contract and discharge the parties from further liability under it'.[119] This identifies another key limitation of the doctrine, its severe effect, which may not be desired by the party seeking enforcement of the contract as it stands, either through specific implement or damages.

Whilst the Gap exists, it is important to identify its significance. If it appears to be negligible, then no response to the Gap is required. If this is not the case, then the nature of the response that should be made can be examined. In order to evaluate this, a potential argument for the negligibility of the gap is made in the section below, and then refuted by the author with a counterargument.

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[118] This will be described going forwards as the 'Gap'.
[119] *J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1, 8 (Bingham LJ).

4.2. A negligible gap?

4.2.1. Arguing that 'the Gap is negligible'

In theory, the fact that there are limitations and difficulties associated with mechanisms used to overcome legal hurdles does not necessarily mean that a new response is actively required to fill the space between them.

Firstly, the Gap only becomes relevant if renegotiation between the parties has failed, and they have commenced legal proceedings. This reduces the significance of the Gap already.

Secondly, it could be argued that force majeure clauses are already a sufficient means of closing the Gap. The reasoning behind this second argument is as follows. Through the inclusion of force majeure clauses in a contract, parties can safeguard against the severe effect of the doctrine of frustration, and avoid payment of damages for breach of contract. This is straightforward, as it merely involves listing examples of events or types of events that fall within the scope of the force majeure clause, and details about what the legal outcomes will be if such events were to occur.[120] The extent to which parties make use of this mechanism (or, in other words, the extent to which they choose to close the Gap) is in their hands, given that the force majeure clause is the product of their agreement.[121]

The importance of drafting effective force majeure clauses has also come to the forefront of legal practitioners' published advice in recent times, following the occurrence of the Covid-19 pandemic.[122] As such, parties are in a better position to

[120] Refer to: '3.2. Formulation of the clause'.
[121] Refer to: '3.2. Formulation of the clause'.
[122] Refer to: '3.1.2. Development'. Relying on: A Nelson, 'Law and Regulation of Force Majeure in Scotland' (*CMS Expert Guides*, 16 March 2020) <cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/scotland> accessed 15 April 2022; E Jones, 'Will Covid-19 Trigger a Force Majeure Clause?' (*Pinsent Masons Out-Law Guides*, 26 March 2020) <www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause> accessed 15 April 2022; D Gourlay, 'Covid-19: A Force Majeure Event?' (*MacRoberts Knowledge Hub*, 17 April 2020) <www.macroberts.com/knowledge-hub/covid-19/covid-19-a-force-majeure-event/> accessed 15 April 2022; S Goldie, J Oyston and R Campbell, 'Force Majeure and Frustration' (1 May 2020) <brodies.com/insights/commercial-contracts-and-outsourcing/force-majeure-and-frustration/> accessed 15 April 2022; S Harrison, 'Five Things to Know about Force Majeure and Contract Frustration' (*Burness Paull Insights*, 19 October 2020)

know the importance of including effective force majeure clauses into their contract. As part of this, parties can carefully take both Scots and English case law into consideration when formulating the clause, so that, if they ever need to litigate in relation to the meaning and application of the clause, accurately express their intentions to the court.[123]

If parties make full use of a force majeure clause in these ways, it should provide them with a clear picture of the situations in which non-performance resulting from changed circumstances does not constitute a breach of contract. This should ensure that the parties avoid disagreement on the meaning and application of the force majeure clause, so that the legal outcomes are immediately clear to both of them. It may also ensure that, if the clause is not applicable in the circumstances, the parties can use the force majeure clause as a guide to renegotiate their obligations. Facilitation of parties' renegotiation reduces the need for litigation. As such, maximising the effectiveness of the force majeure clause in parties' contracts can significantly decrease the Gap.

If the force majeure clause mechanism is inapplicable in the circumstances, the doctrine of frustration may apply. When the doctrine applies, its severe effect is actually beneficial, given that the obligations cannot be fulfilled in the manner agreed to in the contract in the changed circumstances. If the parties have reached this stage, being unable to successfully renegotiate and having commenced legal proceedings, it is clear that the party using frustration as a defence finds the contract no longer suitable to support the parties' relationship in the changed circumstances. Frustration therefore provides an opportunity for the parties to start afresh, and form a new, better fitting contract as a framework for their relationship. Alternatively, they can choose not to recontract with each other, if that is their preference. This choice is better than the parties being stuck with an unsuitable contract that hinders their business activities, which is how the party using the defence of frustration will see

<www.burnesspaull.com/insights-and-events/news/five-things-to-know-about-force-majeure-and-contract-frustration> accessed 15 April 2022.

[123] Given that McBryde refers to both Scottish and English law cases: WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) paras 21.13-21.18.

it.[124] These considerations make the doctrine of frustration a beneficial mechanism in Scots law where renegotiation between the parties has failed, and there is no force majeure clause that applies in the circumstances. Further, where the requirements of the doctrine of frustration are not met, the contract can be enforced, either through specific implement, where this is possible, or otherwise through payment of damages for breach of contract.

Considering these established legal mechanisms together, they present an opportunity for parties to strike a good balance between 1) having autonomy in identifying possible risks that may materialise and distributing these between the parties in a force majeure clause, 2) being released from obligations of future performance where the high threshold for frustration is met, and 3) enforcement of the contract through specific implement or payment of damages. As a result, this argument suggests that the Gap is negligible and only becomes relevant to contracting parties when they are unable to renegotiate, and they commence legal proceedings.

4.2.2. Refuting the 'the Gap is negligible' argument

The argument outlined in the subsection above may seem persuasive. However, there are a number of factors that it does not sufficiently engage with, or even touch upon at all. The author provides a response below, in order to refute the argument that the Gap is negligible.

Firstly, successful renegotiation between parties cannot be counted on. This is evidenced by the recent Covid-19 cases that were examined in the previous chapter, where the parties disagreed on the meaning and application of the force majeure clause, and where one party sought to enforce the contract whilst the other defended on the basis of frustration.[125] As a result, the problem of the Gap is very much a

[124] The importance of certainty and efficiency in business transaction is referred to in: Scottish Law Commission, *Review of Contract Law: Discussion Paper on Formation of Contract* (Scot Law Com 154, 2012) 6. Further, McBryde discussed the importance of the court's ability to intervene in contracts that are no longer fitting to the parties' relationship: WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 10-11.
[125] Refer above to: '3.4.1. Contracts formed prior'.

tangible one, and of ‘real world’ importance. This fact pleads for a greater change than simply relying on successful renegotiation.

Secondly, the idea that parties can choose to maximise force majeure clauses is oversimplified. Whilst including and mindfully formulating force majeure clauses in contracts should be encouraged for the benefits that they bring to the parties, certain factors mean that this cannot sufficiently combat the Gap. As has previously been explained, certain contractual relationships are more likely to make use of standardised contracts, in which case tailoring the force majeure clause is not always possible.[126] In cases where it is possible, it is still difficult for the parties to anticipate all of the potential risks that may materialise, meaning that the force majeure clause may not cover the change of circumstances that they actually experience. Additionally, even if the parties did anticipate the risk that materialised, a court may not believe that the clause was intended by the parties to cover the risk, depending on the court’s process of interpretation, and the factors that they take into account as part of it.

A further problematic aspect of the argument that the Gap is negligible is that, if tailoring force majeure clauses became common practice as suggested, case law would become less relevant to parties seeking to draft an effective force majeure clause. This is because the force majeure clauses analysed in cases would become very specific to one set of contracting parties, their circumstances, and the context and nature of the contractual relationship, which are factors that the court would take into account when making their final decision. This would make decisions on the meaning and application of force majeure clauses very specific to the particular formulation of the force majeure clause and the circumstances of the parties. This may prevent future parties from using those cases to inform them about the way in which they can formulate a force majeure clause so that it would be interpreted in a predictable way by a court, if they were ever to similarly litigate about their force majeure clause’s meaning and application. This is something that the argument did not take into account.

[126] Such as construction and consumer contracts, refer to: ‘3.1.2. Development’.

Following on from this, the recent focus on the importance of effective force majeure clauses surely indicates that legal practitioners and contracting parties are seeking to avoid the limitations and difficulties of the established mechanisms in Scots contract law. A better framing of the idea of 'maximising force majeure clauses' would therefore be that parties are doing the best that they can with the tools that are available to them to battle the Gap.[127] In this light, the value of force majeure clauses cannot be assessed purely on their frequency of use or the increased focus on placed on them.

When considering the established mechanisms available in Scots contract law when there is no applicable force majeure clause, the limitations and difficulties of the doctrine of frustration can be reiterated. Whilst the doctrine can be an effective mechanism in the right situations, this is only where its requirements are met and where its severe effect would be advantageous in the parties' circumstances. There is nothing that can feasibly be done to alleviate these limitations and difficulties, as the requirements of the doctrine are intentionally high to balance out the doctrine's severe effect.[128]

When the requirements of frustration are not met, enforcement of the contract as it stands may entail payment of damages for breach of contract. However, it may be difficult for the party seeking enforcement of the contract to calculate the value of the damage suffered, and they may find the amount of damages awarded to be insufficient.[129] For the non-performing party found to be in breach, it may be difficult to pay a high amount of damages, which may negatively affect their business operations and even engender non-performance in the future: a domino effect that does not benefit either party.

Based on the points that have been discussed, the argument that the Gap is negligible is unpersuasive. On this basis, the next consideration is whether the Gap requires a response.

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[127] Refer above to: '4.1. Reflecting on the previous chapters'.
[128] See further: '2.3. Overarching challenges with the application of the doctrine of frustration'.
[129] WW McBryde, *The Law of Contract in Scotland* (W Green 2007) paras 20.11, 20.132-20.140, 20.142-20.143.

4.3. Does the Gap require a response?

Pointing out that the Gap in the current legal landscape is not negligible is one thing, but demonstrating that the Gap necessitates a response requires additional consideration. In this light, there are two particular aspects that support making a response to the Gap. The first is the idea that cooperation of the parties should be encouraged, which is not achieved by the established mechanisms in the current legal landscape. The second is the types of contractual relationships that would especially benefit from a response to the Gap. The ideal nature of the response is discussed in the subsequent section.

4.3.1. Encouraging parties' cooperation through a response to the Gap

The more that contracting parties cooperate with one another and work together to achieve the shared goals of the contract by allowing for adjustments, concessions and compromises, the easier they can navigate changed circumstances resulting in a party's non-performance.[130] Essentially, trust is paramount where risks are involved.[131] Being able to arrive at solutions themselves in these situations through renegotiation brings a number of benefits.[132] Most importantly, the parties can resume their business activities as quickly as possible and continue a good working relationship which facilitates achieving their overarching goals. There is evidence that these benefits are recognised at the outset of contracting, as empirical studies have shown that initial legal negotiations are generally conducted on a cooperative rather than competitive basis.[133]

Despite this, opportunism in commercial relationships continues to be a phenomenon, which naturally contradicts adopting a truly cooperative and

[130] Scottish Law Commission, *Review of Contract Law: Discussion Paper on Formation of Contract* (Scot Law Com 154, 2012) 6. For discussion in relation to relational contracts, see: RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 7-8.
[131] B Lyons and J Mehta, 'Contracts, Opportunism and Trust: Self-Interest and Social Orientation' (1997) 21 Cambridge Journal of Economics 239, 240-43.
[132] B Lyons and J Mehta, 'Contracts, Opportunism and Trust: Self-Interest and Social Orientation' (1997) 21 Cambridge Journal of Economics 239, 240-43.
[133] GR Williams, *Legal Negotiations and Settlement* (West Publishing Co 1983) 15-46.

collaborative approach.[134] As a result of this, contracting parties will not always be able to renegotiate successfully, and may commence legal proceedings in order for a solution to be reached through the court. With this in mind, the court takes on the responsibility of helping the parties where they are unable to help themselves.[135] This can only be carried out if Scots contract law is orientated towards helping the parties in the right way. For this, it must accommodate the resumption of the parties' business activities and achievement of their overarching goals, in line with the sanctity of contract principle.[136] At the moment, the Gap diminishes Scots contract law's ability to accomplish this. This can be explained as follows.

Whilst force majeure clauses may offer parties the opportunity to delay, adjust the nature of or wholly excuse the non-performance, the fact that the clause is the product of the parties' agreement means that the court must follow a strict, objective process of interpretation, with little flexibility. As such, whilst force majeure clauses can facilitate the continuance of parties' business activities, this is not always the case.

The doctrine of frustration, by bringing obligations of future performance to an end, entirely negates any facilitation of continuance of the relationship based on the contract at hand. Subsequently, parties may choose not to recontract with one another. If they do choose to continue, parties are put in the position of having to renegotiate and redraft their contractual obligations, which involves a great expenditure of time and effort.[137] This may be worsened by a souring of the parties' relationship resulting from the adversarial nature of legal proceedings, which they would then need rebuild in order to effectively continue to work together.

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[134] TJ Muris, 'Opportunistic Behavior and the Law of Contracts' (1981) 65 Minnesota Law Review 521, 525-26; GR Shell, 'Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action' (1991) 44 Vanderbilt Law Review 221, 223; B Lyons and J Mehta, 'Contracts, Opportunism and Trust: Self-Interest and Social Orientation' (1997) 21 Cambridge Journal of Economics 239, 240-43.

[135] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125; ADM Forte, 'Frustration', *Stair Memorial Encyclopaedia* (1995) vol 15, para 880.

[136] This principle is discussed in depth below: '6.3.1. Freedom and sanctity of contract principles'.

[137] KR Connor and KC Prahalad, 'A Resource-Based Theory of the Firm: Knowledge versus Opportunism' in NJ Foss (ed), *The Theory of the Firm: Critical Perspectives on Business and Management* (Routledge 2000); CW Choo and N Bontis, *The Strategic Management of Intellectual Capital and Organizational Knowledge* (Oxford University Press 2002) 114.

Where specific implement is not possible, enforcement of the contract as it stands through payment for breach of damages does not necessarily facilitate the resumption of the parties' business activities and achievement of their overarching goals. As a purely monetary remedy, the aggrieved party may feel compensated for the other party's non-performance, but the non-performing party may feel that this remedy detracts from the sanctity of contract principle, and it may cause them longer-term financial difficulties. The non-performing party may therefore feel that a remedy that can facilitate their performance in some way would be preferable.

Overall, responding to the Gap is warranted on the basis that the mechanisms currently available to contracting parties fail to help them in the way that they really need. The objective of the court when addressing non-performance of contractual obligations in light of changed circumstances should ideally be to allow the parties to move forwards in a practical way, and this will require a solution.

4.3.2. Contractual relationships benefitting from a response to the Gap

Responding to the Gap with a solution is further warranted when considering the contractual relationships that would particularly benefit. Two examples of these are long-running (and complex) contractual relationships, and contractual relationships that are prone to being affected by changed circumstances. The inherent characteristics of these contractual relationships mean that they especially suffer from the Gap. These characteristics and the reasons that these examples would particularly benefit from a response to the Gap will be explored in turn.

Long-running contractual relationships are interesting to consider, as the long-term nature of the contract influences certain expectations of, behaviours of and approaches by the parties.[138] Long-term contracts, by their nature, provide greater certainty of a continued partnership. This is beneficial for the fact that it saves the resources of time, hassle and expense involved with negotiating and concluding multiple short-term contractual relationships over the same period of time –

[138] See generally: E Schanze, 'Failure of Long-Term Contracts and the Duty to Re-negotiate' in F Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997).

especially considering that renegotiation between even the same parties is problematic.[139] Additionally, empirical studies have evidenced that long-term contracts can , for example, 'protect the buyers from the ratchet effect',[140] an economic term for self-perpetuating increases in prices and other resources.[141] In light of these points, the parties have the opportunity to able to build a trusting, beneficial relationship, in which they can rely on each other and work together to achieve their mutual long-term goals. What also becomes clear is that long-running contractual relationships are predicated on and require the parties' cooperation. However, this becomes even more important – and more difficult – when they run into complications that impede their plans and activities, for example, where a change of circumstances results in non-performance of one of the parties.[142]

Given that long-running relationships are predicated on the long-term viability of parties' dealings with one another, supportive mechanisms are absolutely key. A well-known example of a long-running relationship known to have run into problems with such long-term viability is that between Dell and FedEx. Their partnership began in 2005, with Dell hiring FedEx's services to manage their hardware return-and-repair process, and they continue to be in partnership.[143] The parties drew up a long contract to reflect their complex business relationship, which entailed strict obligations that FedEx had to adhere to and means by which Dell would measure its performance. Despite all of the contractual obligations being met by each party in practice, 'Dell felt that FedEx was not proactive in driving continuous improvement and innovative solutions; FedEx was frustrated by onerous requirements that wasted

[139] RE Scott, 'Conflict and Cooperation in Long-Term Contracts' (2005) 75 California Law Review 2006, 2021.
[140] LC Johnsen, A Sadrieh and G Voigt, 'Short-term vs. Long-term Contracting: Empirical Assessment of the Ratchet Effect in Supply Chain Interaction' (2021) 30 Production and Operations Management 2252, 2253.
[141] A Barone, 'Ratchet Effect' (*Investopedia*, 20 April 2021) <www.investopedia.com/terms/r/ratchet-effect.asp> accessed 4 June 2022.
[142] RE Scott, 'Conflict and Cooperation in Long-Term Contracts' (2005) 75 California Law Review 2006, 2019-21.
[143] D Frydlinger, O Hart and K Vitasek, 'A New Approach to Contracts' (2019) 97(5) Harvard Business Review 116, 119; FedEx, 'Dell Technologies, FedEx and Switch Team Up to Deliver Exascale Multi-Cloud Capabilities to the Edge' (*FedEx Newsroom*, 12 November 2012) <newsroom.fedex.com/newsroom/dell-technologies-fedex-and-switch-team-up-to-deliver-exascale-multi-cloud-capabilities-to-the-edge/> accessed 3 June 2022.

resources and forced it to operate within a restrictive statement of work', 'yet neither could afford to end the relationship'.[144]

This example is interesting from a number of perspectives. Firstly, it demonstrates that parties in long-running contractual relationships may have difficulty in renegotiating their obligations, even when both parties are unhappy with their current relationship and want to make improvements to it. Secondly, it illustrates that parties in such circumstances may require a mechanism that is softer than frustration, but that does not entail enforcement of the contract (if all obligations are being performed, then there is nothing to enforce).

When considering situations similar to the Dell and FedEx example, the difficulties that parties may have with renegotiating become apparent. For one thing, renegotiation of long-running, complex contracts is not an easy feat. Two examples of such contractual relationships are those related to construction and IT services. Construction is known for entailing complex contractual relationships because the projects may be large, detailed and lengthy, may be high value in terms of cost as well as societal benefit, and may have many stakeholders involved that can affect the direction and scope of the projects.[145] IT services are perhaps a more modern example, but with essentially the same factors involved, just in a digital instead of tangible context.[146]

The complicated nature of these contractual relationships will have to be reflected in the contract to some extent at the very least, which already makes the initial negotiation and drafting of the contract difficult. Renegotiation of the parties' obligations will therefore require a lot of time and attention. This will also incur high

[144] D Frydlinger, O Hart and K Vitasek, 'A New Approach to Contracts' (2019) 97(5) Harvard Business Review 116, 119.
[145] WP Hughes, 'Construction Management Contracts: Law and Practice' (1997) 4 Engineering, Construction and Architectural Management 59; L Abramowicz and others, 'Collaborative Contracting: Making it Happen' (*McKinsey Our Insights*) <www.mckinsey.com/business-functions/operations/our-insights/collaborative-contracting-making-it-happen> accessed 4 June 2022.
[146] S Bewick, 'Long-Term and Complex Contracts – The Importance and Challenge of Effective Management' (*PWC Blogs*, 13 May 2015) <pwc.blogs.com/deals/2015/05/long-term-complex-contract-management.html> accessed 4 June 2022.

costs, especially in relation to any formalised proceedings necessary to complete the renegotiating and redrafting process.[147]

Something that may make renegotiating even more difficult is that, after experiencing non-performance caused by a change of circumstances, the aggrieved party will naturally be seeking to protect themselves against similar future non-performance by the other party. Indeed, 'short-term considerations will continue to affect each party's calculations even after an explicit agreement to adjust risk … because of intervening events' and, for another, 'renegotiation creates an additional problem … [of n]oncooperative bargaining behavior [and] … exploitation'.[148] This adds an individualistic element to the renegotiation, which moves the parties further away from finding a unified position of cooperation and adaptability.

At the same time, if the parties wish to continue to have a working relationship, they may know that reaching a decision about what action to take is vital. This will necessarily precipitate a reliance on external third parties, such as the court, to make the decision. As such, the court needs to be equipped, by the law, to make effective decisions when parties' renegotiation is unsuccessful. This requires the available mechanisms in Scots contract law to be practically orientated and enable the continuance of the parties' long-running relationship. The importance of ensuring that there are suitable Scots law mechanisms available if the parties' renegotiation is unsuccessful is particularly clear in these examples, given that they relate to key industries in society, with a growing attention to the importance of infrastructure, such as housing,[149] and an ever-increasing reliance on technology as was highlighted during the Covid-19 pandemic.[150] As the mechanisms in Scots contract

[147] Freshfields Bruckhaus Deringer, 'Beyond the Pandemic: Rethinking the Supply Chain: Renegotiating Long-Term Contracts' (*Freshfields Bruckhaus Deringer Our Thinking*) <www.freshfields.com/en-gb/our-thinking/campaigns/beyond-the-pandemic/rethinking-the-supply-chain/renegotiating-long-term-contracts/> accessed 4 June 2022.
[148] RE Scott, 'Conflict and Cooperation in Long-Term Contracts' (2005) 75 California Law Review 2006, 2021.
[149] Levelling-up and Regeneration HC Bill (2022-23) [6], pt 4; J Johnson, 'Property Market Investment is Crucial to Economic Recovery' (*FT Adviser*, 9 June 2022) <www.ftadviser.com/opinion/2022/06/09/property-market-investment-is-crucial-to-economic-recovery/> accessed 9 June 2022.
[150] JJ Barry, 'COVID-19 Exposes Why Access to the Internet is a Human Right' (*Open Global Rights*, 26 May 2020) <www.openglobalrights.org/covid-19-exposes-why-access-to-internet-is-human-right/> accessed 4 June 2022; C Baker and others, 'COVID-19 and the Digital Divide' (*UK Parliament Post*

law do not sufficiently achieve this in all situations, filling the Gap is highly beneficial for parties in long-running, complex contractual relationships,.

The second example of contractual relationships that would benefit from a response to the Gap is those prone to being affected by a change of circumstances. The reason essentially speaks for itself. Again, construction and IT services contractual relationships are useful illustrative examples, as both are in industries highly exposed to change. Construction contracts are predicated on managing a multitude of risks in order to minimise delays, and on building in mechanisms to ensure each party is protected to some degree when a change of circumstances occurs.[151] IT services contracts are constantly at risk of being affected by a change of circumstances, as the industry is continuously developing at a fast pace. For example, something like a change in intellectual property law, which is consistently updated to fit with technological developments, may affect a party's ease or ability to perform certain contractual obligations.[152]

Parties in contractual relationships that are prone to being affected by a change of circumstances will need to balance strictness with flexibility in their contract. If the contract is too strict due to them anticipating changes of circumstances, then they may not be able to adapt their relationship with the passage of time, to accommodate non-performance resulting from the changes that they did not anticipate. On the other hand, if the contract is too flexible, then it may not provide the support necessary to ensure that each party can rely on the other. In this case, non-performance resulting from the inevitable changes of circumstances may be equally difficult to navigate. Achieving this balance may be difficult, but finding means of navigating non-performance resulting from changed circumstances is absolutely essential for contractual relationships that are prone to being affected by this. Their vulnerability means that they need to be equipped to navigate this frequently, in order for them to be able to be pursue their business activities. As

Rapid Response, 17 December 2020) <post.parliament.uk/covid-19-and-the-digital-divide/> accessed 4 June 2022.

[151] A Burrs, *Delay and Disruption in Construction Contracts* (Taylor & Francis 2016) 8-56.

[152] European Union Intellectual Property Office, 'IP and the Challenges of Technology' (*European Union Intellectual Property Office News*, 3 December 2021) <euipo.europa.eu/ohimportal/en/news/-/action/view/9030342> accessed 4 June 2022.

such, the mechanisms of Scots contract law should be able to provide practical solutions without overly severe effects, when the parties are unable to renegotiate their obligations and commence legal proceedings. As this is not currently the case because of the Gap, a solution is required that can benefit contractual relationships prone to being affected by a change of circumstances.

4.4. The ideal nature of the response

From the discussions in this chapter so far, it is clear that something is missing from the current legal landscape and the mechanisms available to contracting parties who encounter non-performance resulting from changed circumstances. Another, legal mechanism is needed, which does not have the high threshold or severe effect of the doctrine of frustration, and which aims to enable the non-performing party to perform somehow in the new circumstances. This would also require the mechanism to be built around seeking to achieve a fair objective, that takes the parties' particular relationship into account. The legal mechanism must, however, align with the established mechanisms in the current legal landscape, and must avoid overlapping with them as far as is possible.

4.5. Interim conclusion

Between the established mechanisms in Scots contract law lies the Gap, into which parties in a number of situations fall. The detrimental effects of the Gap are significant. They are especially clear when considering them in the context of parties who have contractual relationships that are long running and complex, or prone to being affected by changed circumstances.

In order for Scots law to cater effectively for the needs of contracting parties, the Gap must be filled. This would need to be achieved through an additional, legal mechanism that provides a solution to the limitations and difficulties of the current mechanisms, without contradicting them or unduly overlapping with them. This thesis' proposal of a particular legal mechanism as the solution, and the reasons supporting this proposal, are discussed in the following chapters.

5. The Doctrine of Equitable Adjustment – A Solution to the Gap?

The previous chapters have made clear that the Gap requires a response in the form of a legal mechanism. This must fit with the current relevant mechanisms, whilst contributing something new, in order to fill the Gap. To this effect, this chapter proposes the doctrine of equitable adjustment as a fitting solution in response to the Gap.

It will first introduce the doctrine by providing a summary of what it entails, and an explanation of the necessary definitions. Secondly, it will review the proposed scope of the doctrine of equitable adjustment in Scots contract law to address non-performance caused by a change of circumstances.

5.1. Introducing the doctrine of equitable adjustment

What does the doctrine of equitable adjustment mean? Taken literally, an equitable adjustment would occur when an adjustment is made to something in an equitable way. In this case, as a proposed doctrine in contract law, it is a mechanism through which the courts would adjust certain contractual obligations in an equitable way, when a contracting party cannot perform those obligations as a result of a change of circumstances. The aim of this mechanism would be for the contractual obligations to be adjusted in such a way that they can then be performed by the initially non-performing party.

This proposed doctrine would reflect the concept of tacit resolutive conditions in Scots contract law, but instead of 'fulfilment of a resolutive condition bring[ing] the obligation to an end' as with frustration, it would result in an adjustment of the obligations.[153] Viewed in this way, the doctrine of equitable adjustment would be a manifestation of the broad, underlying principle of the power of the court to readjust the position of the parties, just as the doctrine of frustration is suggested to be.

[153] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 4.65.

Therefore, whilst the doctrine of equitable adjustment itself is a new 'manifestation' and suggestion, the broader principle from which it derives is not new.

With this in mind, a deeper exploration of the proposed doctrine of equitable adjustment can be made, beginning with discussion of the two components of the term: 'equitable' and 'adjustment'.

5.1.1. The component of equity: shaping the nature of the doctrine

What is meant by the word 'equity' can be generally understood in a number of ways.[154] Considering equity's derivation from the words 'aequitās' and 'aequus',[155] equity is described as being synonymous with (laws and actions embodying) fairness, justice, righteousness, reasonableness and impartiality.[156] From a jurisprudential perspective, the term can be understood by reference to its usage by Roman jurists, as a label for the principles of justice which provide a standard for and feed into the application of legal rules.[157] Similarly, it can describe reading between the lines of legal rules to find their reason and spirit, and interpret them accordingly, in order to apply their effect to suitable situations which they have not already expressly mentioned.[158]

With regard to how equity has been understood in the context of Scots law, it is known that equity has been engaged with by Scottish courts since the Middle Ages.[159] However, the specificities of this engagement with equity only became more

[154] J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (W Green 1897) vol 5, 67-69; 'equity, n' (*OED Online*, Oxford University Press December 2021) <www.oed.com/view/Entry/63838> accessed 15 February 2022.
[155] S Thomson, 'Scots Equity and the Nobile Officium' (2010) 2 Juridical Review 93, 93.
[156] PGW Glare (ed), *Oxford Latin Dictionary* (2nd edn, Oxford University Press 2012) vol 1, 74, 76; L Brown (ed), *New Shorter Oxford English Dictionary on Historical Principles* (Clarendon 1993); 'equity, n' (*OED Online*, Oxford University Press December 2021) <www.oed.com/view/Entry/63838> accessed 15 February 2022.
[157] J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (W Green 1897) vol 5, 67-69; 'equity, n' (*OED Online*, Oxford University Press December 2021) <www.oed.com/view/Entry/63838> accessed 15 February 2022.
[158] J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (W Green 1897) vol 5, 67-68; 'equity, n' (*OED Online*, Oxford University Press December 2021) <www.oed.com/view/Entry/63838> accessed 15 February 2022.
[159] DJ Carr, 'Are Equity and Law in Scotland Fused, Separate or Intertwined?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and the Law: Fusion and Fission* (Cambridge University Press 2019) 181.

readily identifiable following 'the early development of the Institutional system … where reasoned discussions of equity were written down and promulgated for the first time'.[160] As such, despite the longstanding presence of equity in Scots law, 'the influence of equity on Scots law has not been so obvious as in England and it has consequently [historically] received inadequate attention and appreciation from text - writers and judges.[161] Fortunately, this is less the case now, and there are a number of institutional texts, academic works and judicial comments on equity in Scots law, which suffice for the purposes, and necessary brevity, of the discussion of equity in this thesis.

Turning the discussion to how equity is understood by Scottish jurists and connecting this to the three overarching definitions of equity provided above, there are two predominant perceptions that emerge. On the one hand is the idea that law and equity in the Scottish legal system are harmonious and unified, given that there is no institutional, jurisdictional or practical 'source' divide between them in Scotland, as there is in England.[162] This idea pertains to the first definition of equity provided above, of it being an inherent principle or value within legal rules. This theory was voiced by Lord Cooper, who stated that 'law and equity have never been separated'.[163] It was also popular amongst other 20th century Scottish judges,[164] including Lord President Clyde, who believed that '[i]t is often said, and truly said, that in the law of Scotland law is equity, and equity law'.[165]

On the other hand is a dualist approach, viewing law and equity as distinct concepts. Historically, such a dualist approach was 'adopted from the Greeks by the Romans, principally by the orators',[166] as a result of the 'Stoic philosophy which held up an

[160] DJ Carr, 'Are Equity and Law in Scotland Fused, Separate or Intertwined?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and the Law: Fusion and Fission* (Cambridge University Press 2019) 181.
[161] DM Walker, 'Equity in Scots Law' (PhD thesis, The University of Edinburgh 1952) 175. Later published as a journal article: DM Walker, 'Equity in Scots law' (1955) 66 Juridical Review 103.
[162] DJ Carr, 'Are Equity and Law in Scotland Fused, Separate or Intertwined?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and the Law: Fusion and Fission* (Cambridge University Press 2019) 179-80.
[163] Lord Cooper of Culross, *Selected Papers 1922-1954* (Oliver and Boyd 1957) 124.
[164] DJ Carr, 'Are Equity and Law in Scotland Fused, Separate or Intertwined?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and the Law: Fusion and Fission* (Cambridge University Press 2019) 185.
[165] *Gibson's Trustees* 1933 SC 190, 198. But note his dissent on the question of the exercise of the nobile officium, the equitable jurisdiction of the Court of Session and the High Court of Justiciary.
[166] DM Walker, 'Equity in Scots Law' (PhD thesis, The University of Edinburgh 1952) 24.

ideal of reasonableness and equity as a means of criticising law at a time when it tended to be narrowly customary'.[167] Lord Justice Clerk (Alness), Viscount Stair, Lord Bankton and Lord Kames were proponents of a similarly dualistic approach to law and equity in Scotland, notwithstanding the institutional singularity of the Scottish legal system in this regard.[168] In his reasoning on the question of the exercise of the nobile officium – the equitable jurisdiction of the Court of Session and the High Court of Justiciary – in the *Gibson's Trustees* case, Lord Justice Clerk (Alness) noted that:

> I bear in mind that Stair said long ago, in dealing with the topic, that, 'in new cases, there is necessity of new cures, which must be supplied by the Lords, who are authorised for that effect by the institution of the College of Justice' … More, in his Notes on Stair, [quoted] the passage to which I have referred, and attribute[ed] to Lord Stair the view that 'in many instances the strict rules of law should be relieved by the equitable interposition of the judge'.[169]

Additionally, Stair has stated that laws 'being the Inventions of frail men, there occurs many *casus incogitati* wherein they serve not; But Equity takes place, and the Limitations and Fallancies, Extentions and Ampliations of Humane Laws are brought from Equity'.[170] He found that equity would do this through its synonymity with natural law, which he describes as the 'Law of the Rational Nature',[171] a position which Bankton later mirrored in his work.[172] Similarly, upon reflection of Bell's and Erskine's references to equity in contract law, Gloag notes that equity 'is a principle of construction. The law of Scotland does not compel parties to frame their contracts upon equitable principles; it may assume, in a question of interpretation, that they have done so'.[173] These ideas particularly reflect the third definition of equity

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[167] DM Walker, 'Equity in Scots Law' (PhD thesis, The University of Edinburgh 1952) 26.
[168] DJ Carr, 'Are Equity and Law in Scotland Fused, Separate or Intertwined?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and the Law: Fusion and Fission* (Cambridge University Press 2019) 185. Refer to: Stair, *Institutions*, I.i.6; Bankton, *An Institute*, I.i.24; *Gibson's Trustees* 1933 SC 190, 205; H Kames, *Principles of Equity*, vol 1 (first published 1778, 3rd edn, Edinburgh Legal Education Trust 2013) 27.
[169] *Gibson's Trustees* 1933 SC 190, 205.
[170] Stair, *Institutions*, I.i.6.
[171] Stair, *Institutions*, I.i.6.
[172] Stair, *Institutions*, I.i.6; Bankton, *An Institute*, I.i.24.
[173] WM Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, W Green 1929) 407.

provided above, of using equity to interpret law and contracts in a way that accords with its underlying reason and spirit.

Kames, who dedicated a whole text to the discussion of equity in the Scottish legal system,[174] was inspired by Stair's ideas, but nuanced the dualist perspective somewhat. One significant statement by Kames in this regard is that 'in Scotland … where equity and common law are united in one court, the boundary [between law and equity] varies imperceptibly. For what originally is a rule in equity, loses its character when, gathering strength by practice, it is considered as common law'.[175] Kames continues, that, 'by the cultivation of society, and practice of law, … our notions of equity are preserved alive [in common law]'.[176] It seems that, in Kames' view, whilst equity and law are separate entities to begin with, over time they merge and become one, as equitable rules are crystalised and practised. As such, Kames' understanding of equity does echo the third definition of equity provided earlier in this section, as with the dualist approach that he was inspired by. However, it also reflects the second definition of equity, of it providing a standard for law and directly shaping its application and effect.

Overall, it seems that equity in Scots law can be defined as either the 'principle or reason of the law, [or] the correction of law according to a moral standard … [at] the discretion of a Court judge'.[177] As the principle or reason underlying law, equity generally describes a just and moral interpretation of laws and legal instruments, as well as contracts. As a means of correction of substantive law by the judiciary, equity 'offer[s] equitable solutions where law provides none'.[178] With this knowledge, ideas begin to unfold about the role of equity in relation to the Gap and addressing non-performance of contractual obligations following a change of circumstances in Scots law.

[174] H Kames, *Principles of Equity*, vol 1 (first published 1778, 3rd edn, Edinburgh Legal Education Trust 2013).
[175] H Kames, *Principles of Equity*, vol 1 (first published 1778, 3rd edn, Edinburgh Legal Education Trust 2013) 27.
[176] H Kames, *Principles of Equity*, vol 1 (first published 1778, 3rd edn, Edinburgh Legal Education Trust 2013) 27.
[177] J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (W Green 1897) vol 5, 68-69.
[178] S Thomson, 'Scots Equity and the Nobile Officium' (2010) 2 Juridical Review 93, 94.

5.1.2. The (equitable) adjustment: shaping the scope of the doctrine

In order to complete the definition of the doctrine of equitable adjustment in this thesis, the component of 'adjustment' in relation to the broad explanations of equity above must be considered. From these explanations, the understanding of equity as a means to correct substantive law by the judiciary is most relevant, as this is where a mechanism of judicial adjustment comes into play. The scope and nature of such correction has been specifically commented on by Lord Justice-Clerk (Alness) in relation to the nobile officium, with a warning that it can only occur where it is possible, it is necessary or highly beneficial, and no alternative solution in law already exists. Lord Justice-Clerk (Alness) reflected on John Shank More's comments that:

> [a]mid much that is uncertain as to the exercise of the nobile officium, this may be laid down as a fixed principle, − that it will never be exercised except in cases of necessity, or very strong expediency, and where the ordinary procedure would provide no remedy (Quoted in footnote to Erskine, I.iii.22.).[179]

Whilst the nobile officium is the specific focus of the reflection, the ideas relayed provide inspiration for the doctrine of equitable adjustment. Just as necessity/expediency and a lack of an existing alternative comprise an absolute boundary for the judicial correction of substantive law, so too should they function as parameters for the adjustment of contractual obligations. After all, there is no reason that the scope of equitable corrective mechanisms available to judges in relation to contracts should be greater than in relation to substantive law.[180] In this light, it is proposed that the nature and degree of adjustment possible with the doctrine of equitable adjustment in Scots contract law would be limited. This thesis proposes certain limitations and requirements in the following paragraphs.

[179] *Gibson's Trustees* 1933 SC 190, 205. Referencing: Erskine, *Principles*, I.iii.22.
[180] Discussion of the judiciary's role takes place below, in: '8.3. Moving forwards'.

In all cases, an adjustment should only be made by the judiciary where the parties were truly unable to come to a solution themselves. Legal proceedings would have had to be initiated by the parties, indicating that they are unable to move forwards without judicial assistance. This may require them to demonstrate to the court that they had attempted to discuss and negotiate with each other but were unsuccessful in reaching an agreement, and/or to go through a mediation process beforehand.[181] Such requirements would ensure that the adjustment is a last resort.

Additionally, the force majeure clause in the contract (if there is one), would be assessed before the doctrine of equitable adjustment, in order to first try to proceed using a manifestation of the parties' agreement about what to do in these circumstances. Thus, the doctrine of equitable adjustment would only be considered where the force majeure clause is not applicable in the circumstances.[182] As a result, the court would be making a decision about which legal mechanism applies anyhow, whether that be the doctrine of equitable adjustment or one of the other, established mechanisms in place, with none of these legal mechanisms being the product of the parties' agreement.

The next aspect to consider is whether the doctrine of equitable adjustment could be used as a defence to enforcement of the contract as it stands in the same way as frustration. That frustration is used as a defence in this way makes sense, as if its requirements are met, then it applies automatically. The question is therefore whether the doctrine of equitable adjustment should apply automatically as well, or whether it is better as an alternative to frustration, if the requirements of frustration are not met. The difficulty of the first option is that there may be an overlap between cases to which they apply. In cases of overlap, only one mechanism can be applied. But as they are applied automatically, the court cannot decide which mechanism would be better suited to the situation of the parties in their circumstances.

[181] The Principles of European Common Law suggests the potential award of damages against the non-negotiating party: PECL art 6:111. Discussed in more depth below: '8.3.3. The courts should apply the doctrine'.
[182] For discussion about this point, refer above to: '3.3. Interpretation of contracts and force majeure clauses'; '3.4. Covid-19 as a case study of interpretation of force majeure clauses'.

Considering the second option, if the requirements of frustration are met, then only the doctrine of frustration applies, and not the doctrine of equitable adjustment. As a result, the doctrine of equitable adjustment would only apply to circumstances where the contract is not frustrated, if its requirements are met. Whilst this would mean that equitable adjustment is not applied to certain situations, for example where the party seeking enforcement of the contract as it stands may have preferred it to frustration because of its softer effect, it nonetheless fills the Gap in places that it is required, whilst aligning with the other legal mechanisms.

When the doctrine of equitable adjustment is considered by the court to be the applicable mechanism, the adjustment made must reflect certain factors. The adjustment must be equitable, based on the context of the contract and achieving the overarching aims of the parties' contractual relationship, and not conflict with any substantive principles of Scots law. Furthermore, every effort should be made to ensure that the adjustment made is the minimal possible that can achieve the required outcome. This may help to quell any hesitancy of the judiciary to make an equitable adjustment in practice.[183]

Examples of what an equitable adjustment might look like in practice could be an adjusted timeframe or price to be paid, which better suits the contractual relationship and the changed circumstances. That said, care should be taken not to focus too much on listing the particular types of permissible adjustment, as space should be allowed for nuance and to suitably tailor them according to the particularities of a given case. Instead, what is more important is that the adjustment is indeed possible, necessary or expedient, an ultimum remedium, minimal, effective, and (also as a result of these considerations) equitable. These essentially constitute the requirements that must be met for the doctrine of equitable adjustment to apply.

5.2. Interim conclusion

The doctrine of equitable adjustment is a proposed mechanism to fill the Gap, by providing a new mechanism in Scots contract law. It would address non-performance

[183] This point is further discussed below in: '8.3. Moving forwards'.

resulting from a change of circumstances by permitting the judiciary to make an equitable adjustment to the parties' contractual obligations in such a way as to allow the initially non-performing party to perform, albeit in an adjusted way. This would allow the parties to move forwards with their business activities and for the contract to remain in force.

The doctrine of equitable adjustment could be framed as a possible defence to enforcement of the contract as it stands, but only where the requirements of the doctrine of frustration are not met. This would mean that parties have first had the opportunity to renegotiate. If that is unsuccessful and they commence legal proceedings, the court would consider arguments for different meanings and application of a force majeure clause presented by the parties, if there is such a clause and disagreement about its meaning and applicability. If there is no force majeure clause, or it is found not to cover the risk that has materialised, the court would hear one party's argument for enforcement of the contract as it stands, and the defence of the other, non-performing party. This defence would be that the contract is frustrated, and the party could request, as an alternative, an equitable adjustment to be made.

If the requirements of frustration are not met, an equitable adjustment would only be made if it is possible, and necessary or beneficial. What constitutes a necessary or beneficial adjustment could reflect the definitions for these concepts for the nobile officium, and would need to be proved by the party arguing for the doctrine of equitable adjustment's application in the case. The judiciary would also need to ensure that the equitable adjustment is as minimal as possible to achieve the intended effect. If these requirements are not met, then the doctrine of equitable adjustment is not applicable, and the court can enforce the contract via specific implement or, as is more likely in this context, damages. These requirements would limit the scope of the doctrine of equitable adjustment, whilst it can still fill the Gap.

6. Equitable Adjustment and the Underlying Principles of Scots Contract Law

Through consideration of the characteristics of and important factors in Scots contract law, this chapter seeks to reconcile the doctrine of equitable adjustment with the underlying principles of Scots contract law. The first section of this chapter will discuss the legal ideology that is underlying in Scots contract law in light of the mixed nature and historical development of the Scottish legal system, and why the historical roots of legal principles in Scots law are important when considering the modern legal rules. Following from this explanation, the second section of this chapter will explore the civil and canon law origins of particular legal principles of Scots contract law which the proposed doctrine of equitable adjustment would need to align with. The third section of this chapter will examine these principles in modern Scots law, in light of their historical roots. It will consider their significance for the doctrine of equitable adjustment as a proposed mechanism to fill the Gap. Essentially, this chapter will permit an evaluation of whether the doctrine of equitable adjustment aligns with underlying principles in Scots contract law, in light of their origins and historical development, which would be essential for its successful operation as a mechanism in Scots contract law.

6.1. The mixed nature of the Scottish legal system

The doctrine of equitable adjustment can only be a viable legal mechanism to aid contracting parties experiencing non-performance of obligations caused by a change of circumstances if it fits well with the essential nature and framework of Scots contract law. What cannot fail to be recognised in this regard is the mixed nature of the Scottish legal system.

The mixed nature of the Scottish legal system lies in its substance, and is a varying combination and fusion of feudal law, customary law, civil and canon law

components, amongst others.[184] Over time, the Scottish legal system has brought together different legal ideologies and fused them into an interlocking set of rules and procedures in different legal areas, which are bound together by established underlying principles.[185] To this effect, the 'spirit' of the Scottish legal system has materialised. This is important when attempting to clarify a grey area of Scots contract law, such as possible solutions to fill the Gap. It permits an assessment of whether the doctrine of equitable adjustment as a proposed mechanism would fit with underlying principles of Scots contract law, and therefore whether it is truly reflective of the spirit of Scots contract law. The Scots contract law principles concerned, which relate to parties' fulfilment of their contractual obligations, have been historically developed by the civil law tradition and canon law, making an exploration of their legal origins in these legal traditions important.[186]

Before exploring these principles in civil and canon law, it may be useful to briefly provide some brief, prefatory information about civil and canon law. Civil and canon law are inextricably linked, with canon law having built upon a number of principles and concepts in civil law, whilst merging them with Christian values and functions.[187] Civil and canon law were revived in Central Europe from the late Middle Ages onwards. This was initially by way of a scholarly project, and later gained a more tangible legal influence, with first canon law and then civil law spreading through a

[184] K Reid and R Zimmermann, 'The Development of Legal Doctrine in a Mixed System' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000) 2, 6-8; JW Cairns, 'Historical Introduction' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000).

[185] K Reid and R Zimmermann, 'The Development of Legal Doctrine in a Mixed System' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000) 11-13; JW Cairns, 'Historical Introduction' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000); WM Gloag and RC Henderson, *The Law of Scotland* (HL MacQueen, RD Mackay and C Anderson eds, 15th edn, W Green 2022) para 1.19.

[186] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996); JW Cairns, 'Historical Introduction' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000) 30.

[187] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996); K Reid and R Zimmermann, 'The Development of Legal Doctrine in a Mixed System' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000); JW Cairns, 'Historical Introduction' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000); L Atzeri, 'Roman Law and Reception' (*EGO*, 20 November 2017) <ieg-ego.eu/en/threads/models-and-stereotypes/model-classical-antiquity/lorena-atzeri-roman-law-and-reception#> accessed 14 July 2022.

number of legal systems.[188] In that light, a so-called 'Reception' took place, whereby civil law, fused to some degree with canon law, 'was taken up by court practice in the form of *ius commune* and applied as a substitute legal system'.[189] As a result of this revival, the civil law tradition was developed by jurists, and civil law ideology became hugely respected and valued, and was applied in practice. During this time, humanist and then enlightened philosophy flourished, and civil law was therefore viewed by these jurists with these philosophical ideas in mind, somewhat reshaping civil law to produce 'Romanist' law, and contributing to the overall civil law tradition.[190]

When considering this information in light of the Scottish legal system, it may be helpful to note that Scottish legal professionals were historically influenced by the civil law tradition and canon law. This has caused Scots private law, including Scots contract law, to be heavily influenced by these legal traditions. The influence on Scottish legal professionals primarily occurred due to a widespread educational and professional connection with countries that had a dominant place in Romanist legal scholarship, being France in the late Middle Ages, and the Netherlands in the Early Modern era.[191] These points illustrate why modern Scots contract law principles with their roots in the civil law tradition and canon law, which are relevant to the proposed doctrine of equitable adjustment, are useful to consider from a historical perspective.

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[188] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996); K Reid and R Zimmermann, 'The Development of Legal Doctrine in a Mixed System' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume I: Introduction and Property* (Oxford University Press 2000); L Atzeri, 'Roman Law and Reception' (*EGO*, 20 November 2017) <ieg-ego.eu/en/threads/models-and-stereotypes/model-classical-antiquity/lorena-atzeri-roman-law-and-reception#> accessed 14 July 2022.

[189] L Atzeri, 'Roman Law and Reception' (*EGO*, 20 November 2017) para 59 <ieg-ego.eu/en/threads/models-and-stereotypes/model-classical-antiquity/lorena-atzeri-roman-law-and-reception#> accessed 14 July 2022.

[190] JW Cairns, 'Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century' in GG Simpson (ed), *Scotland and the Low Countries, 1124–1994* (Tuckwell 1996).

[191] JW Cairns, 'Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century' in GG Simpson (ed), *Scotland and the Low Countries, 1124–1994* (Tuckwell 1996) 136. As a result of this, renowned Dutch 'authors such as Grotius, Vinnius and Voet influenced the development of Scots law' in particular: WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 1.17. Referencing: R Zimmermann, D Visser and K Reid, '"Double Cross": Comparing Scots and South African Law' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (Oxford University Press 2004) 8-10.

6.2. Relevant legal rules in the civil law tradition and canon law

Relevant rules in the civil law tradition and canon law are those that concern the binding nature of agreements, exceptions to obligations to perform, and performance following a change of circumstances. As a result of the influence of the civil law tradition and canon law on Scots law, these rules have developed into underlying principles in Scots contract law, which will be discussed following this historical exploration.

6.2.1. Binding agreements

In civil law, contractual obligations only became enforceable if they arose from an 'arrangement between the parties [that] could be classified as emptio venditio, locatio conductio, mandatum or societas'.[192] It was only from these agreements that parties were legally obliged to perform their agreed duties. Otherwise, the arrangement would be an unactionable 'mere pactum'.[193] This was encapsulated in the civil law maxim '*ex nudo pacto non oritur actio*'.[194]

The civilian notion of 'pacta' took on a different level of importance, in terms of their ability to legally bind the parties, when it was developed by canon law. This is because pacta, as agreements without enforceability in civil law, were essentially promises. Despite the lack of legal enforceability, promises were highly valued in Christianity, and breaking a promise was perceived to be sinful.[195] This perception stemmed from the teachings of the bible and the value of fidelity, and has continued to be an important part of canon law throughout the centuries.

In late antiquity of the classical era, canonists placed particular importance on pacta, as they used them as a tool to improve the socio-political environment at the time.

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[192] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 508.
[193] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 508, 538-39.
[194] 'From a nude contract – i.e. a contract without consideration – an action does not arise': EH Jackson and H Broom, *Latin for Lawyers* (Lawbook Exchange 2000) 155.
[195] A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 4.

This was achieved in 348AD, when the Council of Carthage crafted the *pacta sunt servanda* maxim – 'promises must be kept' –, to encourage more people to keep their word and act in good faith.[196] The maxim also served to provide a justification for lowering canon law's threshold for which agreements could be recognised as being enforceable in the eyes of the church.[197] To this effect, canon law emphasised the significance of oath-taking when parties choose to make an agreement, as a means of reinforcing parties' understanding of the correlation between their moral duties and the performance of their agreed, actual duties.[198] In doing so, parties would not only be obliged towards each other, but to God as well. [199] The justification provided by canon law for the binding nature of agreements, including *nuda pacta*, was the element of consent.[200] This meant that the church 'claimed jurisdiction for its ecclesiastical courts over secular obligations … [to enforce] promises for which there was no remedy in the secular courts', and placed 'the emphasis on making amends in the course of penitence and "departure from sin", in the interest of one's soul and good conscience'.[201]

Nonetheless, canon law philosophy was not merely to 'legalise morality' but also to 'moralise legality',[202] which meant that there was a drive to influence civil law to conform to moral principles. In order to achieve a move away from the rigidity of *ex nudo pacto non oritur actio* in civil law, canonists emphasised the idea of *causa*, in

[196] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 543; H Dondorp and EJH Shrage, 'The Sources of Medieval Learned Law' in JW Cairns and PJ du Plessis (eds), *The Creation of the Ius Commune: From Casus to Regula* (Edinburgh University Press 2010) 30; CG Paulus, 'The Erosion of a Fundamental Contract Law Principle pacta sunt servanda vs. Modern Insolvency Law' in UNIDROIT (ed), *Eppur si muove: The Age of Uniform Law, Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (UNIDROIT 2016) vol 1, 740.
[197] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 543.
[198] HJ Berman, 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 Journal of Law and Religion 103, 107; A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 7.
[199] HJ Berman, 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 Journal of Law and Religion 103, 107; A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 7.
[200] HJ Berman, 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 Journal of Law and Religion 103, 109.
[201] A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 7.
[202] HJ Berman, *The Interaction of Law and Religion* (SCM Press 1974) 60.

addition to consent, as making agreements legally binding.[203] *Causa* was a 'notion with which the Roman law had flirted with but never developed in the classical law', and essentially entailed validity of an agreement where 'the promise had been made with a serious purpose'.[204] There were two types of possible *causa*. One was liberality, a generous act that involves giving 'to the right people, the right amounts, and at the right time'.[205] The other was 'the receipt of a performance in return for one's own'.[206]

6.2.2. Exceptions to an obligation to perform

Whilst fidelity to promise was important in canon law, there was nonetheless ample provision for ensuring that it would not come at the cost of fairness or the charitable treatment of a struggling party.[207] As such, in civil law, there were exceptions to a party being legally bound to perform their contractual obligations. These primarily concerned impossibility, where circumstances meant that it would be impossible for a party to perform their obligations. This could be from the outset of the formation of the contract (termed '*impossibilitas*') or following it (termed '*casus*'). This limitation was founded upon the declaration '*nemo tenetur ad impossibile*' – no one is bound to an impossibility.[208] For both *impossibilitas* and *casus*, objectively impossible circumstances outwith the parties' control must exist. Where *culpa* (fault) or *mora* (delay) (could have) contributed to the impossibility, the non-performing party would be liable to the other party, as neither *impossibilitas* nor *casus* could apply.[209]

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[203] HJ Berman, *The Interaction of Law and Religion* (SCM Press 1974) 60; A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 8.
[204] A Jeremy, 'Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations' (2000) 144 Law and Justice 4, 8. See further: J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 77-79.
[205] CCW Taylor (ed), *Aristotle: Nicomachean Ethics, Books II-IV: Translated with an Introduction and Commentary* (Oxford University Press 2006) para IV.1119b28-1120a3.
[206] J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 77.
[207] See generally: HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Vogenauer and S Weatherill (eds), *General Principles of Law* (Hart Publishing 2017).
[208] EH Jackson and H Broom, *Latin for Lawyers* (Lawbook Exchange 2000) 200.
[209] P Savrai, 'Excusable Non-performance of Contract: International and Comparative Aspects' (PhD thesis, University of Glasgow 1994) 9.

In medieval canon law, *difficultas* similarly provided an exception to a party's duty to perform, but related to situations in which a party faced excessive difficulties.[210] This exception was driven by the moral outlook of canon law, and the idea that 'good intention [was] equal to performance'.[211] If the intentions of the party were good, and they genuinely found it excessively difficult to perform, then they should be excepted from doing so. At the core of this principle and the *difficultas* exception is the tenet of canon law that a party to a contract should not be unjustifiably enriched at the expense of another.[212] This provided for a somewhat softer approach to non-performance than in civil law.

6.2.3. Performance following a change of circumstances

The notion of exceptions to a party's duty to perform due to impossibility or difficulty was developed by both the civil law tradition and canon law into the *rebus sic stantibus* doctrine, which has been discussed previously in the chapter on frustration. In order to gain a deeper understanding of the doctrine, further background information can be provided as follows. The doctrine was first alluded to by the philosopher Seneca, but was only later placed into a legal context, in a commentary on Gratian.[213] In its legal context, the doctrine dictates that a significant change of circumstances, which makes a party's fulfilment of their contractual obligations unfairly difficult or impossible, relinquishes that party from those contractual obligations.[214] Good faith is an important element of *rebus sic stantibus*, as the

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[210] P Savrai, 'Excusable Non-performance of Contract: International and Comparative Aspects' (PhD thesis, University of Glasgow 1994) 9.
[211] P Hay, 'Frustration and Its Solution in German Law' (1961) 10 The American Journal of Comparative Law 345, 345.
[212] M Planiol and G Ripert, *Traité Pratique de Droit Civil Français* (2nd edn, Librairie Générale de Droit et de Jurisprudence 1952) vol 6, 391; J Badouin, 'Theory of Imprevision and Judicial Intervention to Change a Contract' in J Dainow (ed), *Essays on the Civil Law of Obligations* (Louisiana State University Press 1969) 153-54. This was not only the case in contract law, but the principle also extended to delict and unjustified enrichment. For further reference, see: GR Dolezalek, 'The Moral Theologians' Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries' [1992] Acta Juridica 104.
[213] *De beneficiis*, IV.35.3; R Feenstra, 'Impossibilitas and Clausula Rebus Sic Stantibus' in A Watson (ed), *Daube Noster: Essays in Legal History* (Scottish Academic Press 1974) 88ff; S Litvinoff, 'Force Majeure, Failure of Cause and Théorie de l'Imprévision: Louisiana Law and Beyond' (1985) 46 Louisiana Law Review 1, 4; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 579; R Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law' (2000) 2 Journal of the History of International Law 178.
[214] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 579.

change of circumstances has to have resulted from an external cause that was not the fault of the parties. Otherwise, it would be governed by the concept of risk in contract law.[215] An example of such an external cause would be socio-economic instability.[216]

Canonists regarded the doctrine as an implicit contractual condition which permitted rescission or revision of the contract.[217] This means essentially that 'the effectiveness of a transaction is made dependent upon the occurrence or non-occurrence of a future and uncertain event'.[218] In this way, there was no requirement for it to be the product of the parties' agreement, nor was it implied in law. Rather, it was elemental to the very fact of parties being in a contractual relationship.

When the civil law tradition was developed during the Enlightenment period, it took on a similarly value-driven outlook to canon law, but through the lens of natural law and reason rather than of religious ideology.[219] As such, by the end of the 16th century, the *rebus sic stantibus* doctrine was developed by the civil law tradition, to become treated as an implicit contractual condition, as with canon law. [220] This continued throughout the 17th century, with the spread of the influence of the 'Hollandse elegante school', which fused Roman law with Dutch customary law to create 'Roman-Dutch law', promoted natural law reasoning, and focused on notions of equity in the law.[221]

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[215] KS Rosenn, *Law and Inflation* (University of Pennsylvania Press 1982) 85.
[216] C Pédamon, 'The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?' (2017) 112 Amicus Curiae 10, 10.
[217] P Savrai, 'Excusable Non-performance of Contract: International and Comparative Aspects' (PhD thesis, University of Glasgow 1994) 9-10.
[218] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 717.
[219] JW Cairns, 'Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century' in GG Simpson (ed), *Scotland and the Low Countries, 1124–1994* (Tuckwell 1996).
[220] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 580; C Tabor, 'Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law' (2008) 68 Louisiana Law Review 549, 556. It has also been suggested that this occurred within the 15th century, refer to: EM Meijers, 'Essai Historique sur la Force Majeure' in EM Meijers (ed), *Études d'Histoire du Droit* (Leiden University Press 1966) vol 4, 29.
[221] JW Cairns, 'Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century' in GG Simpson (ed), *Scotland and the Low Countries, 1124–1994* (Tuckwell 1996) 136.

There are multiple factors which may have induced medieval and early modern Romanist jurists to adopt the doctrine and consequently move away from a strict approach to performance. One possible factor is the many wars that had been going on at the time.[222] Wars create economic and social instability, and uncertainty as to everyday goings-on. This may pose challenges for contracting parties, who may have made agreements without anticipating war or who had not expected the extent to which war would affect their ability to perform the agreed upon obligations. In such times, enforcing performance may well be more detrimental than beneficial, or even futile if performance is not possible or extremely difficult so as to almost be impossible. In this light, Meijers reasons that wars have always provoked a relaxation of obligations.[223] Similarly, factors such as plague and drought, which would have contributed to severe socio-economic dislocation, may have necessitated a more relaxed approach to parties' fulfilment of contractual obligations in light of the changed circumstances.

Another possible factor was the fact that a medieval jurist influenced by humanist ideology in his perception of civil law, Giasone de Mayno (1435-1519), actively and avidly supported the doctrine.[224] Writing in his commentary on the Digest, De Mayno declared that *clausula rebus sic se habentibus* is a condition that is implicit in all promises and contracts, legislation, wills, and oaths.[225] It has been noted multiple times that De Mayno was particularly revered by other jurists, and was influential in the 16th and 17th centuries.[226] The fact that a respected Roman law jurist from the

[222] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 581; C Tabor, 'Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law' (2008) 68 Louisiana Law Review 549, 556.
[223] EM Meijers, 'Essai Historique sur la Force Majeure' in EM Meijers (ed), *Études d'Histoire du Droit* (Leiden University Press 1966) vol 4, 29. Meijers writes that: '[l]es guerres … ont toujours provoqué un relâchement des responsabilités'.
[224] J Maynus, *In Primam [In Secundam] Digesti Vetus Partem Commentaria* (Leiden 1582); RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 31.
[225] J Maynus, *In Primam [In Secundam] Digesti Vetus Partem Commentaria* (Leiden 1582) XII.4.8 no 9, 31; C Visser, 'Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade' (1984) 101 The South African law journal 641, 649; RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 30; L Waelkens, *Amne Adverso: Roman Legal Heritage in European Culture* (Leiden University Press 2015) 351; T Rüfner, 'Art 6:111: Change of Circumstances' in N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 902.
[226] R Feenstra, 'Impossibilitas and Clausula Rebus Sic Stantibus: Some Aspects of Frustration of Contract in Continental Legal History up to Grotius' in R Feenstra (ed), *Fata Juris Romani: Etudes*

early 16th century was so strongly in favour of the doctrine, supporting its application in many different legal instruments, may have provided Romanist jurists with some comfort in adopting the doctrine. Nonetheless, De Mayno's enthusiasm did not cause Romanist jurists to lose all sense of the strictness of traditional civil law with regard to performance of contractual duties, as *rebus sic stantibus* was only applied to contracts.

This remembrance of traditional Roman law was brought back to the foreground towards the end of the 18th century and during the 19th century. A stricter adherence to the performance of contractual obligations had grown in popularity in many legal jurisdictions. This was the result of various factors including, for example, the rise of economic and political theories of capitalism and liberalism, and will theories of contract law, encouraged by the growing and influential Historical School of Jurisprudence.[227] Further, Pothier and Domat disapproved of the *rebus sic stantibus* doctrine, and their works emphasised the importance of fulfilling contractual obligations, without providing for the impact of unforeseen circumstances.[228] Their works were influential, and also inspired the Napoleonic Code, which favoured a return to traditional Roman contract law precepts, and brought a swift end to *rebus sic stantibus* doctrine's operation in the Netherlands, France and, to various degrees, in Germany.[229] As has been noted earlier in the

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d'Histoire Du Droit (Leiden University Press 1974) 84; RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 31.

[227] M Planiol and G Ripert, *Traité Pratique de Droit Civil Français* (2nd edn, Librairie Générale de Droit et de Jurisprudence 1952) vol 6, 526-27; S Litvinoff, 'Force Majeure, Failure of Cause and Théorie de l'Imprévision: Louisiana Law and Beyond' (1985) 46 Louisiana Law Review 1, 4; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 581; C Tabor, 'Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law' (2008) 68 Louisiance Law Review 549, 556-57; RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 31, 38. The last Roman-Dutch jurist to express support for the application of the *rebus sic stantibus* doctrine in contracts was Mr Vink, who wrote about it in his thesis in 1803: F Brandsma, 'The Dutch Common Law Tradition: Some Remarks on Dutch Private Law and the Ius Commune' in JHM van Erp and LPW van Vliet (eds), *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (Intersentia 2006) 8-9.

[228] RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 35-36.

[229] AT Saliba, 'Rebus Sic Stantibus: A Comparative Survey' (2001) 8 Murdoch University Electronic Journal of Law <www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2001/18.html> accessed 27 October 2021; RA Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (Intersentia 2011) 35-36; C Pédamon, 'The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?' (2017) 112 Amicus Curiae 10, 10. For further information on the Napoleonic influence on Germany with regard to the strictness of the legal approach to performance of contractual obligations, refer to: TT Arvind and L

chapter on force majeure clauses, the Napoleonic Code did, however, recognise the doctrine of force majeure, indicating that non-performance was nevertheless accepted in exceptional circumstances.

6.3. Emerging principles in Scots contract law

From these discussed legal rules in the civil law tradition and canon law, come a number of underlying principles of Scots contract law. These can be identified as, on the one hand, the principles of freedom of contract and sanctity of contract and, on the other, the principle of equity.

6.3.1. Freedom and sanctity of contract principles

On the most basic level, Scots contract law is underpinned by the idea that parties may craft and agree upon obligations to one another, and must subsequently fulfil those obligations accordingly. Such obligations can, in Scots law, be understood in the same way as in civil law – they constitute a 'legal tie by which a party or parties are bound to a certain performance'.[230] It is generally understood that parties' autonomy in relation to their creation of and binding themselves to such obligations 'should be respected unless there is a good cause to intervene' – again reflective of the civil law tradition.[231] This understanding is embodied in the principles of 'freedom of contract' and 'sanctity of contract'. Freedom of contract entails that parties are free to commence negotiations with each other, and to shape contractual terms to their own benefit or accommodate the other party's preferences.[232] Equally, they are free not to do these things.[233] Sanctity of contract involves parties being absolutely bound to fulfil their obligations and perform as agreed.[234] These are relevant to the doctrine

Stirton, 'Explaining the Reception of the Code Napoleon in Germany: A Fuzzy-Set Qualitative Comparative Analysis' (2010) 30 Legal Studies 1.

[230] M Hogg, 'Perspectives on Contract Theory from a Mixed Legal System' (2009) 29 Oxford Journal of Legal Studies 643, 646.

[231] C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier 2009) 61; HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 1.46.

[232] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 1.45; KP Berger, *The Creeping Codification of the Lex Mercatoria* (Aspen Publishers 2010) 381, No. IV.1.1.

[233] HL MacQueen and J Thomson, *Contract Law in Scotland* (4th edn, Bloomsbury 2016) 98.

[234] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 1.45; KP Berger, *The Creeping Codification of the Lex Mercatoria* (Aspen Publishers 2010) 381, No. IV.1.2.

of equitable adjustment, as the more that these principles are adhered to in the Scottish legal system, the less space there is for the judiciary to intervene in the parties' affairs and make an adjustment to their prior-agreed obligations – such as through the proposed doctrine of equitable adjustment.

The freedom and sanctity of contract principles are particularly strong components of Scots contract law due the impact of Stair's writings on and development of Scots contract law.[235] Stair draws from Aristotelian ideas of virtue to regard promise-keeping as a virtuous activity, and placed this within a Calvinist framework.[236] He does this by ascribing the virtuousness of promise-keeping and the fulfilment of contractual obligations to both God and the promisor, and advancing the canonist notion that obligations are had towards both God and the promisee.[237]

Whilst Stair incorporates Aristotelian values in his understanding of contractual obligations, he 'give[s] primacy to man's rational choices as commanding the respect of the law'.[238] This placement of human will at the forefront of importance in contract law is significant to the freedom and sanctity of contract principles. For instance, Stair finds that parties' determination of the value of their corresponding performances eclipses external determinations, such as market value or more general societal standards of fairness and justice.[239] As such, Stair finds parties' human will to be fundamental, making it necessary to leave parties to create, and bind themselves to, contractual obligations without external interference. In other words, freedom and sanctity of contract are dominant principles in Scots contract law because they concern the contracting parties' human will. Stair's views are adopted

[235] HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Vogenauer and S Weatherill (eds), *General Principles of Law* (Hart Publishing 2017) 279.
[236] D Reid, 'Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 Journal of Legal History 189; HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Vogenauer and S Weatherill (eds), *General Principles of Law* (Hart Publishing 2017) 280, 282.
[237] Stair, *Institutions*, I.i.19, I.i.20; HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Vogenauer and S Weatherill (eds), *General Principles of Law* (Hart Publishing 2017) 281-82.
[238] M Hogg, 'Perspectives on Contract Theory from a Mixed Legal System' (2009) 29 Oxford Journal of Legal Studies 643, 649.
[239] Stair, *Institutions*, I.x.14; M Hogg, 'Perspectives on Contract Theory from a Mixed Legal System' (2009) 29 Oxford Journal of Legal Studies 643, 649.

by Gloag '[t]he will to be bound … is a necessary element in the constitution of an obligation'.[240]

Stair viewed the freedom and sanctity of contract principles to be of high societal importance, and he prized them in the context of 'freedom of commerce' – 'one of positive law's primary aims'.[241] These principles allow for a level of predictability between the contracting parties, which in turn helps to ensure the smooth-running of their activities that depend on the agreed-upon details and content of the contract. The freedom of contract and sanctity principles act as a backstop that prevents parties from (easily) getting out of their obligations and the details of the agreement between them and another contracting party.

6.3.2. The principle of equity

Although the freedom and sanctity of contract principles are central to Scots contract law, they are not unlimited in application and scope. Certain caveats to their applicability and scope can be found, which are based upon equitable considerations to allow for situations in which a party is not required to perform.[242] In this light, equity is another principle to be considered. However, as equity is, in essence, simply a vehicle for advancing values of fairness and justice in legal rules and throughout the legal system, it may not necessarily contradict the freedom and sanctity of contract principles. For example, some, such as Stair, would argue that not deviating from the initial will of the parties and ensuring predictability is in itself an equitable outcome.[243] That said, it could be argued that there are situations in which it would be unfair to require a party to perform, regardless of the initial will of the parties and the benefits of predictability.

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[240] WM Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, W Green 1929) 16. Referencing: Stair, *Institutions*, I.x.2.
[241] Stair, *Institutions*, I.i.18. Further discussion can be found in: DN MacCormick, 'Stair and the Natural Law Tradition: Still Relevant?' in HL MacQueen (ed), *Miscellany VI* (Stair Society 2009) vol 54, 5; HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Vogenauer and S Weatherill (eds), *General Principles of Law* (Hart Publishing 2017) 291.
[242] Refer above to: '5.1.1. The component of equity: shaping the nature of the doctrine'
[243] Stair, *Institutions*, I.i.18.

For Stair, these situations are very limited. They would only extend to where ‘a contract was impossible or illegal, or if a party was incapable, compelled by another, or made an error about the “substantials” of the agreement’, in which case the contract would be struck down.[244] He also finds that such situations do not include fraud and extortion,[245] which are ‘wrongs [giving] rise to the obediential obligation of reparation, which could be set off against the obligations arising under any resultant contract rather than striking it down’.[246] This is very much in line with the ‘increasingly restrictive approach to fraud and error as grounds for escaping from a contract’ in Scots law.[247] It is worth also noting at this point that Stair, and other institutional writers, make almost no mention of the *rebus sic stantibus* doctrine, perhaps indicating the limited influence of the principle of equity in this particular form during this time. Overall, however, despite Stair’s reserved approach, he does recognise some limits to the application and scope of freedom and sanctity of contract principles, in cases where these limits produce an evidently more equitable outcome. This fact is more important than any specific reference to *rebus sic stantibus*, as it is the principle of equity itself that matters when considering the extent to which Scots contract law permits limits to the freedom and sanctity of contract principles (and whether the doctrine of equitable adjustment aligns with that).

For the late 18th- and early 19th-century jurists who believed freedom and sanctity of contract principles to be grounded in public policy, these principles ‘must yield to weightier concerns of the same public policy, for example in the preservation of an individual’s freedom to trade or practise a profession’.[248] Indeed, ‘[c]ontracts were attacked as contra bonos mores’, and enforcement of such contracts was refused ‘in varying situations and despite previous authority’.[249] Examples of contracts that were refused to be enforced during this period include contracts concerning combinations,

[244] Stair, *Institutions*, I.x.13; HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds*), The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 234.
[245] Stair, *Institutions*, I.ix.8-I.ix.14.
[246] HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds*), The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 234.
[247] HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds*), The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 235.
[248] HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds*), The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 235.
[249] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) paras 19.10-19.11.

smuggling, the sale of public offices, and wagers, with all of these changes, except for combinations, surviving.[250]

Aside from striking down and refusing to enforce contracts, the principle of equity is also used to change contractual obligations where this is deemed to be more equitable than leaving the parties to perform their obligations precisely as initially agreed. For example, where goods are latently insufficient, abatement of price is possible, and where penalty clauses were present in a contract, they are 'reduced to the just interest, whatever the parties' agreement'.[251]

6.4. Interim conclusion

Overall, the legal traditions that have influenced the development of the Scottish legal system can be used to better understand freedom and sanctity of contract, and equity, in Scots contract law. This can then be used as a basis upon which to determine whether the proposed doctrine of equitable adjustment aligns with these principles – a necessary element for it to successfully operate as a mechanism in Scots contract law.

It seems that Scots law strongly seeks to uphold the freedom and sanctity of contract principles, yet does accommodate limits to these in situations where they would very clearly achieve a more equitable outcome. For situations that are not so severe as to undoubtedly warrant the striking down or non-enforcement of a contract, but where it would nevertheless not be equitable to require the parties to perform certain duties, Scots law finds a middle ground, balancing all three principles. This entails making changes to a contract so that it can continue to be in force, but is simultaneously ensured to align with an external standard of equity.

This thesis suggests that the doctrine of equitable adjustment is, similarly, an acceptable limit to the application and scope of freedom and sanctity of contract, for

[250] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) paras 19.10-19.11. Note the absence of fraud and extortion. For further information on why these changes occurred and how they developed, refer to: WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) paras 19.06-19.13.
[251] Stair, *Institutions*, I.x.14-I.x.15.

three reasons. Firstly, such limits are permitted where warranted on the basis of equity. A change of circumstances resulting in non-performance of contractual obligations is a situation where this would indeed be warranted. Secondly, the limit constituted by the doctrine is not as severe as other existing limits that entail the striking down or non-enforcement of a contract. Indeed, the 'middle ground' of changing contractual obligations to achieve an equitable outcome is exactly what is intended by the doctrine. Thirdly, it balances the parties' initial intentions (the principles of freedom and sanctity of contract) with an understanding of when a party cannot fairly be expected to perform (the principle of equity). This is due to the proposal for the doctrine to be a basis of defence to enforcement of the contract as it stands, applicable only if the contracting parties commence legal proceedings, and after the court has determined that there is no applicable force majeure clause and the requirements of the doctrine of frustration are not met.

Further, limits to the application and scope of the freedom and sanctity of contract principles were introduced in the late 18th and early 19th centuries without concrete precedent or even in spite of a previously contradictory approach. This is interesting to consider in light of the proposed doctrine of equitable adjustment – is there a legal foundation for the doctrine in Scots law, or is it solely justified in the abstract, in terms of aligning with the relevant underlying principles? The following chapter will examine the legal foundation for the doctrine of equitable adjustment, by considering rent abatement in commercial leasing. It will demonstrate that rent abatement is a 'manifestation' of the broad, underlying principle of the power of the court to readjust the position of the parties, in the same way as the modern understanding of frustration is, and that it is a very similar manifestation to the proposed doctrine of equitable adjustment. These considerations present rent abatement in commercial leasing as a legal foundation from which the doctrine of equitable adjustment could be developed.

7. Rent Abatement as a Legal Foundation for the Development of the Doctrine of Equitable Adjustment

In addition to assessing whether the doctrine of equitable adjustment aligns with the underlying principles of Scots contract law, it is important to assess the legal foundation for the doctrine, as this provides an even stronger justification for it as a proposed mechanism to address changes of circumstances in contract law. To this effect, this chapter explores rent abatement in commercial leases as a manifestation of the power of the court to readjust the position of the parties, which is very similar to the proposed doctrine of equitable adjustment and which already exists in Scots law. Essentially, if an equitable adjustment to a contract exists in commercial leasing, then it can be argued by analogy that this could be applied to commercial contracts more broadly, as would be entailed with the proposed doctrine of equitable adjustment. It is useful to note that other potential manifestations apart from rent abatement could be discussed, such as partial frustration, temporary suspension of the contract, price abatement in employment and apprenticeship cases, and payment of the value of work done or goods supplied under an uncompleted contract.[252] However, the scope of this thesis does not allow for discussion of all of these, and rent abatement was therefore chosen as the focus of this analogy due to its similarity to the proposed doctrine of equitable adjustment.

Rent abatement is a legal mechanism that applies in situations where parties to a commercial lease experience a change of circumstances, following which the tenant is unable to pay the landlord one of the instalments due as payment of the lease. Rather than being 'a matter of setting off against the liability for rent the tenant's claim to have the subjects repaired by the landlord (a right which also exists unless the lease otherwise provides)', rent abatement entails that:

> where, through no fault of his own, a tenant loses part of the subject let to him, he is entitled to an abatement of his rent,—that is to say, he ceases to be

[252] HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 6.

> the debtor of his landlord to the extent to which he is entitled to an abatement. If that be so, it seems to follow as a matter of course that that right can be pleaded in answer to a demand for rent.[253]

Rent abatement involves all the key ingredients required for it to be analogous to the doctrine of equitable adjustment: contractual obligations of performance, a party's inability to perform following a change of circumstances, a judicial change to contractual obligations, and continuation of the contract. Further, rent abatement is said to be 'founded on the highest equity'.[254] It can therefore be seen as a manifestation of the power of the court to readjust the position of the parties, just as the current understanding of the doctrine of frustration was described to be in the earlier chapter on frustration, and as the proposed doctrine of equitable adjusted is suggested to be.

The following sections will focus on the key aspects of Scots law's development of rent abatement from the 16th century onwards, to draw conclusions about its significance as a legal foundation from which equitable adjustment can be developed in Scots contract law. As rent abatement is a large topic on its own, only the key authorities will be considered.

7.1. 16th and 17th centuries

From the research carried out for this thesis, the first instances of rent abatement identifiable in Scottish case law records took place in the 16th century.[255] These are namely three cases noted in Balfour's Practicks,[256] two of which date back to 1549 and one to 1563. These cases are described by the names of '*The Chapter of*

[253] *Muir v McIntyre* (1887) 14 R 470, 472-73 (Lord President Inglis). In a recent Scottish case where an abatement of rent was granted, Sheriff McCormick states that 'the leading authority remains the opinion of Lord President Inglis': *Fern Trustee 1 Ltd v Scott Wilson Railways Ltd* 2021 SLT (Sh Ct) 7. Further refer to: HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 6.
[254] *Muir v McIntyre* (1887) 14 R 470, 473 (Lord Shand).
[255] As also found by McBryde: WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 6. This differs to Lord Cooper's earlier identification of the principle's emergence in the early 17th century in Scotland, in Craig, *Jus Feudale* III.v.23: Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.
[256] Balfour, *Practicks*, 146.

Glasgow v Laird of Cessford',[257] '*Abbot of Holyroodhouse v Monnypenny*'[258] and '*Abbot of Holyroodhouse v Laird of Inverleith*'.[259] The first case concerns tenants of land on the Scottish border with England, whose corn was shorn and placed in stooks but who, out of fear of the harvest being burned by others, did not place the stooks into the barnyard. The result was that the harvest mostly perished in the field as a result of rot, and the tenants were unable to fulfil their obligation of paying the landlord in corn. The court found that tenants were not obliged to pay teinds for an instalment due in these situations. That said, this was a singular adjustment, and the obligation was to resume thereafter given the continuation of the contract.

The second case did not provide specific details about the circumstances of the parties. The decision does, however, state that, if a person is indebted or obliged to pay teinds to another, they will not be compelled to pay it in whole or in part on an occasion that the corn is destroyed, laid to waste or consumed as a result of the force or violence of a person, army or multitude of men that they were unable to resist.

In the third case, it was held that a person will not be compelled to pay their teind if their tenant labourers are killed by the enemy or disease, are not to be compelled to pay teinds in whole or in part if the tenant labourers are killed by an enemy or disease, or if crops are eaten, destroyed, pillaged or taken away as a result of force or violence by a confederate multitude or army, or those 'of our Soverane Lady is awin liegis'.[260] No details about the circumstances of the parties are provided.

There are several significant aspects of these cases. To begin with, no force majeure clause applies in any of the cases – there would likely be no force majeure clause if the contract was not written, information which is not recorded for any of the cases – and none of the contracts are frustrated.[261] Rather, the court intervened to exempt

[257] Dated 29 July 1563 and cited in Westlaw as: *The Chapter of Glasgow v The Laird of Cessford* (1563) Mor 10143.
[258] Dated 15 December 1549 and cited in Westlaw as: *Abbot of Holyroodhouse v Mr John Monypenny* (1549) Mor 10143.
[259] Dated 20 January 1549 and cited in Westlaw as: *Abbot of Holyroodhouse v The Laird of Inverleith* (1549) Mor 10142.
[260] *Abbot of Holyroodhouse v The Laird of Inverleith* (1549) Mor 10142.
[261] Note that these cases are discussed by McBryde as being an example of frustration in Scots law: WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 6-7. However, this refers to Lord

performance of an obligation of payment when a change of circumstances obstructed that performance, with the exemption being just on the affected occasion. This essentially constitutes an adjustment of the kind that the doctrine of equitable adjustment would entail. The justification for exempting this performance lies in the nature of the circumstances, which are out of the parties' control and understandable as to why the party was unable to perform. Further, the court's adjustment was as minimal as possible to achieve the desired effect, being only an adjustment to the payment falling due from the tenant defender on the affected occasion. These considerations mean that the adjustment was made for equitable reasons, and produced an equitable outcome.

It might be worthwhile to reflect on these cases in light of underlying principles of private law as influenced by canon and civil law. In each case, the court's abatement of rent signifies an exception to the application of the freedom and sanctity of contract principles, in favour of this more equitable course of action, in light of the particular change of circumstances experienced by the tenant. This approach may have been the product of the influence of canon law in Scotland during this period.[262] In medieval Scotland, ecclesiastical courts heard all matters relating to obligations, and canon law slowly became integrated into the wider Scottish common law.[263] Following the Reformation in 1560, canon law continued to be relied upon in matters concerning contractual and voluntary obligations in the commissary courts and the Court of Session.[264] For example, at that time, Thomas Craig wrote that canon law is applied over civil law in Scottish cases, where there are discrepancies between them.[265] Also interestingly, considering that the cases were listed in Balfour's Practicks, Balfour himself was trained in canon law, and had intended to promote

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Cooper's understanding of frustration, being 'how the relations of two parties should be equitably readjusted by the Court when the one had been unintentionally enriched at the expense of the other', rather than the modern understanding that it is 'one of the methods by which contractual obligations are discharged': Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.

[262] Also recalling that this was the period in which canon law's *rebus sic stantibus* doctrine was incorporated into the civil law tradition. See: '6.2.3. Performance following a change of circumstances'.

[263] WDH Sellar, 'Promise' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume II: Obligations* (Oxford University Press 2000) 263.

[264] WDH Sellar, 'Promise' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume II: Obligations* (Oxford University Press 2000) 263.

[265] T Craig, *Jus Feudale,* I.iii.24. See also: R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 543-44.

medieval texts in his presentation of Scots law in his works.[266] In his career, he became Official of the Archdeaconry of Lothian and Chief Judge of the Consistorial Court of the Archbishop of St Andrews.[267] Later, Balfour became Lord President of the Court of Session, where he would have relied on his training in and experience with canon law when engaging in cases on contract law matters.[268]

7.2. 18th and 19th centuries

As the *rebus sic stantibus* doctrine was no longer accommodated by the civil law tradition in the 18th and 19th centuries,[269] it is particularly interesting to consider the applicable authorities' position on rent abatement during this time, and discover whether this change was mirrored in their position.

Two Scottish institutional writers published works in the second half of the 18th century: Bankton with 'An Institute of the Laws of Scotland in Civil Rights', and Erskine with 'An Institute of the Law of Scotland'. Both Bankton and Erskine were Romanist jurists, not canonists, and are not particularly known to have sought to promote natural law theory.[270] Erskine's *Institutes* have been described as being '[d]eliberately and unashamedly … a work on the law of Scotland, founded on Scottish and Roman sources'.[271] Similarly, for Bankton, 'apart from Stair, [his] main guide is the Civil law to which he refers more and more consistently than any other institutional writer'.[272] This makes their position on rent abatement particularly interesting to compare to that of the authorities from the previous centuries, where

[266] KG Baston, 'Understanding the Scottish Practicks' (*The Edinburgh Legal History Blog*, 7 May 2013) <www.elhblog.law.ed.ac.uk/2013/05/07/understanding-the-scottish-practicks/> accessed 3 November 2021.
[267] University of Toronto Libraries and British Armorial Bindings, 'Balfour, James, Sir, of Pittendreich (1525 -1583)' (*Stamp Owners*) <armorial.library.utoronto.ca/stamp-owners/BAL001> accessed 11 November 2021.
[268] University of Toronto Libraries and British Armorial Bindings, 'Balfour, James, Sir, of Pittendreich (1525 -1583)' (*Stamp Owners*) <armorial.library.utoronto.ca/stamp-owners/BAL001> accessed 11 November 2021.
[269] Refer to: '6.2.3. Performance following a change of circumstances'.
[270] AM Bankton, *An Institute of the Laws of Scotland in Civil Rights*, vol 43 (WM Gordon ed, Stair Society 1995) x-xvii, xxii; K Reid, 'John Erskine and the Institute of the Law of Scotland' (2015) Edinburgh School of Law Research Paper 2015/26, 1-3 <ssrn.com/abstract=2644284> accessed 14 November 2021.
[271] K Reid, 'John Erskine and the Institute of the Law of Scotland' (2015) Edinburgh School of Law Research Paper 2015/26, 18 <ssrn.com/abstract=2644284> accessed 14 November 2021.
[272] AM Bankton, *An Institute of the Laws of Scotland in Civil Rights*, vol 43 (WM Gordon ed, Stair Society 1995) xxiii.

canon law was a dominant influence. In their works, Bankton and Erskine take a similar approach to rent abatement. Perhaps surprisingly, notwithstanding the fact that they were strictly Romanist lawyers, their approach is reflective of the one adopted by the courts in the three 16th-century cases recorded in Balfour's Practicks.[273] As such, they adopt the perception of rent abatement in Scots law projected during the 16th and 17th centuries despite their Romanist attachment.

Turning away from institutional writers to Scottish case law, *Foster and Duncan v Adamson and Williamson*[274] is a relevant example of the approach to rent abatement in the Court of Session in the later 18th century. The case considered whether the tenants were excused from their annual, due payment of tack-duty because the tack was sterile for part of the duration of the lease. The landlords let 'a salmon-fishing in the river Tay … on the north side of a shallow … to endure for five years' to the tenants.[275] The river was broad, but the current was narrow, with the result that it only ran along one side of the bank at a time, with the particular side being subject to change over time. The current ran along the north side when the lease commenced, but changed to the other side in the fourth year of the lease. As the tenants did not have fishing rights on the other side of the river, this meant that their tack was sterile in the fourth and fifth years of their lease, and they did not make the annual payments that were due for these two years.

Whilst the lease was still ongoing, the landlords sought payment of the tack-duty owed to them by the tenants for the last two years of the lease, and argued that the tenants could not be excused from making the annual payments in these circumstances. The reasoning was that the sterility of the river, whilst unprofitable for the respondents, could theoretically have changed and become profitable for them again, and the unprofitability for the tenants in the last two years of the lease were therefore part and parcel of the nature of leasing the tack. It was also argued by the landlords that, if the sterility was permanent, with the result that the subject matter of the contact became extinct, then the contract of lease was frustrated. In that case,

[273] Bankton, *An Institute*, I.xx.13; Erskine, *An Institute*, II.vi.41.
[274] (1762) Mor 10131. Note that this took place between the publication of Bankton's and Erskine's works.
[275] *Foster and Duncan v Adamson and Williamson* (1762) Mor 10131.

the respondents could no longer enjoy use of the tack, and must surrender it, which they had not done.

In response, the tenants argued an equitable defence of 'sterility', requesting an abatement of the annual rent in order that the contract continue but the payment not be unfairly enforced in the circumstances. The court decided in favour of the respondents, continuing the pattern from the three earlier cases and Bankton's work.

The commentary complementing the case record is interesting, as it objects to the court's decision – an understandable position knowing that the reporter was the 'disappointed counsel'.[276] The commentator frames the court's decision as catering to the tenant rather than the landlord as a result of the tenant being viewed as the more vulnerable party, in need of protection by the law. The commentator proceeds to point out that a landlord/tenant relationship is not always balanced in this way, therefore rendering the decision of questionable authority if it is applied in exactly the same way in future cases. The commentator then makes use of an argument by analogy: an impoverished widow leases out part of her property, an orchard, to a wealthy man, but the orchard becomes sterile for the last two years of the lease. The question is then whether the court should sustain the wealthy man's equitable defence of sterility to permit non-payment of the annual fee due. The commentator concludes that doing this would not achieve an equitable outcome. *Gowans v Christie*[277] also casts doubt on the strength of the earlier case as precedent. Here, a mineral lease was held not to be frustrated as a result of the mineral seam's failure, but the court also chose not to refuse rent payment for the year that the lease was unproductive. This was justified by the court with the idea that 'the tenant expected to make his profit on a balance of good and bad years', thereby making refusal of the rent an inequitable outcome.[278]

Responding to the case criticism requires recalling the underlying principles of freedom and sanctity of contract, and equity, and that these must be properly

[276] J Thomson, 'Judicial Control of Unfair Terms' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume II: Obligations* (Oxford University Press 2000) 167.
[277] (1873) 11 M (HL) 1.
[278] WM Gloag and RC Henderson, *The Law of Scotland* (HL MacQueen, RD Mackay and C Anderson eds, 15th edn, W Green 2022) para 11.08.

counterbalanced. Of course, decisions which advance equitable principles cannot be blindly applied in all subsequent cases on similar issues, as this may not always lead to an equally equitable outcome. That would indeed undermine the principle of equity. As such, these principles must be counterbalanced according to the circumstances of each case, to achieve their inherent purpose of fairness in regulating contractual agreements. Apart from emphasising this consideration, however, the commentary does not weaken the decision itself, or the reasoning behind it, and is therefore not indicative of a different approach to rent abatement amongst Scottish jurists at the time. Another consideration is that the commentator was the so-called disappointed counsel.

Gowans v Christie[279] can be addressed by pointing out that the unproductiveness of a mineral lease in one particular year could be expected and is therefore an inherent risk when entering into the lease contract, so cannot truly constitute an external change of circumstances.[280] This case may therefore 'be cited as a classic case on freedom of contract'.[281] This is perhaps a better reason for distinguishing *Foster and Duncan v Adamson and Williamson*[282] and for supporting the court's decision.

Following these cases, rent abatement continued to be applied by successive courts. One example is the Court of Session (Inner House, First Division) case of *Muir v McIntyre*.[283] This case concerned tenants of a farm who did not pay the balance of half a year's rent that was due, which the landlords sought payment of. The tenants' defence was that the 'subjects of let have been greatly diminished in value and materially reduced through a fire', with a number of buildings having been 'completely destroyed', meaning that they were unable to use the farm for their intended purposes.[284] They sought to terminate the lease, and to have the value of rent deducted from the overall amount that they owed the landlords, to reflect 'the diminished value of the subject of the lease'.[285]

[279] (1873) 11 M (HL) 1.
[280] Risk and its implications for the doctrine of equitable adjustment are more deeply explored in: '7.4. Understanding the scope of rent abatement as a legal foundation: considering "risk"'.
[281] WM Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (Edinburgh University Press 2007) 132.
[282] (1762) Mor 10131.
[283] (1887) 14 R 470. Referred to earlier in this chapter when defining 'rent abatement'.
[284] *Muir v McIntyre* (1887) 14 R 470, 470.
[285] *Muir v McIntyre* (1887) 14 R 470, 470.

In arguments before the Court of Session, the tenants focussed on their entitlement to an abatement of rent, on the basis that 'they did not get the whole subject let to them', which differed to the total destruction of prior case law, but was still supported in a previous case.[286] The landlords, however:

> admitted that when possession was not given of an essential part of a subject let the tenant was entitled to plead that in answer to a claim for the full rent, but when something happened after possession had been given of the whole subject then the tenant must constitute his claim.[287]

Consequently, they argued, the tenants should have immediately given up the whole lease, which they did not do. The landlords further argued that the tenants' claim was for compensation, which differed to rent abatement.

The court unanimously found in favour of the tenants. They found that the tenants' claim was for abatement of rent and not for compensation, that 'a tenant in the circumstances here is entitled to an abatement is quite settled by authority',[288] and that it would 'be most inequitable if the landlord could exact his full rent from the tenant who has been deprived of a large part of the subject let to him through no fault of his own'.[289] Overall, rent abatement seems to be a settled principle in Scots law by the time of this case, and one that permits the continuation of the contract with an adjustment of certain contractual obligations affected by an external change of circumstances. The court consciously pays attention to the principle of equity, as it seeks to consider whether the adjustment would achieve a more equitable outcome than enforcing the obligation in its original form.

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[286] *Muir v McIntyre* (1887) 14 R 470, 471. HL MacQueen, 'The Covid-19 Pandemic, Contracts, and Change of Circumstance: Still Room for Equitable Adjustment?' (*Edinburgh Private Law Blog*, 24 June 2020) <blogs.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-for-equitable-adjustment/> accessed 6 September 2021.
[287] *Muir v McIntyre* (1887) 14 R 470, 471.
[288] *Muir v McIntyre* (1887) 14 R 470, 474 (Lord Adam).
[289] *Muir v McIntyre* (1887) 14 R 470, 473 (Lord Shand).

7.3. Extending the scope of rent abatement

Whether the scope of rent abatement can be extended outwith commercial leasing is an interesting point to consider, as it may further make the case for the proposed doctrine of equitable adjustment.

One relevant case to examine is the Court of Session (Inner House, Second Division) case *John Maclelland v Adam and Mathie*, which does not seem to support the possibility of extending the scope of rent abatement outwith commercial leasing.[290] The court considered whether a supplier should be 'assoilzied from the present action [of damages], upon the same principle, that an abatement of rent is allowed wherever the value of the subject let is greatly diminished by extraordinary causes.'[291] A supplier (the defender) had agreed to supply 'British spirits, of a certain quality, at a fixed price' to a retailer (the pursuer).[292] However, the price of the spirits rose considerably after an additional tax was introduced, making performance of the obligation 'if, not impossible, at least altogether ruinous to the defenders', who then refused to perform.[293] As part of this argument, the supplier described the objective of the contract as having been 'merely to secure the parties against the ordinary fluctuations in the market-price of the commodity'.[294] The supplier also argued that the retailer had requested 'a much greater quantity of spirits than usual, or than was necessary for him, in the usual course of his trade, merely with the view of making profit at their expense'.[295] The judge found in favour of the pursuer. Following this, a reclaiming motion was presented, but the court 'were clear' that 'a contract of sale could not be affected by a supervenient law, whether diminishing or increasing the price of the commodity'.[296]

Despite this being a Court of Session (Inner House, Second Division) case, it is not necessarily significant authority for the notion that the scope of rent abatement

[290] (1795) Mor 14247.
[291] *John Maclelland v Adam and Mathie* (1795) Mor 14247.
[292] *John Maclelland v Adam and Mathie* (1795) Mor 14247.
[293] *John Maclelland v Adam and Mathie* (1795) Mor 14247. In the words of the counsel for the defenders in the case.
[294] *John Maclelland v Adam and Mathie* (1795) Mor 14247.
[295] *John Maclelland v Adam and Mathie* (1795) Mor 14247.
[296] *John Maclelland v Adam and Mathie* (1795) Mor 14247.

cannot be extended outwith commercial leasing. This is primarily due to the lack of reasons provided for the decision that are specific to the principle of rent abatement. As such, this case does not necessarily reject the notion that rent abatement can be extended to contracts other than commercial leases.

A case that was seemingly successful in extending the principle of rent abatement is *Wilkie v Bethune*.[297] This Court of Session (Inner House, First Division) case concerned a master's obligation to 'deliver to his farm servant nine bolls of potatoes, besides money wages, and certain other allowances'.[298] There was a potato famine in 1847, which meant that 'the master was unable to give delivery of the stipulated quantity to his servant without purchasing at treble the ordinary price of the article'.[299] Further, the potatoes that he had planted were 'tainted with disease', and not suitable to deliver, and therefore he 'offered compensation at the highest rate paid in the district' at that time.[300] The rate was not accepted by the farm servant, who subsequently raised an action against the master in implement of the contract's terms. The court determined that the master should pay the farm servant the monetary equivalent of the potatoes in light of the change of circumstances, to ensure an 'equivalent amount of sustention'.[301]

The court essentially made use of an equitable adjustment to ensure that the overarching aim of the contract and the particular contractual obligation could be fulfilled.[302] The overarching aim of the contract and the contractual obligation in this case was to provide food sustenance of a certain amount to the farm servant alongside monetary wages. These were indeed fulfilled as a result of the court's modification of the affected obligation.[303] As this was not an abatement of rent, but rather an abatement of wages, it seems that this case has extended the principles

[297] (1848) 11 D 132.
[298] *Wilkie v Bethune* (1848) 11 D 132.
[299] *Wilkie v Bethune* (1848) 11 D 132.
[300] *Wilkie v Bethune* (1848) 11 D 132, 133.
[301] *Wilkie v Bethune* (1848) 11 D 132, 137 (Lord Mackenzie).
[302] HL MacQueen, '"Coronavirus" Contract Law in Scotland' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 505.
[303] HL MacQueen, '"Coronavirus" Contract Law in Scotland' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 505; HL MacQueen, 'The Covid-19 Pandemic, Contracts, and Change of Circumstance: Still Room for Equitable Adjustment?' (*Edinburgh Private Law Blog*, 24 June 2020) <blogs.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-for-equitable-adjustment/> accessed 6 September 2021.

underlying rent abatement in commercial leasing. This may support the proposal for the doctrine of equitable adjustment in Scots contract law, which would involve similar principles to rent abatement in commercial leasing, but would not be limited in its application to only certain types of contract. Further, '*Wilkie v Bethune* is thus indeed exceptional on its facts; but it is precisely in exceptional cases that one should expect a principle of equitable adjustment to become applicable.[304]

7.4. Understanding the scope of rent abatement as a legal foundation: considering 'risk'

Something that is prominent when considering rent abatement in commercial leasing, is the choice between going forwards with an adjustment or letting the loss be borne by the non-performing party. The decision entails a consideration of 'risk', to understand whether it is assumed by the non-performing party or the other party. Understanding how this consideration works will help to illustrate the scope of rent abatement as a legal foundation for the doctrine of equitable adjustment.

In the cases on rent abatement that have been considered, it has been deemed equitable by the court to make a single adjustment to the contractual obligations so that the non-performing party is not required to perform in certain changed circumstances. Essentially, the courts' decisions absolve a party from one instance of performance in the context of a contract which involves repeated performance. As is to be expected, the changed circumstances that justify not enforcing that moment of performance are external and directly cause the non-performance. However, they are also circumstances that cannot be reasonably anticipated as being part and parcel of the contract or the affected contractual obligations. In other words, they are not a risk that is assumed by one of the contracting parties.

For example, where crops are agreed to be provided by a farm tenant to a landlord in a series of instalments, changed circumstances may include changes in weather throughout the year, or the consumption of crops by pests. Either of these

[304] HL MacQueen, '"Coronavirus" Contract Law in Scotland' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 505.

circumstances may affect the quantity or quality or the crops, and therefore affect the tenant farmer's ability to properly perform their obligations under the contract. That said, these changes of circumstance are to be reasonably anticipated by the tenant farmer in the course of fulfilling their obligations, and are therefore risks that they would naturally assume.[305] As they are naturally assumed risks, it is expected that the tenant farmer had factored them in when agreeing to the obligations in the first place, and is therefore responsible for fulfilling those obligations despite the naturally assumed risks.[306] Consequently, a single adjustment of the tenant farmers' obligations, where they claim that their non-fulfilment of an instalment is due to these changes of circumstances, would not be fair to the other party, and would not be an adjustment that is equitable.

In contrast, for the same agreement, it would not be reasonable for the tenant farmer to anticipate the crops being destroyed or consumed by an army, or their workers becoming ill by plague and being unable to collect the crops before they perish in the field. The question is therefore: 'on whom should the risk of this casualty fall?'.[307] The answer to this requires study of the foundations of the concept of risk in relation to rent abatement.

In commercial leases, the basic principle of risk in these situations, first espoused by Stair[308] and later summarised in 'a decision of the highest authority'[309] is that:

> [i]f a subject let be totally destroyed by causes beyond the control and not within the contemplation of the parties, the contract comes to an end; if there be destruction of a substantial or considerable part only of the subject let there will arise a claim for abatement of rent; if there be neither, there is no change in the relation of the parties.[310]

[305] On farm leases, see: *Wilkie v Gibson* 1902 9 SLT 431. On mineral leases, see: *Gowans v Christie* 1873 11 M (HL) 1. Generally, see: J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 227-28. This idea fits with the earlier point made, disputing the criticism of *Foster and Duncan v Adamson and Williamson* (1762) Mor 10131 in *Gowans v Christie* (1873) 11 M (HL) 1.
[306] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 226-28.
[307] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 126.
[308] Stair, *Institutions*, I.xv.2.
[309] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 226. Referencing: *Gowans v Christie* 1873 11 M (HL) 1, 4 (Lord Selborne LC).
[310] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 227.

The significance of this principle for commercial leases is that the burden of proof would not lie on the tenant farmer; they are either 'entitled to abandon his lease or claim abatement of rent', depending on the degree to which performance is no longer possible.[311] When considering this from the wider lens of rent abatement as an analogy for the doctrine of equitable adjustment, the principle can be reformulated to illustrate how the burden of risk affects the suitability of making an equitable adjustment as opposed to frustrating the contract or enforcing it. Such a reformulation would constitute impossibility to perform at *all* future moments as a result of a change of circumstances leading to frustration, and impossibility to perform on *particular*, *significant* moments affected by the change of circumstances leading to equitable adjustment. Where the change of circumstances does not affect performance, the obligations are to be enforced as they stand, or, where performance is nevertheless impossible, breach of contract causing loss will be compensated through payment of damages. This approach fits with the narrative of the proposed doctrine of equitable adjustment and how it would fit into the wider landscape of Scots law, reinforcing the notion that rent abatement could provide a basis from which an analogous doctrine of equitable adjustment could be developed.

7.5. Interim conclusion

This chapter has considered rent abatement in commercial leasing as a basis from which the analogous, proposed doctrine of equitable adjustment could be developed. Rent abatement is an example of where the freedom and sanctity of contract principles balance less weightily against the principle of equity when it comes to non-performance of contractual obligations following changed circumstances in Scots private law. Rent abatement is also reflective of similar approaches to the allocation of risk in contracts in relation to changes of circumstances as those that would be adopted by the proposed doctrine of equitable adjustment.

Rent abatement could be viewed as one manifestation of the power of the court to readjust the position of the parties. The modern doctrine of frustration is another

[311] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, W Green 1916) 226.

such manifestation, and the proposed doctrine of equitable adjustment is suggested to be another. This suggestion is supported analogously by rent abatement in commercial leasing, due to its similarity to the doctrine of equitable adjustment and firm establishment in Scots law. *Wilkie v Bethune*[312] may even indicate that the underlying principles of rent abatement in commercial leasing can be extended – or is perhaps evidence of there being multiple manifestations of the power of the court to readjust the position of the parties in light of non-performance caused by a change of circumstances. All in all, the discussed cases on rent abatement create a pattern of decisions that are favourable towards the doctrine of equitable adjustment as a proposed mechanism in Scots contract law.

[312] (1848) 11 D 132.

8. The Doctrine of Equitable Adjustment: Practicalities

This chapter reviews how to implement the doctrine of equitable adjustment in practice, an essential consideration that pulls the research of this thesis together. Primarily, this chapter looks at the possibilities for implementation by the judiciary, as well as by the legislature as a 'plan B'.

8.1. Current judicial treatment of the doctrine

The current judicial treatment of the doctrine of equitable adjustment is essential for understanding the possibilities for implementing the doctrine of equitable adjustment in practice by the judiciary. The most focussed comments about the doctrine of equitable adjustment in modern Scottish case law can be found in the Court of Session case of *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc.*[313]

A charitable foundation had been set up by TSB Bank, and received annual payments from it. The payments were at minimum £38,920 and were calculated using a percentage of the pre-tax profits in the bank's annual accounts. Lloyds Bank later merged with TSB, and became responsible for these payments. Some years later, new accounting requirements were imposed, with the effect that Lloyds' annual accounts had to indicate amounts of negative goodwill (where the capital value of assets acquired exceeds what they had been acquired for, and the amount of this difference). In 2008-2009, Lloyds TSB acquired HBOS Bank. Given the financial crash and the resultant liabilities faced by HBOS, the amount paid for this asset was far less than its capital value, amounting to a difference of over £11 billion. The extent of this negative goodwill caused Lloyds' accounts to indicate substantial profits, despite the financial crash also having affected the bank. In light of these accounts, the bank's obligation to make annual payments based on a percentage of its profits, and the wording of the contract, the foundation claimed that the bank was

[313] [2013] UKSC 3, 2013 SC (UKSC) 169. For a useful summary of the case, see: R MacPherson and M Ross, 'Case Comment: Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc [2013] UKSC 3' (*UKSC Blog*, 4 March 2013) <ukscblog.com/case-comment-lloyds-tsb-foundation-for-scotland-v-lloyds-banking-group-plc-2013-uksc-3/> accessed 20 July 2022.

required to pay them £3.5 million for that year in implement of the contract. In court, Lloyds disputed this interpretation of the contract. In addition, however, whilst agreeing that the contract was not frustrated, Lloyds submitted that the courts could make an equitable adjustment to fairly address the changed circumstances. It was argued that this is a doctrine that is already recognised, or should be recognised, in Scots law.

The treatment of the doctrine of equitable adjustment by the courts can be illustrated by highlighting particular judges' remarks. The first of these was in the Outer House, made by Lord Glennie: 'I am not persuaded that there is such a doctrine [of equitable adjustment] in Scots law'.[314] His reasoning was firstly based upon the idea that, should the doctrine exist, it is unlikely to be 'peculiar to Scots law'.[315] The defender's reference to *Wilkie v Bethune*[316] in this sense did not, he felt, provide sufficient support, with the judges using different reasoning in their opinions, and McBryde's discussion of the case not entailing suggestion of a 'doctrine of equitable adjustment falling short of frustration'.[317] Further to this, he felt that, whilst decisions from England and the US were cited that are supportive of such a doctrine,[318] the doctrine 'must be tested by reference to the general principles of law there too', which had not been undertaken by the defender.[319] As such, he could not recognise the doctrine of equitable adjustment in Scots law because he 'was shown no case law, text book, treatise or article suggesting in terms the existence of such a doctrine in those other

[314] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [90] (Lord Glennie). Considered to be 'rather blunt' by both: LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021; HL MacQueen, 'The Covid-19 Pandemic, Contracts, and Change of Circumstance: Still Room for Equitable Adjustment?' (*Edinburgh Private Law Blog*, 24 June 2020) <blogs.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-for-equitable-adjustment/> accessed 6 September 2021.
[315] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [90] (Lord Glennie).
[316] (1848) 11 D 132.
[317] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [90] (Lord Glennie). Also having noted Gloag's comments that *Wilkie* was 'a very special case', 'the contract was contract was one *inter rusticos*, and that ordinary commercial contracts were on a different footing': WM Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, W Green 1929) 339.
[318] Such decisions being: *Aluminum Company of America v Essex Group Inc* 499 F Supp 53 (1980); *Pole Properties Ltd v Feinberg* (1982) 43 P&CR 121.
[319] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [90] (Lord Glennie).

systems'.[320] The second component of his reasoning focussed on the doctrine of frustration in Scots law. He notes that it 'is well established', whilst the doctrine of equitable adjustment 'has not been mentioned, let alone applied, in the many cases where parties have unavailingly advanced a frustration argument in such circumstances'.[321] To this effect, cases where 'a party will be relieved of his promise where there has been a radical change of circumstances or where the promise has been given under a mistake of fact … are dealt with now by the common law of frustration and mistake'.[322]

Following the case being reclaimed, the First Division stated that they were 'unable to find in Scots law any general doctrine of "equitable adjustment" which would allow the court to moderate the obligation contractually owed by the respondent to the reclaimer'.[323] Similarly to Lord Glennie, the reasoning was that there is currently 'no foundation for it, as a generality, in Scots law', and therefore it 'would be beyond the proper scope of judicial power to develop it in any way which would assist the respondent in this case'.[324] This reflects Macgregor's view that, 'a modern Scottish court is likely to react with surprise to the suggestion that it possesses such a power' of equitable adjustment.[325]

When the case was heard before the UK Supreme Court, Lord Hope stated that:

> the proposition that the court can equitably adjust a contract on the basis that its performance, while not frustrated, is no longer that which was originally contemplated is not part of Scots law. To hold otherwise would be to undermine the principle enshrined in the maxim pacta sunt servanda which

[320] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [90] (Lord Glennie). The Scots law materials that could have (and should have) been cited are discussed later in a later section of this chapter: '8.2. Shining a new light'.
[321] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [91] (Lord Glennie).
[322] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 [92] (Lord Glennie).
[323] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSIH 87, 2012 SC 259 [28].
[324] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSIH 87, 2012 SC 259 [29].
[325] LJ Macgregor, 'The Effect of Unexpected Circumstances in Contracts in Scots and Louisiana Law' in VV Palmer and EC Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 274.

> lies at the root of the whole of the law of contract. I see no need for this and, as there is no need for it, I would reject the suggestion that the court should assume that function.[326]

Before continuing, an important point to note is the obiter, non-binding nature of the statement; the UK Supreme Court found in favour of Lloyds on the basis of the arguments advanced about interpretation of the contract, making equitable adjustment an unnecessary aspect of the decision.

Notable components of Lord Hope's remarks include reference to underlying Scots contract law principles, whether there is a call for the doctrine, and the role of the court. Whilst notable, they are perhaps unsurprising. As MacQueen notes, generally, 'Scots common law has shared its English counterpart's aversion to playing a regulatory role over contractual freedom'.[327] Explaining this further, Thomson describes how:

> there is little, if any, tradition in Scots law of judicial control of contracts on the grounds that they are substantively unfair. Since the sixteenth century onwards, the perceived interests of a mercantile society have led the courts to deny the power to control substantively unfair terms. In the eighteenth and nineteenth centuries, this approach was further justified by the doctrine of freedom of contract. There is some evidence that the harshness of a bargain could be mitigated by sensitive construction of its terms but, even here, the courts maintained that they were simply attempting to give effect to the true intentions of the parties. Even where the courts retained their power to intervene or modify particular types of terms, for example, penalties and irritancy clauses, in practice their discretion has been exercised cautiously.[328]

[326] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, 2013 SC (UKSC) 169, [48] (Lord Hope).
[327] HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 235.
[328] J Thomson, 'Judicial Control of Unfair Terms' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume II: Obligations* (Oxford University Press 2000) 173-74.

Overall, a negative judicial perception of the doctrine of equitable adjustment is highlighted. Key threads in this pattern are the courts' belief that equitable adjustment does not have a basis in Scots law (in terms of a legal foundation and alignment with the underlying principles of freedom and sanctity of contract); reliance on English law as a decisive guide; and aversion to taking on a regulatory role. The effect of these aspects would seemingly be that 'Scottish courts cannot move in this direction [of implementing the doctrine of equitable adjustment,] as a consequence of this decision'.[329] As such, implementation of the doctrine by the judiciary may seem unlikely.

8.2. Shining a new light

Fortunately, the development of academic discourse since the case has shone a new light on the topic, and may provide a different perspective on the future of the doctrine of equitable adjustment. Building on this discourse, the reliance on English law in the case, lack of citation of important authorities supportive of the doctrine, and the court's aversion to taking on a regulatory role can be taken on.

To start with, the English legal system is based on common law, and is not a mixed system as in Scotland. Each system has developed differently and from different origins, and therefore has a different basis for many legal matters, even where the end-result may appear to be similar. For example, referring back to the discussion of frustration, whilst 'the law of frustration in both systems tends to be discussed by reference to the case of *Davis Contractors Limited v Fareham UDC* ([1956] AC 696), there are differences in the way each system approaches this whole area', and 'it seems likely that further differences may exist'.[330] Indeed, the importance of understanding the differences between Scots and English law is what sparked McBryde's recommendation to be 'bold enough to ignore dicta in English cases' and instead rely on 'the approach of [a Scots lawyer's] predecessors'.[331] Overall, it is

[329] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.86.
[330] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[331] WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 4. This plea is particularly interesting to note in light of Lord Glennie's comment about McBryde's non-acknowledgement of equitable adjustment in his discussion of *Wilkie v Bethune* (1848) 11 D 132.

clear that there is no reason to rely to such an extent on English law when considering equitable adjustment in Scots law.

It has also been pointed out that a number of key Scots law works were not cited in the case or were not given their due weight. For example, Lord Cooper's publications on frustration of contract, which are supportive of the doctrine of equitable adjustment but were not referenced, would have been useful to encourage 'a recognition that the law may differ in the two countries [of Scotland and England]'.[332] To that effect, Lord Cooper provides a very interesting take on equitable adjustment of parties' relationships in Scots law. One particular passage states that:

> [i]n any scientific account of the developed doctrine of frustration the subject would almost invariably be treated as one of the methods by which contractual obligations are discharged. Paradoxical as it may appear, it was never from this angle that the subject was approached in Scots Law. The germinal ideas of frustration appeared in Scotland … in answer to the far wider question how the relations of two parties should be equitably readjusted by the Court when the one had been unintentionally enriched at the expense of the other. Frustration of contract was thus a by-product of a process directed to a different end. It seems to have been assumed, rather than asserted, that certain supervening changes in circumstances must necessarily sever the initial contractual tie.[333]

Likewise, an applicable section of the Stair Memorial Encyclopaedia that was not cited in the case states that 'the best explanation for the operation of the doctrine [of frustration], and the one which most closely approximates to what the Scottish courts do, is that having regard to the true construction of the contract, the court will do what is just in the light of the circumstances'.[334] The article focusses on the role of the courts in providing an equitable result to parties and 'also contains support for

[332] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021. Referencing: Lord Cooper, 'Frustration of Contract in Scots Law' (1946) 28 Journal of Comparative Legislation 1.
[333] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957) 125.
[334] ADM Forte, 'Frustration', *Stair Memorial Encyclopaedia* (1995) vol 15, para 880.

equitable adjustment'.[335] Further to these ideas of the connection between equitable adjustment and frustration, McBryde dismisses the fact that 'Gloag queried the general application of the [*Wilkie v Bethune*] case', insisting that 'it is possible that [such equitable adjustment] is consistent with the modern approach to frustration'.[336] This was pointed out by the defender, Lloyds TSB, but was not, it seems, given its due weight by the court. Another article by McBryde, which was not mentioned by the defender, further signifies that he is 'in favour of [the doctrine of equitable adjustment's] resurrection'.[337] Continuing to refute Gloag's comments on *Wilkie v Bethune*,[338] he asks 'is it not a preferable approach to that of the English court in *Anderson* v. *Equitable Law Assurance Society of Unites States*?',[339] where the 'court felt they were powerless to provide a remedy except to express a hope'[340] that the claimant would fairly adjust their expectations of the defender's obligations to perform. Had all of these texts been cited in court at the time, or given their due weight, the court's reasoning may have been very different; it is clear that there is significant support for the doctrine of equitable adjustment in Scots law, regardless of the position in other legal systems.

Turning to the court's aversion to taking on a regulatory role, there is (and has been) room for the judiciary to encourage legal developments in line with real-time socio-economic change. Just as Romanist jurists may have, as a direct result of war, disease and other social circumstances, adopted a more relaxed approach to performance of contractual obligations affected by changed circumstances, so too could modern-day socio-economic changes call for the doctrine of equitable adjustment's implementation in Scots contract law. One example to support this is rent abatement, a manifestation of the principle that the court has the power to readjust the position of the parties, emanating from *rebus sic stantibus*, and a concept that has been developed by the Scottish judiciary over the centuries to

[335] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[336] WW McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007) para 21.21.
[337] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (The ECCLblog, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[338] (1848) 11 D 132.
[339] WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 11.
[340] WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1, 10.

ensure that Scots law takes an equitable approach to performance of contractual obligations.[341]

These considerations temper the seeming finality of the judicial treatment of the doctrine of equitable adjustment in the Lloyds case. A further mitigation, pointed out by MacQueen,[342] is the additional obiter comment by Lord Hope that 'this is not the occasion to cast doubt on the ability of Scots law to find equitable solutions to unforeseen problems. Adaptability has a part to play in any civilised system of law'.[343] This may signify that the bar for equitable adjustment was simply not met on the facts of the case, and it certainly leaves the door open to future judicial implementation of the doctrine in more suitable circumstances, where it would indeed constitute an equitable solution.

8.3. Moving forwards

From this new light on the topic, it seems that moving forwards with the doctrine's implementation in practice by the judiciary requires presenting the doctrine in a way that allays the concerns expressed by the judges. This essentially involves affirmatively answering questions of whether the courts are able to apply the doctrine, how suitably they are placed to apply the doctrine, and whether they ought to apply the doctrine.

8.3.1. The courts can apply the doctrine

There are multiple reasons why the court can apply the proposed doctrine, which can be categorised into three components: the underlying principles of Scots contract law, the landscape of mechanisms used in Scots contract law to address changed circumstances, and the legal foundation for the doctrine of equitable adjustment.

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[341] Refer to: '7. Rent Abatement as a Legal Foundation for the Development of the Doctrine of Equitable Adjustment'.
[342] HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 11.
[343] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, 2013 SC (UKSC) 169, [43] (Lord Hope).

From the research of this thesis, it has been demonstrated that whilst the freedom and sanctity of contract principles are central to Scots contract law, they do need to be balanced with the principles of equity. It has also been explained how the doctrine of equitable adjustment achieves a good balance between these underlying principles.

Linking closely with this point is the legal landscape of Scots contract law. As has been discussed, the doctrine of equitable adjustment would align with the mechanisms available to address changed circumstances and non-performance of obligations. It also fits with the greater pattern of Scots contract law, where *pacta sunt servanda* is key, essentially entailing a focus on the continuation of the contract and resumption of the parties' business activities. Similarly, the doctrine of equitable adjustment would permit (adjusted) performance to ensure continuation of the contract and resumption of the parties' business activities.

The legal foundation for the doctrine has also been extensively discussed in this thesis. Particular focus was had to the function of rent abatement in commercial leasing as an illustration for the mechanism of equitable adjustment in Scots law, and its potential as a means through which the doctrine of equitable adjustment could be developed. Further, authorities including Lord Cooper,[344] McBryde,[345] Forte[346] and MacQueen,[347] are supportive of the doctrine of equitable adjustment in Scots law, providing more persuasive material to work with.

As a result of these considerations, the proposed doctrine of equitable adjustment is a fitting and workable doctrine, the background principle of which (the power of the court to readjust the position of the parties) is a long-existing principle of Scots contract law. This brings the proposed doctrine clearly within the scope of the

[344] Lord Cooper, *Selected Papers 1922–1954* (Oliver and Boyd 1957).
[345] WW McBryde, 'Frustration of Contract' (1980) 25 Juridical Review 1.
[346] ADM Forte, 'Frustration', *Stair Memorial Encyclopaedia* (1995) vol 15, para 880.
[347] HL MacQueen, 'The Covid-19 Pandemic, Contracts, and Change of Circumstance: Still Room for Equitable Adjustment?' (*Edinburgh Private Law Blog*, 24 June 2020) <blogs.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-for-equitable-adjustment/> accessed 6 September 2021; HL MacQueen, 'Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom' (2022) 30 European Review of Private Law 3, 6, 12-14.

judiciary, and is therefore, in the author's opinion, a doctrine that judges would be able to apply in suitable cases.

8.3.2. The courts are well placed to apply the doctrine

The cases on rent abatement in commercial leasing support the notions that the 'law of obligations is essentially judge-made. The law of contract remains in large measure judge-made',[348] as the concept of rent abatement has been applied and developed by the courts. Additionally, Lord Wright's comment that frustration 'is invented by the Court in order to supplement the defects of the actual contract' indicates the broad, underlying principle in Scots contract law that the courts have the power to readjust the position of the parties. As such, the judiciary is well placed to apply and develop the doctrine of equitable adjustment, as a particular means of readjusting the position of the parties.

Further, the courts are familiar with intervening in cases concerning contractual disputes, and therefore have the requisite training and experience to understand how to do so in a way that does not disrupt the principles of freedom and sanctity of contract. Dicey notes that '[j]udicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law'.[349] Indeed, it may be that judges' caution about taking on too much of a regulatory role is beneficial if it translates into restraint and proper consideration of when the doctrine should or should not be applied to a given case.[350]

[348] Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (Max Planck Institute of Comparative and International Private Law, Hamburg, 28 October 2019) 2 <www.supremecourt.uk/docs/speech-191028.pdf> accessed 24 July 2022. See also: Lord Hodge, 'Judicial Development of the Law of Contract in the United Kingdom' (2017) 85 George Washington Law Review 1587, 1589.
[349] AV Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (first published 1905, 2nd edn 1914, Macmillan 2017) 362.
[350] Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (Max Planck Institute of Comparative and International Private Law, Hamburg, 28 October 2019) 2, 16 <www.supremecourt.uk/docs/speech-191028.pdf> accessed 24 July 2022.

8.3.3. The courts should apply the doctrine

As was mentioned earlier, there is space for the judiciary to encourage legal development where this would be appropriate and would maintain Scots law's continued societal relevance. In connection with this, it is indeed the case that recent socio-economic changes have occurred that affect contracts regulated by Scots law and that (as this thesis has sought to prove) there is a Gap in Scots contract law, meaning that these socio-economic changes are not sufficiently accommodated by the existing legal framework. As such, implementation of the doctrine of equitable adjustment is very much warranted. There are multiple examples of severe socio-economic changes that contracting parties using Scots law as their governing law will be affected by. Some of these changes are global, such as Covid-19,[351] the war in Ukraine[352] and the supply chain crisis.[353] They also include somewhat more domestic changes, such as Brexit,[354] the energy crisis[355] and the cost-of-living crisis.[356] In many cases these are interconnected, and the business activities of

[351] G Gopinath, 'The Great Lockdown: Worst Economic Downturn Since the Great Depression' (*IMF Blog*, 14 April 2020) <blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/> accessed 24 July 2022; V Zoumpourlis and others, 'The COVID-19 Pandemic as a Scientific and Social Challenge in the 21st Century' (2020) 22 Molecular Medicine Reports 3035.
[352] M Brueckner and others, 'The War in Ukraine: Addressing the Crisis and Preparing for Its Impact' (*Accenture*, 30 March 2022) <www.accenture.com/us-en/insights/strategy/ukraine-addressing-crisis-preparing-impact> accessed 24 July 2022; L Anayi and others, 'The Impact of the War in Ukraine on Economic Uncertainty' (*VoxEU*, 16 April 2022) <voxeu.org/article/impact-war-ukraine-economic-uncertainty> accessed 24 July 2022; O White and others, 'War in Ukraine: Twelve Disruptions Changing the World' (*McKinsey*, 9 May 2022) <www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/war-in-ukraine-twelve-disruptions-changing-the-world> accessed 24 July 2022.
[353] B Fried, 'How the Supply Chain Crisis Is Changing Domestic Manufacturing Strategies' (*Forbes*, 13 July 2022) <www.forbes.com/sites/forbesbusinesscouncil/2022/07/13/how-the-supply-chain-crisis-is-changing-domestic-manufacturing-strategies/> accessed 24 July 2022; D Thomas and C Giles, 'UK Companies' Confidence in Global Economy Slumps' *Financial Times* (London, 20 July 2022) <www.ft.com/content/b2e24ebb-034c-4477-805c-4d6703abac5e> accessed 24 July 2022.
[354] L Clegg, 'The Impact of Brexit on Commercial Contracts Part 2: What Contractual Protection to Consider' (*Freeths*, 11 January 2021) <www.freeths.co.uk/2020/10/27/the-impact-of-brexit-on-commercial-contracts-part-2-what-to-consider/> accessed 24 July 2022; T Helm and others, '"What Have We Done?": Six Years On, UK Counts the Cost of Brexit' *The Guardian* (London, 25 June 2022) <www.theguardian.com/politics/2022/jun/25/what-have-we-done-six-years-on-uk-counts-the-cost-of-brexit> accessed 24 July 2022.
[355] J Ambrose, 'Energy Costs and Covid Pose "Existential Threat" to UK's Small Businesses' *The Guardian* (London, 30 December 2021) <www.theguardian.com/business/2021/dec/30/energy-costs-and-covid-pose-existential-threat-to-uks-small-businesses> accessed 24 July 2022; O Bartrum, 'Johnson's Caretaker Government Must Act with Care in a Worsening Energy Crisis' (*Institute for Government*, 13 July 2022) <www.instituteforgovernment.org.uk/blog/johnson-caretaker-government-worsening-energy-crisis> accessed 24 July 2022.
[356] WK Chan, 'No Easy Solution to UK Cost of Living Crisis' *Financial Times* (London, 22 May 2022) <www.ft.com/content/f813e3a0-6dc3-4105-b205-97df99a3a10a> accessed 24 July 2022; P Hourston,

contracting parties are affected by multiple changes simultaneously. This consideration means that ensuring the Scottish legal framework adequately addresses non-performance resulting from changed circumstances is very important for parties in these situations who are unable to renegotiate, and therefore are in a position where they need legal intervention to move forwards. This thesis proposes that judicial implementation of the doctrine of equitable adjustment would achieve this, being a suitable means of filling the Gap and catering to contracting parties' needs in a well-considered and balanced way. A lack of equitable adjustment is 'regrettable', as a 'party is left with no [appropriate] remedy', and means that the 'Scottish solution is limited'.[357]

A further reason supporting why the courts should apply the doctrine is the wider legal trend in Europe.[358] For example, all three of the Draft Common Frame of Reference ('DCFR'),[359] the Principles of European Common Law ('PECL')[360] and the Common European Sales Law ('CESL')[361] include provisions which 'empower a court to vary or terminate an obligation the performance of which has become so onerous through an exceptional change of circumstances [occurring after the obligation has been incurred] as to make it manifestly unjust to hold the debtor to the

'Cost of Living Crisis' (*Institute for Government*, 22 July 2022) <www.instituteforgovernment.org.uk/explainers/cost-living-crisis> accessed 24 July 2022.

[357] LJ Macgregor, 'The Effect of Unexpected Circumstances in Contracts in Scots and Louisiana Law' in VV Palmer and EC Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 274-75.

[358] 'The trend in contemporary contract law is to accept hardship or change of circumstances, as it appears from the revision of the Civil Codes of the 20th and 21st centuries and the instruments of uniform and harmonized contract law.': RA Momberg Uribe, 'Economic Limits to Contractual Performance: From Hardship to the Excessive Costs of Specific Performance' (2022) 27 Uniform Law Review 21, 30-32.

[359] 'If, however, performance of a contractual obligation or of an obligation…becomes so onerous that it would be manifestly unjust to hold the debtor to the obligation, a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances: or (b) terminate the contract at a date and on terms to be determined by the court.': DCFR III.-1:110.

[360] 'If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it … If the parties fail to reach agreement within a reasonable period, the court may … adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.': PECL art 6:111.

[361] 'Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract … If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may: (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account': CESL art 89.

obligation'.[362] This means that the previous 'rejection of the concept [of the doctrine of equitable adjustment] is unlikely to be the end of the story'.[363]

These instruments are relevant to consider in relation to equitable adjustment in Scots law as they reflect 'the same conditions' known to the 'majority of the EU legal systems', and the civilian tradition has been highly influential of this particular area of Scots contract law.[364] It is no surprise that the Scottish Law Commission used the DCFR as a close reference guide when undertaking a 'health check' of Scots law between 2010 and 2011.[365] Additionally, however, these rules entail an 'equitable power of the court to distribute between the parties the consequences of the supervening circumstances [that] must be exercised in compliance with the projection in good faith of the contractual equilibrium already reached by the parties on the situation yet to be settled'.[366] As such, what is sought is to 'combine the principle of the will of the parties (and, therefore, of party autonomy), highly appreciated by "common lawyers", and court intervention aimed at adapting the original contract, as favoured by "civil lawyers"'.[367] This reflects the balance of civilian and common law influences in the mixed Scottish legal system, as well as of the underlying principles in Scots contract law. As a result, the DCFR, PECL and CESL are a modern legal standard to which Scots law can be measured against when considering how to develop a particular area.[368]

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[362] Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com 252, 2018) 61. For further discussion of DCFR III.-1:110 and PECL art 6:111, refer to: H Unberath and E McKendrick, 'Supervening Events' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 563, 566-67, 569, 571, 573-77.
[363] LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[364] E Tuccari, 'Change of Circumstances and Judicial Power: A European Perspective of Contract Law' (The European Conference on Politics, Economics and Law, Brighton, July 2015) 2.
[365] Scottish Law Commission, *Review of Contract Law: Discussion Paper on Formation of Contract* (Scot Law Com 154, 2012) 2-5; LJ Macgregor, 'Long Term Contracts, Changing Circumstances and Interpretation' (*The ECCLblog*, 31 July 2011) <www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 6 September 2021.
[366] E Tuccari, 'Change of Circumstances and Judicial Power: A European Perspective of Contract Law' (The European Conference on Politics, Economics and Law, Brighton, July 2015) 4.
[367] E Tuccari, 'Change of Circumstances and Judicial Power: A European Perspective of Contract Law' (The European Conference on Politics, Economics and Law, Brighton, July 2015) 4.
[368] They also serve as inspiration on how to approach more procedural aspects of implementing the doctrine of equitable adjustment, such as how to deal with a party that is unwilling to negotiate, if demonstration of prior negotiation is necessary for the doctrine to apply. For example, PECL suggests the potential award of damages against the non-negotiating party. This was noted earlier in: '5.1.2. The (equitable) adjustment: shaping the scope of the doctrine'. For further discussion on the duty to

8.4. Plan B: the legislature?

Whilst this thesis supports judicial implementation of the proposed doctrine of equitable adjustment, it may be that this would not happen in practice, if the judiciary were to be averse to it. In fact, the codified form of the proposed and model rules of the DCFR, PECL and CESL may indicate a necessary role of statute when implementing the doctrine of equitable adjustment in practice. 'It has usually needed legislation to achieve protection for employees, consumers and other potentially disadvantaged contracting parties',[369] and to 'empower judges to consider the substantive fairness of at least some terms in contracts'.[370] Similarly, in France, 'a rule on *imprévision*, that is, the modification or termination of a contract due to changed circumstances' has required legislative intervention due to 'the refusal of French courts to introduce such a remedy on their own initiative'.[371] Thus, it may indeed come to legislative implementation instead.[372] In order to encourage this, it may be useful for the Scottish Law Commission to look into this particular area, and determine the particularities of how best this could potentially be achieved in practice.[373]

8.5. Interim conclusion

The doctrine of equitable adjustment faces challenges in terms of implementation in practice as a result of its current, seemingly negative judicial treatment. This chapter has aimed to reduce Scottish courts' potential aversion to the doctrine, by

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renegotiate, see: E Schanze, 'Failure of Long-Term Contracts and the Duty to Re-negotiate' in F Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Bloomsbury 1997); G Alpa, 'Remarks on the Effects of the Pandemic on Long-Term Contracts' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 565-66.

[369] HL MacQueen, 'The Law of Obligations in Scots Law' in R Schulze and F Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 235.

[370] J Thomson, 'Judicial Control of Unfair Terms' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland, Volume II: Obligations* (Oxford University Press 2000) 157ff.

[371] S Meier, 'Unwinding Failed Contracts: New European Developments' (2017) 21 Edinburgh Law Review 1, 4. Code Civil (2016) art 1195. See also: D Philippe, 'The Impact of the Coronavirus Crisis on the Analysis and Drafting of Contract Clauses: Force Majeure, Hardship and Deferral of Obligations' in E Hondius and others (eds), *Coronavirus and the Law* (Intersentia 2021) 548.

[372] HL MacQueen, *Contract Law in Scotland* (5th edn, Bloomsbury 2020) para 5.83.

[373] Equitable adjustment is only briefly mentioned by the Scottish Law Commission in a footnote of a 2012 Discussion Paper, with reference to '*Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2011] CSIH 8747' but without taking a particular position on the subject: Scottish Law Commission, *Review of Contract Law: Discussion Paper on Formation of Contract* (Scot Law Com 154, 2012) 47.

demonstrating that a) it is a doctrine that fits within Scots private law as evidenced analogously by rent abatement in commercial leasing, and is therefore within their scope, b) they are well placed to implement the doctrine, and c) such implementation is warranted. Failing this, legislation may be needed to implement the doctrine in practice, as has been the case with other matters requiring judicial intervention in contracts.

9. Conclusion

This thesis has sought to make the case for the doctrine of equitable adjustment in Scots contract law, to address non-performance of contractual obligations following a change of circumstances. The intention when conducting the research for and writing up this thesis was to make a contribution that could potentially be beneficial from an academic but also a societal perspective. In that light, the timing of this thesis was a key consideration, as there have been a significant number of changes of circumstances that have had an effect on contracting parties and their ability to perform their contractual obligations globally, as well as in Scotland specifically. These changes include Brexit, Covid-19, the energy crisis, the supply chain crisis, the UK cost of living crisis, and the war in Ukraine. The consequence of so many impactful and widely felt changes of circumstances in a short amount of time has been an increased focus on how commercial parties can navigate changing circumstances using available legal mechanisms. For example, there has been a large focus amongst legal practitioners on drafting and including effective force majeure clauses. However, the mechanisms in Scots contract law, including force majeure clauses, only go so far in helping parties to successfully navigate the changes of circumstances that they experience. The author has sought to contribute to the discussion about addressing this concern in Scots law through the proposal of the doctrine of equitable adjustment. Of course, there may be other suitable solutions that can be suggested, and whilst the scope of this thesis was not great enough to be able to consider these, they would make a very interesting and useful topic of study for future research.

In order to successfully argue for the implementation of the proposed doctrine of equitable in Scots contract law, there were a number of explanations and evaluations that needed to be made. As such, the thesis was structured in a particular way, which can be summarised as follows.

After introducing the topic and explaining its academic and, importantly, practical importance, two core mechanisms were discussed. These were the doctrine of

frustration and force majeure clauses. A deep exploration of these mechanisms was necessary for two reasons. Firstly, it enabled a full understanding of the options currently available in Scots law to contracting parties in the context of this thesis. Secondly, it illustrated how and why those options are insufficient, again in the particular context of this thesis. If they were found to have been sufficient, there would be no call for an additional mechanism to fit alongside them, at least from a legal perspective.

As this was not the case, and limitations and difficulties were identified, the next stage came, of understanding the significance of these limitations and difficulties for contracting parties. That is why the chapter immediately following the discussion of frustration and force majeure clauses framed itself as an evaluation. It reviewed the limitations and difficulties of frustration and force majeure clauses, also in light of commercial considerations and the wider landscape of Scots contract law, including the mechanisms of specific implement and payment of damages for breach of contract. From this, it identified the Gap in Scots contract law, which needs to be filled.

The evaluation provided the preliminary etchings of the full picture painted by this thesis, that the doctrine of equitable adjustment would be a suitable way of filling the Gap. To this effect, an explanation was provided of the doctrine of equitable adjustment as proposed by this thesis, with close inspection of how Scots law principles and concepts shape its definition and scope. Essentially, the doctrine would involve Scottish courts making a careful, minimal adjustment to parties' contractual obligations affected by changed circumstances, in a fair way that is fitting to the new circumstances of, and relationship between, the parties.

Having laid the foundations of why the doctrine of equitable adjustment is being proposed as a solution by this thesis, and indeed what it is a solution to, the thesis turned to considering the viability of the doctrine as a mechanism in Scots contract law. It considered it from a theoretical and jurisprudential perspective, looking at the underlying principles of Scots contract law and how they have developed and crystalised over time. It also considered it from a tangible perspective, looking at an

established analogous manifestation of the power of the court to readjust the position of the parties.

The combination of both of these perspectives equipped the thesis to effectively engage with resistance to the doctrine and questions about its legitimacy in Scots contract law. This was necessary to tackle when considering if and how the doctrine could be implemented in practice. When considering such implementation by the judiciary, Scottish judges' hesitancy and doubt about the legal basis for the doctrine of equitable in Scots contract law would need to be overcome. Being equipped with the research and conclusions drawn in the earlier chapters of this thesis, the author sought to achieve this by addressing each concern, and pointing out the legal and societal benefits that would be brought. As a 'plan B', the thesis also considered implementation by the legislature, and why this option may, in the end, be necessary.

Each chapter of this thesis was dedicated to achieving a particular aim. Through these, it was sought to demonstrate that the doctrine of equitable adjustment was possible, viable, desirable and effective from a legal, and a socio-economic and commercial standpoint. It is hoped that, together, the arguments presented have made the case for the doctrine of equitable adjustment as a potential mechanism to be implemented in Scots contract law, that could address non-performance of contractual obligations following a change of circumstances.

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