When advising A there are three fundamental questions that must be asked;

Is the event capable of frustrating the contract?

Are there any rules of law that would render the doctrine of frustration inoperative?

What would be the effects if the contract were found frustrated?

In addressing the first question it must be recognised that the hallmark of frustration is an event that occurs after the contract is formed that radically alters the foundation or renders it physically or legally impossible to perform. A simple example of this can be found in *Taylor* v. *Caldwell (1863) 3 B. & S. 826* where a contract for hire of a music hall and gardens was found to be frustrated when the music hall burnt down. The object of the contract was ascertained as the hiring of the gardens and music hall for the purpose of using them to stage four 'grand concerts and fetes'. When the hall was destroyed by fire after the contract was formed, the performance was rendered physically impossible. Thus it is essential when considering frustration to identify the object of the contract and then to decide whether the intervening event radically alters this object.

On the facts present if the object of the contract is merely to produce computer-processing equipment, as B may argue, then the foundation of the contract is not fundamentally altered and frustration would be difficult to assert. However it is more likely that the object of the contract is to produce computer-processing equipment with a specific use dependant upon T's requirements and it may be argued successfully that the contract has been frustrated by A's "fundamental misunderstanding" of T's requirements. In *Krell* v. *Henry (1903) 2 KB 740* a room was rented with the specific purpose of watching Edward VII's coronation, so although the room could still be used after the cancellation of the coronation, it's specific purpose disappeared as a result of the cancellation. In the present case terms one and two of the contract state that "B shall supply the processing equipment in accordance with A's specifications" and "A shall ensure, so far as is reasonably practicable, that the specifications shall comply with the requirements of T". Clearly, the equipment is intended for a specific purpose in accordance with the contract and once the purpose has been removed there is a compelling argument that the contract has been frustrated. So what of T's declaration of bankruptcy? Is it necessary to consider this declaration in light of the arguments for frustration as a result of the 'fundamental misunderstanding'? In *Herne Bay Steamboat Co.* v. *Hutton (1903) 2 KB 683* it was found that the cancellation of the Coronation naval review was not sufficiently fundamental to the contract's object as the contract did not contain any specific mention of the review, nor could a term be implied that would end the contract if a cancellation of the review occurred, and so the assertion of frustration was discounted. Thus it is contended that T's declaration is not an event that would sufficiently alter the foundation of the contract between A and B enough to warrant a finding of frustration and it is proposed to proceed along the route of the 'fundamental misunderstanding'.

The question must then be asked whether the change in circumstances is sufficiently radical to warrant a finding of frustration. As the equipment in the contract is produced to unique specifications (as far as is known) it is unlikely that a further use

for them may be found. It may be that B would seek to rely on *Tsakiroglou & Co.* v. *Noblee Thorl GmbH (1962) AC 93* where the court decided that circumstances such as reduced profitability, increased logistical hardship and inconvenience are not in themselves sufficient to frustrate the contract. The descriptions of circumstances in *Tsakiroglou* fall short of describing the effects of the event in the present case, so that a distinction may be made and *Tsakiroglou* discounted. Furthermore, *Herne Bay Steamboat Co.* v. *Hutton (1903) 2 KB 683* can be distinguished because the court found that the defendant could obtain one of the two primary objectives, whereas on the present facts A would not be able obtain any objective from the contract and so a finding of frustration would be justified.

The next point to consider is whether there are any rules of law that would render the doctrine of frustration inoperative. Did either party foresee the supervening event, and could either party be assumed to have taken the risk that such an event might occur?
It is rare that a party may seek to rely on an event that he has foreseen in order to claim frustration (see *Walton Harvey Ltd* v *Walker & Homfrays Ltd (1931) 1 Ch 274* ). The reason for this is that in the absence of a provision in the contract to deal with such an event, one or other of the parties must be taken to have accepted the risk of its occurring. Therefore, the more foreseeable an event, the more allocation of risk occurs. The courts often distinguish between events that were foreseen and events that were foreseeable at the time of the contract. Where the events are foreseen the courts will usually find that a plea of frustration will fail. A rare exception to this approach can be found in the case of *The Eugenia (1964) 2 QB 226* where Lord Denning MR found there was evidence that the parties intended 'to leave the lawyers to sort it out'. The present facts do not indicate that the parties foresaw that the 'fundamental misunderstanding' of the requirements would occur. Where the events are foreseeable at the time of contract it must be determined whether a term, or terms, of the contract have allocated risk to either one of the parties (for example *Larraga & Co.* v *Societe Franco-Americaine des Phosphates de Medulla (1923) 92 LJKB 455* ). In the present case the second clause of the contract is an express provision covering the event that the specifications may be misunderstood. The clause dictates that A should take all 'reasonably practicable' steps to ensure the specifications meet with T's requirements. An inference may be drawn that if A does make a mistake regarding the specifications, but can prove he took all 'reasonably practicable' steps to prevent this from happening, then the second clause of the contract is satisfied. If this is true, it can be assumed that B has assumed the allocation of risk. If A cannot prove that he has taken all reasonable steps to understand T's requirements, he may have difficulty in asserting frustration, as per Bingham L. J. in *J. Lauritzen A.S.* v *Wijsmuller B. V. (The Super Servant Two) (1990) 1 Lloyd's Rep. 1 at p 8* where he states "A frustrating event must take place without blame or fault of the party seeking to rely on it." However, it is proposed to continue as if A can prove that the second clause of the contract is satisfied and can successfully argue that the contract is frustrated.

The final consideration must be the effects that a finding of frustration would have on a contract. Generally both parties are discharged from future obligations under the contract from the time the frustrating event occurred, as was found by the House of Lords in *Hirji Mulji v Cheong Yue Steamship Co. Ltd. (1926) A.C. 497* . In the present case this would mean that A would be relieved from paying the further £30,0000 (sic). However, there are further considerations to be made in accordance with the *Law Reform (Frustrated Contracts) Act 1943* which provides that any money paid or

payable before the event, ceases to be payable, or is recoverable by the payee. This general rule would mean that A could demand the return of the £5000 he paid in advance. Like all general rules though, the Act provides exceptions, where advance money cannot always be claimed back in part or in whole. S.1 (2) enables the courts to act with discretion where a payee has incurred expenses in the performance of the contract so that he may retain some or all of the specified pre-payment. The rule embodied in *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd. (1943) A.C. 32* - that a party who has paid money but has received no part of the bargained-for performance is entitled to recover his money – is modified in two ways. First it is **not** now necessary to prove a total failure of consideration, but more importantly where the payee has incurred expenses he may be allowed to offset the paid or payable sum by an amount not exceeding the expenses incurred when performing the contract before the frustration. It may be assumed in the present case that B has incurred considerable expense in the development of the equipment and it is likely that the court will find £5000 for three months work to be less than excessive recompense. On this point A should be advised that he might lose all of his deposit and may be required to pay even more.

However, s 1(3) of the 1943 Act allows courts to award a 'just sum' where one party has obtained a valuable benefit under the contract. A can argue that clause four has conferred a valuable benefit on B by allowing him the extra business-generating kudos of being linked with A. There is little in the way of valuable benefit conferred on A that can offset this consideration, so it is contended that A may indeed recover some or all of the £5000 deposit depending on the value placed upon the valuable benefit by the court.