Rein and contract law

Law, Contract Law

“ The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to the execution, or the like. Yet this does not in itself affect the bargain which they have made…” (per Lord Simon in British Movietonews Ltd. v.

London and District Cinemas [1952] A. C. 166 at 185). Discuss this dictum and explain the respects in which it needs to be qualified. This quote refers to the doctrine of frustration. In order to adhere to the essay question, it is important to establish what frustration is. The essence of frustration was identified in Davis Contractors Ltd v Fareham Urban District Council[1] by Lord Radcliffe.

He asserts that “ Frustration occurs whenever the law recognises that without the default of either party, a contractual obligation has become incapable of being performed because of the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”. The doctrine excuses parties from further contractual performance when unforeseen events, subsequent to contract formation, make performance illegal, impossible, or radically different from the obligations the parties undertook at formation[2]. The doctrine was established in the nineteenth century. Prior to this, supervening events provided no excuse for non-performance therefore contractual duties were regarded as absolute. The leading case for this is Paradine v Jane[3]. The claimant sued the defendant for rent. The claimant sued the defendant for afailureto pay rent for three years on leased lands.

Jane asserted as a defense that the lands had been seized and occupied by Prince Rupert of Germany, and that Jane had been put out of possession and frustrated in the performance of his duties under the lease and was not bound to perform under the contract. The court held that when a party creates " a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. " In British Movietonews Ltd. v London and District Cinemas[4]. The contract was made with regards to film distribution. It included a stipulation in the contract which allowed the defendant to end the arrangement given that there was a four week notice. The parties entered into a supplementary agreement which affirms that the original contract would remain until the order was cancelled.

This was due to the fact that the Cinematograph Film Order proscribed them from distributing or obtaining any films without license except it was for “ securing public safety, the defence of the realm, maintenance of public order or efficient prosecution”. However this order went on for longer than expected. The claimant contended that this meant that payment would persist but the defendants opposed. On first instance Lord Slade agreed with the claimants. The appeal was allowed as it was held that the delay could not have been envisaged and the situation had altered significantly from the intentions the parties had created the contract on, hence it couldn’t continue. Lord Simon, on appeal in the House of Lords stressed that the meaning of “ an unexpected turn of events” had been misconstrued and applied too generally thus includes non-frustrating events. He avows that a “

frustrating event must be regarded as introducing a new situation to which no limit can be put”.

The appeal was allowed. Looking at the dictum by Lord Simon, it is possible to infer that he is not in favour of the doctrine of frustration but leans towards the approach of absolute liability as he states “ The parties to an executory contract are often faced, ...

with a turn of events which they did not at all anticipate.....

Yet this does not in itself affect the bargain which they have made…” He takes the point of view that the doctrine has not been employed appropriately by the courts as if it was, there would be fewer terminations of contracts and effective use of other methods like adaptation and force majeure clauses[5]. In the last phrase of this dictum , Lord Simon concluded that although exceptional circumstances may exist, courts must take cautious steps when walking through the door of interpretation and they must never turn their backs on the terms contained in contracts. To Invalidate a contract may carry a greater legal consequence than initially foreseen by the courts. A question to raise is; what if a party to the contract anticipated a future turn of event but assessed the risk involved and notwithstanding, entered into the contract. Should the court step in to cut the tight rope from such a person’s neck when he or she is facing the guillotine? The role of the courts is to seek justice and not to bail us out when things are not going our way. For now, there are certain events that can amount to frustration and the courts can fall back to these precedents to make an informed decision. These events include physical impossibility, non-

occurrence of a particular event, supervening illegality, death or incapacity for personal service, requisitioning of ships and interferences with chaterparties, sale and carriage of goods, building contracts, change in the law and performance of only one party affected.

Only few of these will be discussed further. Physical impossibility is concerned with where the performance of the contract is made impossible by the destruction of a specific thing that is essential to that performance. Such is the case of Taylor v Caldwell[6] where the claimant hired the Surrey Gardens andMusicHall from the defendant to put on four concerts. The hall was destroyed by an accidental fire before the concerts started and the claimant sought damages to cover the expenses incurred in preparing for the concert. Both parties were excused because the contract was impossible to perform. Frustration was the grounds in which the contract was discharged as it included an implied condition. The theory of implied term was elaborated on by Blackburn J.

He suggests that a contract is discharged because the parties have agreed that the contract cannot be preformed if the frustrating event occurs. This begs the question, how fair is this tool? It is definitely a useful tool to the defendants as they will always have a way of being excused from a contract. Non-occurrence of a particular event rose out of the deferment of the coronation of King Edward VII due to his sudden illness. Performance of the contact depended on the existence of the event. This was also evident in the case of Krell v Henry[7]. The court held that the defendant was excused from paying the rent as both parties must have regarded the holding of the

procession on the date planned essential to the contract. The rent agreed was inflated because of the procession.

This was one of the factors the court used to support the fact that the contract was entered into solely to view the procession. It is clearly evident that the flats could have been used on those days. The contract was frustrated as the performance of the contract on those days would not attain the purpose of the agreement which was to view the procession. It also possible to infer that the purpose was frustrated because the rent agreed was inflated because of the procession. If this was not the case, the defendant would have hired a cheaper room without the view. On the other hand, there are some categories which will not amount to frustration. This comprises of self induced frustration, where a force majeure clause is enabled, forseeability, onus of proof, commercial inconvenience and leases.

If one of the parties caused the frustrating event, this is known as self induced frustration and is no frustration in law. In J Lauritzen AS v Wijsmuller BV, The Supper Servant Two;[8] according to Hobhouse LJ, courts use the term self-induced frustration when “ one party has been held by the courts not to be entitled to treat himself as discharged from contractual obligations”. At the Court of appeal, it was stated that the concept of frustration did not operate to remove the defendant’s liability under the contract with the claimant. Bingham LJ felt that it was “ inconsistent with the doctrine of frustration as previously understood on high authority that its application should depend on any decision, however reasonable and commercial, of the party seeking to rely on it”. A controversial category is

the commercial inconvenience. Lord Radcliffe in the case of Davis Contractors v. Fareham UDC[9]stresses that inconvenience or material loss itself does not cause the principle of frustration to be proven.

In addition, there must be an alteration in the duty or obligation. This is apparent in Tsakiroglou & Co Ltd v. Noble Thorl G. M. B. H[10]. This contract surrounded the sale of groundnuts which was rigid in terms of the date of delivery.

It was held the contract had not been frustrated by the closure of Suez Canal. If the delivery date was made an important aspect of the contract, the results might have been different. The House of Lords felt it was still possible to transport the goods though it would have been more expensive. A pertinent decision was whether this would make a significant difference to the original contract. An increase of expense is not a ground of frustration" as held by Lord Simonds. This goes hand in hand with Lord Simon view in the British Movietonews case putting frustration into its proper use which is to end contracts that are no longer possible to carry out. Another case which can be used to reflect Lord Simon view is the case of Staffordshire AreaHealthAuthority v South Staffordshire Waterworks Co[11].

The defendant agreed ' at all times hereafter' to supply water to a hospital at a fixed price. Some years later, the cost of supplying the water was twenty times the contract price. Lord Denning articulated the opinion that by reasoning of continuing inflation, a different situation had materialised in which the contract has ceased to bind. However the other members of the Court of Appeal did not accept his view. They went along with the orthodox

view that any decrease in the purchasing power of sterling or the deflation of a foreign currency in which a debt is expressed is a stake which must be borne by the creditor. Provision must be made in the contract if he does not wish to bear the risk. It is not unusual in leases for the terms of the contract to provide for modification of the price to take account of inflation.

One way of avoiding substantial numbers of frustration cases is using force majeure clauses when drafting the contract. A force majeure clause is a limitation statement made in a contract which prevents parties having to strictly comply with the terms in the contract in unjust situations and prevents the provider from being liable to a customer for failure to perform their obligations. This is beneficial to the courts because they don’t want to allow the doctrine to act as an escape route for a party for whom the contract has simply become a bad bargain. This would also help to enforce Lord Simon’s view and limit the use of frustration as consumers are less likely to bring an action when such clauses are in place and it will also encourage them to read and comprehend the contract fully before agreeing. An illustrative case is Channel Island Ferries v. Sealink UK Ltd[12], in which there was a force majeure clause which allowed the party failing to perform the contract to avoid liability because they had already anticipated the event therefore it cannot be classed as a frustrating event. There are a variety of disadvantages of the doctrine that support Lord Simon’s proposal to narrow down the scope.

To look at it plainly, parties might just prefer to bite the bullet and continue despite a burden being placed on one of them. Another is that frustration

only recognises one legal consequence: termination. However, if we were to apply such adaptation techniques as in Germany, it would be difficult and time-consuming to reproduce a contract that will fully encompass every eventuality that may arise[13], even if it made full use of express provisions like force majeure clauses. Such clauses can be criticised themselves in their use, for example, in an American journal[14], they have been said to subject parties to a painful choice, where they can either reconcile and preserve their relationship, or part in it response to a fractured relationship. They are often drafted with the suppliers' interests in mind referring to an issue of " impossibility" when truly it is a mere case of commercial inconvenience. On the other hand, even though suppliers may impose dishonest force majeure clauses, most customers under long term contracts are not willing to bring an action because it is too expensive and time-consuming as well as disruptive, destroying any possibility of ongoing relationships. To conclude, Lord Simon was accurate in recognising the flaws with the concept of frustration which was it being used as a quick and easy way to manage unsuccessful contracts, however it has become more challenging than expected.

In trying to keep a tight rein on the use of frustration, Lord Simon is attempting to take a firm approach of carrying out contractual obligations as it is evident the future cannot be predicted. The parties are required to envisage numerous possibilities when the contract is being drafted and be able to protect against them. On the other hand, narrowing the use of the doctrine may result in sincere cases being ignored. Leon E. Trakamn "

Declaring Force Majeure: Veracity or Sham? ”, available at: http:/works. bepress. com/leon_trakman/4