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FRUSTRATION AND FORCE MAJEURE

Charles Samek QC

“... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”

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

“... there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.”

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

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

National Carriers Ltd v. Panalpina (Northern) Ltd [1981] AC 675

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1. The object of the doctrine ... to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.
2. The doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.
3. Frustration brings the contract to an end forthwith, without more and automatically.
4. A frustrating event must be some outside event or extraneous change of situation.
5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

J. Lauritzen A/S v Wijsmuller B.V. [1990] 1 Lloyds Rep 1

Comparison of the obligations

1. Determine the 'original' obligation - if there had been no change in the circumstances existing at the time the contract was made.
2. Determine the 'new' obligation - if the words of the contract were enforced in the new circumstances.
3. Compare the two obligations in order to decide whether the 'new' obligation is a "radical" or "fundamental" change from the 'original' obligation.

Question: Was "performance ... fundamentally different in a commercial sense"?

Multi-factoral approach

- the terms of the contract itself
- its factual matrix or context
- the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, but only so far as these can be ascribed mutually and objectively
- the nature of the supervening event
- the parties' reasonable and objectively ascertainable calculations, including as to risk, as to the possibilities of future performance in the new circumstances

The "Sea Angel" [2007] EWCA Civ 547

Limits of the doctrine

- Express provision in the contract
- Parties foresaw the event
- Event foreseeable but not foreseen
- Self-induced frustration – cf. **Canary Wharf** at [204]

“... the frustrating event will strike the parties to the contract “out of the blue”, and the court will be left to consider what they could have done, post-alleged-frustrating event, in order to ameliorate its effects...”

- “Partial frustration” – cf. **H.R. & S. Sainsbury Ltd v Street** [1972] 1 W.L.R. 834 (doctrine of partial excuse)

CORONAVIRUS

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- Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754 – a S.A.R.S. case
- National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] A.C. 675. Need to make a quantitative and qualitative judgment.
- Government advisory as opposed to Government ordered
- 'Is "performance ... fundamentally different in a commercial sense"?'
- Canary Wharf (BP4) T1 Limited, Canary Wharf (BP4) T2 Limited, Canary Wharf Management Limited v European Medicines Agency [2019] EWHC 335 (Ch)

The Coronation cases

- **Krell v Henry** [1903] 2 KB 740 (flat hired for days not nights)
- **Herne Bay Steam Boat Co v Hutton** [1903] 2 KB 683

'The coronation cases show that where the supervening event causes one party to appreciate – with the benefit of hindsight – that he or she has made a bad bargain, there will be no frustration of a common purpose. If the only effect of the supervening event is to cause the price for the bargain to appear – in hindsight – to be too high, the contract will not be frustrated.' **Canary Wharf** at [38].

But see also **Chitty on Contracts** 33rd ed. 23-033 – 23-034

Remedies

Law Reform (Frustrated Contracts) Act 1943

- Only applies to contracts which are governed by English law
- Only applies to contracts which have become 'impossible of performance or otherwise been frustrated.'

s. 1(2) "All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') **shall**, in the case of sums so paid, **be recoverable** from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, **cease to be payable**:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court **may, if it considers it just** to do so having regard to all the circumstances of the case, **allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred."**

s. 1(3) “Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, **obtained a valuable benefit** (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, **there shall be recoverable from him** by the said other party **such sum** (if any), not exceeding the value of the said benefit to the party obtaining it, **as the court considers just**, having regard to all the circumstances of the case and, in particular—

- (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and
- (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.”

s. 1(3) Law Reform (Frustrated Contracts) Act 1943

3-stage process:

1. Identify the non-monetary benefit received.
2. Value the non-monetary benefit received.
3. Assess a just sum to be paid by the benefitted party having regard to all the circumstances of the case and in particular the matters in ss. 1(3)(a) and (b).

BP Exploration Co (Libya) Ltd v Hunt (No. 2) [1979] 1 WLR 783 (upheld on appeal [1981] 1 WLR 232)

(further appeal to HL but only on s. 2(3) of the Act and s. 3(1) Law Reform (Misc. Provs.) Act 1934 as to interest)

Force majeure clauses

A contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control.

In two parts:

- the first which identifies the triggering events;
- the second which sets out the operative provisions.

An 'exceptions' clause? **Great Elephant Corporation v Trafigura Beheer B.V.** [2013] EWCA Civ 905 at [25]

Force Majeure clauses

1. Burden of proof is on relying party.
2. Applicable only where the specified triggering event is beyond party's control and party has taken reasonable steps to avoid the event stipulated.
3. Breach of contract excludes reliance.
4. Negligence excludes reliance.
5. General words of no use if event not reasonably in contemplation.
6. "Prevented" = physical or legal prevention.
7. "Hindered" – performance rendered more difficult.
8. Need for a causal connection.
9. Inapplicable if there are other methods of performance.

“Force majeure”

- Act of G-d? Cf. *Corpn. of Greenock v Caledonian Railway Company* [1917] AC 556
- *Lebeaupin v Richard Crispin* [1920] 2 KB 714
“Force Majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus, war, inundations, and epidemics, are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure.”
- “*other events beyond the control*” – application of *eiusdem generis* rule of construction



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