FRUSTRATION OF CONTRACT

DAVIS CONTRACTORS LTD. v. *FAREHAM URBAN DISTRICT COUNCIL*

The doctrine of frustration of contract has always been a source of joy to the academic lawyer and a corresponding cause of confusion to the practising lawyer owing to the vast number of different opinions as to the basis of the doctrine that have been advanced by the judges. As Lord Radcliffe remarks in the present case:[1] "It has often been pointed out that the descriptions vary from the case of one high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an anthology of different texts directed to the factor of delay alone . . . . A full current anthology would need to be longer yet".[2] The result has been that as the learned Editor of the *Law Quarterly Review* (Professor Goodhart) once observed: "No branch of the law of contract is so difficult to explain or so uncertain in its effects as that dealing with frustration".[3] Hence it can readily be seen why *Davis' Case*,[4] which clearly lays down the general principle to be followed in all future cases of frustration and sweeps away most of the uncertainty which surrounds the doctrine, merits the attention of all members of the legal profession.

The facts before their Lordships were as follows. The appellants, a firm of building contractors, had entered into a contract with the respondent, a local authority, to build for it seventy-eight houses within a period of eight months for a fixed price. The original tender had been accompanied by a letter stating that it was "subject to adequate supplies of labour and materials being available as and when required to carry out the work within the time specified". Owing to an unforeseen delay in demobilisation there was a shortage of skilled labour so that the work took twenty-two months to complete and the contractors' costs as a result were considerably increased. They contended:

1. That the contract price was subject to an express condition contained in the letter which had been attached to the tender that there should be adequate supplies of labour and materials.

2. That the unexpectedly long delay due to neither party's fault frustrated the contract in law, and they were entitled on a *quantum meruit* claim to the excess costs.

Their Lordships unanimously rejected the first ground of claim and held that the letter was not incorporated into the contract; therefore it could not affect the express terms.[5] On the second and more important ground the House again unanimously gave judgment for the respondent and decided that the contract had not been frustrated; but in doing so their Lordships, particularly Lord Reid and Lord Radcliffe, exhaustively considered what was the "true basis of the law of frustration".[6]

Out of the numerous views as to when a contract is frustrated two principal theories have emerged. These were the theory of the "implied term" and the theory of the "just solution". Up to this time the most commonly favoured theory as to the basis of the doctrine had been that of the "implied term". This states that the court will imply a term into the contract that the parties thereto be discharged in the event that has happened if to do so would be in harmony with the presumed intention of the parties. Probably the best-known judicial statement in favour of this view is that of Lord Loreburn in *F. A.*

[1] (1956) A.C. 696; (1956) 3 W.L.R. 37; (1956) 1 All E.R. 145.
[2] (1956) A.C. 696, 727. [3] (1936) 52 *L.Q.R.* 7. [4] (1956) A.C. 696.
[5] "It would . . . be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed". (*Id.* at 713).
[6] *Per* Lord Reid. *id.* at 719.

Tamplin Steamship Co. Ltd. v. *Anglo-Mexican Petroleum Products Co. Ltd.*:

> A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract[7] . . . Were the altered conditions such that, had they thought of them, . . . as sensible men they would have said: 'if that happens it is all over between us ?'[8]

The "implied term" theory had been strongly criticised particularly by Lord Sumner and Lord Wright on the ground that the doctrine of frustration is frequently applied although one of the parties would clearly have refused to insert a term in the contract discharging the parties in the event that had happened had he contemplated that it might occur. "On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations".[9] Thus in a case like *Krell* v. *Henry*,[10] where the cancellation of the Coronation procession of King Edward VII was held to have frustrated a contract for the hire of a room overlooking the route of the procession, the owner of the room would clearly have rejected such a term had he been asked by the other party to insert it. Being the owner of a commodity for which the demand by far exceeded the supply he would have dictated his own terms and could easily have got any number of offers for the hire of his room for the mere "chance" of seeing the Coronation procession. A further illustration of the unrealistic nature of the "implied term" theory is provided by the case of *Bank Line Ltd.* v. *Arthur Capel & Co.*[11] where the contract expressly referred to the possibility of the frustrating event taking place without providing that its occurrence should automatically discharge the parties; and yet it was held that it frustrated the contract. Accordingly Lord Wright and Lord Sumner declared that frustration is not an inference of fact but an implication of law and what the court really does when it decides that a contract has been frustrated is to exercise its powers "in order to achieve a result which is just and reasonable" [12] — the so-called "just solution" theory.

Nevertheless until *Davis' Case*,[13] the "implied term" theory was "accepted by a preponderance of judicial opinion as the correct statement of the law",[14] and text-writers like Cheshire and Fifoot,[15] while pointing out the weaknesses of the theory, were forced to concede as late as January 1956 that it was still "the fashionable explanation".[16] This was made necessary by the approval given to the "implied term" theory by some of the Law Lords in *British Movietones Ltd.* v. *London District Cinemas Ltd.*[17] in 1951. In that case Viscount Simon said[18] that the general principle of frustration was to be found in the famous passage contained in Lord Loreburn's judgment in *Tamplin's Case*.[19] Lord Simonds, too, remarked[20] that he would prefer the view expressed by Viscount Simon in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[21] that the theory of the implied term was the most satisfactory basis on which the doctrine of frustration can be put, to the views of Lord Wright. In Australia, in *Scanlan's New Neon Ltd.*

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[7] (1916) 2 A.C. 397, 403.
[8] *Id.* at 404.
[9] *Per* Lord Wright in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* (1944) A.C. 265, 275.
[10] (1903) 2 K.B. 740.
[11] (1919) A.C. 435.
[12] *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corpn. Ltd.* (1942) A.C. 154, 186.
[13] (1956) A.C. 696.
[14] Anson, *Law of Contract* (20 ed. 1952) 341.
[15] G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (4 ed. 1956).
[16] *Id.* at 462.
[17] (1952) A.C. 166.
[18] *Id.* at 183.
[19] (1916) 2 A.C. 397, 403-404.
[20] (1952) A.C. 166, 187.
[21] (1942) A.C. 154, 163.

v. *Tooheys Ltd.*[22] Latham, C. J., after a masterly examination of the principal conflicting views on the doctrine also expressed his preference for the "implied term" theory,[23] although the views of the other members of the High Court in that case, particularly Williams, J., as to the true basis of the doctrine are a lot less clear.

Against this background (discussed at length by the Law Lords in the present case[24]), the principles laid down in the main judgments in *Davis' Case*[25] by Lord Reid[26] and Lord Radcliffe[27] may now be examined. Both rejected the "implied term" theory and laid down what now is claimed to be the correct test in all cases for frustration of contract.

Lord Reid (with whom Lord Somervell agreed) adopted Lord Wright's criticism of the "implied term" theory[28] that it is unrealistic and "it seems hard to account for certain decisions of the House in this way"[29]. At the same time Lord Reid also rejected the view that a court can declare a contract frustrated and the parties thereto discharged merely because the court in its discretion thinks it just and reasonable to do so. This appears from his Lordship's citation,[30] with approval, of the following passage from the judgment of Viscount Simon in *British Movietones Ltd.* v. *London and District Cinemas Ltd.*:[31] "If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation". The proper test in Lord Reid's opinion is that the frustrating events — what Lord Cairns had described as "additional or varied work so peculiar, so unexpected, and so different from what any person reckoned or calculated upon"[32] must be "fundamental enough to transmute the job the contractor had undertaken into a job of a different kind which the contract did not contemplate and to which it could not apply".[33] Lord Reid defined frustration as "the termination of the contract by operation of law on the emergence of a fundamentally different situation".[34]

Lord Radcliffe's objection to the theory of the implied term is expressed in somewhat different terms from those of Lord Reid. His Lordship says that "there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw".[35] But his Lordship's view as to the true principle of frustration comes in effect to the same thing as that laid down by Lord Reid. It is that "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 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".[36] Lord Radcliffe also declared that "frustration is not to be lightly invoked as the dissolvent of a contract".[37] In thus envisaging a limited scope for the operation of the doctrine his Lordship has the support of Viscount Simonds who points out in the same case that "the doctrine has and must be kept within narrow limits".[38]

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[22] (1943) 67 C.L.R. 169.
[23] *Id.* at 201.
[24] *Davis Contractors Ltd.* v. *Fareham Urban District Council* (1956) A.C. 696.
[25] *Ibid.*
[26] *Id.* at 718-724.
[27] *Id. at* 724-733.
[28] *Id.* at 720, and for discussion of same see *supra.*
[29] *Id.* at 720.
[30] *Id.* at 721.
[31] (1952) A.C. 166, 185.
[32] *Thorn* v. *London Corporation* (1876) 1 App. Cas. 120, 127.
[33] (1956) A.C. 696, 723.
[34] *Ibid.*
[35] *Id.* at 728.
[36] *Id.* at 729.
[37] *Id.* at 727.
[38] *Id.* at 715.

Although Lord Radcliffe rejected the "just solution" view as alone sufficient to bring the doctrine of frustration into operation[39] it would appear that his judgment can be interpreted as impliedly expressing the view that in border-line cases at any rate the elements of "hardship or inconvenience or material loss" may guide the courts in deciding to reach a decision one way or the other. The principal basis for such a construction of his Lordship's judgment is his statement that "it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".[40] This passage could by necessary implication be taken to mean: "hardship or inconvenience or material loss may help to call the frustration into play provided that there is as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".

Further support for such an implication is provided by Lord Radcliffe's express adoption[41] of those same passages from the judgment of Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[42] and of Lord Watson in *Dahl* v. *Nelson*[43] which had earlier been relied on by Lord Wright[44] in support of the "just solution" theory now abandoned as a principal theory. Then again Lord Wright has stated: "In short in ascertaining the meaning of the contract and its application to the actual occurrences the court has to decide not what the parties actually intended, but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man".[45] On comparison this seems rather similar to Lord Radcliffe's view in *Davis' Case*[46] when he says that in the place of the parties "there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself".[47]

If this interpretation of Lord Radcliffe's judgment is accepted there still remains the problem of reconciling it with the opinion of Lord Reid having regard to his citation[48] of Viscount Simon's view in *British Movietone Ltd.* v. *London and District Cinemas Ltd.*[49] which at first sight may well appear to conflict with it. But regard must be had to the fact that Lord Reid's purpose, as he himself points out[50] in citing that passage from the judgment of Viscount Simon[51] was to provide authority for his view that frustration depends not on any question of implied terms but on whether or not the contract is on its true construction sufficiently wide to apply to the situation that has unexpectedly arisen. Consequently it would seem quite reasonable to suggest that a limited operation of the "just term" view as a purely auxiliary aid to the general principle laid down in the *Davis Case* would not be inconsistent with the judgment of Lord Reid.

Davis' Case[52] is also important in that it lays down that no principle of frustration law arises from the decision in *Bush* v. *Whitehaven Port and Town Trustees*.[53] In that case a contractor undertook to build a water-main in difficult country in Cumberland for £1,300. Possession of the site was not given until October instead of early in the summer with the result that the contract became a winter contract and cost an extra £600 to complete which sum the contractor claimed from the defendant employer. An express clause

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[39] *Id.* at 729. [40] *Ibid.* [41] *Id.* at 728.
[42] (1926) A.C. 497, 510. [43] (1881) 6 App. Cas. 38.
[44] As in *Denny, Mott and Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* (1944) A.C. 265, 275.
[45] *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154, 185.
[46] (1956) A.C. 696, 728. [47] *Ibid.* [48] *Id.* at 721.
[49] (1952) A.C. 166, 185. [50] (1956) A.C. 696, 720-21. [51] (1952) A.C. 166, 185.
[52] (1956) A.C. 696.
[53] (1888) 2 *Hudson's Building Contracts* (4 ed.) 122.

of the contract provided that if the site was not available in proper time the contractor should not be entitled to extra payment. This clause was circumvented by the finding of the jury, upheld by the Court, that the delay had been so great that it ought not to be covered by the exception and the contractor was entitled accordingly to his £600 on a *quantum meruit*.

In a number of cases the courts have considered themselves bound by it as a frustration case,[54] but now in *Davis' Case*[55] the House of Lords has finally disposed of it by declaring that *Bush* v. *Whitehaven Port and Town Trustees*[56] was decided "upon very special facts"[57] and "must be read in the light of the development of the law in later cases".[58] Lord Radcliffe's judgment on this point[59] is worth citing for its own role as a piece of vigorous judicial denunciation not framed in unduly restrained terms. It runs as follows:

> My Lords, I think that *Bush* v. *Whitehaven Port and Town Trustees*[60] may be worth remembering as an instance of what can happen to a case during its passage through successive courts, but I do not think it worth recording as an exposition of any principle of law. In that regard the editors of the Law Reports who ignored it, showed a sounder judgment than Mr. Hudson, who enshrined it. In so far as it applied the principle of frustration to the facts of the case, the principle was in my view misapplied. In so far as the judgments of the Court of Appeal contain general statements as to the law of frustration, I think that the subject has been so fully explored in later cases of high authority that the particular exposition is of no real value.[61]

Although the test of frustration laid down by Lord Radcliffe and Lord Reid in *Davis' Case*[62] may on the face of it appear quite novel, a view taken by Professor Goodhart,[63] this is not so. For the same test was applied in only slightly different terms by Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*[64] back in 1917. There a firm of contractors entered into a contract with the Metropolitan Water Board in July 1914 to construct a reservoir within six years subject to a proviso for extension of time if delay was caused by difficulties, impediments or obstructions howsoever occasioned. In February 1916, the Minister of Munitions exercising the powers conferred by the Defence of the Realm Acts and the Regulations ordered the contractor to cease work and disperse and sell the plant. The House of Lords held that the provision for extension of time did not cover such a substantial interference with the performance of the work as this; that the interruption created by the prohibition was of such a character as to make the contract when resumed in effect a different contract from the original contract when broken off; and therefore the original contract had been frustrated. Lord Dunedin said:

> On the whole matter I think that the action of the Government which is forced on the contractor as a *vis major* has by its consequences made the contract if resumed a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount if resumed to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation they are entitled to succeed in their defence to this action.[65]

However, until *Davis' Case*[66] Lord Dunedin's test was not regarded as

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[54] *Porter* v. *Tottenham Urban District Council* (1915) 1 K.B. 776, 797; *Naylor, Benzon & Co. Ltd.* v. *Krainische Industrie Gesellschaft* (1918) 1 K.B. 331, 340.
[55] (1956) A.C. 696.
[56] (1888) 2 *Hudson's Building Contracts* (4 ed.) 122.
[57] (1956) A.C. 696, 718.
[58] *Id.* at 724.
[59] *Id.* at 732-33.
[60] (1888) 2 *Hudson's Building Contracts* (4 ed.) 122.
[61] (1956) A.C. 732-33.
[62] *Supra.*
[63] (1956) 72 *L.Q.R.* 457, 459.
[64] (1918) A.C. 119.
[65] *Id.* at 130.
[66] (1956) A.C. 696.

being of general application. According to Cheshire and Fifoot[67] it applied only to cases of frustration arising from interference by the Government, particularly in time of war. Some justification for that view was afforded by the fact that Lord Dunedin's test had been applied to several ship-building contracts the performance of which was hindered by the impositions of government restrictions and prohibitions created in war-time.[68] In *Bank Line Ltd.* v. *Arthur Capel & Co.*[69] Lord Sumner referred to and approved Lord Dunedin's test but on the ground that it was "directed to the factor of delay alone and delay, though itself a frequent cause of the principle of frustration being invoked, is only one instance of the kind of circumstance to which the law attends".[70] What has now been established by the decision in *Davis' Case,*[71] though curiously enough none of the Law Lords expressly refer to *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.,*[72] is that this principle of the change of identity of the contract is one of general application and is the proper test to be applied in all cases where the question arises whether or not a contract has been frustrated. The nearest reference that can be found in *Davis' Case*[73] to Lord Dunedin's test is Lord Radcliffe's reference[74] to the tests discussed by Lord Summer in *Bank Line Ltd.* v. *Arthur Capel & Co.,*[75] Lord Sumner there ending his exposition of those tests with a statement expres sing his preference for that of Lord Dunedin.[76]

Thus, summing up, it is obvious that *Davis' Case*[77] is a decision of no mean importance. It rejects the "implied term" theory which had until now been recognised in principle by the majority of authorities though the opinions as to its actual application varied from one case to another. At the same time its principal adversary, the theory of the "just solution", is relegated at best to a subsidiary role which the court may consider in doubtful cases provided that the requisite changes of circumstances are also present at least to a considerable degree. Instead another principle has been adopted which to a large extent corresponds to Lord Dunedin's old change of identity theory. The question simply is whether a situation has emerged, fundamentally different from that existing at the time the contract was made, and which cannot be said to fall within the scope of the contract on the true construction of it. The decision makes it quite clear that the doctrine of frustration is only to be applied in a limited number of cases where this is justified on the true construction of the contract as it stands and cannot be used as a convenient general device for escaping from binding contractual obligations. Last, but not least, the troublesome case of *Bush* v. *Whitehaven Port and Town Trustees*[78] is disposed of and declared to have laid down no principle of frustration law. In conclusion, it can confidently be said that this long sought for clarification of the law relating to frustration constitutes a most praiseworthy addition to our law of contract and will be welcomed with relief by the legal profession.

A. HILLER, Case Editor — Third Year Student.

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[67] G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (4 ed. 1956) 467-68.
[68] *Federal Steam Navigation Co. Ltd.* v. *Dixon and Co. Ltd.* (1919) 1 Ll.L.R. 63 (H.L.); *Woodfield Steam Shipping Co. Ltd.* v. *J. L. Thompson & Sons Ltd.* (1919) 1 Ll.L.R. 126 (C.A.); *Fisher, Renwick & Co.* v. *Tyne Shipbuilding Co.* (1920) 3 Ll.L.R. 253 (Bailhache, J.).
[69] (1919) A.C. 435.
[70] (1956) A.C. 696, 727, *per* Lord Radcliffe.
[71] *Supra.*
[72] (1918) A.C. 119.
[73] (1956) A.C. 696.
[74] *Id.* at 727.
[75] (1919) A.C. 434, 457-460.
[76] *Id.* at 460.
[77] (1956) A.C. 696.
[78] (1888) 2 *Hudson's Building Contracts* (4 ed.) 122.

THE EMPLOYER'S DUTY TO INSURE
LISTER v. *ROMFORD ICE AND COLD STORAGE CO. LTD.*

The House of Lords, in the recent decision of *Lister* v. *Romford Ice and Cold Storage Co. Limited*[1] dealt with two matters of vital interest to both employers and employees. They were, firstly, the employee's duty of care arising out of the contract of service and, secondly, the employer's duty to insure his employees against claims made on them for injuries suffered by fellow employees or third parties.

The appellant was a lorry driver employed by the respondent Company. While reversing the lorry the appellant ran over and injured his father, also an employee of the Company. The father recovered damages[2] against the Company[3] in respect of the appellant's negligent act. The Company, however, held two insurance policies, a Lloyd's employer's liability policy and a motor vehicle third party insurance policy. The latter policy was of no benefit to the Company in the present case[4] but the Lloyd's policy covered them against claims such as the father had made. The insurance company paid the damages awarded to the father and, exercising the express power of subrogation contained in the policy,[5] sued the appellant in the Company's name. It claimed contribution from the appellant as a joint tortfeasor under the Law Reform (Married Women and Tortfeasors) Act, 1935[6] or alternatively damages for breach of an implied term in the appellant's contract to use reasonable care and skill in driving the lorry.

Judgment was given for the respondent Company on the latter ground by Ormerod, J. and this decision was affirmed in the Court of Appeal[7] (Denning, L. J. dissenting). The House of Lords dismissed the present appeal affirming the existence of an implied term in the contract that the appellant would perform his duties with proper care, and denying that there was any obligation cast on the employer to insure his employees against risks of financial loss. However, with great respect, the House appears to have adopted an unsatisfactory approach in its solution of these problems.

(i) *The Contract of Service and the Implied Term of Reasonable Care.*

The House of Lords held unanimously that there was implied, in the contract of service, a term that the driver would perform his duties with proper care. It decisively rejected Denning, L. J.'s proposition[8] that the servant did not owe a contractual duty of care to his master but that actions

[1] (1957) 2 W.L.R. 158.

[2] McNair, J. found the father one-third to blame and the son two-thirds. Total damages were assessed at £2,400 and judgment entered for the father for £1,600 and costs.

[3] The Company was only vicariously liable. Had there been any evidence of negligence on the Company's part then the situation could have been quite different. However, the present Note is limited to circumstances where the employer is only vicariously liable.

[4] The third party policy did not cover the employer since it did not provide insurance against injury caused by one servant to another servant of the same employer as this was not compulsory under the Road Traffic Act, 1930. Furthermore it is doubtful whether the policy could have been invoked had the injured person been a third party and not an employee since the accident occurred in a yard and not on a "road" within the meaning of the Act.

[5] Condition 2 of the policy gave the underwriters power "to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and full discretion in the conduct of any proceedings and in the settlement of any claim . . . ".

[6] Section 6; The provision is similar to s. 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act (N.S.W.), Act No. 33, 1946.

[7] (1955) 3 All E.R. 460 (C.A.).

[8] *Supra* at 465.