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THE PRINCIPLES IN APPLICATION OF THE DOCTRINE OF FRUSTRATION IN CONTRACTUAL AGREEMENT

Abubakar, Shehu A.T.*

I. INTRODUCTION

After the parties to a contract might have made their agreement, unforeseen contingencies may occur which make it legally, physically or commercially impossible to fulfill the contract as agreed upon by the parties thus, preventing them from attainment of the purpose they had in mind. The question is whether this discharges parties from liability or not. Prior to 1863, the rule of "Absolute Contract" prevailed. By this rule, it was meant that a man was strictly bound by his contract and in the absence of express limitation of his liability; he must bear the consequences of his being unable to perform his obligation in the contract he entered into.¹ The reason for this harsh rule was that, a party to a contract can always guard against unforeseen contingencies by an express stipulation, but if he voluntarily undertakes an absolute and unconditional obligation, he cannot complain merely because events turn out to his disadvantage.² That was the position of the law in the seventeenth century as decided in the English case of *Paradine v. Jane*.³ However, in 1863, a substantive and radical change took place in the case of *Taylor v. Caldwell*⁴ which mitigates the rigour of the rule in "Absolute Contract" by providing that if the further fulfillment of the contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties be discharged accordingly. This article has examined the meaning of the term frustration of contract, theories applicable to frustration of contract, application of doctrine of frustration to contract of employment, the controversy on application of doctrine of frustration of contract and relevant recommendation concerning the doctrine of frustration of contract in Nigeria.

II. DEFINITION OF FRUSTRATION OF CONTRACT

The term "Frustration" has been defined as "the prevention of a plan or hope that should have taken place".⁵ According to Black's Law Dictionary, the word "frustration" is "the prevention or hindering of the attainment of a goal, such as contractual performance".⁶ It goes further to define "commercial frustration" at the same page as, An excuse for a party's non performance because of some unforeseeable and uncontrollable circumstance.⁷

In the locus – classicus of *Mazin Eng. Ltd. v. Tower Aluminum*⁸, Wali, J.S.C. while quoting his Lordship Viscount Simon, L.J. in the English case of *Cricklewood Property & Investment Trust Ltd. v. Leightons Investment Trust Ltd.* defined "Frustration of contract" as follow:

Frustration may be defined as the premature determination of an agreement between parties lawfully entered into and in course of operation at the time of its premature

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¹ Sagay, I.E. (1996). *Nigerian Law of Contract*, Ibadan: Spectrum Law Publishing, pp.479- 529.

² Furmston, M.P. (1981). *Cheshire and Fifoot's Law of contract*, (10th Edition), London: Butterworth & Co (Publishers) LTD. (pp.512-529).

³ (1647) Aleyn 26. Simpson 91 LQR 247 at 269-273.

⁴ (1863) 3 B & S 826; (1861-73) All E.R 24

⁵ Juliana Amey (1992). *BBC English Dictionary*, Rex Charles & Patrick Ltd. 7th Edition, p.467.

⁶ Paul ST. (1999). *Black's Law Dictionary* West Group. 7th Edition, p.679.

⁷ Ibid

⁸ (1993) 5 NWLR (PT.295) 526 at 534, Paras F-G (1993) 6 S.C.N.J. 176 at 182.

determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement.⁹

It should be noted that the phrase "frustration of contract" is derived from a Latin maxim "*non haec foedera*" which literally means "it was not that I undertook". Therefore, frustration of contract occurs when an obligation undertaker has become impossible of performance.

III. THEORETICAL APPROACH TO THE DOCTRINE

The basis of doctrine of frustration of contract can be traced to the following phenomena. a) Implied Term Theory and (b) Radical Change of Obligation Theory

a) Implied Term Theory

The profounder of the implied term theory was BLACKBURN, J. in the case of *Taylor v. Caldwell*¹⁰. He based his application of frustration of contract on the implied term theory to the effect that a contract based on the continued existence of a thing is frustrated if due to no fault of either party, the thing ceases to exist. In *Taylor v. Caldwell*¹¹, the court held that the parties contracted on the basis of the continued existence of the music hall at the time when concerts were to be given, that being essential to their performance. The music hall having ceased to exist without the fault of either party, both parties were excused from their obligations under the contract.

It is noteworthy that, implied term was used to introduce the doctrine of frustration into the common law. If the performance of a contract depends on the continued existence of a thing or things, then, the destruction of that thing or things will discharge the parties from the contract (discharge by frustration), provided none of them was responsible for the change that had taken place. In fact, there is no requirement that an express stipulation to that effect should be contained in the contract by the nature of the contract itself, that term or condition must be implied. The implied term theory has been heavily attacked and strongly criticized in recent years on the ground that parties to a contract cannot possibly have impliedly provided for something they neither expected nor foresaw.

Another ground for criticizing the theory is that, frustration occurs by operation of law and not by intention of the parties. The attack and / or criticism can be found in the speech of Lord Wright in *Denny, Mott & Dickson V. James B. Fraser & Co. Ltd* where it was stated as follow

It is now, I think, well settled that, where there is frustration, a dissolution of a contract occurs automatically. It does not depend, as does the rescission of a contract of a contract on the ground of repudiation or breach, on the notice of election of either party...it is the court that decides the true position of the parties¹².

With this, one can rightly submit that this is now the more generally accepted view because to attempt to guess the arrangements that the parties would have made at the time of the contract, had they contemplated

⁹ (1945) 1 All E.R. 252.

¹⁰ Ibid

¹¹ Ibid

¹² (1944) A.C 265

the event that has now unexpectedly happened, is to attempt the impossible. Instead, the courts refused to apply the doctrine of frustration unless they consider that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract. This is the dictum of Per Lord Simonds in the Case of *Tsakiroglou & Co. Ltd. v. Noble & Thorl GmbH*¹³

b) The Radical Change of Obligation Theory

Having declared the implied term theory as unrealistic, Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.*¹⁴ based his application of discharge by frustration on radical change of obligation theory. According to him, frustration occurs when ever 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. This is expressed in a Latin – Maxim *Non Haec in Foederal Veni*, that is, it was not this that I undertook or it was not this I promised to do.

From the foregoing, it can be deduced that if the terms of the contract, when construed and in the light of the circumstances existing at the time it was made, show that it cannot be held to apply to the changed situation, the contract is discharged.

This theory has been tested and applied by the Supreme Court of Nigeria in *Mazin v. Tower Aluminum*¹⁵ See Also *C.C.B. V. Onyekwelu*¹⁶ And *Total (Nig) Plc v. Akinpelu*¹⁷

It should be noted that hardship, inconvenience, increased cost and material loss, originally unexpected in performance of a contract cannot constitute frustration. There must be such a change of circumstance that if the contract were not brought to an end, the parties would in effect be performing obligations different from what they had contracted for. In *Davis Contractors Ltd v. Fareham U.D.C.*¹⁸, the Court held that mere increase in costs, or unexpected hardship, delay or inconvenience did not constitute frustration.

Also in the case of *Mazin v. Tower Aluminum*¹⁹ It must be emphasized that where the contract is frustrated, further performance is excused only if:

- i. It occurs before breach of the contract,
- ii. It is without the fault of either party, and
- iii. It is due to a fundamental change of the circumstance beyond the control and original contemplation of the parties.

It is submitted that whatever theory is applied to a particular case, it is probable that the same result would be achieved. In *Davis Contractors Ltd. v. Fareham U.D.C.*²⁰ Lord Radcliffe acknowledged this fact when he held that, "So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed" The theories represent different stages in a court's "thinking" process in the course of considering whether frustration exists in a given situation. The court must first come to the conclusion that there has been a radical or fundamental change of obligations, or that the foundation of the contract has

¹³ (1962) A.C. 93 at 115.

¹⁴ (1956) A.C. 696

¹⁵ (1993) 5 NWLR (PT. 295) 526 at 534, Paras F-G (1993) 6 S.C.N.J. 176 at 182.

¹⁶ (1999) 10 NWLR (PT. 623) 452 at 461, Paras E-F

¹⁷ (2004) 17 NWLR (PT. 903) 509 at 523-524, Paras E-A

¹⁸ (1956) A.C. 696

¹⁹ Ibid, p.537

²⁰ Ibid

been destroyed by the subsequent event before deciding that the parties must be taken to have implied in the contract that they would be discharged from further performance in such an event.

Thus, the implied term theory presumes the existence of the radical change in obligation or the destruction of the foundation of the contract. Hence, the court will come to the same decision, no matter what theory is applied.

IV. IS FRUSTRATION A QUESTION OF LAW OR FACT?

There has been much discussion as to whether frustration presents a question of law or fact. Devlin, J suggested an answer in the illuminating case of *Universal Cargo Carriers Corp v. Citati* to the effect that, "While the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact".²¹ It appears that there are three questions to be asked. First, what are the general rules about the doctrine of frustration? This is clearly, a question of law. Secondly, what are the primary facts? Equally, this is clearly a question of fact. Thirdly, how is the first to be applied to the second? This is a question of degree or judgment which does not fall naturally as a matter of abstract logic into either category and the practical question is the extent to which the Trier of facts views are open to challenge.²²

V. APPLICATION OF DOCTRINE OF FRUSTRATION IN CONTRACT OF EMPLOYMENT

The available judicial authority shows that frustration does not apply absolutely to the contract of service or employment as held in the case of *C.C.B v. Onyekwelu*.²³ It has been held by courts at one time or the other that the following circumstances or situations would constitute frustration:

- a) **Subsequent Legal Changes:** - It should be noted that where there is a subsequent change of law or change of legal position affecting a contract, the plea of frustration of the contract would be successful. In *Davis, Contractor's Case And Mazin v. Tower Aluminum*.²⁴
- b) **Outbreak of War:** - The outbreak of war renders illegal, null and void whatsoever, all contractual transactions between the citizens of the state at war with each other. For instance, any contract between a Nigerian and an alien enemy is discharged automatically by the outbreak of war. *Daps Brown v. Haco Ltd.*²⁵
- c) **Destruction of the Subject Matter of the Contract**
A contract will be deemed to have been brought to an end by doctrine of frustration of contract where the subject matter of the contract destroys or where same is no longer in existence without the fault of either party to the contract as in the case of *Taylor v. Caldwell*.²⁶
- d) **Government Requisition of the Subject Matter of the Contract:** Generally, government requisition of the subject matter of a contract will terminate the contract by frustration if the requisition is of a permanent nature. War and other emergencies are some of the events that cause government requisition of property. During the Nigerian civil war, the Federal Government of

²¹ (1957)2 Q.B. 401 at 435, (1957) 2 ALLER 70 at 83

²² Ibid

²³ Ibid

²⁴ (1903) 2 All N.L.R. 47.

²⁵ Ibid

²⁶ (1903) 2 K.B. 740

Nigeria empowered itself and its agencies to requisition any property by Decree No. 39 of 1967, as amended by decree No. 43 of 1969.

- e) **Cancellation of an Expected Event:** - Where there is an indefinite postponement of an event previously fixed to take place at a particular time without the fault of either party, the contract stands frustrated

In *Krell v. Henry*²⁷, the defendant agreed to hire rooms in the plaintiff's flat on 26th and 27th June, 1902 in order to witness the coronation processions of **KING EDWARD VII** of Great Britain and Ireland fixed for those two days. But as a result of the king's sudden illness and surgical operation, the coronation was postponed (cancelled). The defendant who had paid only one third of his rent refused to pay the balance. The Court upheld his refusal on the ground that the contract has been brought to end by doctrine of frustration since the coronation procession was the foundation of the contract and the non happening of it prevented the performance of the contract".

- f) **Miscellaneous Events:** - No one can exhaust the list of the events that can lead to frustration of contract. It is the court that has the power to decide which event constitutes frustration of contract and the one that does not, depending on the peculiar circumstance of each case that comes before the court.

VI. EFFECT OF THE DOCTRINE

The rule of frustration of contract under the Common Law reveals that the occurrence of the frustrating event brings the contract to an end forthwith and automatically. *Hirji Mulji v. Cheong Yue SS Co*²⁸.

The common law drew inferences which, though appears to be harsh, were not illogical. Under that rule, each party must fulfill his contractual obligation so far as they have fallen due before the frustrating event, but he is excused from performing those that fall due later. For instance, in *Krell v. Henry*²⁹ it was held that the plaintiff could not recover the agreed rent from the defendant since it did not fall due until the last minute of 24 June, and before this moment had arrived the abandonment of the procession had been announced. This position was followed by the Supreme Court of Nigeria in *Mazin v. Tower Aluminium*.³⁰

VII. LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943

The Act is confined to a case where a contract governed by English law has become impossible of performance or has been otherwise frustrated, and the parties thereto have for that reason been discharged from further performance of the contract. See Section 1 (1) of the Act. This simply means that, the provisions of the Act do not apply where a contract is discharged by breach or for any reason other than the impossibility or frustration. The Act permits the recovery of money paid even throughout the date of frustration; there has been no total failure of consideration. In addition, it allows a party who has done something in performance of the contract prior to the frustrating event to claim compensation for any benefit thereby conferred upon the other party.

- (b). **The Right To Recover Money Under the Law Reform (Frustrated Contracts) Act, 1943.**
S.1. (2) of the Act provides that,

²⁷ (1926) AC, 497

²⁸ (1993) 5 N.W.L.R.(PT.295) 526 AT 534

²⁹ (1943) A.C 32, (1942) 2 All E.R.122

³⁰ Ibid

goods are not specific or if the frustration is due to some other reason, such as requisitioning, the Act will apply.

- d. In Nigeria, the substance of the British law was with minor modifications enacted in Western Nigeria in 1959 when Contracts Law, Cap. 25, Laws of Western Nigeria, 1959 was enacted. The Federal Government also enacted Law Reform (Contracts) Act, 1961, (No. 64 of 1961). The effect of the Federal Government Act was limited to the then Federal Capital of Lagos. That is to say, the modification of common law effects of frustration by legislation in Nigeria applies only to Lagos, Ogun, Oyo, Ondo and Bendel States. The rest of the country i.e. all Northern and Eastern States are still operating under the common law in this regard.

It is very important to note the following features of the Federal Government Act mentioned earlier which was also present in the Western Nigeria Law.

- (a) The Act applies only to contracts that have been discharged by frustration.
- (b) Where the parties to the contract have made provisions for the event that has occurred, the Act will not apply. The court is to give effect to the said provisions.
- (c) The Act applies to contracts to which the Government is a party as to those between private parties. See Section 3 of the Federal Government Act (Supra).
- (d) The Act cures defect in Fibrosa case (Supra) by making provisions for the recovery of any expenses incurred towards the performance of the contract, and before the occurrence of frustrating event. See S.4 (1) and (2) of the Act.
- (e) The Act confirms the decision in the Fibrosa case by permitting the recovery of money prepaid towards the performance of the contract, and by abolishing any liability to pay, if in fact, payment had not yet been made. See S.4 (2) of the Act.
- (f) The Act allows a party who has done something towards the execution of the contract, which constitutes a valuable benefit to the other (other than payment of money) to recover a sum of money not exceeding the value of the benefit so conferred by him on the other party. See S.4 (3) of the Act.

However, the Act does not apply to four types of contracts as provided by S.3 (5) of the Act. These are:

- Any charter party except a time charter party or a charter party by way of demise;
- Any contract for the carriage of goods by sea;
- Any contract of insurance; and
- Any Contract for the sale of specific goods where the goods have perished before the risk per se to the buyer or any other contract for the sale and delivery of specific goods where the contract is frustrated by reason of the fact that the goods have perished.

The reason for the exceptions is that, by commercial practice, well known rules of insurance have been developed against risks of these contracts. Thus, unless the contract stipulates to the contrary, a carrier is not entitled to remuneration if the contract of carriage of goods by sea is frustrated after the ship has only gone part of the way. Likewise, the exemptions of the insurance contracts from the operation of the Act is based on a well established principle that part of a premium is legally recoverable where the subject matter of the risk ceases to exist before the period of the insurance expires. Thus, if a house which has been insured against fire is requisitioned by government before the expiration of the insurance policy, then the assured is not in any way entitled to recover any part of the premium.

VIII. CONTROVERSY ON APPLICATION OF DOCTRINE OF FRUSTRATION OF CONTRACT

Under normal circumstance, a person buying land or acquiring a lease of land should enjoy an estate in the land entirely independent of the contract; so, frustration should not affect such transactions. This has

been the argument of many jurists in the past until very recently. See the case of *Criclewood Property and Invest. Ltd. v. Leighton Invest Ltd*³²

However, the decision of the Supreme Court of Nigeria in the case of *Araka v. Monier Construction Company Ltd*³³ and the decision of the House of Lords in *National Carriers Ltd V. Panalpina (Northern) Ltd*³⁴ have put all the controversies to rest permanently. According to both decisions, frustration is applicable to all categories of contract: sales of land, leases, and tenancies inclusive.

IX. CONCLUSION

The doctrine of frustration of contract makes provision for the discharge of a contract where subsequent to its formation; a change of circumstances makes it legally, physically or commercially impossible to fulfill the contract, thus discharging the parties from further performance.

In the seventeenth century, the rule of absolute performance was laid down by the English courts as already discussed in this paper. Nevertheless, starting from 1863, the substantive and particular doctrine of frustration was introduced by the courts to mitigate the rigour of the rule of absolute performance. Thus if further fulfillment of a contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties be discharged henceforth. Among them are the Implied Term Theory and Radical Change of Obligation Theory.

This paper has also considered the applicability of the doctrine to various contracts and has also examined the various law reforms made to the doctrine both in Nigeria and in England. Suffice to say that the doctrine of frustration of contract is an effective tool or machinery evolved towards quick and just dispensation of administration of justice between the parties, especially, with the aid of the Federal Government "Law Reform [Contracts] Act, No. 64, 1961 and Contracts Law, Cap.25, Laws of Western Nigeria, 1959

At this juncture, this paper wishes to recommend that other parts of our country(Nigeria) that have not enacted any law to take care of the lacuna or lacunae associated with the common law doctrine of frustration of contract should endeavour to do so without any further delay since the English court are also taking the benefit of the Law Reform (frustrated contracts) Act, 1943 to proffer appropriated solution to some problems attached to the doctrine so as to see that justice is not only seeing to be done but manifestedly seeing to be done.

³² (1945) A.C.221

³³ (1981) A.C. 675; (1981)2 W.L.R. 45; (1981) 1 ALL E.R. 161

³⁴ (1978) 2 L.R.N. 60