BRITISH MOVIETONEWS LTD. v LONDON & DISTRICT CINEMAS LTD.
(1951) 2 ALL E. R. 617

CONTRACT – CONSTRUCTION – FRUSTRATION

Until this case reached the House of Lords the law relating to frustration had reached an advanced stage in its developement. But now it has been set back a good many years. Such a reaction is often seen in the formation of new doctrines and theories. The status quo resists for a time, but finally gives way to new ideas. I would say that this case presents such a bloc in the progress of the law and in time will succumb.

In 1941 the appellant (plaintiff), a distributor of news reels, agreed with the respondent (defendant), an exhibitor, to supply news reels for a period of at least 26 weeks and thereafter either party could terminate the contract on four weeks notice. However in 1943 the rationing of film made it necessary for the parties to enter a supplementary contract under which the original contract was to remain in force until the rationing order was lifted. The order was made under the Emergency Powers (Defence) Act 1939 – This act expired in 1946 and was replaced by the Supplies and Services (Transitional Powers) Act 1945 which act continued the order, rationing film. In 1948 the Respondents gave four weeks notice even though the order was still in existence.–The plaintiff sued to enforce the contract. The defendants countered that they had the right to terminate under the original contract or in the alternative that it was ended by frustration due to the different purpose for which the new act was passed. The plaintiff succeeded at the trial but the Court of Appeal reversed this judgment and thus the plaintiff carried his appeal to the House of Lords, who allowed the appeal.–

The Court of Appeal based their judgment on the fact that notwithstanding the literal words of the contract the parties could not have contemplated the new situation which arose consisting of the different purpose for which the order of 1943 was continued after the expiration of the 1939 act; that therefore the defendant was free to give notice. Denning, L.J. expounded what he thought was a third theory of frustration; namely that in the face of an uncontemplated turn of events which does not amount to a frustrating cause, the court has a qualifying power under which it applies justice and common sense to the words in the new circumstances. This theory he says was stated by Lord Wright in Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn. Ltd. (1941) 2 All E.R. 85 and in Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co. Ltd. (1944) 1 All E.R. 683, which in turn were based on Bush v. Whitehaven Town & Harbour Trustees (1888) 52 J.P. 392, and Jackson v. Union Marine Insurance Co. Ltd. (1874) L.R. 10 C.P. 125. He continues to say that until recently the theory was applied only in cases where there

was a frustrating event; one which struck at the foundation of the contract. But in the case of Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works & Public Buildings (1950) 1 All E.R. 208 the Court of Appeal applied the principle to an uncontemplated turn of events where there was no undermining of the foundation of the contract.

However the House of Lords firmly disagreed with the Court of Appeal and Viscount Simon is very explicit in saying that there is no such 3rd theory as put forth by Denning L.J. There are only two theories; the doctrine of the implied term and the doctrine of the disappearance of the foundation of the contract. Both these doctrines he says, are based on a construction of the contract. Turning to this case he says that as a matter of construction the parties are bound by the agreement until the order is revoked.—

The learned Lord then sums up in the following words the law on frustration as it stands to-day:

> "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.....Yet this does not of itself affect the bargain they have made. 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."

Evidently the House of Lords felt that the Court of Appeal was opening a new door and opening it too far and too quickly. As a result, the clock of frustration is set back three or four hours. However I feel that this view will be changed in the not too distant future and that the clock will be re-set and allowed to run its normal course in an ever-changing world of commerce. As Denning L.J. so aptly put it, "qui haeret in litera, haeret in cortice."—"He who clings to the letter clings to the dry and barren shell, and misses the pith and substance of the matter."

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