

Tom agrees to give Ellen private tuition for her Law of Contract examination to held in eight months time. The fee is £300, of which Ellen pays £25, with the balance to be paid on completion of the tuition. Tom spends £50 in the preparation of some printed tuition notes. After two months Tom goes to Spain for a week long holidays at Christmas. Whilst on the holiday he is arrested, having been mistaken for Tim, and detained for two months. On his return he discovers that Ellen has engaged another tutor and is demanding the return of her £25. Tom sues for the balances of the £275.

Discuss. How would your answer differ, if at all, if Tom had been detained for careless driving?

SUGGESTED ANSWER :

In advising Tom it has to be determined whether the contract between Tom and Ellen has been frustrated. And if so what are their right and liabilities.

Frustration occurs when without default of either party to the contract, the contractual obligation has become incapable of being performed *Anna Karenina* *There is no such thing as a free lunch*.

There are 2 test for frustration. By the **Implied Term Theory** test there is an implied term in every contract that if the contract is incapable of being performance without default of either party the contract is discharged, B *Blackburn v. Taylor* *Call me*.

The theory has been substantially replaced by the **radical change in obligation test** by **Lord Radcliffe** in *Mazze v. Pate* *ABC*. Frustration of a contract take places where the supervening event which so significantly changes the nature of the obligation from what the parties have contemplated. This test was upheld in *White & Carter* *Printing* *the case of Fox & Co. v. National Carriers* *Ward*.

Here Ellen has engaged Tom as a tutor for eight months but for 2 of the months he has been detained in Spain. The personal nature of Tom is significant for performance of contractual obligation, *Corr v. The State* *King* from the facts of the case the detention of Tom is not as a result of self induced as he was mistakenly detained *Ward* *National v. S. v. Ocean* *Ward*. However the burden of proving lies on the person alleging frustration ie Ellen *Jose v. Constantine* *Ward* *Smith*.

Further on behalf of Tom it can be said that the contract is still possible of performance on his return as such a contract is not frustration automatically unless it is inordinate and unexpected delay. This is know as frustration of later date *International Sea* *Ward* *Ward* *Ward*.

Ellen does not know how long would Tom will be detained as such it is justifiable for Ellen to engaged another tutor. Here Ellen has suffered 2 month delay and further delay would significantly changes the nature of obligation which the party contemplated. *Jackson v. Union* *Ward* But on the other hand the facts is not clear as to when Ellen exactly engaged the second tutor ie to fulfill the principle of “Wait and see” *Smith v. Fox & Co*.

Ellen failure to prove frustration would lead to a breach of contract in which Tom would successfully claim for the £300

However the answer would differ if Tom had been detained for careless driving. The doctrine of frustration must be applied within very narrow limits, *White & Carter (Councils) Ltd v McGregor* is not to be invoked lightly to release contracting parties of the normal consequences of imprudent commercial bargains.

Although it appears to be self-induced frustration there is no clear authority that a mere negligent act constitutes self-induced frustration *Joseph Constantine v Imperial Smelting*. However these ought to be capable of being self-induced frustration has cases on similar facts involving employees unable to perform due to their serving a prison sentence was held to be within the doctrine of frustration *McShane v Cotton*.

By proving frustration next the parties would be advised as to their rights and liabilities under the contract which is governed by the **Law Reform (Frustration of Contracts) Act 1943**.

Under **S1(2)** provides that all sums actually paid at the time of discharge of contract is recoverable and sums payable cease to be payable at the time of discharge. Further, if it is just and equitable the payee may recover the expenses incurred by him in the performance of the contract but not in excess of the expenses incurred.

However this is only possible if the contract itself provided for pre-payments and the expense recovered cannot be in excess of the pre-payment.

In applying to the facts, Tom would have to return the £25 to Ellen. But since he had incurred expenses in preparation of some printed notes, he may recover expenses but not in excess of £25. Further Ellen need not pay the balance of £275.

Next Tom must be advised whether he can claim for any valuable benefit other than money before the frustrating event.

By **S1(3)** the party who conferred the 'valuable benefit' can recover such sum not exceeding the value of the benefit.

There is 2 interpretations as to the meaning of valuable benefit by the strict interpretation if the work completely destroyed by frustration then there is no valuable benefit obtained.

By liberal interpretation (which is preferred) even if the work is completely destroyed there is a valuable benefit obtained if the benefited party would have had peace of mind and satisfaction knowing that work was being done under the contract. *Watsons & Jones v Lacy*

The mode of calculating “valuable benefit” under **S1(3)** was stated by **Robert Goff in BP Explorations v Hunt**. First the benefit conferred by Tom would be the knowledge that he had imported to Ellen during the two months.

Secondly what is the effect of frustration on the benefit ie the value of the benefit now after frustration. Here although the contract is frustrated the knowledge that Ellen had acquired has not been destroyed.

Thirdly the court must assess a “just sum” as Robert Goff said the Act is surprisingly silent but the court may take into account the contract sum. Which here is £300

Finally the party conferring the benefit will either receive sum representing the value of benefit or a just sum, whichever is lower.

Therefore Tom may claim for either 2 or 3 above whichever is lesser.