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Bingham LJ's statement expresses well the purpose of the doctrine of frustration which is to moderate the general rule, as expressed in *Paradine v. Jane (1647)*, that, unless they have been expressly qualified, contractual obligations are absolute. It does not tell us much about the underlying principles of the doctrine. How and when does it apply and what are the effects? Contract law needs certainty and a doctrine that excuses parties from the performance of their obligations must, by necessity, be restrictive and unambiguous. By concentrating on the object of the doctrine, however, the author reflects accurately the courts' modern trend of relying less on an abstract theory justifying the doctrine, and more on an objective interpretation of the contract and the practical situation before them in order to produce a just result. We will see how this development has affected both the ambit of the doctrine and its effects.

A contract is frustrated if an event occurs after the contract has been formed which makes it impossible to perform it and this event is outside the control of the parties to the contract. This definition is as valid now as it was when the seminal case of *Taylor v Caldwell (1863)* was decided. The underlying principle was that there was an implied condition that the parties would be excused from their obligation if performance (literally and legally!) became impossible trough no fault of theirs. The principle applied if a specific person vital to the contract would become unavailable (*Morgan v Manser [1948]*), if a fundamental event did not occur (*Krell v Henry [1903]*), if the contract was made impossible through government intervention (*Metropolitan Water Board v Dick Kerr & Co [1918]*), if performing the contract had become illegal (*Fibrosa Spolka Akcyjna v Fairbain Lawson Combe Barbour Ltd [1943]*) and even delay could cause frustration (*Jackson v Union Marine Insurance Co Ltd (1874)*). As a final blow to *Paradine*, the House of Lords in *National Carriers Ltd v Panalpina ltd [1981]* decided (obiter dictum) that a lease of land could be frustrated. The implied condition principle was however showing signs of strain. It is for instance difficult to reconcile the decision in *Herne Bay Steamboat Co v Hutton [1903]* with *Krell*. In the former the court decided that the contract did still have some purpose as it was still capable of some performance, when it is obvious that the object of the contract was in both cases the review/parade that went with the coronation. The court should have taken a more detached and objective view of the contract without attempting an artificial separation of motive and object. The subsequent

criterion of the contract becoming "radically different" from what the parties originally intended, as in the *Metropolitan Water Board* case, or the "different adventure" factor in the *Jackson* case, marked a different, more practical and just approach. The doctrine had to be restrictive however and during the closure of the Suez Canal in 1956, the courts were reluctant to apply the "different adventure" approach unless the contract was very specific. Difficulty of performance or reduced profits would not in themselves lead to frustration (*Davis Contractors v Fareham UDC [1956]*), lest the courts would open the floodgates to litigation. An objective approach based on the construction of the contract (as expounded by Lord Loreburn in *F.A. Tamplin Steamship Co. Ltd v Anglo-Mexican Petroleum Products Co. Ltd [1916]*) was to dominate the way courts would approach frustration. The premise of the early decisions on frustration was that the parties had not foreseen the event and that, if they had, they would have agreed on an express term. Subsequently, the fact that the parties did not include express terms (ex: force majeur clause) in the contract when they could have easily foreseen the supervening event (or the cause of the delay) would restrict the application of the doctrine (see *Davis Contractors*). Not unsurprisingly self-induced frustration (*The Super Servant Two [1990]*) restricts very strictly the application of the doctrine. However in *The Eugenia [1964]*, Lord Denning took the view that it did not matter that the parties could have foreseen the event as they "would have differed about what was to happen". He then went on to conclude that, in that case, there was no frustration anyway as the closing of the Suez Canal did not bring about a "fundamentally different situation", basing his decision on an objective and just appraisal of all the elements of the situation; certainly a step further from the construction theory but very practically achieving the purpose of the doctrine.

The supervening event has to happen after, not before, the formation of the contract or else the contract is void for common mistake (*Griffith v Brymer (1903)*). When frustration is established the contract is voidable. In the early cases losses lay where they fell. Money paid before the frustrating event was not recoverable and money due before it was to be paid (*Chandler v Webster [1904]*). The principle underlying this position was that, although the innocent party did not benefit from the performance of the contract, he had had the benefit of the promise of the performance until the event making the contract impossible happened. The injustice of this situation was addressed in the *Fibrosa* case through the theory of "total failure of consideration". If the payer had received no benefit under the contract, he could recover his money or did not have to pay it. If any benefit had been

received, the money could not be recovered or still had to be paid. However the manufacturers in *Fibrosa* had incurred expenses as they had started working on the order and they still had to reimburse their Polish client under the total failure of consideration principle. Viscount Simon LC thought it was up to Parliament to sort this out. Thus came the Law Reform (Frustrated Contracts) Acts 1943 which brought a practical solution in cases of partly performed contracts. Under S 1(2), expenses incurred before the frustrating event by the party to whom money was paid or payable in the performance of the contract, can be paid out of that money and the onus of proof is on the payee to show that it is just (*Gamerco SA v ICM/Fair Warning Ltd [1995]*). S 1(3) deals with valuable benefits and the court is not limited to the amount paid or payable before the frustrating event but the value is calculated as per the value of the product/service of what the claimant has provided, not what it cost him (see BP *Exploration Co. Ltd v Hunt [1979])*. Parties may exclude the act and the common law rules apply to excluded contracts.

In applying the statute the courts have much discretion and the combination of common law principles and statute have practically brought the whole subject of frustration into the principles of equity: what justice demands!