FRUSTRATION OF CONTRACT

BRISBANE CITY COUNCIL v. *GROUP PROJECTS PTY. LTD. AND ANOTHER*[1]

The New South Wales Law Reform Commission, in its report on frustrated contracts,[1a] has given no definitive statement as to what constitutes frustration. With no "satisfactory" definition at hand, the Commission resorts to the two following juridicial statements to shed light on the doctrine:

> . . . 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 determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the 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.[2] . . . 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 would 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.[3]

Although, in 1949 it was asserted that the "volume of legal literature on the subject of frustration of contract is fast reaching massive proportions, and is being constantly fed by decisions of the English Courts,[4] since the High Court's decision in *Scanlan's New Neon Ltd.* v. *Tooheys*

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[1] (1980) 54 A.L.J.R. 25.

[1a] N.S.W. Law Reform Commission, *Report on Frustrated Contracts*, 25, 1976, n. 2.1. The Frustrated Contracts Act, 1978 (N.S.W.), which follows the 1976 Law Reform Commission report and is analogous to the English Act of 1943, deals with the consequences which flow from frustration. The Act does not consider the common law question of when a contract is frustrated.

[2] *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.* [1945] A.C. 221, 228 *per* Viscount Simon, L.C.

[3] *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696 at 729 *per* Lord Radcliffe.

The American *Restatement of the Law of Contracts*, 1932, vol. 2, provides: 454 — Impossibility includes impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. Mere unanticipated difficulty is not within the definition. (An objective test is used). S. 288 — Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

[4] Anderson, R., "Frustration of Contract in the High Court", 1 *Univ. W.A. Ann.L.R.* 60.

Ltd.,[5] in Australia, and the House of Lords' decision in *Davis Contractors Ltd.* v. *Fareham U.D.C.*,[6] there has been a paucity of cases which extend or clarify the doctrine of frustration. It was once again the focus of High Court attention in *Brisbane City Council* v. *Group Projects*.[7]

Although the *Group Projects Case* was unanimously decided, only two of the five judges, Stephen and Murphy, JJ., analysed the issue in terms of frustration. The majority, Gibbs, Mason and Wilson, JJ., based its decision on a breach of contract and did not proceed to the question of frustration. Further, Murphy, J., while deciding that the concept of frustration was crucial, merely concurred with Stephen, J.'s treatment of that issue. Stephen, J., by adopting the criterion of "purpose" in his determination of whether the contract was frustrated, has awakened old notions of frustration which have, since the *Davis Contractors Case*,[8] remained dormant. This approach to the doctrine of frustration could be distinguished in future, having, in effect, the weight of a single judgment only. However, as already noted, there have been very few judicial treatments of this area of contract law in recent years. The fact that Stephen, J.'s analysis moves away somewhat from seemingly settled theories of frustration makes it striking and worthy of consideration. This casenote will discuss the basis and implications of Stephen, J.'s judgment as far as frustration of contract is concerned.

The Facts

The facts of the case can be summarized as follows: Group Projects (the first respondent) owned in 1975 an area of land zoned "Future Urban", which it wished to develop in subdivisions. Such development was prevented by the above zoning under the City of Brisbane Town Planning Act, 1964-1976 (Qld.). Negotiations between the Brisbane City Council (the appellant) and Group Projects produced a deed on 30th October, 1975. This deed was quite complex, but it provided, in essence, that the Council should apply to the appropriate Minister to have the land rezoned as "Residential 'A' ". In return for this, Group Projects agreed to carry out certain works, both on and off the land in question, and to make certain payments to the Council. The estimated cost of this was $196,160. Furthermore, Group Projects was to furnish a bond of almost $200,000 as security for performance of its obligations.

On 18th December, 1975, such a bond was executed, with A.G.C. (Advances) Ltd. (the second respondent) as the obligor. Group

[5] (1943) 67 C.L.R. 169.
[6] *Supra* n. 3.
[7] (1980) 54 A.L.J.R. 25.
[8] *Supra* n. 3.

Projects also mortgaged the land to the A.G.C. to secure the A.G.C.'s liability should Group Projects fail to fulfil its obligations.[9]

The condition precedent for Group Projects' active assumption of its obligations under the deed, contained in clause 2, was the giving of approval by the Governor-in-Council to the rezoning application.

In July, 1976, both Group Projects and the Council were notified that the Land Administration Commission intended to resume the whole of the land for school purposes. In August, 1976, the Council inquired of Group Projects whether the latter wished to proceed, nevertheless, with the proposed rezoning. Group Projects, having lodged an objection to the resumption, advised the Council to continue performance of its obligations under the deed.

On 13th November, 1976, despite Group Projects' objection, the whole of the land in the deed was resumed and Group Projects ceased to be the registered proprietor of the land. On 23rd December, 1976, however, approval of the Council's rezoning application was given, the Order-in-Council being gazetted on 25th December. This operated to amend the Town Plan, the land in question thenceforth being zoned "Residential 'A' ", in accordance with the deed.

At the time of the rezoning, therefore, the land was already vested in the Crown. Group Projects sought a declaration that the deed, bond and mortgage had each ceased to be binding upon the parties, the obligations contained therein having been discharged from 13th November, 1976. The Council argued, on the other hand, that, whether or not the Crown was bound by the Town Plan, Crown land was in fact and in law zoned under it. The Council having fulfilled its obligations to have approval given for the rezoning, it submitted that the obligation of Group Projects under the deed ought to continue. Moreover, the Council, relying on clauses 7 and 9 of the deed,[10] denied that the contract was frustrated.

The Judgments

At first instance, Dunn, J., in the Supreme Court of Queensland, citing the *Davis Contractors Case*[11] as authority, made the declaration sought, on the basis that the contract had been frustrated by the Government's acquisition of the land on 13th November. At this date, the land, becoming Crown land, could no longer be rezoned and the three documents became, without default of any party, inapplicable to the new situation.

The Council then made an unsuccessful appeal to the Full Court of the Supreme Court, comprised of Wanstall, C.J., Douglas and

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[9] The second respondent desired to abide by the decision on the appeal and was excused from further attendance at the hearing.

[10] See later discussion on these clauses, 7 and 9, at p. 473 ff.

[11] *Supra* n. 3.

Sheahan, JJ. It then appealed to the High Court which again dismissed the appeal.

Although the High Court was unanimous in rejecting the Council's appeal, there was a clear division of opinion on the basis for such a dismissal. Gibbs, Mason and Wilson, JJ. held that the Town Planning Act did not bind the Crown either expressly or by necessary implication, based on their reading of ss. 13 and 36 of the Acts Interpretation Act, 1954-1977 (Qld.). Accordingly, the Crown was not bound by the Town Plan, nor the rezoning.[12] Having determined that the Government intervention in November rendered the rezoning ineffective, the majority held that the Council had failed to fulfil its obligations and was in breach. At this point the parties could be discharged from their obligations under the respective instruments. It followed that three of the five judges thought it unnecessary to consider the question of frustration.

Murphy and Stephen, JJ., however, concluded that the effect of resumption was to frustrate the contracts contained in the three documents. Stephen, J. points out that, in accordance with the Council's limitations (it being not within the Council's powers either to rezone the land or to procure its rezoning), *effective* rezoning was neither contracted for, nor made a condition precedent to, Group Projects' assumption of obligations under the deed.[13] The Council's contractual obligation was only to make the appropriate rezoning application to the Minister, which it had done.[14] By 25th December, the Council had, therefore, fulfilled its obligations up to that point.

Group Projects' protection against the rejection of the rezoning application was incorporated in cl. 2.[15] Clearly, the words of the deed provide that it would not be the *effective* rezoning which would call into play Group Projects' obligations, but rather the Governor-in-Council's *approval* of the application for the desired rezoning.

Thus, Stephen, J. argues, the question of the effectiveness of the rezoning is irrelevant to the parties' assumption of their duties and has nothing to do with the question of any frustration of the contract.[16] At no point did Group Projects stipulate that rezoning be effective before its obligations were to accrue. As a result there was, in November, no breach of contract by the Council.

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[12] *Per* Wilson, J., *Obiter,* a lessee of Crown land may, however, be subject to the Plan in respect of land leased. He suggests, though, that if Crown land which purports to be zoned is thereafter leased, the original zoning will be inoperative for all purposes. *Supra* n. 7 at 30 and 31.

[13] *Id.* at 26.

[14] The Council had some other obligations under cl. 3 of the deed, but these arose after final approval of a plan of subdivision of the land at the earliest. The application for rezoning was the principal obligation.

[15] The opening words of which are: "In the event of the Governor-in-Council approving the application referred to in Clause 1 hereof the Applicant will. . . ."

[16] *Supra* n. 7 at 26.

Murphy, J. reaches the conclusion that the question of frustration is relevant by a somewhat different process of reasoning. Whereas Stephen, J. finds no breach of contract as the parties did not contract for effective rezoning, Murphy, J. queries the majority's assertion that rezoning was ineffective. He points to a distinction between the question whether the Town Plan can bind the Crown and the question whether Crown land is capable of being zoned. His opinion that even "if the zoning is not enforceable against the Crown, that does not mean that zoning has no consequences",[17] supported by his illustration of those consequences in terms of public and parliamentary pressures on the Crown to observe such a zoning, leads Murphy, J. to the decision that rezoning could be effective despite the resumption of the land. He then looks to the question of frustration, adding that no simple test is applicable, and holds that the contract has been frustrated because of the consequences of the resumption of the land referred to by Stephen, J. (see following discussion). It is only the judgment of Stephen, J. which treats the question of frustration at any length. For the purposes of this note, therefore, it is necessary to dwell on Stephen, J.'s decision, which, as far as its initial premise is concerned, is to be preferred.

Stephen, J. held that frustration of the contract resulted from the actual resumption of the land and not the effect its acquisition had on the rezoning. In saying this, he had regard to the *purpose* for which the obligations under the contract were undertaken. The test to be applied was a comparison between the situation contemplated by the parties at the time the contract was entered into, and the situation following the resumption of the land. What had to be determined was whether the change had rendered the performance of the contract a thing radically different from that initially undertaken. Here, he held that this was so.

Despite his application of a seemingly similar test to that espoused by Lords Radcliffe and Reid in the *Davis Contractors Case*,[18] it is arguable that Stephen, J. is departing from the orthodox doctrine of frustration as it appears today, by placing emphasis on the purpose rather than the obligations represented by the contract. Frustration, he claims, does not necessarily involve a "change in the significance of the obligation".[19] This viewpoint is manifested in his decision, as Stephen, J. asserts:

> . . . it is clear that, although Group Projects no doubt remains able to perform the bulk of the obligations which it has undertaken, being that part of the work which is not to be undertaken on the

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[17] *Id.* at 30. This is at variance with the view expressed by Wilson, J., that "To speak of Crown land being zoned under a Plan which has the force of law yet in respect of which no legal consequences arise is to speak of an abstraction, a meaningless fiction" (at 32).

[18] *Supra* n. 3 at 720-721, 723, 729.

[19] As Lord Radcliffe emphasized — *id.* at 729.

acquired land, and although that work will neither have changed in character nor become more onerous, yet the acquisition of the land for a school site has wholly destroyed Group Projects' purpose in undertaking any obligations at all.[20]

The Background Law

One can isolate certain conceptual explanations of frustration from the earlier cases, the different theories of the juridicial basis of the doctrine being:

(a) the notion of the implied term;
(b) that of the disappearance of the basis of the contract;
(c) that of the Court imposing a just and reasonable solution on the parties;
(d) that of the construction of the contract.

An historical overview of these theories will serve to illustrate within which conceptual stream Stephen, J.'s approach can best be encompassed.

(a) *The implied term theory.*

This seems to be aligned with the concept of mistake — mistake being the initial impossibility, frustration the supervening impossibility. In *Taylor* v. *Caldwell,*[21] which set a precedent for departure from the absolute rule laid down in *Paradine* v. *Jane,*[22] the Court resorted to the use of an implied term to allow recovery for what would now be termed frustration of contract. This involves the imputation into the contract of a term dissolving the contract in the event of the unexpected and so-called frustrating occurrence. In theory, this term is derived from asking what the parties would have included in the contract to cover the event, had they anticipated it.[23]

(b) *Theory of the disappearance of the basis or foundation of the contract.*

In the *Tamplin Case,*[24] Lord Haldane preferred to phrase the determinant of frustration as:

> When people enter into a contract which is dependent for the possibility of performance on the continued availability of a specific thing and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made.

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[20] *Supra* n. 7 at 27.
[21] (1863) 3 B & S 826.
[22] (1647) Aleyn 26.
[23] *Cf.* Lord Loreburn in *Tamplin (F.A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A.C. 397 at 403. Adopted by Lords Dunedin and Atkinson in *Metropolitan Water Board* v. *Dick, Kerr and Co.* [1918] A.C. 127, 131.
[24] *Id.* at 406.

This approach has been adopted by Lord Finlay in *Bank Line Ltd.* v. *Arthur Capel*[25] and by Goddard, J. in *W. J. Tatem Ltd.* v. *Gamboa.*[26]

(c) *The just and reasonable solution.*

This was enunciated by Lord Wright in *Denny, Mott and Dickson* v. *Fraser,*[27] who claimed that the Court's adjudication of frustration was unsatisfactorily explained by the implied term theory. The Court, in such a situation, he said ". . . supplement(s) the defects of the actual contract".[28] In essence, the Court, applying Lord Wright's theory, is called upon to determine a just and reasonable solution and to impose that solution on the parties.[29]

(d) *The construction of the contract theory.*

Viscount Simon, in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.,*[30] described frustration in terms of the construction theory:

> If . . . 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 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.

This, the most modern theory of frustration, has been espoused in two recent English decisions — the House of Lords in the *Davis Contractors Case*[31] and the Court of Appeal in *Ocean Tramp Tankers Corporation* v. *v/o Sovfracht.*[32] The approach is to construe the contract to determine whether a radically different situation from that originally contemplated has emerged. The facts of the *Davis Contractors Case* both illustrate the application of this test and the emphasis it places on a change in *obligation*:

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[25] [1919] A.C. 435 at 441.

[26] [1939] 1 K.B. 132. The essence of this theory is shown in Lord Shaw's statement in *Horlock* v. *Beal* [1916] 1 A.C. 512: ". . . the underlying *ratio* of cases such as *Jackson* v. *Union Marine Insurance* [(1874) L.R. 10 C.P. 125] and *Krell* v. *Henry* ([1903] 2 K.B. 740), is the failure of something which was the basis of the contract in the mind and intention of the contracting parties".

[27] [1944] A.C. 265 at 275.

[28] In a later address, Lord Wright asserted: "This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the Court in the absence of express intention of the parties determines what is just". Cited in McNair, A.D., "Frustration of Contract by War", (1940) 56 *L.Q.R.* 173 at 180.

[29] This theory has been adopted by Atkinson, J., in *Baxter Fell and Co. Ltd.* v. *Galbraith and Grant Ltd.* (1941) 70 Ll.L.Rep. 142 at 157; Lord Sumner in *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* [1926] A.C. 497 at 509; and others.

[30] [1952] A.C. 166 at 185.

[31] *Supra* n. 3.

[32] [1964] 2 Q.B. 226. Hereafter cited as *The Eugenia.*

The contractors entered into a contract to build 78 houses for a local authority within eight months, for a fixed sum. Inadequate supplies of labour, due to unexpected circumstances and without fault of either party, caused delays resulting in increased costs to the contractors. They completed the work in 22 months and were paid £94,424 17s 9d for work which cost them £115,233 14s 0d. The contractors contended, *inter alia,* that the contract had been frustrated. The House of Lords unanimously rejected this. In so doing the construction test was adopted. Overall, the judgments stress a need for the emergence of a fundamentally different situation in order for the contract to be frustrated. This is measured by a change in the nature of the parties' obligations. They must not merely be more onerous than expected, they must be transmuted into obligations of a different *kind* than contemplated.[33] Applied to the facts of the case, it was held that the delays did not change the contractors' obligation into something radically different from what it was before, they at most made the obligation more onerous. Accordingly, the contract had not been frustrated.

Earlier judicial authority favoured the implied term theory.[34] It was seen to be difficult at times, however, to distinguish clearly between the first three theories. A. D. McNair, writing in 1940, argued that theories (a), (b) and (c) (as I have stated them), simply restate each other, emphasising different aspects of the doctrine.[35] He described the theory of the disappearance of the basis of the contract as:

> . . . really an inference of fact which is drawn by the Court and upon which the Court bases the implication of a term to the effect that the parties are thereupon discharged.

Lord Wright's "just and reasonable" view he saw as concentrating on the result rather than the "rational process or machinery whereby it is achieved", that is, by the insertion of an implied term.

In *Scanlan's Case,*[36] Latham, C.J. referred to the difficulties which present themselves if the substance of the contract is something which is imported into the contract as one of its terms. On this view, theories (a) and (b) become virtually indistinguishable. *Scanlan's Case,*[37] one of the most exhaustive treatments of frustration delivered by the Australian Courts, contains support for more than one view of frustration. McTiernan and Williams, JJ. favoured the basis of the contract test.[38]

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[33] *Supra* n. 3. *Per* Viscount Simonds at 716; Lord Reid at 721, 723, 724 and Lord Radcliffe at 729.

[34] *Taylor* v. *Caldwell, supra* n. 21. *Tamplin's Case, supra* n. 23. *Court Line Ltd.* v. *Dant and Russell Inc.* [1939] 3 All E.R. 314.

[35] McNair, A.D., *supra* n. 28 at 179-181.

[36] *Supra* n. 5 at 192.

[37] *Ibid.*

[38] Although Williams, J.'s first rule inclines to the implied term theory ". . . no such condition [of discharge] should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document." *Id.* at 223-225, as stated by Lawrence, J., in *Scottish Navigation Co. Ltd.* v. *W. A.*

Latham, C.J., after reviewing the prevalent theories of frustration, adopted the statement of Russell, J. in *In Re Badische Co. Ltd.*:

> The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document a term should be implied dissolving the contract upon the happening of the event or circumstances.[39]

The modern approach to the doctrine of frustration, however, has rested on the basis of construing the contract, as was affirmed in the *Davis Contractors Case*.[40] This has received strong judicial approval,[41] as well as current academic recognition.[42]

Stephen, J.'s Judgment

Placed within these conceptual streams, Stephen, J.'s approach appears to revive the earlier notions of frustration, giving prominence once more to the criterion of "purpose". While approving *dicta* of Lords Reid and Radcliffe in the *Davis Contractors Case*, Stephen, J. chooses not to follow the emphasis on obligation, concentrating instead on the "fundamental change in situation" in terms of the purpose of the parties. Indeed, he emphatically asserts that the *Davis Contractors Case* test would not accommodate frustration in this case:

> . . . this is not a case in which performance of contractual obligations has either been rendered impossible or more onerous by the frustrating event . . . the bulk of the work contracted for, or towards the cost of which it was promised to contribute, was to be done *off* the acquired land, so that its acquisition by the Crown in no way prevents the doing of that work or alters its nature or cost. That this is not so in relation to all the work to be done is in a sense fortuitous and the great bulk of the work can still be performed with no greater difficulty than before.[43]

Thus, the *ratio* of Stephen, J.'s judgment is, in fact, that the purpose[44] for which the contract was entered into has been destroyed by

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Footnote 38 (Continued).
Souter and Co. [1917] 1 K.B. 249; and approved by Lord Sumner in the *Bank Line Case, supra* n. 25 at 460.

[39] *Supra* n. 5 at 201. Citing *In Re Badische Co. Ltd.* [1921] 2 Ch 331 at 379.

[40] *Supra* n. 3.

[41] *Cf. Albert D. Gaon and Co.* v. *Société Interprofessionelle Oléagineux Fluides Alimentaires* [1960] 2 Q.B. 318; *Tsakiroglou and Co. Ltd.* v. *Noblee Thorl G.m.b.H.* [1962] A.C. 93; *Roberts* v. *Independent Publishers Ltd.* [1974] 1 N.Z.L.R. 459; *Finch* v. *Sayers* (unreported) 071 Supreme Court, N.S.W., 29 Nov. 1976 — Wootten, J.

[42] *Cf. Halsbury's Laws of England* (4th edn. 1976), Ch. 7, para. 450.

[43] *Supra* n. 7 at 27. At 29, Stephen, J. attributes Lord Radcliffe's emphasis on a change in the obligation to the particular fact situation of the case.

[44] The American *Restatement, supra* n. 6, distinguishes between impossibility and frustration of purpose.

the resumption of the land to such an extent that, even though Group Projects' obligations remain fundamentally unchanged, the contract must be held to be frustrated. Stephen, J. looks to the rezoning as something that "was regarded by the parties as fundamental to the incurring of obligations on the part of Group Projects".[45] This seems to be a reversion to the idea of the basis of the contract, or as some have said, the insertion of an implied term that, should the purpose be wholly destroyed, the contract will fall. Although this approach can be accommodated (as Stephen, J. purported to do) within the "construction of the contract" concept, the notion that a contract can be frustrated where the parties' purpose, as distinct from the possibility of their performance, is thwarted involves a reversion to earlier applications of the doctrine. Stephen, J. maintains that Lord Radcliffe should not be understood to mean that only where there is a fundamental change in obligation can the contract be frustrated. He gives an example of a situation, like this, wherein Lord Radcliffe's change in obligation test is inapplicable, by referring to the "Coronation cases", of which *Krell* v. *Henry*[46] is a leading example.

The similarity between Stephen, J.'s approach and that of earlier judges is highlighted by reference to the criterion for determining frustration enunciated by Lord Macmillan in the *Denny, Mott Case*:

> . . . in judging whether a contract has been frustrated, the contract must be looked at as a whole. The question is whether its purpose as gathered from its terms has been defeated. A contract whose purpose has been defeated may contain subsidiary stipulations which it would still be possible and lawful to fulfil, but to segregate and enforce such a stipulation would be to do something which the parties never intended.[47]

Stephen, J. looks in great detail at the deed entered into by the parties, applying such a test as that of Lord Macmillan. The terms of the deed offer evidence, he claims, of the overriding importance placed on the rezoning and ensuing proposed residential subdivision.[48]

> But for [the proposed subdivision] . . . it cannot be conceived that the Council would seek to impose [the obligations]; certainly Group Projects would not have agreed to undertake them.[49]

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[45] *Supra* n. 7 at 28.
[46] *Supra* n. 26.
[47] *Supra* n. 27.
[48] *Cf.* cl. 19, which provides that, where part only of the land is rezoned obligations under the deed are to be correspondingly reduced. Performance of certain obligations is only to follow the Council's approval of a plan of subdivision — monetary payments, for example, are in some cases dependent upon the extent of such subdivision. While this would seem to lend support to the contention that the parties intended the contract to fall if the land as a whole were resumed, this clause must be read in conjunction with cl. 7 (see p.), which expressly covers the situation which arose.
[49] *Supra* n. 7 at 28.

I submit, therefore, that Stephen, J. has refocussed attention on earlier theories of frustration involving the rather discredited "purpose" test.[50] As such, his judgment is of significance as an unexpected development in contract law. However, with respect, I would contend that Stephen, J. has applied the test poorly in this case. This is manifested in three aspects:

(1) *The subjective viewpoint.*

It has been held that the basis of the contract, or indeed any implied term, must be ascertained from an objective viewpoint.[51] Stephen, J., when discussing Lord Radcliffe's comments on frustration, speaks of the cases decided on the implied term basis as taking "diverse approaches, sometimes subjective and sometimes objective. . . ."[52] It is submitted, however, that modern authority is against the use of the subjective viewpoint,[53] which Stephen, J., clearly took when determining the Council's intention in entering the contract.

Stephen, J. emphasizes that the Council is a public body and claims that, in essence, the inducement the Council is offered is not monetary gain. He attributes to the Council an overwhelming concern with proper residential development and the well-being of its ratepayers.[54] Yet the standards that the Council was supposedly anxious to procure in the subdivision could, no doubt, have been imposed later when Group Projects sought approval of a plan of subdivision. Although Stephen, J. acknowledges that there is some financial benefit that the Council will derive from the large sums to be expended on its behalf by Group Projects, he claims:

> If the contract be declared to be frustrated the Council will not be deprived of some commercial advantage which it sought to attain when it entered the contract. . . .[55]

One wonders, indeed, why the Council would bother to make this further appeal if it were not financially interested in the continuance of the contract. Stephen, J. appears to be ignoring the commercial reality of the situation. The Council was contracting to receive benefits worth almost $200,000, for making a rezoning application (some other obligations arising much later) which is in the course of its everyday duties. I submit that, when looked at objectively, the commercial benefit to the Council under the contract was enormous and the altruism attributed to the Council seems misplaced.

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[50] *Cf. dicta* of Latham, C.J. in *Scanlan's Case, supra* n. 5. See p. 469.

[51] Lord Sumner in the *Hirji Mulji Case, supra* n. 29 at 510; Lord Watson in *Dahl* v. *Nelson, Donkin and Co.* (1881) 6 A.C. 38; Lord Radcliffe in the *Davis Contractors Case, supra* n. 3 at 728.

[52] *Supra* n. 7 at 28.

[53] This also seems to be the position in America: Corbin, A.L., "Recent Developments in the Law of Contracts", (1937) 50 *Harvard L.R.*, 466.

[54] *Supra* n. 7 at 28.

[55] *Id.* at 29.

(2) *Voluntary assumption of risk.*

Frustration is not available as a means of discharging a party's obligations where it was self-induced,[56] nor where the risk of such a frustrating occurrence was assumed by the party concerned.[57] Here, it is arguable that Group Projects' direction to the Council in August, 1976, to continue with the rezoning process, whilst knowing that there was a distinct possibility that the land would be resumed, was, in essence, a voluntary assumption of the risk that such a resumption would occur. Moreover, it seems a rather rash direction,[58] given the extent of the losses Group Projects must have realized it would incur if its objection to the resumption were ineffective and the rezoning application were approved (its obligations under the deed at that stage becoming operative).

A recent English Court of Appeal case dealt with the consequences of such an assumption of risk — *Amalgamated Investment and Property Co. Ltd.* v. *John Walker and Sons Ltd.*[59] Briefly, the facts were: the defendants advertised for sale a commercial property they owned, describing it as suitable for redevelopment. The plaintiffs entered into a contract for sale on 25th September, 1973, with, as both parties were aware, the intention of redevelopment. On 26th September, the defendants were informed that the property had been listed as a building of special architectural or historic interest. The effect of this listing, while it remained in force, was that the value of the property was depreciated by about £1,500,000 (a sum only £200,000 less than the purchase price). Buckley and Lawton, L.JJ., and Sir John Pennycuick, held that the contract had not been frustrated by the listing, applying *dicta* of Lord Radcliffe in the *Davis Contractors Case*.[60] There was

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[56] *Bank Line Case, supra* n. 25; *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524.

[57] *Amalgamated Investment and Property Co. Ltd.* v. *John Walker and Sons Ltd.* [1976] 3 All E.R. 509. Corbin, A.L. *supra* n. 53 at 465: "Courts have given increasing consideration [in dealing with the concept of impossibility] to the extent of the risk that a promisor should be regarded as having undertaken. . . ." This risk, he says, is allocated according to reason. In America, there has been held to be no frustration where, "[T]he frustration complained of related to a more remote objective — the making of a profit out of the use of leased premises". *Megan* v. *Updike Grain Corporation* 94 F 2d. 551 (C.C. P. 8th, 1938). The High Court's decision could be seen here as a consideration of the allocation of risk in such cases. Presumably, the majority would hold that the Council must bear the risk of loss up until the date of rezoning, from which point Group Projects would automatically assume the risk. Given the express provision of cl. 7 and Group Projects' instruction to the Council to go ahead with the rezoning application, the decision to impose the risk of loss on the Council seems questionable.

[58] There is no evidence that the direction was negligent but it is interesting to note that the question was left open in the *Joseph Constantine Case, supra* n. 56, whether "mere negligence" as distinct from "positive acts" or "deliberate choice" would justify a finding that frustration was self-induced — *Chitty on Contracts*, vol. 1 (24th edn. 1977), p. 685.

[59] *Supra* n. 57.

[60] *Supra* n. 3.

no warranty nor stipulation in the contract that planning permission be able to be obtained for redevelopment. The plaintiffs were, therefore, held to have assumed the risk inherent in the ownership of buildings, that such a listing would be imposed.[61] The Court of Appeal thus affirmed the first instance judgment of Plowman, V.C., who said, *inter alia*:

> In my judgment the plaintiffs took the risk under the contract, and it seems to me impossible to maintain that the contract ceased to apply when the property was listed. They could have provided against the risk by an appropriate provision in the contract, but they did not do so. . . . They took the risk . . . and it has turned out badly for them, but as Lord Simonds said, ". . . it by no means follows that disappointed expectations lead to frustrated contracts".[62]

This assessment could be applied in the present case. Having voluntarily assumed the risk of the resumption, it is my contention that Group Projects should be bound by its direction to the Council.[63] Its obligations remained essentially the same. It contracted for the application to be forwarded to the Minister, and this was done. It stipulated that approval be given, and it was. Group Projects could have covered the position which arose and which was clearly foreseeable. As Latham, C.J. asserted:

> I suggest, with respect, that it is much safer, when parties have chosen to contract in absolute terms, to hold them to the terms of their contract. If they desire the contract to be conditional, they can readily so provide in express terms.[64]

(3) *Express provision.*

The above leads to the third criticism which can be levelled at Stephen, J.'s judgment. Included in the deed was an express provision for the type of event which occurred: clause 7 provided, *inter alia,* that Group Projects' obligations were to remain in force, even if Group Projects should cease to be the registered proprietor of the land, or were for any reason precluded from benefiting either wholly or partially

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[61] It seems that Government resumption of land is also, in some cases at least, considered to be a risk inherent in the ownership of land — *Scottish Halls Ltd.* v. *The Minister* (1915) 15 S.R.(N.S.W.) 81.

[62] *Supra* n. 57, citing the *Davis Contractors Case per* Lord Simonds, *supra* n. at 715. *Cf.* also Lord Somervell at 734.

[63] Plowman, V.C., *id.*, asked whether the contract properly construed was wide enough to apply to the new situation. Purpose was irrelevant. I submit that on this basis the contract between the Council and Group Projects was wide enough to cover the situation that arose after resumption. *Cf.* also *Walton Harvey* v. *Walker and Hornfraser* [1931] 1 Ch 274, where in an analogous situation the Court declined to hold that the contract had been frustrated.

[64] *Supra* n. 5 at 200. Lord Radcliffe, in the *Davis Contractors Case,* at 731, said that the fact that the cause of the delay was not "any new state of things which the parties could not reasonably be thought to have foreseen", was a factor preventing the application of frustration. The possibility of delay could have been made subject to a special contractual stipulation.

from the rezoning.[65] As it was held that the resumption of the land extinguished the fee simple, the land becoming Crown land, Group Projects was no longer the registered proprietor.[66] It would seem that cl. 7 would then cover the situation, keeping Group Projects' obligations alive.

Stephen, J. interprets cl. 7 with the aid of the example therein contained[67] as one disclosing advertence to:

> . . . a quite different situation, one in which, while Group Projects remains the owner of the land and the land is duly rezoned, nevertheless for quite other reasons, Group Projects cannot benefit to the full extent it would wish to from that rezoning.[68]

It has been held that no term may be implied in a contract which is inconsistent with an express term of the contract.[69] Stephen, J.'s position is, therefore, somewhat tenuous. Although the Courts have held that it is possible to construe an express provision as not being intended to cover the situation which unexpectedly arose,[70] this is usually the case where the event is "so fundamental and far-reaching in extent and operation and so prolonged in duration as to change the whole circumstances of the contract and the character of its performance".[71] This seems to involve the application of the change in obligation test which, as discussed above, suggests that there has been no frustration and that effect should be given to cl. 7.

With respect, therefore, this seems to be an unjustified reading down of the clause, involving, when one considers the express language used, "an impermissible re-writing of the parties' contract." (as Stephen, J. earlier described the majority's analysis).[72] As Bailhache, J. once said:

> . . . where the contract makes provision for a given contingency it is not for the Court to import into the contract some other and

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[65] Subject to cl. 9 (which is not relevant here), providing that upon any sale of land other than in approved allotments before any of Group Projects' obligations have been performed, the purchaser shall bind itself to the Council to perform them, providing security also.

[66] *Per* Wilson, J., *supra* n. 7 at 30. Acquisition of Land Act, 1967-1969, (Qld.), s. 12(2). *Cf. Attorney-General* v. *Brown* (1847) 1 Legge 312.

[67] Group Project's inability to use the land for a purpose for which it may only be used with the Council's approval.

[68] *Supra* n. 7 at 28.

[69] Lord Denning, M.R., in *The Eugenia*, *supra* n. 32 at 239; *The Moorcock* (1889) 14 P.D. 64; the *Bank Line Case, supra* n. 25 at 462; *the British Movietonews Case, supra* n. 30. *Cf. Sutton and Shannon on Contracts* (7th edn. 1970), p. 348.

[70] Lord Haldane in the *Tamplin Case, supra* n. 23 at 406; McCardie, J., in *Naylor Benzon and Co.* v. *Krainische Industries Gesellschaft* [1918] 1 K.B. 331 at 339; *Jackson* v. *Union Marine Insurance, supra* n. 26; the *Bank Line Case, supra* n. 25.

[71] McCardie, J., *ibid.*

[72] *Supra* n. 7 at 26.

different provision for the same contingency called by a different name.[73]

Conclusion

It may be argued, despite these criticisms, that Stephen, J.'s judgment has the virtue of imparting justice to the parties, where otherwise Group Projects would be called upon to perform presumably onerous obligations whilst having no interest left in the land. Frustration has been described, after all, as "not a physical fact but an intellectual conception".[74] Perhaps, therefore, this judgment gives an idea of the extent to which such a departure from orthodox principles will be acceptable in the name of justice. However, the Courts have constantly asserted their reluctance to invoke the doctrine of frustration widely.[75] This emphasis is visible in the *Amalgamated Property Case,* where such a drastic change in purpose was held not to frustrate the contract.

Stephen, J.'s adoption of a subjective viewpoint in determining the common purpose for the parties seems misjudged. To say that "the destructive impact of the compulsory acquisition is not confined to the interests of Group Projects; it extends in a degree to those of the Council",[76] seems to ignore the great commercial advantages which undoubtedly induced the Council to enter the contract, and fulfilment of which Group Projects was seeking to avoid. Latham, C.J.'s comments are relevant here:

> There is some difficulty in specifying the "common object" of the parties to a contract, as distinct from the "individual advantages" which one party or the other might have gained from the contract. Contracting parties as such are not partners. They are engaged in a common venture only in a popular sense.[77]

Stephen, J., in achieving his "just" result, has raised the spectre of the implied term/basis of the contract line of cases, placing emphasis on the change in situation as far as the parties' purpose is concerned, rather than on the currently favoured test of a fundamental change in obligation. The difficulties of Stephen, J.'s line of approach have been considered in many of the cases leading up to the *Davis Contractors Case*. They are, to a certain extent, the reason *Krell* v. *Henry*[78] has

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[73] *Admiral Shipping Co.* v. *Weidner Hopkin and Co.* [1916] 1 K.B. 429 at 438, cited by Lord Sumner in the *Bank Line Case, supra* n. 25 at 455.

[74] McNair, A.D., *supra* n. 28 at 200.

[75] Lord Radcliffe, *supra* n. 3 at 728: "Frustration is not to be lightly invoked as the dissolvent of a contract."; Viscount Simonds at 715. Also Lords Reid and Simonds in the *Tsakiroglou Case, supra* n. 41 at 119, 116.

[76] *Supra* n. 7 at 29.

[77] *Supra* n. 5 at 196. Corbin also criticizes the "purpose" view, pointing out that a contractor may have a complex purpose — his purpose is to get return performance, but he bargains for performance often in order to use it in some profitable way. Corbin notes that frustration of this further ultimate purpose may not, in some cases at least, lead to a discharge of contract for frustration — *Corbin on Contracts,* vol. 6 (1962), s. 1322.

[78] *Supra* n. 26.

been seen as such a nebulous case.[79]

It is submitted that the construction test of Lords Reid and Radcliffe, with its insistence on a fundamental change in obligation, is a preferable basis for the doctrine of frustration. It removes the subjective element and places responsibility on the parties, themselves, when entering contracts to state clearly the agreed terms and to make provision for reasonably foreseeable events which would render performance of the contract more onerous. Stephen, J.'s test widens the concept of frustration and adds further uncertainty to an area sufficiently unclear at the present. In view of this, it is to be hoped that his approach will not be followed by the Australian Courts.

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[79] *Cf.* Latham, C.J.'s discussion in *Scanlan's Case, supra* n. 5. McCardie, J., in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen and Sons Ltd.* [1918] 1 K.B. 540 at 551: "I desire respectfully to add that in my opinion the *Krell* v. *Henry* rule should not be unduly extended. It is only in exceptional cases that it can be safely applied."