

**THE INTERPRETATION OF THE LAW ON FRUSTRATED CONTRACTS
IN THE BRITISH AND ZAMBIAN LEGAL SYSTEM**

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**An obligatory essay submitted to the school of law of the University of Zambia
in partial fulfillment of the requirements for the award of the Degree of
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The University of Zambia

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DECLARATION

I Kasompe Bernadette Mukate of computer number 28021231, do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so. I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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Abstract

This dissertation basically considers the interpretation of the law on frustrated contracts in the British and Zambian legal systems, focusing primarily on how the Zambian Legal system can improve its law on frustrated contracts as well as its application and interpretation without heavy reliance on the law on frustrated contracts in the British legal system.

The dissertation starts by outlining the doctrine of frustrated contracts. It has outlined the basis of this doctrine, the operation and the effect of the doctrine of frustration in general. The dissertation further discusses the development of the doctrine of the law on frustrated contracts by examining the common law position on frustration. It has also discussed the development of the Act on frustrated contracts in the British and Zambian legal system. The study has further discussed the salient provisions of the Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute and the salient provisions of the Law Reform (Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia as well as the effectiveness of the two Acts and how they have evolved. The study goes on to analyze the judicial interpretation of the law on frustrated contracts in both jurisdictions and points out the difficulties that the courts in both jurisdictions are faced with in the interpretation of these statutes.

The dissertation through research and analysis found that the act on Frustrated Contracts in the Zambian legal system is stagnant and lags behind in terms of interpretation. The study reveals that the Act on frustrated contracts in the Zambian jurisdiction has not undergone any changes since its enactment in 1964 and also reveals the lack of detail in the decisions of the Zambian courts as they interpret the law on frustrated contracts and how this lack of detail and careful analysis of the Act has further led to the stagnation of the Act on Frustrated contracts in Zambia.

As a result of these findings, the study recommends that the Act on Frustrated contracts in Zambia be amended or repealed in order to bring it line with the current changes in society so that the Act may become more responsive to the needs of society as well as to correct some of the errors and weaknesses that have come to be associated with the Act itself.

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DEDICATION

To my parents Nelson Kasompe and Justina Kasompe and my four sisters, Kalonde, Totela, Kasompe and Malumbo, the six people who give the strength to go the extra mile each day. Thank you ever so much for having so much faith in me and for instilling in me the values of hard work. I could never thank you enough for all the love and support you have shown me throughout this period. I love you and I wish you abundant blessings from above everyday of your lives.

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CHAPTER ONE

1.0 Introduction

The law of contract is one of the widely practiced branches of law as people are always entering into contracts with each other. A contract is the creation of a legally binding agreement which gives rise to obligations and liabilities. These contracts may be discharged in a number of ways and one of these ways is by frustration. A contract is considered as frustrated when there exists a change in circumstances, after the contract is made, which was not the fault of either party to the contract, which renders the contract either impossible or deprives it of its commercial value. Where a contract has been frustrated, each party is discharged from future obligations under the contract and neither party can sue for breach. It therefore becomes the duty of the courts to determine the manner in which the allocation of the losses incurred by either party to the contract will be carried out. The objective of this research is to look at the law on frustrated contracts and the court's interpretation of this law in various decisions in the Zambian legal system as compared to the law and interpretation of the law on frustrated contracts in the British legal system.

1.1 Statement of the problem

The law on frustrated contracts in Zambia is governed by the law reform (frustrated) contracts Act¹. This Act was a mere adoption and domestication of the law Reform (frustrated contracts) Act of 1943 of Britain. The law on frustrated contracts in Britain has undergone a number of amendments and modification with the effect that it has been updated and is very responsive to the changes that have taken place in the area of frustrated contracts since its first enactment.

¹ Law Reform (Frustrated Contracts) Act of 1964, chapter 73 of the laws of Zambia

However, the law in Zambia is stagnant and has not been amended to meet the current changes in terms of frustrated contracts, it is for this reason that the *Zambian legal system* still lags behind in terms of amendment and interpretation of the law on frustrated contracts as evidenced by the limited number of *Zambian case law*.

In addition, when interpreting the law on frustrated contracts the courts in Zambia have shown heavy reliance on the English Act² and current English case law. This research shall therefore be undertaken in order to look at the law on frustrated contracts and its interpretation in Zambia as compared to how Britain has applied and interpreted the law on frustrated contracts, focusing primarily on how the *Zambian legal system* can improve its law on frustrated contracts as well as its application and interpretation without heavy reliance on the law on frustrated contracts in the *British legal system*.

1.2 Purpose of the study

The main objective of this research is to critically analyze the law on frustrated contracts in Zambia and how it has been interpreted by the courts in comparison to how this law has developed and interpreted in the *British legal system*. The specific objectives of the study will be to:

- Consider the doctrine of frustrated contracts in general
- Consider the development of the law on frustrated contracts focusing on the common law position.
- Look at the law on frustrated contracts in both the *Zambian* and the *British legal systems* focusing on how these two pieces of legislation have developed in both jurisdictions.

²Law Reform (Frustrated Contracts) Act of 1943, Chapter 40, British Statutes

- Look at the major differences and similarities if any between the two pieces of legislation
- Analyze the application of the two Acts by looking at the judicial interpretations of the Acts in both jurisdictions under study.
- Make recommendations on how the Zambian legal system can improve and develop its application and interpretation of the law on frustrated contracts.

1.3 Research methodology

This research will rely mostly on secondary information. This secondary information will be obtained through desk research; it will be descriptive in nature and will basically employ the qualitative method of research. It will draw most of its data from learned authors published works on contract in Zambia as well as in Britain. Further, the study will also use the provisions of the law relevant to the research that are contained in either the volumes of the law or the law reports.

1.4 Chapter layout

Chapter one: Chapter one will be the proposal. As an introductory chapter, it will generally introduce the research paper and give an outline of the most important aspects of the research. It will among other things outline the general understanding of the law on contracts and frustrated contracts in general in both countries under study.

Chapter two: Chapter two will look at the development of frustrated contracts by discussing in detail the common law position on frustrated contracts, in the process of this discussion, the research in this chapter will show the development of the Acts on frustrated contracts. It will look at the law on frustrated contracts in Zambia comparing it to the law in Britain. This chapter

will then look at how these two pieces of legislations have developed pointing out any major differences in the two pieces of legislation.

Chapter three: Chapter three will focus on the judicial interpretation of these two pieces of legislation. It will analyse some of the land mark cases in the two legal systems and point out any major differences or similarities in the rulings by looking at the principles that were employed by the courts in determining the cases to be discussed.

Chapter four: Chapter four will contain the observations, recommendations and conclusions of the paper which will be based on the discussions in the chapters outlined

1.5 THE DOCTRINE OF FRUSTRATION

Frustration is a contract law doctrine, which acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principle purpose for entering into the contract.³ Where parties have made their agreement and unforeseen contingencies occur which prevent the attainment of the purpose that they had in mind, that agreement may be said to be frustrated. A contract or agreement may be said to have been frustrated were there exists a change in circumstances, after the contract has been made, which is not the fault of either of the party, which renders the contract either impossible to perform or deprives the contract of its commercial purpose.⁴

The doctrine of frustration deals with events which are outside the control of either party or which the contract does not provide for; it is sometimes confined to events which the parties had

³ Micheal P. Firmstone, *Cheshire, Fiffoot and Firmston's Law of contract* (USA: Oxford University Press, 2006) 720
⁴ Patrick Smith Atiyah, *Atiyah's Introduction to the Law of Contracts (Claredon Series)*, (USA, OUP Oxford, 2006) 330

not foreseen.⁵ Frustration does not depend on the option of either party but is imposed by law as a result of the events which have occurred. It should be noted that frustration is about subsequent impossibility; if a contract was impossible to perform right from the outset, then the issue is one of mistake as a vitiating factor and not frustration.

There are two tests employed to determine whether frustration has occurred or not, these are the implied term theory and the radical change in obligation test.⁶ Under the implied term theory, the principle seems to be that, in a contract where performance depends on the continued existence of a person, condition or thing, there is an implied term that where such person, thing or condition ceases to exist, such a contract will be rendered frustrated by the perishing of such object due to the implied condition that the impossibility of performance arising from the perishing of the goods, persons or thing will excuse performance.⁷

The second test is called the radical change in the obligation test. The description of the circumstances that justify a radical change in obligations is a matter of fact necessary to be determined by looking at the specifics of a given case. In determining whether there has been a radical change in obligations, the courts examine the contracts and the circumstances in which they were made not with the view of varying it but with the intention of explaining it in order to see whether from the nature of the contract the parties had made their bargain that a particular thing or state of things will continue to exist throughout the contract. Were the parties had done so, a term to that effect will be implied though not expressed in the contract that the breach of such a term will lead to a radical change in circumstances which will ultimately lead to the

⁵ Joseph Chitty, *Chitty on Contracts*, (London: Sweet & Maxwell, 1983), 42

⁶ Patrick S. Atiyah, *Essays on Contract* (Clarendon, OUP oxford, 1988) 180

⁷ Mphanza P Mvunga et al, *Mvunga, Malila and Ng'ambi on contract*, (Lusaka: University of Zambia Press, 2010) 276

existence of a frustrating event in the contract.⁸ The courts have the power to infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted such that if that condition is vitiated by anything, there will be a radical change in obligations of the parties which will amount to the frustration of such a contract.⁹

1.6 BASIS OF THE DOCTRINE

The precise legal theory upon which the doctrine of frustrated contracts is based has aroused a lot of controversy, in the eighteenth century starting with the case of *Taylor v Caldwell*,¹⁰ a substantive and particular basis of this doctrine gradually evolved and tried to mitigate the rigor of the common law position 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 discharged. The brief facts in the case of *Taylor v Caldwell* where that the defendant contracted to permit the plaintiff the use of the musical hall at Newington, the contract stated that the hall must be fit for a concert but there was no express provisions regarding disasters. The hall was later destroyed by fire before the first concert was held and neither party to the contract was at fault. The plaintiff sued for breach and sought reimbursement for costs in preparing for the concert. The court held that if the performance of a contract depends on the continued existence of a person or thing and that person or thing ceases to exist, performance may be excused for impossibility of performance.

This new principle was based on the understanding that the court ought to give effect to the supposed intention of the parties. Black Burn J in *Taylor v Caldwell* found it necessary to keep in

⁸ Lord Loreburn in *F.A Tamplin Steamship Co. Ltd v Anglo-Mexican Petroleum Products co. Ltd*

⁹ Lord Loereburn, *F.A Tamplin Steamship Co. Ltd v Anglo-Mexican Petroleum Products co. Ltd*

¹⁰ *Taylor v Caldwell* [1863] 3 B & S 826

mind some circumspection in order to reconcile reason and justice with the established rule as to absolute contracts. His reasoning was that a contract is not to be construed as absolute if the parties must from the beginning have known that its fulfillment depended upon the continued existence of some particular thing and therefore must have realized that this continuing existence was the foundation of the bargain, meaning that the contract has been made subject to some implied condition that the parties will be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.¹¹ It is important to note at this point that the old rule which is basically the common law position will be discussed in the second chapter of this paper.

The *Taylor* case gave rise to the theory of implied term on which the doctrine of frustration is based. This theory implies that where no express term for the discharge of the contract was made by the parties but where they had anticipated and considered the catastrophic event that if in fact happened they would have said it is over. In implying such a term it has been said that the law is doing what the parties really though subconsciously meant to do themselves.¹² This theory has been heavily criticized in recent years and has been substantially replaced by a more realistic view that the court imposes upon the parties the just and reasonable solution that the new situation demands. This is because the doctrine of frustration operates to supplement the defects of the actual contract and must therefore keep evolving to stay abreast with the changes in contractual practices.

¹¹ *Taylor v Caldwell* [1863] 3 B & S 826

¹² Hugh Collins, *the law of contract*, (Cambridge: Cambridge University Press, 1986) 130

1.7 OPERATION OF THE DOCTRINE

To illustrate the operation of the doctrine of frustration, reference must be made to what are known as frustrating events as well as a few cases in which the doctrine has been invoked. The instances in which the doctrine of frustration will operate include the following:

a) Destruction of subject matter

The doctrine of frustration will operate in instances where the subject matter of the contract is destroyed. Upon proof that the continuing availability of a physical thing or person is essential to the attainment of the fundamental object which the parties had in view, the contract is discharged if owing to some extraneous cause, such thing or person is no longer available. *Taylor v Caldwell*¹³ sufficiently illustrates the case of a physical thing. This was a case in which the subject matter of the contract was destroyed, so that performance of the letter of the contract was rendered impossible. The rule laid down in this case applies with equal force if it is a fundamental requirement that a person should remain available¹⁴

b) Non-occurrence of some even

Another cause of frustration is the non-occurrence of some event which must reasonably be regarded as the basis of the contract. *Krell v Henry*¹⁵ illustrates this proposition clearly. It was held in this case that the cancellation of the procession discharged the parties of their obligations since it was no longer possible to attain the real aim of the agreement. It was observed in this case that discharge will not be decreed if the event cannot reasonably be regarded as the real basis of the contract.

¹³ Taylor v Caldwell [1863] 3 B & S 826

¹⁴ Taylor v Caldwell [1863] 3 B & S 826

¹⁵ Krell v Henry [1903] 2 KB 740

A more recent case which illustrates the non-occurrence of an event as a frustrating event is the case of *Chase Precast corporation v John J. Paonessa co.*¹⁶ the pertinent facts of this case were that the commonwealth through the department of public works entered into two contracts with Paonessa for the resurfacing and improvements of two routes. The claim of the plaintiffs arose from the cancellation of its contracts with the defendant for the supply of median barriers in the highway construction project. The court in this case like in the above case held that where a party's principal purpose is frustrated by the non-occurrence of an event, the occurrence of which was a basic assumption on which the contract was made, and the duty of performance is charged.

c) Personal Incapacity

Personal incapacity of one of the key parties to a contract may also frustrate a contract. A contract may become frustrated where a person or group under contract become unavailable either through death, illness or unavailability. This generally occurs only for the performance of personal services and not for generic commercial services such as building work, which could be performed by numerous individuals.¹⁷ A good illustration of this proposition is the case of *Robinson v Davison* which involved a piano player who became ill prior to a concert he was contracted to play in; the contract in this case was held to be frustrated due to the personal incapacity of the piano player. A similar result can be seen in *Condor v The Baron Knights*¹⁸ where a drummer in a pop group whose contract provided that he works seven days a week suffered illness which meant that he could only work four days a week. The group hired another drummer who could work seven days. The court held that the contract had been frustrated by the fact that the drummer could only work four days.

¹⁶ *Chase Precast corporation v John J. Paonessa co* [1991] mass 406

¹⁷ Patrick Smith Atiyah, *Atiyah's Introduction to the Law of Contracts (Clarendon Series)*, (USA, OUP Oxford, 2006)

¹⁸ *Condor v The Baron Knights* [1966] 1 WLR 87

d) Government interference

Another common cause of frustration is interference by the government in activities of one or both of the parties. The case of *Mumba v Zambia Fisheries and Fish marketing Corporation Ltd*¹⁹ is very illustrative on this point. In this case the plaintiff had sued the defendants for breach of contract as they had altered some of his conditions of service and had failed to fulfill others. The defendants contended that the contract had been frustrated owing to the fact that the Mwanakatwe Salaries Commission followed by a government directive altered the plaintiff's terms of employment. Sakala J held that that the government directives did amount to a frustrating event. He observed that the defendant company did not breach the terms of the contract but the contract was frustrated by government directives. The contract therefore ceased to be binding on the implementation of the government directives.

e) Illegality

A contract may also be frustrated if it becomes illegal. An illustrating case is the case of *Re shipton, Anderson and Harrison Brothers*²⁰ where the parties had entered into a contract for the supply of wheat. Before it could be delivered however it had been requisitioned by the government under the wartime emergency food control measure. The court held that the contract was discharged because the requisition was a frustrating event making it impossible to perform the contract.

This principle was further emphasized in a more recent case known as the case of *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association Ltd*²¹. In this case

¹⁹ *Mumba v Zambia Fisheries and Fish marketing Corporation Ltd* (1980) ZR 135

²⁰ *Re shipton, Anderson and Harrison Brothers* [1944] AC 265

²¹ *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association Ltd* [2010] EWHL 2661

the plaintiffs entered into a contract with the defendants. The plaintiffs were supposed to obtain insurance cover in relation to the goods in question, the plaintiff however did not obtain the said insurance cover. Later a piece of legislation was passed making the acquisition of the insurance cover compulsory. The defendants sought to avoid liability under the contract on grounds that the contract had become illegal by the plaintiffs failure to obtain the insurance cover. The court held that the failure by the plaintiffs to follow the provisions of the piece of legislation rendered the contract illegal and therefore the defendant was discharged from all liability as the contract was frustrated due to the subsequent illegality.

1.8 LIMITS OF THE DOCTRINE

The doctrine of frustration is construed very narrowly and as such there are limitations to this doctrine. It must be noted that the doctrine of frustration must not be lightly invoked to relieve contracting parties of the normal consequences of imprudent bargains.²² An important limitation is that economic hardship, or a bad bargain will not render a contract frustrated. Thus in *Davis Contractors v Fareham UDC*²³ the courts declined to render a contract for building work frustrated purely because the price of labor and materials had increased. The court in this case stated that it is not hardship or inconvenience or material loss itself which calls the doctrine of frustration to come into play.

There is also a limit on the doctrine of frustration where there is an express provision for frustration in the contract.²⁴ If there is an express provision in the contract stating for example that the contract will subsist notwithstanding a frustrating event then the doctrine of frustration

²²Mphanza P Mvunga et al, *Mvunga, Malila and Ng'ambi on contract*, (Lusaka: University of Zambia Press, 2010) 288

²³ *Davis Contractors v Fareham UDC* [1956] AC 696

²⁴ Mvunga et al: 300

will not be invoked. Such a provision is called a **force majeure clause**, this type of a clause is however only valid if it is full and complete. The leading case on this issue is the case of *Jackson v Union Marine Insurance co Ltd*.²⁵ In this case a ship was chartered to proceed with all possible dispatch, dangers and accidents of navigation excepted, from Liverpool to Newport. The ship sailed for a month and in the second month it broke down and was taken to Liverpool for repair and the charterers repudiated the contract based on delay. The court held that the contract had been discharged and that the defendants could not rely on the fact that there was an express provision for frustration because the provision in the contract was not full and complete to cover issues such as failure to load the ship and delay for repairing the ship. The said events were not in the ordinary course of shipping; as such they were not contemplated when making the force majeure clause

Additionally, for a claim under frustration to succeed the frustration must not be self induced. Were a frustrating event is foreseeably induced, a claim of frustration may be denied. *Maritime National Fish Ltd v Ocean Trawlers Ltd*²⁶ exemplifies this principle. Maritime National Fish contracted to hire a steam trawler fitted with an otter trawl, from Ocean Trawlers Ltd. Both parties knew that the use of such a vessel without a license was illegal. Subsequently, Maritime National Fish applied for five licenses from the Canadian government, however, only three were granted. Maritime National Fish did not name the hired vessel from Ocean Trawlers as one of the licensed vessels, and refused to go through with the hire, on the grounds the contract was frustrated. Their appeal was rejected on the grounds that they had taken on the risk that some licenses may be denied, and by thereby not allocating a license to their chartered steam trawler,

²⁵*Jackson v Union Marine Insurance co Ltd* [1976] LR 10 CP 125

²⁶*Maritime National Fish Ltd v Ocean Trawlers Ltd* Privy council [1935] AC 524

the frustration was self induced and they were therefore precluded from claiming that the contract had been frustrated.

Last but not the least, for the doctrine of frustration to be invoked it must be shown that the frustrating event was not foreseeable. A party cannot rely on an event if it was or should have been foreseeable. This limitation on the doctrine of frustration was illustrated in *Walton Harvey Ltd v Walker & Homfrays Ltd*²⁷. In this case the defendants had entered into a contract with the plaintiffs in which the plaintiffs were to advertise on the defendant's hotel for seven years. However before the expiry of this seven year period, the hotel was compulsorily acquired by a statutory order and demolished. The defendants claimed that the acquisition had frustrated the contract. The court held that the defendants were liable to pay damages owing to the fact that they knew of the risk of compulsory acquisition which they could have prevented whilst the plaintiffs were not aware of it.

The above limitations to the doctrine have been put in place to prevent situations where people are allowed to profit from their own negligence or as a result of their own imprudent bargains in the ordinary course of business. They also exist to protect the innocent party in a contract from being taken advantage of by the other party who enters into contractual relations being fully aware of the frustrating event or who may even be responsible for bringing it about as a way of escaping contractual obligations and liability.

1.9 EFFECT OF THE DOCTRINE OF FRUSTRATION

If a contract is frustrated, each party is released from any further obligations to perform. Accrued rights to damages which may have accrued before the date of frustration are not affected but

²⁷ *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 CH 274

neither can a party be liable in damages to the other for non-performance of the rest of the contract.²⁸ The effect of frustration on a contract will be discussed in full in the next chapter which will discuss the position under common law and the change that came with the enactment of the Act on frustrated contracts²⁹. It is in the next chapter where the issue of apportionment of losses will be discussed.

CONCLUSION

From the above explanations it has been shown that the doctrine of frustrated will be invoked to discharge a contract which has been made impossible to perform due to supervening event. However, as it has been shown the doctrine will not be invoked to discharge a contract were there is an express provision of the frustrating event, were the frustration is self induced, were the frustrating event is reasonable foreseeable and many other circumstances for the purpose of preventing people from benefiting from their imprudent bargaining. The above exposition of the doctrine of frustration represents the basic idea of frustrated contracts both in Zambia and in Britain. The principles outlined above are the corner stones of the interpretation of frustrated contracts in both jurisdictions.

The next chapter will discuss the development of the Acts on frustrated contracts, it will also outline the position before the enactment of the Act on frustrated contracts which is basically the common law position, and it will then compare the Zambian and the British Acts.

²⁸ H.G Beale, et al, *contract cases and materials* (London: Butterworths,1990) 396

²⁹ Law Reform (Frustrated Contracts) Act of 1964, Chapter 73 of the Laws of Zambia

CHAPTER TWO

2.0 THE DEVELOPMENT OF THE LAW OF FRUSTED CONTRACTS

Having discussed the doctrine of frustrated contracts as it is known today, it is of great importance that the development of this doctrine is discussed focusing primarily on the common law position on the doctrine as it is the harshness of the common law position that greatly influenced the evolution of this doctrine to what it is known today. This chapter will discuss the development of the doctrine of frustrated contracts by looking at how the doctrine has evolved. It will begin by looking at the common law position on the doctrine and proceed to discuss the legislative intervention through the development of the first Act on frustrated contracts focusing on aspects such as how it has evolved, its strengths and weaknesses. The study will also discuss the development of the Act on frustrated contracts in Zambia, how it has evolved and its effectiveness.

2.1 The Common Law Position on Frustrated Contracts

The common law doctrines of impossibility of performance and frustration are strict and insist on the literal performance of contracts. Common law has historically adopted the view that the aim of the doctrine is to relieve the parties from the burden of having to perform obligations that have subsequently become impossible. This objective is achieved by the automatic termination of the contract and a limited right to restitutionary relief.³⁰

Under common law, contractual duties were regarded as absolute, in the sense that supervening events provided no excuse for non-performance³¹. The precise legal theory upon which the common law understanding of the doctrine of frustrated contract is based was clearly laid down

³⁰ Chen-Wishart, *Contract Law*, (Oxford University Press, 2007) 13

³¹ Chen-Wishart, *Contract Law*, (Oxford University Press, 2007) 13

in *Paradine v Jane*³². The brief facts of this case were that the Plaintiff sued the defendant for failure to pay rent for three years on leased lands. The plaintiff asserted as a defense that the lands had been seized and occupied by Prince Rupert of Germany and that he had been put out of possession and frustrated in the performance of his duties under the lease and was not bound to perform under the contract. The court held that if a party creates a charge or duty to himself, he is obliged to perform even in the face of frustration of purpose.

The principle of law established in this case essentially entailed that when the law casts a duty upon a man which through no fault of his own, he is unable to perform, he is excused for non performance; but if he binds himself by a contract absolutely to do a thing, he cannot escape liability for damages for proof that as events turned out performance is futile or even impossible.³³ The rule in this case can be said to be the rule on frustrated contracts under common law. This rule, though harsh, was justified on grounds that a party to a contract can always guard against unforeseen contingencies by express stipulations.³⁴ If a party undertakes an absolute and unconditional obligation to do something, he cannot complain merely because events turn out to his advantage.

Another feature of the doctrine of frustrated contracts under common law is that under common law the loss laid where it falls. At common law, parties are only discharged from the obligation of future performance. Rights which have accrued before the occurrence of the frustrating event are still enforceable. The common law proposition that 'the risk lies where it falls' entailed that at common law, rights not yet accrued at the time of frustration are unenforceable.

³² *Paradine v Jane* [1647] Aleyn 26

³³ *Paradine v Jane* [1647] Aleyn 26

³⁴ These express stipulations are known as *force majeure clauses* and have been discussed in chapter 1

The case of *Cutter v Powell*³⁵ illustrates the meaning of this rule clearly. In this case a seaman was employed as ship captain on a voyage. According to the agreement governing his employment he was to receive payment only at the completion of the voyage. The seaman however died before completion of the voyage and an attempt by his executors to recover his pay proved futile as the court following the common law rule that the loss lies where it falls found no reason to give the seaman's executors his pay. The justification for the decision in the *Powell* case is that the executrix could not recover on a quantum meruit as no agreement to pay a proportionate sum for doing part of the work could be implied in the teeth of an express agreement for payment on completion. It must be noted however that though the effect of frustration on a general contract and a contract of employment are the same, the employment contract is different from a general contract and sometimes special rules apply to it.

From the foregoing, it is important to note that where a contract is frustrated, common law gives no remedy outside the contract by which a party can recover all or any of the cost he has incurred for the purpose of performing the contract. It follows that, where a contract is frustrated, costs which a party has incurred before frustration, for the purpose of performing the contract, cannot be recovered from another party on the footing that the other party impliedly promised to make reimbursement of that cost. Therefore, where a party has received something under a contract, and the contract is afterwards frustrated, common law gives no remedy outside the contract by which the party can be made to pay for what he has received. This means that under common Law, when a contract is made without any provisions for how losses will be shared in the case of a frustrating event and if that contract is subsequently frustrated, a party cannot claim any rights that are or were not granted by the contract itself and as such that party gets to bear the risk alone

³⁵ *Cutter v Powell* [1975] 6 T.R. 320.

Further, under common law things that have been under a contract are considered as done and if such a contract is later frustrated, those things therefore cannot be used as grounds for making an inference of some other implied contract under which the receiving party could be made liable to pay for what he has received.³⁶ The common law does provide redress outside the contract in respect of money paid under the contract. There is a principle of common law that where a party to a contract has paid money to another party in return for some performance to be given by that other party and the contract is discharged without the payer having received any part of that performance, so that the consideration for the payment has wholly failed, he is entitled to a refund of the money.

The features of the common law position on frustrated contract from the above paragraphs can be summarized as follows: Common law does not offer redress to a party who has incurred costs for the purpose of performing the contract and a party who has received some performance of the contract is not obliged to pay for what he has received. If, however, a party has received a payment of money under the contract, and the consideration for the payment has wholly failed, he is obliged to return the money but if the consideration for the payment has only partly failed, he may keep all the money. All this, of course, is against the background that contractual rights accrued before frustration remains enforceable, except where there has been a total failure of consideration. It was to meet these inadequacies of the common law that the English Act was passed.

³⁶ G.L Williams, *the law Reform (Frustrated Contracts) Act 1943*, *The Modern Review*, (Blackwell, Publishing: 1944), 712

2.2 The Development of the Act on Frustrated Contract in the British Jurisdiction

The effects of a frustrating event in the British legal system are governed by common law and the provisions of the Law Reform (Frustrated Contracts) Act 1943³⁷. The law reform Frustrated Act of 1943 is the first Act on frustrated contracts to be enacted in Britain. Some scholars argue that it is the rigor that came to be associated with the principle established in the *Paradine Case*³⁸ and inevitably with the operation of common law on the issue of frustrated contracts that necessitated the enactment of the 1943 Act. Further, the 1943 Act can be said to have been enacted to address some of these inadequacies in the common law such as the principle of absolute liability set forth in *Paradine v Jane*³⁹ as well as the common law principles such as the loss in a contract despite being frustrated lies where it falls. The law reform (frustrated contracts) Act of 1943 establishes the rights and liabilities of parties involved in frustrated contracts. It amends previous common law rules on the complete or partial return of pre-payments, where a contract is deemed to be frustrated, as well as introducing a concept that valuable benefits other than financial benefits -may also be returned.⁴⁰

2.3 Salient Provisions of the Act

The first section of the Act changes the rights of parties, subject to frustrated contracts, to claim payments or damages. Section 1(1) of the Act states the application of the Act and provides that the Act applies where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason being discharged from the further performance of the contract. The Act therefore does not modify any previous

³⁷ Law Reform (Frustrated Contracts) Act of 1943, British Statute

³⁸ *Paradine v Jane* [1647] Aley 26

³⁹ *Paradine v Jane* [1647] Aley 26

⁴⁰ Section 1, Law Reform (Frustrated Contracts) Act of 1943, British Statute

common law developments on when contracts are frustrated but, merely modifies the legal consequences of frustration.

Section 1(2) of the Act⁴¹ regards payments already made, or financial obligations which fell before the frustrating event. The effect of this section is that pre-payments can be returned in part, or in full, where it is deemed just to do so having regard to all the circumstances. Section 1(3)⁴² covers instances where one party has obtained a valuable benefit other than a payment of money prior to a frustrating event. The Act in this section provides that some or even all of such a benefit can be recovered from the benefited party, where it is considered just. The second section of the Act provides for various instances where the active provisions may be applied differently, or not at all.

Section 2(3) establishes that parties may contract out of the Act and that if under a true construction of the contract, if this is the case, the section may only apply if it is consistent with such a construction.⁴³ The case of *Jackson v Union Marine Insurance Co Ltd*⁴⁴ is a good example of a case where effect was given to the provisions of a contract despite the provisions of the contract being covered under the 1943 Act as the provisions of the contract were not inconsistent with the provisions of the Act. In this case the charterer of a ship stated in the contract that the ship should proceed with all possible dispatch dangers and accidents of navigation excepted. When an action was brought by the owner of the ship, it was held by the Exchequer Chamber that the exception in the contract absolved the ship owner from liability because of the clause inserted in the agreement exempting his liability for all acts that are a direct

⁴¹ Section 1(2) Law Reform (Frustrated Contracts) Act, Chapter 40, British Statute

⁴² Section 1(3) Law Reform (Frustrated Contracts) Act, Chapter 40, British Statute

⁴³ Section 2(3) Law Reform (Frustrated Contracts) Act, Chapter 40, British Statute

⁴⁴ *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP 125

incident of any possible dispatch dangers and accidents of navigation. The parties had contracted outside the provisions of the Act such that although the event fell within the provisions of the Act, the Act could not apply as the provision in the contract was not inconsistent with provisions of section 2(3) of the 1943 Act and as such the court was under an obligation to give effect to the agreement between the parties as expressed in the contract.

Section 2(4) on the other hand deals with the issue of severing parts of frustrated contracts. Where a contract contains multiple obligations; the Act does not apply to obligations which were completed prior to a frustrating event, only to those still in performance. Section 2(5) further excludes certain types of contract from being subject to the Act. Contracts that are excluded from the application of the 1943 Act by virtue of section 2(5) include contracts for the sale or for the sale and delivery of specific goods where such contract is frustrated by reason of the fact the goods have perished, contracts for the sale of specific goods which perish before the risk has passed to the buyer and contracts of insurance unless there is an obligation to insure imposed by an express term of the frustrated contract to mention only a few.

2.4 The Scope of the Act

The scope of application of the Act is contained in section 2 of the Act and by virtue of that section, the scope of the Act extends to all those contracts whether made before or after the commencement of the Act, as respects which the time of discharge is on or after the commencement of the Act, but not to contracts as respects which the time of discharge is before the date of commencement of the Act. Section 2 further sets out some important limitations on the scope of the Act. It makes it clear that the parties can agree to exclude the provisions of the 1943 Act. In practice, the fact that section 2(3) expressly authorizes the parties to exclude the

application of the Act is likely to support the conclusion that the term is not unfair.⁴⁵ Section 2(4) provides that if parts of the contract that have been wholly performed and can properly be severed from the remainder of the contract, they are to be treated as a separate contract, which has not been frustrated. The remainder of the contract will be subject to section 1 of the Act. Section 2(5)⁴⁶ contains a list of contracts that are excluded from the scope of the Act. This includes charter parties for a particular voyage and contracts of insurance.

From the above exposition, we are able to deduce that there are two key provisions in the Act. The first provision being contained in section 1(2) which deals with money paid or owing under the contract prior to the frustrating event and the second being contained in section 1(3) and deals with the situation where a party has obtained a non-money benefit before the time of discharge.

The principle which is common to both section 1(2) and (3) is indeed the fundamental principle underlying the Act itself and this principle is the principle of prevention of the unjust enrichment of either party to the contract at the other's expense. However, Although section 1 (2) and (3) is concerned with restitution in respect of different types of benefit, it is right to construe the two subsections as flowing from the same basic principle and therefore, so far as their different subject matters permit to achieve consistency between them. Restitution as used in this paragraph means an equitable remedy that restores a person to the position they would have been if not the improper action of another. This case was adopted by the courts in the case of *Russel v Farley*⁴⁷

⁴⁵ H.G Beale, et al, *contract cases and materials* (London: Butterworths,1990) 396

⁴⁶ Section 2(5) Law Reform (Frustrated Contracts) Act, Chapter 40, British Statute

⁴⁷ *Russel v Farley* [1881] CH 105

2.5 How the British Act has evolved

The Law Reform (Frustrated Contracts) Act of 1943 has undergone a number of amendments since its enactment. The latest of these amendments is the 1996 amendment and is the official text of the law on frustrated contracts as amended and in operation to date in the British jurisdiction. The 1996 Act, among other things, widens the scope of the Act by stating in section 1 that the Act shall apply to every contract from which the parties are discharged by reason of the application of the doctrine of frustration. This is evidently an improvement from the original Act which limited the scope to a certain type of contracts.

Furthermore, section 2 of the 1996 amendments, unlike section 2 of the 1943 Act, does not allow parties to contract outside the provisions of the Act but instead limits its operation to contracts only to the extent that on the true construction of that contract it contains no provision for the consequences of frustration or avoidance. This is to say that the Act limits its operation to contracts which do not have provisions for the consequences of frustration or avoidance. The 1996 amendment has not amended section 4 of the 1943 Act. It has adjusted the rights and liabilities of the parties under a contract that has been frustrated. These provisions are contained in section 5 of the 1996 amendment.

In essence, it is prudent to note that the basic idea of the 1943 Act has been maintained throughout the amendments. The most substantial thing to note about the various amendments to the Law Reform (Frustrated Contracts) Act of 1943 is that they seek to bring the Act up to date, making it responsive to problems that were not contemplated in the 1943 Act such as those problems that have come about as a result of the rapid advancement in the British society arising from the technological advancement of individuals in all areas of their lives.

It must be noted, however, that despite the various amendments to the Act, none of the amendments have addressed the issue of the wide discretion placed on the court when it comes to deciding the amount of restitution to give to an aggrieved party, as a result of the operation of the doctrine of frustration and the issue of wide discretion being given to the courts remains a major weakness of the Act on frustrated contracts in the British Legal System. A good illustration of this weakness is the case of *BP v Hunt*⁴⁸, where the court held that in assessing just compensation or restitution in an event of frustration, what is just is what the trial judge thinks is just. The court further held that an appellate court is not entitled to interfere with the assessment of the just sum by the trial judge unless it is so plainly wrong that it cannot be just. This case clearly shows the inadequacy of the Act in terms of providing guidelines on the assessment of just restitution.

2.6 OVERVIEW OF THE ZAMBIAN LEGISLATIVE PROVISIONS ON FRUSTRATED CONTRACTS

The Law Reform (Frustrated Contracts) Act⁴⁹ of Zambia is the principle Act that governs the law on frustrated contracts in Zambia. the enactment of this Act like many other Acts in Zambia was largely influenced by the Law on Frustrated Contracts in Britain and this is largely owing to the fact that as a colony of the crown, Zambia has learnt to look up to the British legal system and seeks to emulate it. It is for this reason that the Law Reform (Frustrated Contracts) Act⁵⁰ is almost the same the 1943 Act on Frustrated contracts in Britain only with minor modifications to bring it line with the Zambian society.

⁴⁸ *BP Exploration v Hunt* [1979] 1 WLR 783

⁴⁹ Law Reform (Frustrated Contracts) Act of 1964, Chapter 73 of the Laws of Zambia

⁵⁰ Law Reform (Frustrated Contracts) Act of 1964, Chapter 73 of the Laws of Zambia

Some of the modifications that have been to the English Act on frustrated contracts include the replacing of the phrase “as applicable in England” as used in the English Act with the phrase “according to the law applicable in Zambia. This in essence shows that chapter 73 of the laws of Zambia is an exact copy of the 1943 Act on frustration in England with minor modifications. The law on frustrated contracts in Zambia came into force on 17th July 1963. Like the 1943 Act of England, chapter 73 of the Laws of Zambia was enacted to amend the law relating to the frustration of contracts and provide matters incidental thereto.⁵¹

2.7 Salient Provisions of the Zambian Act on Frustrated Contracts.

The scope of the Act is contained in section 4 of the Act. This section provides that the Act shall apply to contracts whether made before or after the commencement of this Act, as respects which the time of discharge is on the or after the said commencement but not as respects which the time of discharge is before the said commencement.⁵² This section further goes on to state that the Act will apply to contracts which the state is a party. It also limits the operation of the Act to contracts which do not contain clauses that provide for the consequences of the frustrating event just like the British Act. Section 5 provides a list of the types of contracts to which the Act shall not apply.

Section 3 provides for the adjustment of rights and liabilities of parties to a frustrated contract. This section clearly sets out the rights and liabilities of parties to a frustrated contract by setting out what is recoverable and that which is not recoverable at the time of discharge of the contract. Apart from that the section also lays down some of the conditions necessary for one to be able to

⁵¹ Law Reform (Frustrated Contracts) Act of 1964, Chapter 73 of the Laws of Zambia the preamble

⁵² Section 4, Law Reform (Frustrated Contracts) Act of 1964, Chapter 73 of the Laws of Zambia

recover anything under a frustrated contract.⁵³ This section however does not give any guidelines which the court should follow when deciding what should be given to either party at the time of discharge of the contract. The case of *Mumba v Zambia Fisheries and Fish Marketing Corporation Ltd*⁵⁴ is a good example of a case that shows that the courts in Zambia like the courts in England do not follow any set guidelines in deciding the amount of restitution to be paid to parties to a frustrated contract. In this case the restitution which was paid to the parties in question was dependant on what the court felt was just. This in turn gives the court a type of discretion that may be considered to be too wide as what is recoverable under a frustrated contract is left to be decided by the court at its discretion.

2.8 Effectiveness of the Act on Frustrated Contracts in the Zambian Legal System

The law in Zambia on frustrated contracts is effective only to the extent unlike the previous situation before its enactment where parties to a frustrated contract did not know what their rights and liabilities are under the contract are as it clearly sets out the rights and liabilities of the parties through section 3 of the Act.

However, in general, it may be argued that the effectiveness of this Act is compromised by the giving of wide discretion to the courts in setting exactly what a party to a frustrated contract can recover and the extent of the liability. This is because though the Act sets out the liabilities and rights of parties under a frustrated contract, it does that in a rather general manner leaving the court a wide responsibility to quantify exactly what is recoverable. In carrying out this responsibility, the court exercises wide discretionary powers as the Act does not provide any

⁵³ Frustrated contracts Act of 1964, chapter 73 of the laws of Zambia, section 3

⁵⁴ *Mumba v Zambia Fisheries and Fish Marketing Corporation Ltd* (1980) Z.R 135 HC

guidelines that the court should consider when deciding what each party is entitled to recover after a frustrating event.

Further, the *Zambian Act* since its enactment has only been amended once by an Act of Parliament of 1964. Since then no substantial changes have been made to the Act and as a result the law on frustrated contracts in Zambia remains stagnant and not effective in the sense that it is incapable of responding to the changing needs of society which are becoming more and more complex and going far beyond the application of an Act which was drafted in 1964 at a time when the country was in its early stages of development.

From the foregoing, it would be right to conclude that the Act on Frustrated contracts is ineffective to a large extent and in order to ensure its effectiveness a number of things have to be addressed. However, the paper shall not address these issues in this chapter as they are being reserved for the fourth chapter of this study.

Conclusion

In this chapter the study has considered the development of the doctrine of frustrated contracts starting from the common law position up until the enactment of the Acts on frustrated contracts in both jurisdictions. From the discussion it has been pointed out that it is indeed the rigor and inadequacies associated with the common law position on frustrated contracts that the 1943 Act was enacted and although this Act did not change the effect of frustration on a contract, it established clearly the rights and liabilities of contracting parties in the event of frustration. The study also considered the *Zambian Act* and seen how it was largely based on the British Act though unlike the 1943 Act, it has not undergone any significant transformation to bring it up to date and make it more responsive to the current problems arising today.

It is for reasons such as the lack of significant change that the Zambian Act lags behind and unable to address the problems arising from frustrated contracts without heavy reliance on the law on frustrated contracts in the British legal system. The next chapter will look at how the law has been interpreted in both the Zambian and British Legal system by looking at some of the landmark cases in both jurisdictions.

Chapter three

3.0 Judicial interpretation of the law on frustrated contracts in the British and Zambian legal systems.

3.1 Introduction

This chapter will consider the judicial interpretation of the law on frustrated contracts in both the British and Zambian legal systems. In order to effectively go about achieving the said aim, this chapter will be divided into two parts. The first part will consider the judicial interpretation of the law on frustrated contracts in the British legal system by looking at some of the decisions on frustrated contracts that have been made by the English courts and provide an analysis of these decisions that will be discussed. The second part will look at how the courts in Zambia have interpreted the law on frustrated contracts through their decisions and provide an analysis of the judicial interpretation of the law on frustration in the Zambian jurisdiction focusing mainly on an analysis of the effectiveness of these decisions in relation to their ability to improve the position of parties to a frustrated contract as well as the short comings of these decisions. This chapter will further provide a substantive analysis of the law on frustrated contracts by comparing the provisions of the Zambian and British Acts on frustration.

3.2 Judicial interpretation of the law on frustrated contracts in the British legal system

As has been seen from the preceding chapters, the law on frustrated contracts in the English jurisdiction has greatly evolved as compared to the law on frustrated contracts in the Zambian jurisdiction; as a result it will be seen in this chapter that there are more cases decided by the English courts on frustration as compared to the Zambian courts.

In the case of *BP Exploration Company (Libya) Limited v Hunt*¹ where the brief facts were that the defendant who was an owner of an oil concession in Libya entered into an agreement with the plaintiff's oil company under which they would explore, develop and operate the oil concession and also make contributions to the defendant in cash and oil. In return, the plaintiff would receive a half share of the concession. In 1971, following a revolution in Libya, the plaintiff's interest in the oil field was expropriated by the Libyan government. By this time, the plaintiff had already received approximately one third of the 50 million barrels of 'reimbursement oil' to which it was entitled. It also received some compensation from the Libyan government in relation to the facilities left at the field. The plaintiff claimed that the contract had been frustrated by the exploration of its interest in the oil field and sought an award of a just sum under section 1 (3).

The court in this case held that the plaintiff was indeed entitled to an award of a just sum as the contract had been frustrated. Goff J in arriving at this decision made important observations in terms of the operation of section 1 (2)² and 1 (3)³ the 1943 Act, which sections still operate as they operated in the original Act. He stated that "The principle, which is common to both section 1 (2) and (3), and indeed is the fundamental principle underlying the Act itself, is the prevention of the unjust enrichment of either party to the contract at the other's expense and although section 1 (2) and (3) is concerned with restitution in respect of different types of benefit, it is right to construe the two subsections as flowing from the same basic principle and therefore, so far as their different subject matters permit, to achieve consistency between them." He further went on to illustrate the difference between awards under section 1 (2) and awards under section 1 (3). He observed that awards made under section 1 (2) are generally awards for the repayment of money which has been paid to the defendant in pursuance of the contract, subject to an allowance in respect of expenses incurred by either while awards made

¹ *BP Exploration Company (Libya) Ltd v Hunt* [1892] 1 ALL ER, 234

² S. 1(2) deals with money paid or owing under the contract prior to the frustrating event and the recoverability of such sums upon the occurrence of a frustrating event

³ S.1(3) deals with the situation where a party has obtained a non-money but valuable benefit from the contract before time of discharge

under section 1 (3) are awards made where either party to the contract by reason of something done by the other party for the purpose of the performance of the contract obtained a valuable benefit (other than a payment of money) before the time of discharge and that it is for this reason that the assessment of a just sum in the making of these awards becomes a very vital role of the court.

Goff J on the issue of the assessment of a just sum stated that a just sum will be that which the court deems to be reasonable remuneration in the case of a contract of service and that which the court deems to be a reasonable price in terms of a contract for the sale of goods. Based on the analysis of the provisions of the Act as well as the nature of the contract existing between the parties Goff J allowed the plaintiff to get a reasonable price because the defendant had incontrovertibly benefited from the contract such that if the plaintiff did not get a reasonable price award from the defendant, it would ultimately result in the unjust enrichment of the defendant.

The above case and in particular the observations of Goff J present a well reasoned and analyzed judgment. The court in this matter took time to look at the intention of the Frustrated Contracts Act of Great Britain and sought to give effect to its provisions by all means possible. The court further pointed out the difference in claims arising under section 1 (2) and (3) in such a manner that no ambiguities as to the effect of the two sections nor as to the nature of claims that can be brought under section 1 (2) and (3) respectively can be considered to exist.

However, despite the decision in this case being excellent and a true reflection of the spirit of the law on frustrated contract as contained in the Act, this case also points out one of the major weaknesses associated with the Act on frustrated contracts. The Act though endeavors to prevent the unjust enrichment of either party to a contract; the Act in determining how much should be paid to a party to a frustrated contract uses the most vague and by far ambiguous words. It requires that a *just sum* should be paid to an affected person without providing any guidelines that should be considered by the

courts in determining what will amount to a just sum and this inevitably endows the courts with wide discretionary powers in the determination of the matter.

It must be noted that the statute of interpretation⁴ in Britain like the Act of Frustrated contracts does not define what the term just sum means and as far as case law goes the acceptable standard of determining what amounts to an award of a just sum is the award that the judge will consider to be reasonable based on the circumstances of each case.

The case of *Cemex International Trade Group Incorporation v Transcler S.A*⁵ provides a more modern interpretation of the law on frustrated contracts in Britain. The brief facts of this case were that the sellers entered into a contract on 7th May to sell a cargo of cement at Padang. They made arrangements with a local supplier Semen Padang for the shipment of the cargo but did not enter into a binding contract with it for the loading of the vessel. During the subsistence of the contract, Cemex used its commercial influence to persuade PT Semen Padang not to provide the goods and also used its commercial influence to dissuade other potential suppliers in the region, in particular the alternative supplier that the sellers had identified in Taiwan, China Rebar, from making goods available for shipment on the vessel. Upon failure to supply the goods by the defendant, the plaintiff in this case claimed damages for non performance. In their defense the defendants argued that the contract had been frustrated and as such both parties were discharged of their obligations under the contract.

The court held that the failure to supply goods by the seller as a result of their decision to yield to the influence of Cemex cannot amount to a supervening event that could render the contract discharged. The court in this case made reference to the dicta of Lord Reid in the case of *Davis Contractor's v Fareham*⁶ and gave a more modern interpretation of this dictum on frustrating events in light of changing social situations. In the present case Lord Justice Moore- Bick held that the contract could

⁴ The Interpretation Act 1978, Chapter 30, British Statutes

⁵ *Cemex International Trade Group Incorporation v Transcler S.A* [2008]EWCA Civ 856

⁶ *Davis contractor's v Fareham* [1956]AC 696, p. 721

not have been held to be frustrated because in order to rely on the doctrine of frustration it is necessary for there to have been a supervening event which renders the performance of the seller's obligations impossible or fundamentally different in nature from that which was envisaged when the contract was made. In the present case however, regardless of the amount of pressure put on the sellers by Cemex, the nature of the performance called for by the contract remained the same.

Further, the pressure that Cemex was putting on the sellers and the willingness of the sellers to succumb to these pressures cannot be considered to be supervening events that render the performance of the contract impossible because of one of the conditions required for an event to frustrate a contract is that such an event must not be the fault of either party to the contract. In the present case the decision to succumb to the pressures of Cemex was all up to the sellers, it was due to the personal decision of the sellers to succumb to these pressures that the sellers failed to perform their obligations under the contract and as such they were found to be under an obligation to pay damages as their non performance amounted to the breach of the contract which entitled the buyers to damages.

This case, like the cases above, shows the commitment of the British courts to stand by their decisions to ensure that if they are to make reference to any external materials they rely on their own previous decisions. For this case in particular, the court in reaching its decision improved on their earlier decision by explaining in detail what the judge in the earlier case of *Davis contractor's*⁷ meant when he made reference to a supervening event and how cases to come after the present case should understand a supervening event to mean. This in particular is a very important observation of the courts as through their interpretation of the term supervening event, more meaning has been given to section 1(1) of the British Act which talks about the adjustment of rights and liabilities upon occurrence of a frustrating event in that the parties to a contract are now able to tell whether the frustrating event that the other party seeks to rely on is indeed a frustrating event and properly so.

⁷ *Davis contractor's v Fareham* [1956]AC 696, p. 721

In the most recent case of *Gold Group Properties Limited v BDW Trading Limited*⁸ where brief facts were that Gold Group Properties entered onto an agreement with BDW Trading Limited for the development of substantial site for whyteleafe surrey. Under this agreement, BDW Trading was to build a large number of houses and flats over a specific timetable and the built units would be sold on long leases which Gold Group as freeholder would grant. BDW Trading however, carried on very little work on the site, and were unable to complete the number of buildings that they were supposed to complete under a given period. Because of this failure to perform by BDW Trading, Gold Group sought summary judgment against BDW for breach of contract. BDW claimed that their failure to perform was a result of a fall in the market property between 2008 and 2009 which indicated that the minimum prices of the units set out in the agreement could not be achieved. They argued that this fall in the market property amounted to a supervening event which rendered the contract discharged by frustration.

The court held that the fall in the market prices on the property did not amount to a frustrating event. The court after considering a number of British judgments came to a conclusion that for an event to qualify as a supervening event proper, it must satisfy certain conditions. Among conditions indentified by the court include the question whether the agreement made express provision for the re-negotiation of the minimum price for the units if the market price declined and whether any injustice would result if builders were allowed to rely on the fall in the market prices as a frustrating event. In consideration of the above factors the court held that the fall in market prices could not be seen as a frustrating event because it had been contemplated by the parties with the effect that if the prices should fall, the parties can re-negotiate the prices of the built buildings.

⁸ Gold Group Properties Limited v BDW Trading Limited [2010] EWCH 323

The case also aids in the interpretation of section 1(1) of the British Act⁹ in that it laid down some of the factors the court should consider when determining whether an event is a frustrating event proper. The court in this case further went ahead and distinguished this case from other cases in which the British courts have held that a fall in market prices can qualify as a frustrating event by stating that if the fall in market prices was not contemplated and that fall renders the contract substantially different, then it will amount to a frustrating event as long as the party wishing to rely on the frustration can show that it is not his own financial capacity that is making the performance impossible.

3.3 Analysis of the judicial interpretation of the law on Frustrated contracts in the British legal system

The British cases considered above show the independence of the British courts when it comes to the interpretation of the cases on frustration. In all the cases considered above it has been seen that the courts in Britain when arriving at a decision usually try to make a decision from the facts before it without any heavy reliance on doctrines developed in other jurisdictions. They tend to rely only on their previous decisions and this enhances predictability of the law on frustrated contracts and inevitably leads to an effective interpretation of the law on frustrated contracts in Britain.

However, despite the success that the courts have had in interpreting the law on frustrated contracts, the predictability of their decisions is undermined by the lack of precision of the law as contained in the statute that the courts endeavor to interpret. The law contained in the Act lacks precision as the wording of the Act leaves much room for unpredictability. For example the Act uses vague and ambiguous terms such as valuable benefit and just sum but does not go as far as establishing what amounts to a valuable benefit or what will amount to a just sum nor does it provide any guidelines for the determination of what such terms mean. This in turn places wide discretionary powers on the judges and inevitably leads to a situation where what will amount to a just sum or valuable benefit

⁹Law Reform (Frustrated contracts) Act of 1964, chapter 40 British Statute

becomes a matter of fact to be determined from case to case thereby undermining the predictability of the law on the doctrine of frustrated contracts which the courts in Britain have tried to build by providing guidelines in their decisions on such matters because despite their efforts decision can be relied on to be the standard for the determination of such issues that are not expressly provided for in the Act.

3.4 Analysis of certain sections of the British Act in light of the decisions discussed above

The cases discussed above bring to light some of the weaknesses that are associated with the British Act on frustration. Under this part of the paper some of the sections of the British Act will be considered, the weaknesses of their drafting revealed and how these weaknesses can be remedied as well as how case law has tried to address some of these weaknesses. Section 1(1) of the Act which talks about the adjustment of rights and liabilities under a frustrated contract will be our starting point. This section is framed in such a way that it makes reference to a frustrating event that renders a contract impossible to perform but does not go further to describe or give guidelines or examples of the events that will be considered as frustrating events. This section would have been more properly drafted by at least providing the basic standard features that a frustrating event proper should pose for it to render a contract discharged. The way this section is drafted presents a weakness in the British Act¹⁰ as it gives interpreters of the law a blank check when determining whether an event is a frustrating event proper or not, this inevitably leads to the lack of precision of the law on frustrated contracts in Britain and it is for this reason that the courts in cases such as Gold Group¹¹ case referred to above have tried to come up with standards that a frustrating event proper should satisfy.

¹⁰ Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute

¹¹ Gold Group Properties limited v BDW trading limited [2010] EWCH 323

Section 1 (2) of the British Act¹² which deals with money paid or owing under the contract prior to the frustrating event and section 1(3) of the British Act¹³ which deals with situations where a party has obtained a non-money benefit before the time of discharge are further sections that have raised so much concern and reflect poorly on the drafters of the Act on frustrated contracts in Britain. These subsections despite being very important to the doctrine of frustration are couched in very loose terms and by far contribute to the lack of precision that has come to be associated with the Act on frustrated contracts in Britain. These subsections use terms such as ‘valuable benefit’ and ‘just sum’ but do not go as far as explaining what will amount to a valuable benefit or just sum nor do they give guidelines as to what factors should be had in mind when determining what will amount to a just sum and a valuable benefit. This lack of guidelines has led to the conferring of wide discretionary powers on the courts when it comes to determining such matters as neither the British Act¹⁴ itself nor the Interpretation Act of Britain¹⁵ has tried to interpret these terms. These sections would be better phrased if they would give some sort of guidelines or standards that should be satisfied when determining such issues.

3.5 Overview of the judicial interpretation of the law on frustrated contracts in the Zambian legal system

As was mentioned at the beginning of this chapter, the courts in Zambia have not had a lot of opportunities to render their decisions on the law on frustrated contracts. This fact is evidenced by the scarcity of case law on the issue of frustrated contracts. The few cases decided by the Zambian courts on the doctrine of frustration are brief and a mere reflection of previous judgments of the British courts.

¹² Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute

¹³ Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute

¹⁴ Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute

¹⁵ The Interpretation Act of 1978, chapter 30, British Statutes

In the case of *Sam Mumba v Zambia Fisheries and Fish marketing*¹⁶ the plaintiff was claiming damages for breach of contract of employment entered into between him and the defendant company. The plaintiff was a company secretary, at trial he produced a written contract and in addition a letter written by him which he claimed to be part of the contract. This letter was contested by the defendant company. The plaintiff claimed that the conditions of employment he had been offered were altered and some of them not fulfilled at all. The defendant company pleaded frustration contending that the plaintiff's conditions of service were altered as a result of the Mwanakatwe Salaries Commission followed by a Government white paper which directed that all salaries of permanent employees were to be within the Government's recommendations.

It was held in this case that the government directives to the defendant to implement the Mwanakatwe recommendations were a frustrating event with the effect of putting to an end the contract between the parties. Sakala J (as he then was) observed that the contract was automatically terminated as to the future because as at that date its further performance became impossible due to circumstances which involved liability for damages for the failure on either party.

The basic principle of the doctrine of frustrated contracts that was had regard to in this case is the principle of frustrating events and what kind of events will render a contract frustrated. After the court established the type of event it was that rendered the contract frustrated a decision on the issue of whether the contract was frustrated or not was instantly arrived at. Unlike the position of Goff J in *BP v Hunt*¹⁷ where he went on to establish under which section of the frustrated contracts Act¹⁸ was failing under, the court in this case did not see it necessary to establish which section of the *Zambian Act*¹⁹ was applicable to the facts at hand. Further, the court in determining the damages payable under the frustrated contract unlike the courts in the British jurisdiction, the *Zambian court* did not even attempt

¹⁶ *Sam Mumba v Zambia Fisheries and Fish Marketing* (1980) Z.R 135 HC

¹⁷ *BP Exploration Company (Libya) Limited v Hunt* [1892] 1 ALL ER 234

¹⁸ Law Reform (Frustrated contracts) Act of 1943, chapter 40 British Statute

¹⁹ Law Reform (Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

to come up with guidelines of their own on the issue of assessment of a just sum neither did they even attempt to determine whether either party to this contract had obtained any valuable benefit which would necessitate the payment of a reasonable restitution to prevent the unjust enrichment of either parties to the contract.

These oversights by the Zambian courts in the interpretation of the law on frustrated contracts such as failure to classify cases according to the section under which they fall as well as lack of details in their decisions greatly undermines the effectiveness of the law on frustrated contracts in Zambia because in their attempt to interpret the law on frustration, the courts in Zambia take a very relaxed approach to the interpretation on the Act on Frustration.²⁰ They overlook their duty as interpreters of the law whose major role involves giving life to the law as contained in the statute and giving effect to the spirit of the Act²¹ both at the time of enactment and years after the enactment by giving effect to the original intention of parliament at the time of enactment having regard to the current trends in society and trying to bring the Act to operate within the society in which it was enacted to operate.

In the case of *Phoenix Materials Limited v SynchroMech Limited*²² the brief facts were that the plaintiff company and the defendant company through their directors entered into verbal contracts for the hire of equipment to each other. The defendant agreed to hire from the plaintiff three conveyors while the plaintiff agreed to hire from the defendant a crane. During the subsistence of the agreements between the parties, the conveyors that were hired by the defendant from the plaintiff got stolen from the defendant's premises and consequently counsel for the defendant averred that the contract had been frustrated following the theft of the conveyors thereby discharging the defendant from liability.

²⁰ Law Reform(Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

²¹ Law Reform(Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

²² Phoenix materials limited v synchroMech limited (2009) HN 105

Siavwapa J in arriving at his ruling on this issue relied on the ruling in the case of *Taylor v Cladwell*²³ and the ruling in the case of *Williams v Lloyd*²⁴ and held that the defendant had been discharged from paying the fees from the date he notified the plaintiff of the loss of the conveyors because the contract had become incapable of performance due to the loss of the conveyors which were the subject matter of the contract as the theft of the conveyors was an act of God and without due negligence on the party claiming the frustration.

Unlike Goff J in the Hunt case, the judge in this case basically stood by the definition of the doctrine of frustration in deciding his case. He did not make reference to the section of the Act²⁵ where the case was falling and neither did he give a clear illustration as to whether either parties will be entitled to any form of restitution as a result of the operation of the doctrine of frustration on the contract. Further, the court in this case as in most Zambian cases showed heavy reliance on the cases that have been decided in the British courts, this is a further weakness as it symbolizes the fact that the Zambian legal system is not that developed and lags a great deal in terms of issues of interpretation of the law on frustrated contracts.

Further, by relying on cases such as *Taylor v Caldwell*²⁶ not only suggests the stagnancy of the Act on frustration but also a lack of desire by the courts to depart from the old interpretation of the law on frustrated contracts by giving effect to old law as opposed to establishing new law through the application of the law to the facts and coming up with a decision that is reflective of the prevailing circumstances in the Zambian community. The judge in this case would have simply stated that this case is one which falls under section 3(3) (a) of the Zambian Act²⁷ as through the use of the crane the party had obtained a valuable benefit and should have gone further to determine what valuable benefit

²³ *Taylor v Caldwell* [1863] 3 B & S 826

²⁴ *Williams v Lloyd* [1931] 1 CH 274

²⁵ Law Reform(Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

²⁶ *Taylor v Caldwell* [1863] 3 B&S 826

²⁷ Frustrated contracts Act of 1964, chapter 73 of the Laws of Zambia

is as well as what will amount to an award of a just sum having regard to the prevailing circumstances as opposed to relying on an old British judgment.

3.6 Analysis of the judicial interpretation of the law on frustrated contracts in the Zambian legal system

The cases discussed above show to a large extent the heavy reliance that the courts in Zambia exhibit in arriving at their decisions. This heavy reliance on the British decisions undermines the effectiveness of the Zambian Act in the sense that the decisions made by the British courts are made in light of the prevailing conditions in the British society therefore relying on these judgments may not be as effective in the Zambian jurisdiction due to the differences in the circumstances prevailing in the Zambian society. The Zambian courts should try to interpret the law on frustrated contracts with less reliance on the British cases so that the law that they pronounce maybe responsive to and reflective of the needs of the people of Zambia.

Further, the decisions discussed above have also shown that the courts in Zambia in their interpretation of the law on frustrated contracts are too brief. They focus only on the basic principles of the doctrine of frustration and do not go as far as giving well elaborated decisions which involve the analysis of the particular section of the Act under which a case at hand falls. This in turn makes the law appear as an alien which exists outside the society in which it was meant to operate because people who the law is supposed to regulate are not able to understand the law because despite the attempts to interpret it by the judges, the law still remains complicated due to the fact that the judges in interpreting the law are not making any attempts to break down the law as presented in the Act on frustrated contracts.

The cases above also show how the judicial interpretation on the law on frustrated contracts as well as the Act on frustrated contact in Zambia have remained stagnant and lags behind in addressing the emerging issues in the changing Zambian society. The courts in Zambia make no attempts to establish

a responsive approach to the interpretation of the law on frustrated contracts by showing no desire to depart from the old interpretation of the law on frustrated contracts and by giving effect to old laws as opposed to establishing new approaches the law on frustrated contracts through the application of the law to the facts and coming up with a decision that is reflective of the prevailing circumstances in the Zambian community. The courts in Zambia as evidenced by the above cases make no attempts to provide guidelines for the assessment of the amount of money that should be paid under a frustrated contract.

3.6 Analysis of certain sections of the Act on frustration in Zambia in light of the discussed case law and in comparison to the British Act and decisions

It has already been established that the Act in Zambia is a mere reflection of the British Act of 1943²⁸ and as such all the weaknesses associated with the British Act apply to the Zambian Act. Therefore, it must be noted that like the British Act section 3(1) of the Zambian Act²⁹ does not explain what events will amount to a frustrating event proper and section 3(2) and section 3(3) give wide discretion to the courts on the assessment of valuable benefit and just sum as they do not contain any guidelines for the assessment of the above. However unlike the courts in Britain the courts in Zambia have made no attempts to cure the defects of the Act as seen from the Zambian cases discussed, they do not provide any guidelines for the determination of what will amount to a just sum or what will amount to a valuable benefit.

Section 4(1) of the Zambian Act³⁰ provides that the Act will apply to contracts created by the government and an individual as if they were contracts entered into between two individuals. This section is too broadly drafted and should be redrafted in such a way that it provides for exceptions under which such contracts may not be made subject to the Act as the state performs certain functions

²⁸ Law Reform (Frustrated contracts) Act of 1943, chapter 40, British statute

²⁹ Law Reform (Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

³⁰ Law Reform(Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

of public interest that a mere frustrating event must not render the contract discharged. Further section 5(1) of the *Zambian Act*,³¹ the section of the Act that contains the scope of application of the Act, like every other section of the *Zambian Act* on frustration is a total copy of the *British Act*, for this reason, this section limits the application of the Act to instances that are only feasible in the *British jurisdiction*. Therefore, to be properly drafted the drafters of the law must consider widening the scope of application to include instances that may not have been contemplated by the initial drafters of the *Act*. Thus it is for this reason that this author is of the opinion that the law on frustrated contracts should be reviewed and amended with particular emphasis on certain aspects of the current *Act*. These specific areas of amendments will be discussed in the next chapter.

Conclusion

This chapter has considered the judicial interpretation of the law on frustrated contracts in the *British and Zambian legal systems*. However, due to the scarcity of cases in the *Zambian legal system* only two cases under the *Zambian legal system* have been discussed. The discussion of the above cases has pointed out the major weaknesses in the interpretation of the law on frustrated contracts especially in the *Zambian legal system*.

The next chapter will draw a conclusion on the issues discussed in this study and make recommendations on what can be done to improve the law on frustrated contracts in the *Zambian legal system*.

³¹ Law Reform (Frustrated contracts) Act of 1964, chapter 73 of the laws of Zambia

Chapter four

Recommendations and conclusions

4.0 Introduction

This study through the preceding chapters has shown how the law on the doctrine of frustrated contracts has been interpreted and applied in the Zambian and British legal systems. Having discussed at length the issues surrounding the interpretation of the law of frustrated contracts both in Zambia and in Britain and based on the inadequacies that the courts especially in Zambia are facing as a result of poor drafting of the Law reform (frustrated contracts) Act¹ as well as due to heavy reliance on British decisions and authority by the Zambian courts in making their decisions, this chapter proposes recommendations that may be regarded as necessary for the development of the law on frustrated contracts in the Zambian legal system, which developments will lead to a more effective interpretation and operation of the law on frustrated contracts without placing so much reliance on the interpretation of the law on frustration in the British legal system.

Recommendations

4.1 legislative reforms

It has been established in this study that the Law Reform (frustrated contracts) Act² is the principle piece of legislation that governs the law of frustrated contracts in Zambia. This piece of legislation is basically a copy of the British Act on frustration.³ Since its enactment in 1964 this Act despite being largely based on the 1943 Act has not undergone any change in the form of

¹ Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

² Law Reform (Frustrated contracts Act) of 1964, chapter 23 of the laws of Zambia

³ Law reform (Frustrated contracts Act)of 1943, chapter 40, British statute

reviews, repeals or amendments. This lack of change in the forms stated above greatly undermines the effectiveness of the law in addressing the needs of society. The law as a social instrument is important for the development of society, as society is never stationary, there is need to have laws that are abreast with the changing society and are able to respond to new needs of society as society keeps changing. The most effective way of achieving this is through the introduction of new laws and through the amendment or repealing of old laws. Law that is stationary and does not change may find itself in a situation where it is not able to operate due to the fact that society keeps changing.

Zambia has for the past 48 years relied on a piece of legislation that was initially drafted 69 years ago and despite all the years that have past, this piece of legislation stands as it stood at the time of enactment in the *Zambian legal system* with no modifications or changes of any kind. This is not healthy especially for a developing country like Zambia because this lack of development of the law greatly undermines the development of the country as a whole. Based on this conclusion, this author proposes that the law on frustrated contracts be amended so as to update and enable it to solve some of the problems that have been encountered whilst relying on the 1943 Act. In particular, this author recommends that the proposed amendment of the Act focuses primarily on the following aspects of the Act.

a. Guidelines on the assessment of the amount to be recovered under a frustrated contract

The Law Reform (Frustrated Contracts) Act⁴, like the 1943 Act of Britain⁵ as has been shown in chapters two and three provides no guidelines on the assessment of the amount that can be recovered by parties to a frustrated contract after a frustrating event. This lack of guidelines

⁴Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

⁵ Law Reform (Frustrated contracts) Act of 1943, chapter 40, British statute

inevitably confers unlimited discretionary powers on the court when it comes to the issue of assessing how much a person can recover under a frustrated contract and this inevitably leads to some unjust assessment of the amount recoverable as it is impossible to determine whether that which the judge or court deems to be an award of a just sum will amount to a just sum as there is no standard measure by which the decision of the court can be weighed and assessed.

It is for the reasons above that this author proposes that the frustrated contracts Act in Zambia⁶ should not only require the courts to award a sum that they think is fit in light of the surrounding circumstances but at least try to give some form of guidelines that the courts should make reference to when assessing the sum to be given to the affect person. This proposition is not to suggest that the award of a just sum under a frustrated contract be turned into a rigid process but to ensure that justice is done and also enhance the predictability of the law as the presence of guidelines on the assessment of these awards will not totally abrogate the powers of the court but will operate only to ensure that these powers that the court have are exercised within the boundaries of the law. The law makers can do this by simply elaborating more on what factors the court should have regard to when assessing what amounts to a just sum other than the surrounding circumstances of the case and also by elaborating within the Act⁷ what will amount to a valuable benefit and by including factors that the court should consider when determining whether indeed someone had obtained a valuable benefit.

⁶Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

⁷Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

b. Scope of the Zambian Act on Frustration

It has been shown in this study that the Law Reform (frustrated contracts) Act⁸ is a very old Act, this means that the scope of application as contemplated at the time of the enactment which was initially in 1943 cannot efficiently operate in a 21st Century society like that of the Zambian society because this society has undergone a number of changes, which changes require the law as an instrument that supervises this social change to reflect the changes that a society is undergoing by incorporating some of the striking changes in society and by finding means through which these new problems can be addressed in society.

Based on the above observations which have been discussed at length in chapter three, it is proposed by this author that the scope of the Act be widened to include instances that may not have been in the contemplation of the drafters of the Act on frustration. The scope should be widened to include instances that could not have been contemplated by the drafters at the time of drafting due to the nature of Zambian society at the time of drafting, such as common technological problems as well as popular political problems that have emerged as a result of the rapid change that our society has been undergoing.

This author is of the view that the frustrated contracts Act of Zambia should be amended or repealed to widen its scope so that it can be more comprehensive, responsive and reflective of the current needs of society thereby making it more effective in addressing the needs of the people in the changing society because if a piece of legislation remains stagnant for too long, it will fail to operate within the society that it was enacted to operate.

⁸ Frustrated contracts Act of 1964, chapter 23 of the laws of Zambia

c. Definition of a frustrating event

The study in chapter one has showed that the operation of frustration is dependent on the occurrence of an event which through no fault of either party renders the contract impossible to perform, however despite that fact, the Act in Zambia⁹ as seen in chapter three neither contains a comprehensive definition of a frustrating nor sets any standards that an event must satisfy in order for it to qualify as an event rendering the performance of a contract impossible. This has led to a situation where there is no predictability of events that will qualify as a frustrating event and in the end gives the courts a blank cheque in determining whether an event qualifies as a frustrating event or not.

Based on these findings, this author recommends that the Act in Zambia should be improved to contain a provision or provisions that will highlight some of the basic characteristics that an event should poses in order for it to qualify as an event rendering the performance of the contract impossible. This will reduce on the powers placed on the courts in determining whether an event qualifies as a frustrating event of not and lead to predictability of the law on frustrated contracts as a whole.

4.2 Judicial approach

It has been shown in this paper that the *Zambian* courts unlike the *British* courts do not go in detail in their interpretation of the law on frustrated contracts. This lack of details in their interpretation approach can be seen from the brief judgments rendered by the *Zambian* courts which judgments do not more than state the basic principles of the law on frustration as well as pronounce how much a person will recover without stating any reasons or basis for such a

⁹ Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

decision. This approach adopted by the courts in Zambia not only renders the law on frustrated contracts very ineffective in the Zambian legal system, but also plays a major role in the stagnation of this area of the law as it is the responsibility of the judges to interpret the law as contained in statutes and give effect to it in such a way as it responds to the needs and changes of society as if the changing situation were contemplated by the law makers.

It is not in dispute that the law is that which the judges say it is. The role of the courts therefore, is to give meaning to Acts of Parliament through the courts construction of the words used as opposed to the words themselves. When confronted with a case that requires the interpretation of a given statute the courts must always seek to ascertain the intention of the legislation and this quest as observed by the learned author, Dias, is no less elusive than the search for the reasoning of a case.¹⁰ this therefore means that the courts have got a huge role to play in the development of any Act of Parliament and as such if they neglect their duty of exercising their role as interpreters of the law with due diligence, they can affect the development of such piece of legislation and can equally contribute to the stagnation of such an Act.

The author therefore, recommends that courts in Zambia participate in the development and improvement of the law on frustrated contracts by giving more details in the decisions which details must basically be a detailed interpretation of the Act on frustrated contracts. Through the giving of detailed decisions the courts will be participating the development of the law on frustrated contracts in Zambia, as through their interpretations, the courts will be able to make the law as contained in the Zambian Act¹¹ more responsive to the needs of society as well as correct erroneous positions of the law that may have been included in the Zambian Act.¹² Further

¹⁰ R W M Dias *Jurisprudence. 5TH Ed.*(London: Butterworths & Co, 1985), 87

¹¹ Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

¹² Law Reform (Frustrated contracts) Act of 1964, chapter 23 of the laws of Zambia

if the courts were to exercise their role of interpreting the law with due diligence, the law on frustrated contracts will emerge to be responsive to the needs of society as through their interpretation the courts will be able to bring the *Zambian Act*¹³ in line with the prevailing conditions in society.

Further, if the courts were to take a more detailed approach in determining matters of frustrated contracts, the courts will not feel the need to rely heavily on the decisions of the British courts. This heavy reliance on British judgments by our courts is a direct consequence of the relaxed approach towards that interpretation of the law on frustrated contracts that has been adopted by our courts in Zambia. if the courts were to adopted a more detailed approach towards the interpretation of the Act on frustrated contract in Zambia the result would be that the application of the law contained in the Act on frustration to the facts before the court after a critical analysis of both the facts and the law and after exercising its role of interpreting statutes with due diligence, the courts will not feel the need to rely so heavily on the British judgments to reach their decisions. It is for the above reasons that this author is of the view that the review of the Law Reform (frustrated contracts) Act¹⁴ alone will not ultimately lead to an improvement of the law of frustration in Zambia, this improvement will only come about when the judges fully take up their role as interpreters of the law and embark on an endless endeavor to ensure that life is given to the law as contained in the statute before them.

4.3 Conclusion

The law of contract is one of the widely practiced branches of the law as people are always entering into contracts with each other, it is therefore important that the law governing such

¹³ Law Reform(Frustrated contracts Act) of 1964, chapter 23 of the laws of Zambia

¹⁴ Law Reform (frustrated contracts) Act, chapter 73 of the laws of Zambia

contracts such as the Law Reform (frustrated contracts) Act set not only the adjustment of liabilities of parties where a contract is brought to an abrupt end by a frustrating event but also provides such guidelines that are necessary for the assessment of such sums so that the award under a frustrated contract are not done with too much discretion, which may inevitably lead to injustices. Further, the law relating to frustrated contracts must be amended so that it may be responsive to the needs of society. However, it must be noted that the amendment of the law on frustrated contracts alone is not sufficient for the creation of law that is effective and responsive to the needs of society. Law that is responsive and effective can only be achieved if the law makers and the interpreters of the law work together and ensure that the law remains effective and responsive to the needs of society. This can be achieved by ensuring that the people endowed with the responsibility of interpreting and drafting the law undertake their duties with due diligence, that is by the courts giving life to the law as contained in statutes and by the law makers ensuring that the law as a tool for social change does not remain stagnant and unable to operate within the society that it was meant to operate through constant reviews and changes being made to the existing legislation.

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