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OXFORD CAMBRIDGE AND RSA EXAMINATIONS
General Certificate of Education Advanced Level

LAW 2576/RM

SPECIAL STUDY MATERIAL

PRE-RELEASE MATERIAL FOR JUNE 2005 EXAMINATION

Wednesday **22 JUNE 2005** Morning 1 hour 30 minutes

INSTRUCTIONS TO CANDIDATES

This is a clean copy of the Special Study Material which you should already have seen.

You may **not** take your previous copy of the Special Study Material into the examination.

You may **not** take notes into the examination.

This paper consists of 9 printed pages and 3 blank pages.

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2576 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIALS

SOURCE 1

Extract adapted from Walker and Walker's English Legal System Richard Ward. Butterworths. pp 62–63, 75, 76, 34–36, 42, 218–219.

The traditional view of……

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Details:

An extract from 'Walker and Walker's English Legal System'. ISBN: 978-0406959539

.....repercussions of law reform.

Where the words of……

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.....left by the legislature.

SOURCE 2

Extract adapted from the judgment of Blackburn J in Taylor v Caldwell [1863] 3 B & S 826

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued

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existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused.

SOURCE 3

Extract adapted from *Cheshire, Fifoot & Furmston's Law of Contract.* Butterworths. p 583

In practice parties very often insert in their contracts provisions designed to deal with unforeseen difficulties. Such force *majeure* or hardship clauses are particularly common where the parties can foresee that such problems are likely to occur but cannot foresee their nature or extent, as in building or engineering contracts. Such clauses often present problems of construction and application.

Nevertheless … a substantive and particular doctrine has gradually been evolved by the courts which mitigates the rigour of the rule in *Paradine* v *Jane* 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 be discharged.

The most obvious cause which brings this doctrine into operation … is the physical destruction of the subject matter of the contract before performance falls due. A less obvious cause, but nevertheless one that has occasioned a multitude of decisions … and which has brought about a rapid development in this branch of the law, is what is called the 'frustration of the common venture'. Owing to an event that has supervened since the making of the contract, the parties are frustrated in the sense that the substantial object that they had in view is no longer attainable. Literal performance may still be possible, but nevertheless it will not fulfil the original and common design of the parties. What the courts have held in such a case is that, if some catastrophic event occurs for which neither party is responsible and if the result of that event is to destroy the very basis of the contract, so that the venture to which the parties now find themselves committed is radically different from that originally contemplated, then the contract is forthwith discharged. Mere hardship or inconvenience to one of the parties is not sufficient justify discharge. 'There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.' (*Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696)

SOURCE 4

Extract adapted from the judgment of Lord Justice Vaughan Williams in *Krell* v *Henry [1903] 2 KB 740 CA*

It is plain that English law applies the principles not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract and essential to its performance … it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have

been in contemplation of the contracting parties when the contract was made. I do not think that the principle is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain what is the substance of the contract and then to ask the question whether that substantive contract needs for its foundation the assumption of the existence of a particular state of things.

Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly: was the performance of the contract prevented? And thirdly: was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case) I think both parties are discharged from further performance of the contract.

SOURCE 5

Extract adapted from the judgment of Lord Justice Vaughan Williams in Herne Bay Steamboat Co. v Hutton [1903] 2 KB 683

I see nothing to differentiate this contract from a contract by which some person engaged a cab to take him on each of three days to Epsom to see the race, and for some reason, such as the spread of an infectious disease or an anticipation of a riot, the races are prohibited. In such a case it could not be said that he would be relieved of his bargain.

SOURCE 6

Extract adapted from Law of Contract. W T Major and Christine Taylor. 9th Ed. Pearson Publishing. pp 258–259

Clearly the death of……

.....cannot be legally enforceable."

SOURCE 7

Extract adapted from the judgment of Lord Wright in *Maritime National Fish Ltd* v *Ocean Trawlers Ltd [1935] AC 524 PC*

The essence of frustration is that it should not be due to an act or election of the party. There does not appear to be any authority which has been directly decided on this point. There is, however, a reference to the question in the speech of Lord Sumner in *Bank Line Ltd* v *Arthur Capel and Co.* What he says is:

> "When the ship-owners were first applied to by the admiralty for a ship, they named three, of which the Quito was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration. Indeed such conduct might give the other party the option to treat the contract as repudiated …"

However, the point does arise in the facts now before the Board and their Lordships are of the opinion that the loss of the St Cuthbert's licence can correctly be described as a 'self-induced frustration'.

SOURCE 8

Extract adapted from the judgment of Lord Radcliffe in *Davis Contractors Ltd* v *Fareham UDC [1956] 2 All ER 145 HL*

Perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. There is, however, no uncertainty as to the materials on which the court must proceed.

> 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred.'
> (*Denny, Mott & Dickson* v *James B Fraser & Co Ltd, per Lord Wright*)

In the nature of things there is often no room for any elaborate inquiry. The court must act on a general impression of what the rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must also be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

I am bound to say that, if this is the law, the appellant's case seems to be a long way from a case of frustration.

SOURCE 9

Extract adapted from The Modern Law of Contract Richard Stone. Cavendish Publishing. pp426–427

In Avery v Bowden (1855) 5 E & B 714.....

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Details:

An extract from 'The Modern Law of Contract'. ISBN: 978-1859416679

.....claim for the breach.

SOURCE 10

Extract adapted from Law of Contract . Paul Richards. 5th Ed. Pearson Publishing. pp314–315

The effect of frustration.....

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Details:

An extract from 'Law of Contract'. ISBN: 978-1405846912 (Revised Edition)

.....Law Reform (Frustrated Contracts) Act 1943.

SOURCE 11

Extract from the Law Reform (Frustrated Contracts) Act 1943

1 Adjustment of rights and liabilities of parties to frustrated contracts

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Details:

An extract from the Law Reform Act 1943. Part 1, 2 and 3 of section 1.

SOURCE 12

Extract adapted from The Modern Law of Contract Richard Stone. Cavendish Publishing. pp 398–401

Section 1(2) of the Law. . . . .

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Details:

An extract from 'The Modern Law of Contract'. ISBN: 978-1859418826

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