NMLS

JAMAICA

IN THE COURT OF APAPEAL

SUPREME COURT CIVIL APPEAL NO. 114/2002

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN: **COUTTES LIMITED** **APPELLANT**

AND: **BARCLAYS BANK PLC** **RESPONDENT**

Mr. Dennis Morrison, Q.C. and Miss Shena Stubbs instructed by Dunn Cox, for the appellant.

Mrs. Sandra Minott-Phillips and Mr. Nigel Jones, instructed by Myers Fletcher and Gordon, for the respondent.

October 21 and 22, 2003; and July 29, 2005

PANTON, J.A.

1. On October 22, 2003, we dismissed this appeal from a judgment of Granville James, J. delivered on October 7, 2002, whereby he had refused certain declarations that had been sought in an originating summons filed by the appellant. These are our reasons for the dismissal.

2. In order to understand the nature of the declarations sought by the appellant in its amended originating summons dated the 8th November, 1999, it is necessary to state a summary of the factual situation in which the parties

found themselves. The affidavits of Dennis Morgan dated 8th November, 1999, and Janet Morgan dated 1st May, 2000, and the attachments thereto provide the factual background.

3. The appellant is a company incorporated under the laws of Jamaica whereas the respondent is incorporated under the laws of England. The respondent was the sole beneficial owner of Saffrey Ltd. which was incorporated under the laws of Jamaica on May 3, 1993. Saffrey Ltd. owns all the shares in Barclays Finance Corporation of Jamaica Limited (hereinafter referred to as Barfincor), a company incorporated in Jamaica on December 14, 1977. The sole asset of Barfincor was a banking licence issued on August 16, 1979 under the Protection of Depositors Act, the precursor of the Financial Institutions Act, 1992.

4. On October 11, 1995, the appellant entered into an option agreement with the respondent whereby the appellant would acquire all the shares in Saffrey Ltd. In keeping with the terms of the agreement, the appellant paid US$3,000.00 to the respondent in consideration of the right granted to the appellant to exercise the said option. This payment was non-refundable. A further sum of US$147,000.00 was payable on the exercise of the option which was slated to take place within 45 days of the date of the agreement. This payment was made on December 1, 1995, by way of a demand debenture in exchange for which the share certificate of Saffrey Ltd. together with a copy of the licence issued to Barfincor were delivered to the appellant.

5. The appellant, having paid the sum US$3,000.00 referred to earlier, had applied to the Ministry of Finance and Planning on November 3, 1995, for approval under section 21 of the Financial Institutions Act in keeping with clause 11 of the option agreement. That clause is at the root of these proceedings. It reads thus:

> "On or before the expiry of fourteen days from the date hereof, the grantee shall prepare an application...to the Minister of Finance pursuant to section 21 of the Financial Institutions Act for approval of transfer of shares to the grantee, and the grantor or its attorneys-at-law acting on its behalf shall have the right to vet and approve the application within two business days of the date of its delivery to the grantor prior to the grantee submitting the application to the Minister. If the grantor or its attorneys-at-law fail to respond within the business two days (sic) as aforesaid it shall be deemed to have waived the requirement for approval. It shall be a condition to the exercise of the option that the Minister shall have approved or shall be deemed to have approved the application pursuant to the said Act".

6. Section 21(2) of the Financial Institutions Act provides that where approval is sought of the Minister and he fails to respond within twenty-one days he shall be deemed to have waived the requirement for approval. In the instant situation, the appellant paid the required sum for the right to exercise the option and made the application to the Minister on November 3, 1995. The appellant received no reply so when twenty-one days expired on November 24, 1995, the appellant was deemed to be the new licensee. On November 27, 1995, acting on the assumption that the application was deemed to have been approved, the

appellant proceeded to exercise the option and paid the balance of the option price on December 1, 1995. The appellant then proceeded to change the name of Barfincor to Alliance Capital Merchant Bank of Jamaica Limited.

7. On March 27, 1996, the appellant received from the Bank of Jamaica a letter stating that the Minister was not satisfied as required by section 21(2) of the Financial Institutions Act. There followed a letter dated June 22, 1998, from the Ministry of Finance and Planning advising that the Minister intended to revoke the licence which had been issued to Barfincor.

8. It is against this background that the appellant sought as follows:

> "Declaration that on a proper construction of the option agreement dated the 11th October, 1995, made between the applicant and the respondent, and in the events which have happened that,
>
> (1) The said option agreement is frustrated and the applicant entitled to a return of the contract money paid and interest thereon the Honourable Minister of Finance and Planning having refused to deem the requirement of approval of the arrangement waived whereby the applicant would have obtained control of a licensee under section 21 of the Financial Institutions Act (Act 16 of 1992);
>
> (2) The waiver of the Honourable Minister of Finance and Planning being a condition precedent to the formation of the agreement between the parties, the exercise by the applicant of the option was therefore void, entitling the applicant to a refund of the full sum of the contract paid by the applicant to the respondent and interest thereon;
>
> (3) There has been a total failure of consideration under the option agreement, entitling the applicant to a refund of the contract money

> and interest thereon the Honourable Minister of Finance and Planning having refused to deem the requirement of approval of the arrangement whereby the applicant obtained control of a licencee waived under section 21 of the Financial Institutions Act (Act 16 of 1992);
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> (4) The contract money paid by the applicant to the respondent in purported exercise of the option pursuant to section 21 of the Financial Institutions Act 16 of 1992 was paid under a mistake of law and the applicant is accordingly entitled to a refund of the full sum of the contract money paid and interest thereon from the respondent; and
>
> (5) The applicant is entitled to restitution of the full sum of the money paid and interest thereon, there having been a total failure of the consideration for which the said money was paid."

The appellant also sought an order that the respondent refund to the applicant the contract money and interest thereon.

9. Granville James, J., in refusing to grant the various declarations sought, held that there had been no frustration of the contract and that when the option was exercised, the contract had been completely performed. The appellant was therefore the valid owner of the licence that had been held by Barfincorp. The licence had been "in force and in the possession of and effectively for the use of" the appellant from December, 1995, until June, 1998, when the Minister revoked it. The learned judge further said that full consideration had been given, and that the appellant "could have validly called upon the Minister to perform his statutory

duty under the Act and formally declare him (it) a licensee under section 21(2)". The appellant, he noted, had failed to do so for the period up to June, 1998.

10. The grounds of appeal were as follows:

> (1) the learned judge erred as a matter of law in finding that on the evidence before him there was no frustration of the contract between the parties;
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> (2) the learned judge erred as a matter of law in finding that "The obligations on both the applicant and the respondent were satisfied. The parties received all that they had bargained for, including the benefit of the deeming provisions of section 21(2) of the Act, in favour of the applicant";
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> (3) the learned judge erred as a matter of law in finding that "there was no total failure or any failure of consideration at all";
>
> (4) the learned judge erred as a matter of law in finding that there had been no unjust enrichment and that restitution of the money paid was therefore not available to the applicant".

11. In advancing the cause of the appellant before us, Mr. Dennis Morrison, Q.C. expressed the view that the outcome of the appeal would turn on whether the Court took a practical purposive approach to the question of what the contract between the parties was intended to achieve, as opposed to the narrow view contended for by the respondent. The practical purposive view, he said, was the giving to the appellant of an operative banking licence, whereas the narrow view concentrated on the transfer of the shares. He urged the Court to take the view that in the context of the entire contract, the appellant really

received nothing. The object of the contract was the provision of an operational banking licence for the appellant, but that liability has not been discharged. He submitted that the facts of the case were such that it would be against conscience for the respondent to keep the benefit derived.

12. Mrs. Sandra Minott-Phillips, on the other hand, submitted that there was no fault in the reasoning and decision of Granville James, J. By law, she said, the appellant was deemed to have had the requisite approval under section 21 (2) (c) of the Financial Institutions Act. On that score, therefore, the question of frustration does not arise. There was nothing, she said, to indicate that the object of the contract had not been realized. The view taken by the Bank of Jamaica had nothing to do with the views of the parties. As far as the law is concerned, the appellant's wish had materialized. If the object was to establish a banking business, with a licence, the object was achieved with the purchase of the shares. She said that the appellant was aware that it had an operational banking licence but never pursued the question of going to the Court to have a declaration as to its rights thereunder.

13. The real thrust of the appellant at the hearing before us was in respect of the question of frustration of the contract. That was not surprising because unless the performance of the contract was regarded as having been frustrated there would have been no hope of the appeal being successful. So, in this regard, Mr. Morrison relied on the principles and arguments set out in three cases in particular:

- **Davis Contractors Ltd. v. Fareham Urban District Council** (1956) A.C. 696;
- **National Carriers Ltd. v. Panalpina (Northern) Ltd.** (1981) A.C. 675; and
- **Pioneer Shipping v. B.T.P. Tioxide** (1982) A.C. 724.

14. At this stage, it is only necessary to refer to the first two named. In **Davis Contractors Ltd. v. Fareham Urban District Council**, contractors entered into a building contract to build 78 houses for a local authority for a fixed sum of money within a period of eight months. They had attached to their form of tender a letter stating that it was subject to adequate supplies of labour being available as and when required. Due to unexpected circumstances, and without there being fault on the part of either party, adequate supplies of labour were not available and the work took 22 months to complete. The contractors contended that the contract was frustrated, and claimed to be entitled on a quantum meruit to a sum in excess of the contract price. It was held in the House of Lords that the letter attached to the form of tender had not been incorporated in the contract, and that the contract had not been frustrated. The fact that there had been an unexpected turn of events which made the contract more onerous than contemplated was not a ground for relieving the contractors of the obligation that they had undertaken and thereby allowing them to recover on the basis of a quantum meruit. In his reliance on this case, Mr. Morrison emphasized the following passage taken from pages 728-729 of the judgment of Lord Radcliffe:

> "By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that **frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."**

15. In **National Carriers v. Panalpina (Northern) Ltd.** (supra), at page 717 C-F, Lord Roskill stated that there had been at least five theories advanced at different times as the jurisprudential foundation upon which the doctrine of frustration supposedly rests. He supported the approach taken by Lord Radcliffe in the **Davis Contractors** case (supra), saying that he saw little difference between Lord Radcliffe's view and the so-called construction theory. Mr. Morrison made specific reference to Lord Roskill's words at page 712 C-G. There is no doubt that the entire passage is worth quoting:

> "My Lords, I mention these matters for three purposes: first to show how gradually but also how extensively the doctrine has developed; secondly to show how, whenever attempts have been made to exclude the application of the doctrine to particular classes of contract, such attempts, though sometimes initially successful, have in the end uniformly failed and thirdly, albeit I hope without unnecessary reference to a mass of decided cases – many in your

> Lordships' House – the doctrine has at any rate in the last half century and indeed during and since the first World War been flexible, to be applied whenever the inherent justice of a particular case requires its application. The extension in recent years of government interference in ordinary business affairs, inflation, sudden outbreaks of war in different parts of the world, are all recent examples of circumstances in which the doctrine has been invoked, sometimes with success, sometimes without. Indeed the doctrine has been described as a "device" for doing justice between the parties when they themselves have failed either wholly or sufficiently to provide for the particular event or events which have happened. The doctrine is principally concerned with the incidence of risk – who must take the risk of the happening of a particular event especially when the parties have not made any or any sufficient provision for the happening of that event? When the doctrine is sufficiently invoked it is because in the event which has happened the law imposes a solution, casting the incidence of that risk on one party or the other as the circumstances of the particular case may require, having regard to the express provisions of the contract into which the parties have entered. **The doctrine is no arbitrary dispensing power to be exercised at the subjective whim of the judge by whom the issue has to be determined. Frustration if it occurs operates automatically. Its operation does not depend on the action or inaction of the parties. It is to be invoked or not to be invoked by reference only to the particular contract before the court and the facts of the particular case said to justify the invocation of the doctrine.)**

16. In **Pioneer Shipping Ltd. and Others v. B.T.P. Tioxide Ltd** (supra), Lord Roskill pointed out that whatever may have been said in other cases at an earlier stage of the evolution of the doctrine of frustration, the House of Lords in **National Carriers Ltd. v. Panalpina (Northern) Ltd.** (supra), had

"approved the now classic statement of the doctrine" by Lord Radcliffe in the **Davis Contractors** case (quoted above). When the statements of Lord Radcliffe and Lord Roskill are applied to the facts of the instant case, it is quite clear that the doctrine of frustration bears no relevance whatsoever. The submissions advanced by Mrs. Minott-Phillips are clearly correct, and the learned judge was not in error in any respect. It is worth noting that he carefully analyzed the facts and the law relevant to the issue for determination, and thereby arrived at what we regard as the appropriate conclusion.

SMITH, J.A.

I have read in draft the judgment of Panton, J.A. I agree with his reasons and conclusions and have nothing further to add.

COOKE, JA;

I have also read the judgment of my brother Panton, J.A. and having agreed with his reasons and conclusions there is nothing more I wish to add.

PANTON, J.A.

ORDER

(1) The appeal is dismissed.

(2) Costs to the Respondent to be agreed or taxed.