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Frustration of contracts for the sale of land in Singapore

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Treaty with the allied forces and the US–Japan Security Treaty in 1951 to help the nation defend itself against military attack.[53]

3. Article 9 as a universal principle of mankind

Having witnessed first hand the horrors of warfare, Japan should spearhead an international movement to encourage peace. Although Article 9 of the Japanese Constitution renounces all wars, it is not yet international law. Rather, it appears to be a self-control provision that lifts Japan up to the forefront of a peace movement and sets a guideline which may become ratified as a principle of international law by the UN General Assembly. In so doing the member nations would recognise Article 9 as international law. Until such time Japan would have responsibility for participating in the UN peace-keeping operations in accordance with the 1992 International Peace Co-operation Law under the five conditions laid down in that Law.

SHOTARO HAMURA and ERIC SHIU*

FRUSTRATION OF CONTRACTS FOR THE SALE OF LAND IN SINGAPORE

A. Introduction

The recent Singapore Court of Appeal decision of *Lim Kim Som* v. *Sheriffa Taibah bte Abdul Rahman*[1] is significant for at least two specific (and related) reasons in the context of the doctrine of frustration: first, because it pertains to the more particular issue as to whether a contract for the sale of land can be frustrated; and, second, because it also raises certain significant questions with regard to more general aspects of the doctrine itself.

The facts of the case itself can be briefly stated. The plaintiff vendor granted a written option to the defendant purchaser to purchase a piece of property. The purchaser exercised the option, paying (up to that point in time) a total of 10 per cent of the purchase price. The purchaser did not, however, complete within the stipulated period and the vendor's solicitors sent the purchaser's solicitors a notice to complete. But on the very same day, a declaration was made under section 5 of the Land Acquisition Act[2] stating that the property concerned was required for a public purpose (viz., general redevelopment) and some six days later a notification of the declaration was published in the *Government Gazette*. The defendant purchaser predictably sought to extricate himself from the contract, requesting a refund of the 10 per cent deposit already paid. The plaintiff declined, and in fact purported to forfeit the deposit on the ground that the defendant had failed to complete by the date stipulated in the notice. The plaintiff thereafter commenced the present action, claiming the balance of the purchase price plus interest or, alternatively, damages for breach of contract; the defendant counterclaimed for

53. See Defense Agency, *op. cit. supra* n.3, at pp.52–72.

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1. [1994] 1 S.L.R. 393.
2. Then Cap.272, 1970 Rev. Ed. See now Cap.152, 1985 Rev. Ed.

the refund of the deposit paid. The Collector of Land Revenue had, in the meantime, awarded a sum as compensation for the acquisition, which sum was paid into court and later paid out to the plaintiff with interest; possession of the property was subsequently taken by the Collector. The amount of compensation was only approximately a fifth of the purchase price of the property.

A great many issues were canvassed at first instance[3] but, for the purposes of the present appeal, only two main points were at issue: first, whether or not the compulsory acquisition of the property in question frustrated the contract, thus absolving the defendant purchaser from any liability; and, second, whether the declaration had precluded the plaintiff vendor from giving the defendant a good title to the property.

The court held in favour of the defendant. It was of the view that the doctrine of frustration was capable of being applied to a contract for the sale of land and that, on the facts of the instant case, the doctrine indeed applied. It also held that the declaration precluded the plaintiff vendor from conveying a good title to the defendant.[4] As already alluded to, the focus of this article will be on issues raised in the context of the doctrine of frustration. It remains only to be mentioned at this preliminary juncture that the court applied section 2(2) of the (local) Frustrated Contracts Act[5] to order that the vendor refund the deposit paid by the purchaser.

B. The Applicability of the Doctrine of Frustration to Contracts for the Sale of Land

Although it has been established relatively recently that the doctrine of frustration can, on occasion at least, apply to leases,[6] the court found that there was no direct English authority as such on the applicability of the doctrine in the context of contracts for the sale of land. It did, however, find oblique support in judicial *dicta* in various decisions.[7] Of more direct relevance, in the court's view, was the Canadian decision of *Capital Quality Homes Ltd* v. *Colwyn Construction Ltd*,[8] where

3. For a report of the High Court decision see [1992] 2 S.L.R. 516.

4. The court was of the view that the change in the nature or duration of the title in the property was not what the defendant purchaser had bargained for; and see generally [1994] 1 S.L.R. 393, 412–414.

5. Cap.115, 1985 Rev. Edn. This provision is identical to s.1(2) of the UK Law Reform (Frustrated Contracts) Act 1943, upon which it was in fact based.

6. See *National Carriers Ltd* v. *Panalpina (Northern) Ltd* [1981] A.C. 675. It should be mentioned that Singapore was apparently ahead of the English law in so far as there is authority allowing the frustration of a lease (albeit without detailed reasoning): see *Singapore Woodcraft Manufacturing Co. (Pte) Ltd* v. *Mok Ah Sai* [1979] 2 M.L.J. 166. See also the discussion and general references in Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (Singapore and Malaysian edn, 1994), pp.832–834.

7. Citing *Amalgamated Investment & Property Co. Ltd* v. *John Walker & Sons Ltd* [1977] 1 W.L.R. 164; *Universal Corporation* v. *Five Ways Properties Ltd* [1979] 1 All E.R. 552; and *Panalpina*, *ibid* (where, significantly, the House of Lords did emphasise, *inter alia*, the fact that there was nothing inherent in the concept of a lease to preclude the applicability of the doctrine of frustration, thus endorsing, at least implicitly, the general nature of the doctrine itself). The court also referred to the Hong Kong Privy Council decision of *Wong Lai Ying* v. *Chinachern Investment Co. Ltd* (1979) 13 B.L.R. 81, which, however, is probably more *direct* authority than the court appeared to grant (see also the discussion of the Canadian authorities, below).

8. (1975) 61 D.L.R. (3d) 385; and see the very perceptive comment by Reiter in (1978) 56 Can. Bar Rev. 98 and the critique by Professor Waddams in *The Law of Contracts* (3rd edn,

the Ontario Court of Appeal applied the doctrine to a contract for the sale of land. Of particular interest is the court's reference to a passage of the judgment of Evans JA (who delivered the judgment of the court) to the effect that he was "unable to distinguish any difference between leases of land and agreements for the sale of land, so far as the application of the doctrine is concerned".[9] The court in the present case then pointed out that the "non-existence of the subject-matter of the contract is not the only circumstance where frustration can occur".[10] That this is an elementary (albeit fundamental) proposition is evident from a cursory survey of the leading cases.[11] Yet, to give an across-the-board effect to this very fundamental proposition, it must surely follow that the doctrine of frustration must be at least potentially applicable to *all* contracts, so long as, in Lord Radcliffe's now-famous words in *Davis Contractors Ltd* v. *Fareham UDC*,[12] "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".[13] It is, of course, clearly consistent with the propositions discussed thus far to argue that the doctrine be not liberally applied,[14] but this is surely distinct from the proposition that the doctrine can *never* apply under certain given factual circumstances. The approach adopted by the court in the present case is therefore to be welcomed, as it provides the necessary flexibility without adversely affecting the discretion vested in the court as to whether or not to apply the doctrine on the facts of the case itself. Looked at in this light, it might be observed that the controversy surrounding the English law on the applicability of the doctrine to leases as well as the lengthy period of time taken for the English courts themselves to arrive at a flex-

1993), pp.248–249. There is some earlier (also Canadian) authority, albeit without any detailed reasoning: see e.g. *Cooke* v. *Moore* [1935] 1 W.W.R. 374; affd, but without written reasons (see [1935] 3 W.W.R. 256) and *Focal Properties Ltd* v. *George Wimpey Canada Ltd* (1975) 14 O.R. (2d) 295; affg (1974) 51 D.L.R. (3d) 647 (the Supreme Court, however, did not find it necessary to rule on the issue of frustration: see (1977) 78 D.L.R. (3d) 129, 132); and cf. *Goulding* v. *Rabinovitch* [1927] 3 D.L.R. 820; reversing [1927] 2 D.L.R. 559. Reference may also be made to the recent decision by Hutchinson J in the British Columbia Supreme Court decision of *R. in Right of British Columbia (Minister of Crown Lands) and Canada Mortgage and Housing Corporation* v. *Cressey Development Corporation* [1992] 4 W.W.R. 357, where he applied *Capital Quality Homes* and distinguished *Victoria Wood Development Corp.*, *infra* nn.43 and 45 (for further related proceedings see (1992) 97 D.L.R. (4th) 380). Cf. also the Ontario High Court decision of *Smale* v. *Van der Weer* (1977) 80 D.L.R. (3d) 704 where *Capital Quality Homes* was distinguished on the basis (*inter alia*) that there had been a waiver by the party seeking to rely on frustration, although the general applicability of the doctrine to contracts for the sale of land was accepted.

9. (1975) 61 D.L.R. (3d) 385, 397. See also *supra* n.7.

10. [1994] 1 S.L.R. 393, 401.

11. These would include *Jackson* v. *Union Marine Insurance Co. Ltd* (1874) L.R. 10 C.P. 125 and the famous series of "Coronation cases"; indeed, in so far as the latter was concerned, the court in the present case referred in some detail to *Krell* v. *Henry* [1903] 2 K.B. 740.

12. [1956] A.C. 696.

13. *Idem*, p.729. Indeed, the court in the instant case cites *in extenso* from the judgments of Lord Reid and (especially) Lord Radcliffe: see generally [1994] 1 S.L.R. 393, 402–403.

14. This was clearly the position taken by the House of Lords with regard to leases: see generally *Panalpina*, *supra* n.6. This is also the position taken generally, as evidenced by the case law: see Phang (1992) 21 Anglo-Am. L.Rev. 278, esp. 283–284.

ible position in the *Panalpina* case[15] is a little difficult to understand—unless one argues that the hold of real property concepts over the mindset of the English judges was so great as to provide a possible explanation for such delay as well as the stress placed on the rarity of success that will be afforded by the courts themselves.[16]

In so far as the actual application of the doctrine to the facts at hand was concerned, the court, after deciding that there had been no express provision for compulsory land acquisition,[17] held that the defendant had "obviously purchased it for a commercial purpose" and that it was "obviously not contemplated that compulsory acquisition by the Government would occur".[18] As for the alleged supervening act itself (viz., the process of compulsory acquisition effected in the present case), the court refused to follow the decision of Vaisey J in *Hillingdon Estates Co.* v. *Stonefield Estates Ltd*,[19] who had held, in essence, that in a contract for the sale of land the purchasers are to be regarded in law as the owners of the property concerned, notwithstanding the absence of completion; the reasoning is based on the premise that although the vendor continues to hold the legal estate in the land, he nevertheless holds it as a trustee for the purchaser, who has become the owner in equity. Vaisey J thus held that, in the circumstances, notwithstanding the existence of a compulsory purchase order, the contract itself was not frustrated, simply because the property concerned could still be conveyed on the purchase money being paid by the purchasers to the vendors. L. P. Thean JA, who delivered the judgment of the court in the present case,[20] disagreed with this reasoning; he was of the view that the reasoning as embodied in *Hillingdon Estates* was "somewhat of a circular argument"[21] in as much as the passing of the beneficial ownership in the property concerned was premised on the availability of specific performance which, however, would not be granted in the situation where the contract had been frustrated.[22] The judge also disagreed with the trial judge's reasoning to the effect

15. See *supra* n.6. This argument would not, of course, apply to situations existing in the distant past (i.e. during a period prior to the actual crystallisation of the doctrine of frustration itself). For a historical survey, see Price (1989) 10 J. Leg. Hist. 90.

16. See *supra* n.14.

17. See the discussion below.

18. See [1994] 1 S.L.R. 393, 404. And see the discussion below with regard to the issue of foreseeability.

19. [1952] 1 Ch. 627. Interestingly, Evans JA in *Capital Quality Homes*, *supra* n.8, distinguished this case on (in part at least) the basis that the "equities between the parties" had been affected (see, esp. p.394).

20. The other judges were Karthigesu JA and Warren L. H. Khoo J.

21. [1994] 1 S.L.R. 393, 406.

22. The court cited, *inter alia*, *Barnsley's Conveyancing Law and Practice* (3rd edn, 1988), p.227 and Thompson [1984] Conv. 43, 49. See also Waters, *The Constructive Trust* (1964), esp. pp.87 and 98–99 (though cf. Gardner (1987) 7 O.J.L.S. 60, albeit in the context of the doctrine in *Walsh* v. *Lonsdale*, *infra* n.28). However, the argument relating to the passing of equitable ownership to the purchaser (already referred to above) may nevertheless continue to cast doubts, especially when viewed through the lenses of property law, presumably on the basis that the alleged frustration comes too late. At least two points may be made in response. First, it has been clearly established that even with the passing of equitable ownership the vendor is not a trustee in the fullest sense of that term and, indeed, both vendor and purchaser have their respective benefits and duties (see generally Waters, *idem*, pp.88–101). Second, the issue here is, at bottom, arguably whether contract should trump property or vice versa. In the light of the preceding arguments as well as the extension of the doctrine

that the contract had not been frustrated because the date fixed for completion fell prior to the vesting of the title of the property concerned in the State as the availability of specific performance was decided only at the time of the proceedings.[23] Whilst agreeing with the trial judge that a declaration made under section 5 of the Land Acquisition Act did not *ipso facto* vest the title in the property in the State, he was of the view that "once a declaration is made the process of acquisition has started and its progress will lead almost with absolute certainty to divesting the owner of his title to the land and vesting it in the state".[24] This approach is to be welcomed as it eschews undue technicality and emphasises a practical approach.[25] And the reader will have noticed that such a flexible approach in the application of the doctrine is entirely consistent with the approach adopted to the principal point of law as briefly noted in the preceding paragraph. In the event, the court arrived at the conclusion that, notwithstanding the fact that the vendor could have literally completed the transaction, the substance of the matter was that the contractual obligation had been radically changed by the process of compulsory acquisition, which would inevitably run its course. Adopting the language of Lord Simon in the *Panalpina* case,[26] the court reasoned that "the reality is that the purchaser had bargained not only for the legal estate but for the use of the property",[27] which had been rendered wholly nugatory by the acquisition—especially since the compensation, as we have seen, was but a fraction of the market value of the property itself.

One final observation on the applicability of the doctrine of frustration to contracts for the sale of land is apposite. In the present case the tenure of the property concerned was freehold. However, a great many properties in Singapore are held on either 999-year or (as is more common, particularly in the case of public housing, where the vast majority of the population reside) 99-year leases. This would appear to suggest that had the facts of the present case pertained to a leasehold instead, the reasoning of the court might have well turned simply on a straightforward application of the *Panalpina* case itself. Whilst it is true that a contract for a lease is different from the lease itself, there is no difference in effect, owing to the well-known doctrine in *Walsh* v. *Lonsdale*.[28] However, it should be borne in mind

of frustration to leases in *Panalpina* (*supra* n.6), it is submitted that contractual principles ought, on balance at least, to prevail. Indeed, and interestingly enough, a similar approach centring on the unavailability of specific performance was adopted by Lord Simon in *Panalpina* itself in so far as an agreement to grant a least was concerned (and where, therefore, the equitable interest had clearly passed under the doctrine in *Walsh* v. *Lonsdale*): see [1981] A.C. 675, 704.

23. [1994] 1 S.L.R. 393, 407. And cf. Sparkes (1989) 10 J. Leg. Hist. 29.

24. *Idem*; and relying on the Singapore Privy Council decision of *Re Robinson*; *Robinson & Co. Ltd* v. *Collector of Land Revenue, Singapore* [1980] 1 M.L.J. 255. See also [1994] 1 S.L.R. 393, 408: "In our experience, there has hardly ever been a case where after the publication of the s.5 declaration the Government has withdrawn the acquisition."

25. See also [1994] 1 S.L.R. 393, 409: "... in considering whether a contract for the sale of land has been frustrated by compulsory acquisition which has begun, it is not sufficient to have regard purely to such technical aspects of the transaction. Regard must be had to the practical impact the compulsory acquisition has on the land."

26. See [1981] A.C. 675, 705.

27. [1994] 1 S.L.R. 393, 409.

28. (1882) 21 Ch.D. 9. Reference may also be made to *Rom Securities Ltd* v. *Rodgers (Holdings) Ltd* (1967) 205 E.G. 427.

that a strict dichotomy between freehold property on the one hand and leasehold property on the other cannot obviously be taken too far. Lord Hailsham observed, for example, in *Panalpina*, that: "No doubt a long lease, say for example one for 999 years, is almost exactly identical with the freehold."[29] Looked at in this light, the full reasoning in the present case is welcome in elucidating the approach to be taken toward the applicability of frustration to contracts for the sale of land, regardless of the tenure of the property concerned. In any event, as we have seen, Evans JA in *Capital Quality Homes*, for example, was unable to see any real distinction between leases and contracts for the sale of land;[30] in other words, there is no sharp break in the extension of the principle in *Panalpina* to situations such as the one presently considered. Indeed, in *Panalpina* itself, Lord Simon was of the view that a *contract for* a lease could be "effectively discharged by frustration notwithstanding that it has created an estate or interest in land, albeit equitable".[31]

C. Other Aspects of Frustration

Whilst the approach taken by the court in the present case with regard to contracts for the sale of land is progressive and flexible, two other related arguments raised by counsel for the vendor at least raise some issues which may have to be ruled upon more definitively in later cases.

The first argument centred on the doctrine of self-induced frustration—specifically, that the defendant purchaser had been at fault in delaying completion. This argument was rejected by the court, which pointed out that "a causal link" had to be shown between the breach (here, delay) on the one hand and the alleged frustrating event on the other. In the instant case: "It [could not] be said that the purchaser was in any way responsible for the compulsory acquisition of the property."[32] Whilst it is true that the purchaser had not *deliberately* delayed completion with a view to taking advantage of the doctrine of frustration, could it nevertheless be at least arguable that the purchaser had been *negligent* in not completing on time, thus resulting in the present situation? It is submitted that the *degree* of foreseeability, although present, was of a very low order, thus preventing the appropriate causal link from arising. As a matter of interest, the problem with regard to the state of mind of a party in relation to self-induced frustration is still a thorny one to begin with, although it did not, as just seen, really arise on the facts of the instant case.[33] The argument centring on the degree of foreseeability is, in fact, linked to the next argument raised.

The second argument focused on foreseeability simpliciter: in other words, the purchaser ought to have foreseen the possibility of compulsory acquisition, and

29. [1981] A.C. 675, 691.

30. See *supra* n.9.

31. See [1981] A.C. 675, 704. The equitable interest arises, of course, as a result of the doctrine in *Walsh* v. *Londsdale*, *supra* n.28. See also the Ontario High Court decision of *Re Dennis Commercial Properties Ltd and Westmount Life Insurance Co.* (1969) 7 D.L.R. (3d) 214; appeal dismissed by the Court of Appeal and ultimately settled prior to the further hearing before the Canadian Supreme Court (see (1969) 8 D.L.R. (3d) 688).

32. [1994] 1 S.L.R. 393, 410.

33. See, though, Phang, *op. cit. supra* n.14, at pp.297–299 where the important English decision of *J. Lauritzen AS* v. *Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep. 1, whilst not directly in point, is considered to be helpful in the resolution of this particular issue.

could not therefore now rely on the doctrine of frustration. Whilst the court rejected this argument, it is not without force. Given the scarcity of land in Singapore, compulsory acquisition by the State is always a possibility. Ought the plaintiff vendor then have been given judgment on this ground instead? The court was fully aware of the potential difficulties raised by this argument; in its own words: "The relevance of foreseeability to the doctrine of frustration is not free from doubt. Different judges have proffered different views on the subject."[34]

However, the court relied on the predominant strand in the English authorities[35] to the effect that mere foreseeability is not a reason for precluding the application of the doctrine. The present writer has, however, argued elsewhere that there is no reason in principle that foreseeability should not preclude the application of the doctrine.[36] However, because there are obviously different levels of foreseeability, the ultimate determination must, in the final analysis, be one of *degree*.[37] For example, if the alleged frustrating event is *actually* foreseen, the doctrine should not apply; any other situation must depend on an assessment by the court, taking into account all the relevant circumstances.[38]

The result arrived at in the instant case is, in the final analysis, consistent with the general approach briefly advocated in the preceding paragraph. The court found, in fact, that there was "*no evidence* in the present case that the parties *actually foresaw* that an acquisition might take place";[39] indeed, the court did proceed to observe that if, in fact, the compulsory acquisition had been foreseen, it would have been on the part of the *vendor*'s agents instead.[40] It is, of course, true that compulsory acquisition is always a possibility in land-scarce Singapore—a point we have already noted. However, the mere *possibility* (as distinct from the *probability*) of acquisition is insufficient to preclude the application of the doctrine. In other words, the party seeking to exclude the application of the doctrine must lead evidence that demonstrates that compulsory acquisition was not merely possible but probable. One clear illustration would be where a check effected reveals that acquisition of the property concerned is probable in the foreseeable future. What this means, of course, is that there can be no blanket proposition as such to the effect that compulsory acquisition in Singapore either must or must not preclude the doctrine of frustration, notwithstanding the special circumstances relating to land scarcity in the island republic. If this appears to be a rather undesirable result because it does not conduce to certainty, it should be borne in mind that the very doctrine of frustration itself is very much dependent on the precise facts of the case concerned; as Lord Roskill aptly put it in *Pioneer Shipping Ltd* v. *BTP Toxide Ltd*: "Where questions of degree are involved, opinions may and often legitimately do differ"[41]—an opinion that was, in fact, endorsed in the present case itself.[42] It

34. [1994] 1 S.L.R. 393, 410.
35. *WJ Tatem* v. *Gamboa* [1939] 1 K.B. 132 and *per* Lord Denning MR in *The Eugenia* [1964] 2 Q.B. 226.
36. See generally Phang, *op. cit. supra* n.14, at pp.289–294.
37. *Idem*, p.293.
38. See also Treitel, *The Law of Contract* (8th edn, 1991), pp.800–802.
39. [1994] 1 S.L.R. 393, 411 (emphasis added).
40. *Idem*, pp.411–412.
41. [1982] A.C. 725, 752.
42. [1994] 1 S.L.R. 393, 403.

should also be observed, however, that although (as already alluded to above) there is nothing in the present case to contradict the proposition advanced with regard to the relevance of foreseeability as a factor, the importance of which will differ depending on the individual facts of the case concerned, there is, equally, nothing to endorse it *expressly*. As explained above, the court was apparently concerned only with events *actually* foreseen. It is therefore hoped that the court will take the opportunity to clarify further the role of foreseeability in the context of the doctrine of frustration when an appropriate occasion next presents itself. Finally, however, a somewhat intriguing decision should be noted: that of Osler J in the Ontario High Court decision of *Victoria Wood Development Corp Inc.* v. *Ondrey*.[43] That case, which concerned the enactment of legislation prohibiting development of the property that was the subject matter of the contract, is intriguing because of the following remarks by the judge which suggest, contrary to the arguments just tendered in respect of the present case, that governmental intervention is almost always *inherently* foreseeable, thus precluding the application of the doctrine of frustration:[44]

> As it was put by counsel for the [vendors], a developer in purchasing land is *always conscious of the risk that zoning or similar changes* may make the carrying out of his intention impossible, or may delay it. He may attempt to guard against such risk by the insertion of proper conditions in the contract and thereby persuade the vendor to assume some of the risk. In the present case he has not done so and, indeed, there is no evidence that he has attempted to do so. "The very foundation of the agreement" is not affected and there is no room for the application of the doctrine of frustration.

Arnup JA, who delivered the judgment of the Court of Appeal,[45] assumed that the doctrine of frustration could apply to a contract for the sale of land,[46] but nevertheless proceeded to distinguish the *Capital Quality Homes* case and thus refused to apply the doctrine to the facts at hand, thus affirming the decision of Osler J at first instance. He did not, however, really make any pronouncement on the issue of foreseeability in the context of compulsory acquisition, although he did cite (without disapproval) the view in the English Court of Appeal decision of *Amalgamated Investment & Property Co. Ltd* v. *John Walker & Sons Ltd*[47] to the effect that the risk (there) of being listed as a property of architectural or historical interest was an inherent risk that had to be borne by the purchaser—an approach not unlike that adopted by Osler J at first instance.[48] The present case, however, adopts a quite different approach which, as the present writer has sought to show, is not to be perceived as endorsing the other extreme but, rather, as an illustration of the very factual nature of the doctrine itself.[49]

43. (1977) 74 D.L.R. (3d) 528. See also Waddams, *loc. cit. supra* n.8. But cf. *per* Hutchinson J in *Cressey Development*, *supra* n.8.
44. *Idem*, pp.532–533 (emphasis added).
45. Of Ontario (curiously the very same court which decided *Capital Quality Homes*, *supra* n.8): see (1978) 92 D.L.R. (3d) 229.
46. (1978) 92 D.L.R. (3d) 229, 232.
47. [1977] 1 W.L.R. 164.
48. See *supra* n.44.
49. See *supra* n.41.

D. Conclusion

In one very real sense, the present case may be seen as an (albeit incremental) advance on the position in English law in so far as it logically extends the ambit of the doctrine of frustration to contracts for the sale of land. As we have seen, however, this extension does not, *ipso facto*, result in a liberalisation of the doctrine, which continues to be utilised sparingly.[50] The factual nature of the doctrine is thus still of crucial importance.[51] It is hoped, however, that when a suitable occasion arises in the future, there could be elaboration as well as definitive rulings on certain other problematic aspects of frustration—in particular, the relevance of the state of mind of the parties with regard to self-induced frustration and the equally thorny issue of the role of foreseeability in the context of the application of the doctrine as a whole.

ANDREW PHANG*

THE SUNDAY TRADING EPISODE: IN DEFENCE OF THE EURO-DEFENCE

THE use of Article 30 of the EC Treaty as a defence to prosecutions for breach of a member State's Sunday trading legislation is now a dead letter. The European Court of Justice has unequivocally held that national legislation on the closure of shops is within the category of "selling arrangements" and accordingly, applying its recent decision in *Keck and Mithouard*,[1] falls outside the scope of Article 30.[2] This decision will have little impact in the United Kingdom, where the Article 30 defence to prosecutions for Sunday trading has been extinguished since Decem-

50. And see Phang, *op. cit. supra* n.14.

51. See *supra* nn.41 and 49.

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1. Cases C-267 and 268/91 [1993] E.C.R. I-6097. In what has been described as a remarkable somersault, the ECJ (in Nov. 1993) in *Keck and Mithouard* overturned its previous case law and held that "contrary to what has previously been decided" (para.16) national provisions which restrict or prohibit certain "selling arrangements" fall outside the scope of Art.30 EC. For an explanation of why Art.30 (the fundamental Treaty provision ensuring the free movement of goods in the EC) may conceivably by invoked to challenge a member State's Sunday trading legislation, see Section A *infra*. For comment on the wisdom of this new departure in the ECJ's jurisprudence, see Gormley (1994) E. Business L.Rev. 63; Moore (1994) 19 E.L.Rev. 195 and Roth (1994) 31 C.M.L.Rev. 845.

2. Cases C-69/93 and C-258/93 *Punto Casa SpA* v. *Sindaco del Comune di Capena* and *Promozioni Polivalenti Venete Soc. coop. arl (PPV)* v. *Sindaco del Comune di Torri di Quartesolo, Comune di Torri di Quartesolo* [1994] E.C.R. I-2355. As in *Keck*, *ibid*, the ECJ repeated the provisos that the national legislation, in order to be considered within the category of "selling arrangements", must apply to all traders operating within the national territory and must affect in the same manner, in law and in fact, the marketing of domestic products and those from other member States.