

Although *Jones* and *Huckvale* concerned the express grant and reservation, respectively, of an easement, there is no reason, in principle, why the doctrine should not apply to the implied grant of easements (through necessity, common intention or by virtue of s.62 of the Law of Property Act 1925) and easements arising by prescription.⁹³ Indeed, the same analysis may be said to apply to profits a prendre which, like easements, are grounded in contract in so far as they may be granted expressly (either by statute or deed) or they may be implied under s.62 of the Law of Property Act 1925. They may also be acquired by prescription under the common law, lost modern grant or under the Prescription Act 1832. Take, for example, a profit a prendre granted to X by deed for a period of 20 years to pick apples from an orchard on Y's land. After two years, the whole orchard becomes the subject of a compulsory purchase order to make way for a new motorway across the land. In these circumstances, the profit would, it is submitted, be automatically extinguished or discharged as a result of frustration. Moreover, it should make no difference if the right to pick the apples had arisen impliedly or by prescription.

MORTGAGES

Mortgages may be created in two different ways: (1) by a grant by demise (i.e., a term of years absolute) and (2) by legal charge (i.e., a charge made by deed under s.85(1) of the Law of Property Act 1925. The former, being founded on a landlord and tenant relationship, is presumably capable of frustration like any other lease made between the parties. Because the mortgage creates a demise, both the lender and the borrower have a legal estate in the land but, applying *National Carriers*, this should not preclude the doctrine from discharging the mortgage in appropriate circumstances.

With registered land, it is no longer possible to create a mortgage by granting a lease. Instead, s.23(1) of the Land Registration Act 2002 provides that a legal mortgage of registered land can only be created by means of a legal charge which grants the borrower a legal interest in the lender's land until the mortgage is repaid. This charge, although not conferring on the lender any legal term or estate in the land,⁹⁴ is statutorily deemed to invest the lender with the same protection, powers and remedies (including the right to take proceedings to obtain possession) *as if* a leasehold term had been created in his favour.⁹⁵ Significantly also, as mentioned earlier, the legal charge has to be made by deed.⁹⁶ In essence, therefore, the legal charge is founded in contract because there are contractual obligations imposed on both the lender and the borrower in relation to the mortgaged property. In particular, the borrower covenants to repay the borrowed money (together with any interest) and, if the borrower defaults, the lender has an action on the borrower's personal covenant to repay the mortgage. Given, therefore, the "live" contractual basis of the mortgage, it is submitted that the doctrine of frustration should, in principle, also apply to this form of mortgage transaction.

The consequences, however, of a frustrating event may be somewhat limited from the borrower's perspective in that he will still be obliged to repay the loan under his

⁹³ This would include the implied grant of an easement under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31. The acquisition of an easement by prescription (or long use) is also, it is submitted, founded on implied contract in so far as it is presumed that the servient owner must have granted (thereby implying a deed) the easement at some point in the past. The presumption of grant is based upon the acquiescence of the servient owner (i.e., his failure to object to the actions of the dominant owner). This applies to all forms of prescription, namely, common law, lost modern grant and under the Prescription Act 1832.

⁹⁴ See, *Weg Motors Ltd v Hales* [1962] Ch 49, at 74 and 77, per Lord Evershed MR.

⁹⁵ See, s.87(1) of the Law of Property Act 1925. In other words, the lender under a legal charge has the statutory equivalent of a term of years absolute: see *Four Maids v Dudley Marshall Properties Ltd* [1957] Ch 317, at 320, per Harman J.

⁹⁶ See, s.85 of the Law of Property Act 1925. The requirements for a deed are stated in s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989.

personal covenant in the mortgage. The lender, on the other hand, would presumably lose his right to repossess (and sell) the mortgaged property in the event of the land being destroyed as a result of the frustrating event. His right of foreclosure would also be lost given that he is no longer able to step into the shoes of the borrower and become registered as proprietor of the land. In any event, there would be little point in seeking a foreclosure order assuming the land is now worthless; a foreclosure order would also extinguish the personal covenant of the borrower leaving the lender effectively without any remedy to pursue his debt.

In essence, therefore, the effect of frustration would be to destroy the lender's security and discharge all remedies associated with his right to the land, but still leave him with the ability to bring a personal (contractual) action on the borrower's personal covenant and obtain a money judgment for the amount of the loan outstanding prior to the frustrating event.

COVENANTS AFFECTING FREEHOLD LAND

Here again, the covenant made by one landowner to another regarding the use of land is grounded in contract. As between the original covenantor and covenantee, enforceability of such covenants is governed by the parties' contractual relationship. Beyond the original parties, there are rules which govern the passing of the benefit and burden of covenants at common law and in equity. As with leases, the rights and obligations as between successors in title are entirely rooted in the terms of the contract agreed between the original covenantor and covenantee. Effectively, those rights and obligations created by the original parties pass to their respective successors in title.

Although there is statutory provision, under s.84 of the Law of Property Act 1925 (as amended), for the modification or discharge of obsolete covenants or covenants which impede the reasonable user of the land, it is submitted that the doctrine of frustration may operate independently of s.84 so as to discharge a covenant where some supervening event renders performance of (or compliance with) the covenant impossible to perform. Again by analogy with leases, a particular covenant (positive or restrictive) in the deed may be temporarily suspended until it becomes possible to perform it.⁹⁷

CONCLUSION

As we have seen, the doctrine of frustration has already been held to apply to the landlord and tenant relationship despite leases having key features which render them a unique form of contract and which anchor them squarely in the law of real property. The notion of the estate, which prior to *National Carriers*, provided an obstacle to the extension of the doctrine to leases, is no longer viewed as the foundation of that relationship but merely one of its incidents.⁹⁸ Indeed, the judicial trend is towards a general assimilation of leases with other contractual transactions.⁹⁹

⁹⁷ See, in relation to particular covenants in leases, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, at 233-234, per Lord Russell; *John Lewis Properties plc v Viscount Chelsea* [1993] 34 EG 116 and *Baily v De Crespigny* (1869) LR 4 QB 180.

⁹⁸ See, *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904., (HL).

⁹⁹ It is interesting, for example, to observe that the doctrine of disclaimer of a landlord's title has been held to be analogous to the doctrine of repudiation of contract: *WG Clark (Properties Ltd v Dupre Properties Ltd* [1991] 3 WLR 579. See also, *Hussein v Mehman* [1992] 32 EG 59, where a tenancy was held to come to an end by the tenants' acceptance of their landlord's repudiatory breach.

Beyond that, it is possible to conclude that the doctrine applies to other real property interests including contracts for the sale of land, options to purchase land, easements, profits a prendre, mortgages and covenants affecting freehold land. Here, as with leases, the right in question is grounded in an on-going or "live" contractual relationship notwithstanding its inherent proprietary characteristic.¹⁰⁰ As we have seen, there are several English cases which have assumed the existence of the doctrine in relation to sales of land despite the possible objection that the purchaser acquires an equitable interest in the land upon exchange of contracts. The actual circumstances, however, in which the doctrine will be held to frustrate the contract will be rare amounting to some catastrophic event which renders performance of the contract either impossible or radically different from that envisaged under the contract. Moreover, the doctrine operates as a form of risk analysis in so far as the question is whether it is reasonable to place the risk of non-performance for the events which have happened on one party or the other, or neither. If it is not reasonably possible to place the risk on either party then the contract is frustrated. If, on the other hand, the risk of placed on a particular party (by contract or otherwise), the doctrine does not apply. There is also English authority for the application of the doctrine to options to purchase land. The *Denny* case shows that, if the option is dependent on the performance of wider agreement, a frustrating event may discharge the option on the basis that it forms part of a composite contract which can no longer be performed due to illegality or some other supervening cause.

So far as easements are concerned, the decisions in *Jones* and *Huckvale* recognise the possibility of such rights being extinguished by a frustrating event. Although the language of the caselaw is couched in terms of extinguishment (as opposed to the contractual doctrine of frustration), it is apparent that an easement (including, it is submitted, a profit a prendre) which has become impossible to use will be treated as discharged. As we have seen, mortgages by demise, being essentially leases, are founded on a landlord and tenant relationship. Because the mortgage creates a demise, both the lender and the borrower have a legal estate in the land but, applying *National Carriers*, this should not preclude the doctrine from discharging the mortgage in appropriate circumstances. The legal charge, on the other hand, is a creature of statute, but because of the requirement of a deed, it too has the hallmarks of a contractual relationship albeit one between borrower and lender. Similarly, covenants affecting freehold land, in so far as they are also grounded in contract, should be capable of discharge (or suspension) where some supervening event renders performance of (or compliance with) the covenant impossible to perform.

The overall conclusion, therefore, in the writers' view, is that a real property interest which has as its foundation a contractual relationship (whether express or implied) is capable, in principle, of falling within the doctrine of frustration.¹⁰¹

¹⁰⁰ Indeed, the decisive argument in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 was "the essential unity of the law of contract and the belief that no type of contract should as a matter of law be excluded from the doctrine": Cheshire, Fifoot & Furmston, *Law of Contract*, (15th ed., 2007), OUP, at p.737. Given that the real property interest is grounded in contract, this should also permit the application of the Law Reform (Frustrated Contracts) Act 1943 so as to allow for the allocation of losses and benefits between the parties.

¹⁰¹ The actual consequences of frustration will, of course, vary with the circumstances of each case and the nature of the real property interest which has been terminated.