***Discharge of Contractual Obligations* by Jordan English (Oxford University Press, 2025)**

On 25 November 2025 in the Middle Temple London, Lord Burrows was one of a panel of four discussing this new book by Associate Professor Jordan English. He was asked to discuss chapters 6 and 7 on Frustration and Common Mistake. Here are his comments.

In the light of what I am about to say, I want to start by making clear that I found Jordan's chapters on Frustration and Common Mistake penetrating and beautifully clear and well-written. They have caused me to think very carefully about my own preferred view. All interested in contract law should read what Jordan has to say.

Jordan's essential thesis is that, in English law, there is no doctrine of frustration or of common mistake. Rather the case law in each of those two areas is best explained by recognising that the promised performance rests on a condition and that condition has failed. The failure of condition means that each contractual obligation to perform is discharged. Therefore, if a music hall burns down after the contract for its hire is made, there is no breach by the owner because, subject to terms to the contrary, there was a condition in the contract that the music hall should still be in existence. Similarly, if the music hall burns down before the contract of hire is made, there is no breach by the owner because, subject to terms to the contrary, there was a condition in the contract that the music hall was then in existence. This means that, rather than being imposed by a legal rule or doctrine external to the parties, the decisions can all be properly and better explained as turning on the correct construction of the contract in question, including on an implied term, and hence on the objective common intention of the parties.

At a high level of generality, we might say that the law of contract either effects the parties' objective intentions through the terms of their agreement or it imposes on the parties certain rules or doctrines. As regards the latter, for example, no one would suggest that the law on contracts entered into by misrepresentation or duress or undue influence or the impact of illegality or restraint of trade on a contract rests on the terms of the contract. It is plainly not a condition of the contract that the other party is not exercising duress. Therefore, at a high level of generality what we are asking ourselves is whether frustration and common mistake are best viewed as rules or doctrines imposed externally by the law where the parties' objective intentions have run out or whether they are best seen as resting on the parties' objective intentions.

In one of the great articles on comparative law, 'Rules and Terms, Civil Law and Common Law' (1974) 48 Tulane LR 946, Professor Barry Nicholas wrote, at pp 948-9:

"In the field of contract, a fundamental difference between French law and the traditional Common law is that the Common law habitually attempts to derive all the consequences of a contract from the will of those who made it (or at least ostensibly to

do so, for the French lawyer would say that the will from which those consequences are derived is a very artificial or objective one) whereas the French law (and the Civil Law generally) will often have recourse to rules."

It might therefore be said that what Jordan is here arguing for is a very traditional common lawyer's approach of viewing these areas as resting on the terms of the contract. Indeed, Jordan explicitly recognises that what he is arguing for is not new. At para 10.3 of his book, he writes:

"The primary claims advanced in this book are not new and have been made before. This book should be seen not as a rejection of tradition in favour of novelty but as a return to an earlier and better understanding – a return to the contract law that modern contract lawyers seem to have forgotten."

This debate is therefore not a new one. Even if one accepts that the conventional modern view is that there is a doctrine of frustration, Jordan's thesis is very close to the judicial surface and is played out under the question, "what is the juristic basis of frustration?" with one of the main answers being the construction of the promise and another being an implied term. And in respect of common mistake, the debate is openly played out in terms of the long-asked question, "is there a doctrine of common mistake at all?". When I studied contract law for the first time in 1976, I went to a series of lectures given by Robert Venables, then Law Fellow at St Edmund Hall, who subsequently went on to become an eminent tax silk. The thesis of his lectures was that there is no doctrine of common mistake in English law and that all the cases can be better explained as turning on whether or not there is a relevant implied condition that, for example, goods being bought exist or that performance is possible. We were also required to read articles by Christopher Slade and JC Smith that advocated an approach to common mistake that is similar to that put forward by Jordan.

However, my preference is to accept what Jordan calls the modern accepted view. In my opinion, it is more illuminating to accept that that there is a doctrine of frustration and a doctrine of common mistake. They will be imposed on the parties, ultimately as a matter of fairness and justice, subject to the parties having contracted to the contrary. I find this more illuminating and easier to understand than seeing everything as turning on the construction of the contract or an implied term. To turn Jordan's favourite phrase against him, I regard his resurrection of all this law as resting on the objective intention of the parties as taking a "capacious view" of the contractual agreement. Moreover, we have moved on in recent years and now have clear and well-established rules on interpretation of a contract and on implied terms and on the relationship between them and I am not convinced that Jordan's approach fits those rules. Eg we are looking for business efficacy or obviousness for an implied term of fact but I am not sure that either of those tests is satisfied in respect of the terms one needs in the context of frustration or common mistake. Put another way, the parties' objective intentions have run out and

do not deal with the situation. That is because either, at the time the contract was made, the parties did not know about what has already happened (ie they were both mistaken) or because there has been a subsequent change of circumstances that they did not anticipate. The law has to work out as matter of policy the response to the parties being mistaken or a change of circumstances after the contract was made. I regard it as fictional to think that the parties have already dealt with this so that it all rests on their objective intentions.

I therefore essentially agree with what Charles Fried wrote about mistake and frustration in *Contract as Promise* at p 60:

"In all of these cases the court is forced to sort out the difficulties that result when parties think they have agreed but actually have not. The one basis on which these cases cannot be resolved is on the basis of the agreement – that is, of contract as promise … Judgment must therefore be based on principles external to the will of the parties."

Jordan gives a number of reasons why he thinks it is preferable to see these areas as based on conditions in the contract. As regards frustration, these include explaining that it is each party's obligation that is discharged not the contract; and that there are difficulties with partial frustration. And as regards common mistake, he says that this clashes with the normal objective approach to intention, that it has no justification and that it obscures the relationship with other areas of the law not least frustration.

However, in the light of what I have already said, you will not be surprised that I do not accept the force of those supposed advantages. On the contrary, at a granular level, I think one can best understand what is happening by thinking of narrow doctrines of frustration and common mistake. In policy terms, having these as narrow doctrines makes perfect sense. In general, parties should not be able to escape from contracts just because they have made a common mistake or because circumstances have changed. That would undermine the certainty of contract. But there are extreme examples, in general terms impossibility, whether initial or subsequent, where the default position as a matter of fairness is that it is inappropriate for either party to bear the risk in question. The law has decided that, subject to terms to the contrary, the parties should be allowed to escape. Far from being inconsistent with other areas, recognising common mistake is consistent with clear doctrines of mistake that cannot rest on conditions such as non est factum or rectification in equity. Nor do I accept that there is any insurmountable problem about seeing frustration as discharging the contract; or about the relationship between frustration and excuses which deal with changes of circumstance that are less extreme than frustration.

In conclusion, while I disagree with Jordan in these chapters (and I have confined my comments this evening to what I was asked to talk about), this is a great book, a work of

outstanding doctrinal or practical legal scholarship, and fully deserving of the Peter Birks Society of Legal Scholars Prize for 2025. I congratulate Jordan on his achievement.