House of Lords before Lord Chancellor Lord Wilberforce Lord Simon of Glaisdale Lord Russell of Killowen Lord Roskill. 11th December 1980

Lord Hailsham of St. Marylebone, my lords,

1. We are all agreed that this appeal from decisions of Master Waldman and Sheen J. refusing leave to defend under RSC 0.14 fails on the facts for the reasons given by my noble and learned friends to which personally I have nothing to add. The appellants have failed to raise a triable issue.

2. Nevertheless, though they arrive in your Lordships' House by an unusual route, the proceedings do raise an interesting and important general question of principle relating to the extent and nature of the law of frustration which has long been debated and which, since the matter has reached this stage and has been fully argued, should now be decided by your Lordships' House.

3. This question is the applicability of the law of frustration to leases and agreements for a lease. The question is discussed at length in ***Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.*** [1945] A.C. 221 by the decision of which in the Court of Appeal, Master Waldman and Sheen J. rightly considered themselves bound, with the result that, in dismissing the appeal from Master Waldman, Sheen J. gave his certificate under section 12 of the Administration of Justice Act 1969, and so, for the first time in my experience, an Order 14 summons bypasses the Court of Appeal and " leapfrogs " directly to the Appellate Committee of the House of Lords.

4. Before I reach a discussion of the point of law it is necessary that I fill in the factual background. This illustrates the curious and sometimes unexpected results which can ensue from the present vogue of listing industrial buildings as part of our national heritage. Kingston Street, Hull is a continuation of English Street (of which, originally it may have been part) and terminates by running perpendicularly into a T junction with Railway Street. Before it reaches this end, it crosses more or less at right angles an intersection with Commercial Road and Manor House Street. Hereinafter, when I speak of Kingston Street, I shall be referring solely to that section of it between this intersection and the T junction with Railway Street. Although it is now, it would seem, a public highway for all types of traffic, it may well be that at one time it was the private property of a railway company, since otherwise it is difficult to explain the "*demise* " (sic) of a private right of way along it by the lessors of the property about to be described.

5. Kingston Street is bounded on both sides by warehouses and on part of one side by a railway shed. At one side of it, at the point nearest the intersection, is a derelict and ruinous Victorian warehouse which at some time has become, under the laws for the conservation of our national heritage, a " listed building " which means that it cannot be demolished without the consent of the Secretary of State for the Environment, and that, if the demolition is objected to by local conservationists (as in fact happened), this consent will not be granted without the holding of a public local enquiry. Even assuming a result favourable to demolition the total process is likely to last a year. In the events which have happened, the process is not yet complete, but, on the material before us, is likely to be concluded by the end of December 1980 or the beginning of January 1981. By that time, it will have lasted about 20 months.

6. Since, in course of time, the Victorian warehouse became dangerous as well as derelict it evidently presented problems of safety to the City Council of Hull. In 1978 they placed a restriction order on Kingston Street, and on the 16th May 1979 they closed it altogether to vehicular traffic. It was not made altogether clear to us under what powers they acted, but the closure was subsequently confirmed and continued by the Secretary of State, and, at the present, access to Kingston Street is not merely prohibited to vehicles, but rendered physically impossible, by the erection across it by the local authority of a fenced barrier. This will not be removed until the demolition process is completed at the end of the current year or the beginning of next.

7. Opposite the ruinous listed building, there is another warehouse, more or less triangular in shape, the only access to which (except perhaps on foot) is via a loading bay in Kingston Street. The consequence of the application for demolition, and the subsequent proceedings, has been that, from the 16th May 1979 until the time when the barriers are finally removed and the prohibition order lifted, this triangular warehouse has been rendered totally useless for the one purpose, that of a commercial warehouse, for which alone it is fitted, and for which alone, by the terms of the contract between the parties, it may be lawfully used.

8. In 1974 the triangular warehouse had become the subject of a demise between the plaintiffs/respondents to these proceedings, the lessors, and the defendants/appellants. This demise was contained in a lease dated the 12th July 1974 and was expressed to run for 10 years from the 1st January 1974. The terms of the lease, most of which are not unusual in documents of this kind, contained inter alia a covenant to pay an annual rent (£6,500 for the first five years, and for the second five years subsequently increased by agreement in accordance with a formula contained in clause 4(1) of the lease to £13,300) payable in advance by four quarterly instalments. The present proceedings, commenced by writ dated the 9th July 1979, are for the payment of £5,115.38 being the two quarterly instalments due on the 1st April, and the 1st July 1979. There is no dispute between the parties as to the amount of this sum, nor, subject to the defence of frustration hereinafter to be mentioned, of the liability of the defendants/appellants to pay it.

9. The lease also contained obligations by the tenants to pay rates, to repair, to pay a rateable proportion of the expense of cleaning and maintaining the sewers, roads etc., to insure at full value in the joint names of landlord and tenant, to paint, to yield up in good and substantial repair at the end of the tenancy, not to assign or sublet,

alter, or to utilise otherwise than for the purpose of a warehouse without the written consent of the landlord, and other matters. The landlord's covenants included an express covenant of quiet enjoyment. There were special provisions for the suspension of the obligation to pay rent and for the termination of the tenancy at the option of the landlord in case of destruction by fire, and provisions for re-entry by the landlord in case of breach of covenant, or on six months notice, if the premises were required for the proper operation of British Railways (with whom the plaintiffs are associated).

10. The sole defence raised by the defendants/appellants to their obligation to pay rent was that, by reason of the events described above the lease had become frustrated and was therefore wholly at an end. By their printed case each party raised two questions for your Lordships' decision. The first is the broad question of principle, viz. whether the doctrine of frustration can ever apply to determine a lease, and the second, of particular application, whether even if the doctrine can on occasion apply, there is here a triable issue as to whether it does apply to the lease between the parties in the circumstances described. In the event of both questions being determined in favour of the appellants, your Lordships, if allowing the appeal, would have no option but to return the case for trial at first instance, with the possible result that, after a lapse of two years, it might reappear in your Lordships' list for a second hearing. In any event, unless some guidance is given on the first issue, sooner or later argument would have to be directed to it in some later proceeding. It is therefore perhaps as well that, although dismissing the appeal on the second question, we thought it right to hear the first fully argued on both sides. We are doubly indebted to counsel for the appellants, who, though aware that he had not succeeded, nevertheless stayed to deliver an admirably concise reply to the forceful arguments on the point of principle helpfully presented on behalf of the respondents.

11. The doctrine of frustration is of comparatively recent development. The general rule of common law, laid down as early as 1647 in ***Paradine v. Jane*** (Aleyn 26) is that the performance of absolute promises is not excused by supervening impossibility of performance. ***Paradine v. Jane*** itself, a case arising out of the civil war, was like the present, an action of debt based on a covenant to pay rent contained in a lease. But, since the doctrine of frustration had not at that stage come into existence, the argument turned solely on the absolute and unconditional nature of the promise to pay the rent, and the applicability to the estate in land created by the demise of any such doctrine did not arise.

12. It is generally accepted that the doctrine of frustration has its roots in the decision of the court of Queen's Bench given by Blackburn J. in ***Taylor v. Caldwell*** (1863) 3 B & S 826. In that case, the parties to the contract had used terms appropriate to the relationship of landlord and tenant describing the money payment as " *rent*" and the transaction as a " *letting*". But, after analysing the facts, Blackburn J. decided that the true nature of the transaction was not one of landlord and tenant but one of licensor and licensee. He then added, cryptically, the words: " *Nothing, however, in our opinion depends on this* ". I am inclined to think that by these words he was in effect taking the view which I myself am about to express, but, as counsel for the respondents firmly pointed out when I put the point to him in argument, they are capable of a more neutral meaning, viz., that since the question of demise did not arise in the case before the court, it did not call for decision. I am content to assume, though I am inclined to the contrary view, that this is right.

13. At least five theories of the basis of the doctrine of frustration have been put forward at various times, and, since the theoretical basis of the doctrine is clearly relevant to the point under discussion, I enumerate them here. The first is the " *implied term* ", or " *implied condition* " theory on which Blackburn J. plainly relied in ***Taylor v. Caldwell,*** as applying to the facts of the case before him. To these it is admirably suited. The weakness, it seems to me, of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement. In the present case, had the officious bystander pointed out to the parties in July 1974 the danger of carrying on the business of a commercial warehouse opposite a listed building of doubtful stability and asked them what they would do in the event of a temporary closure of Kingston Street pending a public local inquiry into a proposal for demolition after the lease had been running for over five years, I have not the least idea what they would have said, or whether either would have entered into the lease at all. In ***Embiricos v. Sydney Reid & Co.*** [1914] 3 K.B. 45 at 54 Scrutton J. appears to make the estimate of what constitutes a frustrating event something to be ascertained only at the time when the parties to a contract are called on to make up their minds, and this I would think, to be right, both as to the inconclusiveness of hindsight which Scrutton J. had primarily in mind and as to the inappropriateness of the intrusion of an officious bystander immediately prior to the conclusion of the agreement.

14. Counsel for the respondent sought to argue that ***Taylor v. Caldwell*** could have as easily been decided on the basis of a total failure of consideration. This is the second of the five theories. But *Taylor* v. *Caldwell* was clearly not so decided, and in any event many, if not most, cases of frustration which have followed *Taylor* v. *Caldwell* have occurred during the currency of a contract partly executed on both sides, when no question of total failure of consideration can possibly arise.

15. In ***Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*** [1926] A.C. 497, 510 Lord Sumner seems to have formulated the doctrine as a " *device (sic) by* " ***which the rules as to absolute contracts are reconciled with a special*** " *exception which justice demands* " and Lord Wright in ***Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*** [1944] A.C. 265 at 275 seems to prefer this formulation to the implied condition view. The weakness of the formulation, however, if the implied condition theory, with which Lord Sumner coupled it, be rejected is that, though it admirably expresses the purpose of the doctrine, it does not provide it with any theoretical basis at all.

16. ***Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*** is, it seems to me, really an example of the more sophisticated theory of" frustration of the adventure " or " *foundation of the contract*" formulation, said to have originated with ***Jackson* v. *Union Marine Insurance Co. Ltd.*** (1874) L.R. 10 C.P. 125, cf. also e.g. per Goddard J. in ***W. J. Tatem Ltd. v. Gamboa*** [1939] 1 K.B. 132 at 138. This, of course, leaves open the question of what is, in any given case the foundation of the contract or what is " *fundamental* " to it, or what is the " *adventure* ". Another theory, of which the parent may have been Lord Loreburn in ***Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Co.*** [1916] 2 A.C. 397, is that the doctrine is based on the answer to the question: *" What in fact is the true meaning of the contract? "* See ***Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Co.*** [1916] 2 A.C. 397, 404). This is the " *construction theory* ". In ***Davis Contractors Ltd. v. Fareham U.D.C.*** [1956] A.C. 696 at 729 Lord Radcliffe put the matter thus, and it is the formulation I personally prefer:

" 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. Non haec in foedera veni. It was " not this that I promised to do ".

17. Incidentally, it may be partly because I look at frustration from this point of view, that I find myself so much in agreement with my noble and learned friends that the appellants here have failed to raise any triable issue as to frustration by the purely temporary, though prolonged, and in 1979, indefinite, interruption, then expected to last about a year, in the access to the demised premises. In all fairness however, I must say that my approach to the question involves me in the view that whether a supervening event is a frustrating event or not is, in a wide variety of cases, a question of degree, and therefore to some extent at least of fact, whereas in your Lordships' House in ***Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H.*** [1962] A.C. 93 the question is treated as one at least involving a question of law, or, at best, a question of mixed law and fact. For a discussion of the apparent inconsistency of this view with the verdict of the jury in ***Jackson* v. *Union Marine Insurance Co. Ltd.*** (1874) L.R. 10 C.P. 125 see Professor Treitel's treatise on Contracts 5th Edition at p.671 when the author suggests that the reconciliation may lie in the distinction between primary and secondary facts now developing as the result of the disappearance of the civil jury.

18. This discussion brings me to the central point at issue in this case which, in my view, is whether or not there is anything in the nature of an executed lease which prevents the doctrine of frustration, however formulated, applying to the subsisting relationship between the parties. That the point is open in this House is clear from the difference of opinion expressed in the *Cricklewood case (supra)* between the second Lord Russell of Killowen and Lord Goddard on the one hand, who answered the question affirmatively, and Viscount Simon and Lord Wright on the other, who answered it negatively, with Lord Porter reserving his opinion until the point arose definitively for consideration. The point, though one of principle, is a narrow one. It is the difference immortalised in *H.M.S. Pinafore* between *"never"* and *"hardly ever",* since both Lords Simon and Wright clearly conceded that, though they thought the doctrine applicable in principle to leases, the cases in which it could properly be applied must be extremely rare.

19. With the view of Viscount Simon and Lord Wright I respectfully agree. It is clear from what I have said already that, with Lord Radcliffe in the passage I have cited, I regard these cases as a subspecies of the class of case which comes so regularly before the courts, as to which of two innocent parties must bear the loss as the result of circumstances for which neither is at all to blame. Apart from the statute of 1943, the doctrine of frustration brings the whole contract to an end, and in the present case, apart from any adjustment under that Act and any statutory right to compensation under the closure order, the effect of frustration, had it been applicable, would have been to throw the whole burden of interruption for 20 months on the landlord, deprived as he would be of all his rent, and imposed, as he would have, upon his shoulders the whole danger of destruction by fire and the burden of reletting after the interruption. As it is, with the same qualification as to possible compensation, the tenant has to pay the entire rent during the period of interruption without any part of the premises being usable at all, together with the burden (such as it may be) of the performance of the other tenant's covenants which include covenants to insure and repair. These are no light matters.

20. I approach the question first via the authorities, mainly catalogued in the report of the ***Cricklewood*** case at first instance and in the Court of Appeal. I need not analyse these in detail, but, your Lordships having done so in the course of argument, I must say that, although they all tend in that direction, they did not and they never did afford the court compelling authority for the proposition advanced. The point was not argued at all in front of Asquith J., and in the very short judgment of the Court of Appeal, the three cases cited ***London & Northern Estates Co. v. Schlesinger*** [1916] 1 K.B. 20, ***Whitehall Court Ltd. v. Ettlinger*** [1920] 1 K.B. 680, and ***Matthey v. Curling*** [1922] 2 A.C. 180 do not, I believe, on analysis constitute authority for the proposition. The most that can be said is that, as Lord Goddard said, the view that frustration did not apply to leases was widely held in the profession at the time and that Lord Atkinson in ***Matthey v. Curling*** [1922] 2 A.C. 180 at pp.233, 237 gave expression to the view that ***Whitehall Court v. Ettlinger*** *(supra)* was rightly decided. I agree here with what Lord Simon said on this at p.231 of the ***Cricklewood case*** *(supra),* and I would add that what was decided both in ***Whitehall Court*** *(supra)* and *London and Northern Estates (supra)* was no more than that the legal estate created by a lease that was not destroyed by wartime requisition and such requisition was not an eviction by title paramount. In the Court of Appeal I do not find that Bankes L.J. (at p. 185) or Younger L.J. (at p.210) were unequivocal on the present point at issue, and I note that Younger L.J. committed himself to the now untenable proposition that the doctrine of frustration was not to be extended. Atkin L.J. (who dissented) gave, at pp.199 and 200 important reasons for

rejecting the " *never* " principle and in ***Cricklewood*** at p.230 Viscount Simon expressly approved the crucial paragraph in Atkin L.J.'s judgment in support of the " hardly ever " doctrine. Before us there was some discussion in argument of American cases, especially the liquor saloon cases based on prohibition, in some of which at least the frustration doctrine was applied to leases. We were also referred to the opinions of Laskin J. in Canada in ***Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*** (1971) 17 D.L.R. (3d) 710, at p.721, and that of Isaacs J. in the Australian case of ***Firth v. Halloran*** (1926) 38 C.L.R. at p.269 (where, however, he appears to have differed from his colleagues), all of which favour the " *hardly ever*" doctrine. Reference was also made to text book authority. Megarry & Wade (4th edition) tend to the " never " view, but run into fairly heavy weather when they discuss the possible destruction of a flat on the higher floors of a tenement building (see p.675). Professor Treitel, after referring to ***Cusack- Smith v. London Corporation*** [1956] 1 W.L.R. at 1368 which in turn relied on ***Denman v. Brise*** [1949] 1 K.B. p.22 esp. at p.26 (the only case where frustration appears to have been advanced on behalf of a landlord) comes to the conclusion that the " *never* " position is only open to review at the level of the House of Lords but concludes that the " *hardly ever* " view is intrinsically preferable. This also appears to be the opinion of the American writers Williston and Corbin and in England of Cheshire and Fifoot.

21. I conclude that the matter is not decided by authority and that the question is open to your Lordships to decide on principle. In my view your Lordships ought now so to decide it. Is there anything in principle which ought to prevent a lease from ever being frustrated? I think there is not. In favour of the opposite opinion, the difference in principle between real and chattel property was strongly urged. But I find it difficult to accept this, once it has been decided, as has long been the case, that time and demise charters even of the largest ships and of considerable duration can in principle be frustrated. This was sufficiently well established by 1943 to make these charters worthy of an express exception upon an exception in the Law Reform (Frustrated Contracts) Act 1943 section 2(5), and since then the Suez cases have supervened. There would be something anomalous in the light of what has been going on recently in the Shatt el Arab to draw a distinction between a leased oil tanker and a demise-chartered oil tanker. Other anomalies would follow if the absolute principle were to be applied to leases. Golf J. appears to have found no difficulty in applying frustration to an agreement for a lease (which creates an equitable estate in the land capable of being specifically enforced and thereby converted into a legal estate operating as from the beginning of the equitable interest). See ***Rom Securities Ltd. v. Rogers (Holdings) Ltd.*** (1968) 205 Estates Gazette 427. Personally I find the absurdities postulated by Megarry and Wade in the case of the destruction by fire of the upper flat of a tenement building (already referred to) unacceptable if the " never " doctrine were rigidly applied, and I am attracted by Professor Treitel's argument (at p.669 of the current edition of his work on contracts) of the inequitable contrast between a contract for the provision of holiday accommodation which amounted to a licence, and thus subject to the rule in *Taylor* v. *Caldwell* and a similar contract amounting to a short lease. Clearly the contrast would be accentuated if Goff J.'s view be accepted as to the applicability of the doctrine to agreements for a lease (see above).

22. I accept of course that systems of developed land law draw a vital distinction between land, which is relatively permanent and other types of property which are relatively perishable. But one can overdo the contrast. Coastal erosion as well as the " vast convulsion of nature" postulated by Viscount Simon in ***Cricklewood*** (at p.229) can, even in this island, cause houses, gardens, even villages and their churches to fall into the North Sea, and, although the law of property in Scotland is different, as may be seen from ***Tay Salmon Fisheries Co. Ltd. v. Speedie*** 1929 S.C. 593, whole estates can there, as Lord President Clyde points out at p.600, be overblown with sand for centuries and so fall subject to the *rei interitus* doctrine of the civil law. In ***Taylor v. Caldwell*** itself Blackburn J., after referring to the Digest on the subject of " *obligatio de certo corpore* " on which in part he founds his new doctrine, expressly says: (at p. 834) *" No doubt the propriety, one might almost say the necessity, of " the implied condition is more obvious when the contract relates to " a living animal, whether man or brute, than when it relates to some " inanimate thing (such as in the present case a theatre) [emphasis " mine] the existence of which is not so obviously precarious as that " of the live animal, but the principle is adopted in the civil law as " applicable to every obligation of which the subject is a certain " thing ".*

He then refers to Pothier, Traite des Obligations partie 3. chap. 6. art. 3 in support of his contention.

23. No doubt a long lease, say for example one for 999 years, is almost exactly identical with the freehold for this purpose, and therefore subject to the ordinary law regarding the incidence of risk (recognised as regards chattels in section 7 of the former Sale of Goods Act 1893). But there is no difference between chattels in this respect and real property except in degree. Long term speculations and investments are in general less easily frustrated than short term adventures and a lease for 999 years must be in the longer class. I find myself persuaded by the argument presented by Atkin L.J. in his dissenting judgment in ***Matthey v. Curling*** at p.200 and quoted with approval by Viscount Simon in ***Cricklewood*** at p.230. In that passage Atkin L.J. said:

" It does not appear to me conclusive against the application to a " lease of the doctrine of frustration that the lease, in addition to " containing contractual terms, grants a term of years. Seeing that " the instrument as a rule expressly provides for the lease being " determined at the option of the lessor upon the happening of certain " specified events, I see no logical absurdity in implying a term that " it shall be determined absolutely on the happening of other events " namely, those which in an ordinary contract work a frustration."

I pause here only to observe that, in the instant case, the lease gave the lessor a contingent right of determination in case of destruction by fire or in case of a need for the use of the premises in connection with the railways, and

to point out that in the War Damage Acts the lessee was given a statutory right, albeit different in kind from the doctrine of frustration, to disclaim a current lease on the happening of other events as the result of enemy action.

24. In the result, I come down on the side of the *" hardly ever "* school of thought. No doubt the circumstances in which the doctrine can apply to leases are, to quote Viscount Simon in *Cricklewood* at p.231, " exceedingly " rare ". Lord Wright appears to have thought the same, whilst adhering to the view that there are cases in which frustration can apply (ibid, p.241). But, as he said in the same passage: *" The doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula ".*

25. To this school of thought I respectfully adhere. Like Lord Wright, I am struck by the fact that there appears to be no reported English case where a lease has ever been held to have been frustrated. I hope this fact will act as a suitable deterrent to the litigious, eager to make legal history by being first in this field. But I am comforted by the reflexion of the authority referred to in the Compleat Angler (pt. i, ch. 5) on the subject of strawberries: " Doubtless God could have made a better berry, but doubtless God never did ". I only append to this observation of nature the comment that it does not follow from these premises that He never will, and if it does not follow, an assumption that He never will becomes exceedingly rash.

26. In the event my opinion is that the appeal should be dismissed with costs.

Lord Wilberforce, My lords,

27. There are two questions for decision in this appeal: *(a)* whether the doctrine of frustration can apply to a lease so as to bring it to an end if a frustrating event occurs; *(b)* whether, if so, in the circumstances the existing lease between the respondent and the appellant has been determined.

28. The lease was dated 12th July 1974. The respondent as landlord let to the appellant as tenant a purpose-built warehouse in Hull for a term of ten years from 1st January 1974. The rent was £6,500 a year during the first five years, and for the remainder was to be the open-market rent of the demised premises let as a warehouse. In fact this was fixed at £13,300.

29. There was a covenant by the tenant not without the landlord's consent to use the premises for any purpose than that of warehousing in connection with the tenant's business, or to assign, underlet, or part with possession.

30. There was only one access to the warehouse—along a street called Kingston Street. This would appear to be a public highway, but the land- lord purported to grant a right-of-way along it for all purposes connected with the occupation of the premises. On 16th May 1979 the City Council made an order under section 12(1) of the Road Traffic Regulation Act 1967 closing Kingston Street for use with or without a vehicle. This was done because another warehouse, of the Victorian period and style, abutting on the street was in a dangerous condition. Because it was a listed building there were conservationist objections against its demolition. The order was, it appears, renewed by the Secretary of State, under the same Act on 15th August 1979 and again, purportedly, but with questionable validity, by the Council's Engineer under section 25 of the Public Health Act 1961. We must assume, at this stage, that all these acts of closure were valid and legal. I shall refer further to this matter when dealing with the second question.

31. Because of this closure, which made the warehouse unusable for the only purpose for which it could be used under the lease, the appellant contended that the lease was frustrated, so that rent ceased to be payable. In an action for rent due, followed by a summons for summary judgment under RSC.O.XIV the master, upheld by the judge, held that the defence of frustration was not available as a matter of law. That the doctrine of frustration was not available to determine a lease had in fact been decided by the Court of Appeal in ***Leighton's Investment Trust Ltd. v. Cricklewood Property and Investment Trust Ltd. (the "Cricklewood" case***) [1943] K.B. 493. An appeal was brought to this House but, on the question of law, their Lordships were divided, two Lords holding that the doctrine could be applied, two that it could not, and the fifth expressing no opinion. The House unanimously held, on the facts, that frustration had not occurred. The point is therefore open for decision.

32. My Lords, the arguments for and against application of this doctrine are fully and cogently put in the rival speeches in the ***Cricklewood case***, for its possible application by Viscount Simon L.C. and Lord Wright, against by Lord Russell of Killowen and Lord Goddard. I can therefore give fairly briefly the reasons which have persuaded me, on the whole, that the former ought to be preferred.

    1. The doctrine of frustration of contracts made its appearance in English law in answer to the proposition, which since ***Paradine v. Jane*** (1647) Aleyn 26 had held the field, that an obligation expressed in absolute and unqualified terms, such as an obligation to pay rent, had to be performed and could not be excused by supervening circumstances. Since ***Taylor v. Caldwell*** (1863) 3 B & S 826, it has been applied generally over the whole field of contract.

    2. Various theories have been expressed as to its justification in law: as a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands, as an implied term, as a matter of construction of the contract, as related to removal of the foundation of the contract, as a total failure of consideration. It is not necessary to attempt selection of any one of these as the true basis: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration. One could see, in relation to the present contract, that it could provisionally be said to be appropriate to refer to an implied term, in view of the grant of the right-of-way, or to removal of the foundation of the contract—viz. use as a warehouse. In any event, the

doctrine can now be stated generally as part of the law of contract; as all judicially evolved doctrines it is, and ought to be, flexible and capable of new applications.

3. In view of this generality, the onus, in my opinion, lies on those who assert that the doctrine can *never* apply to leases. They have at once to face the argument that it has been held to apply to demise charters of ships, (and presumably by analogy could apply to hirings of other chattels), and to licences for use *(Krell* v. *Henry* [1903] 2 K.B. 740 and other Coronation cases). So why not to leases of land? To place leases of land beyond a firm line of exclusion seems to involve anomalies, to invite fine distinctions, or at least to produce perplexities. How, for example, is one to deal with agree- ments for leases? Refusal ever to apply the doctrine to leases of land must be based upon some firm legal principle which cannot be departed from: (compare Art. 62 of the Vienna Convention on treaties which excludes boundary disputes from the analogous doctrine in international law).

4. Two arguments only by way of principle have been suggested. The first is that a lease is more than a contract: it conveys an estate in land. This must be linked to the fact that the English law of frustration, unlike its continental counterparts, requires, when it applies, not merely adjustment of the contract, but its termination. But this argument, by itself, is incomplete as a justification for denying that frustration is possible. The argument must continue by a proposition that an estate in land once granted cannot be divested—which, as Viscount Simon L.C. pointed out, begs the whole question.

   It was pointed out, however, by Atkin L.J. in ***Matthey v. Curling***, in a passage later approved by Viscount Simon, that as a lease can be determined, according to its terms, upon the happening of certain specified events, there is nothing illogical in implying a term that it should be determined on the happening of other events—namely, those which in an ordinary contract work a frustration ([1922] 2 A.C. 200). It has indeed been held, with reference to an agreement for a lease, that this can be put an end to through implication of a term *(**Rom Securities, Ltd. v. Rogers (Holdings) Ltd.*** (1967) 205 Estates Gazette 427, per Goff J.). So why, in the present case, for example, should an actual lease not be determinable by implication of a term? If so, it could hardly be suggested that a lease was not capable of frustration even though the theory of frustration had shifted to another basis.

   In the second place, if the argument is to have any reality, it must be possible to say that frustration of leases cannot occur because in any event the tenant will have that which he bargained for, namely, the leasehold estate. Certainly this may be so in many cases—let us say most cases. Examples are ***London & Northern Estates Co. v. Schlesinger*** [1916] 1 K.B. 20, where what was frustrated (viz. the right of personal occupation) was not at the root of the contract, and requisitioning cases, e.g. ***Whitehall Court Ltd. v. Ettlinger*** [1920] 1 K.B. 680, where again the tenant was left with something he could use. But there may also be cases where this is not so. A man may desire possession and use of land or buildings for, and only for, some purpose in view and mutually contemplated. Why is it an answer, when he claims that this purpose is " *frustrated* " to say that he has an estate if that estate is unusable and unsaleable? In such a case the lease, or the conferring of an estate, is a subsidiary means to an end, not an aim or end of itself. This possible situation is figured, in fact, by Viscount Simon L.C. in *Cricklewood*.

   The second argument of principle is that on a lease, the risk passes to the lessee, as on a sale it passes to the purchaser (see per Lord Goddard in ***Cricklewood***). But the two situations are not parallel. Whether the risk—or any risk—passes to the lessee depends on the terms of the lease: it is not uncommon indeed, for some risks—of fire or destruction—to be specifically allocated. So in the case of unspecified risks, which may be thought to have been mutually contemplated, or capable of being contemplated by reasonable men, why should not the court decide on whom the risks are to lie? And if it can do this and find that a particular risk falls upon the lessor, the consequence may follow that upon the risk eventuating the lessee is released from his obligation.

   To provide examples, as of a 999-year lease during which a frustrating event occurs, or of those in decided cases (see above), to show that in such cases frustration will not occur is insufficient as argument. These examples may be correct: they may cover most, at least most normal, cases. But the proposition is that there can be no case outside them and that I am unable to accept.

5. I find the experience in the United States of America instructive. It is clear that in the common law jurisdictions of that country, the doctrine of frustration has developed and is still developing. It has been applied *inter alia* in connection with Prohibition and leases of liquor saloons, to leases. Yet neither of the well-known commentators Williston, or Corbin, sees any doctrinal objection to this. I quote one passage from Corbin:

   " In modern cases, there has been a tendency to treat a lease as " a contract instead of a conveyance, although in fact it is both at " once. The older allocation of risks does not now always seem just. " Many short-term leases have been made, in which the purpose of the " lessee was to conduct a liquor saloon, a purpose known to the " lessor and one which gave to the premises a large part of its rental " value. There followed the enactment of a ... prohibitory law " preventing the use of the premises for the expected purpose. The " prohibition law does not make it impossible or illegal for the lessee " to keep his promise to pay the rent . . . but it frustrates his purpose " of using the premises for a liquor saloon in the reasonable hope of " pecuniary profit. If the terms of the lease are such that the lessee is " restricted to this one use, it has been held in a considerable number " of cases that his duty to pay rent is discharged." (Corbin on Contracts (1951) Vol. 6, para. 1356.)

Williston is to a similar effect, where it is pointed out that termination of a lease by frustration is more difficult to establish than termination of a mere contract (Williston on Contracts, 3rd Ed. (1978), para. 1955).

There is a similar indication in Canada. The Supreme Court had to consider in 1971 the extent to which the contractual doctrine of wrongful repudiation could be applied to a lease—the argument being that the landlord was limited to remedies given by the law of property. In an instructive judgment Laskin J. said:

" It is no longer sensible to pretend that a commercial lease, such " as the one before this court, is simply a conveyance and not also " a contract. It is equally untenable to persist in denying resort to " the full armoury of remedies ordinarily available to redress " repudiation of covenants, merely because the covenants may be " associated with an estate in land." *Highway Properties Ltd.* v. *Kelly, Douglas & Co., Ltd.* (1971) 17 DLR, 3rd, 710, 721.

So, here is a route opened by common law jurisdictions, by which the result of frustration of leases may be attained. This may be wide, or narrow, or indeed very narrow: that we need not decide in advance. But it would be wrong to erect a total barrier inscribed " You shall not pass ".

6. I can deal briefly with the authorities: they are one way (against application of the doctrine), they are partial. They decide that particular sets of facts do not amount to frustrating events. A judgment often quoted is that of Lush J. in *Schlesinger's* case (u.s.) where a lessee was unable to occupy the rented premises because he was an alien enemy:

" As the contract could be performed without his personal residence, " the fact that his personal residence was prohibited by the Order did " not make the performance of the contract impossible. But there is, " I think, a further answer to the contention. It is not correct to " speak of this tenancy agreement as a contract and nothing more. " A term of years was created by it and vested in the appellant, and I " can see no reason for saying that because this Order disqualified him " from personally residing in the flat it affected the chattel interest which " was vested in him by virtue of the agreement." l.e. p.24.

There is nothing to disagree with here—the argument may indeed be valid in many or most cases of leases. It is not expressed as one which must apply to all.

The reasoning of this House in ***Matthey v. Curling*** [1922] 2 A.C. 180. is not " clear " or any authority that the doctrine of frustration does not apply to a lease (see per Lord Wright in *Cricklewood* 1.c. p.230). It was not until *Cricklewood* that the argument was put on principle and fully explored. The governing decision (of the Court of Appeal) was summary, unargued, and based upon previous cases which will not bear the weight of a generalisation. I think that the movement of the law of contract is away from a rigid theory of autonomy towards the discovery—or I do not hesitate to say imposition—by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties.

It is said that to admit the possibility of frustration of leases will lead to increased litigation. Be it so, if that is the route to justice. But even if the principle is admitted, hopeless claims can always be stopped at an early stage, if the facts manifestly cannot support a case of frustration. The present may be an example. In my opinion, therefore, though such cases may be rare, the doctrine of frustration is capable of application to leases of land. It must be so applied with proper regard to the fact that a lease *i.e.* a grant of a legal estate is involved. The court must consider whether any term is to be implied which would determine the lease in the event which has happened and/or ascertain the foundation of the agreement and decide whether this still exists in the light of the terms of the lease, the surrounding circumstances and any special rules which apply to leases or to the particular lease in question. If the *" frustrating event*" occurs during the currency of the lease it will be appropriate to consider the Law Reform (Frustrated Contracts) Act 1943.

33. I now come to the second question which is whether on the facts of the case the appellant should be given leave to defend the action: can it establish that there is a triable issue? I have already summarised the terms of the lease. At first sight, it would appear to my mind that the case might be one for possible frustration. But examination of the facts leads to a negative conclusion. The circumstances which it is claimed amount to a frustrating event are proved by affidavit evidence supplemented and brought up-to-date by other documents. They are as follows. The first order closing Kingston Street was made on 16th May 1979 to take effect from 18th May. The lease had then four years and six-and-a-half months to run. In his affidavit sworn on 20th September 1979 the appellant's solicitor stated that it was likely that " *well over a year "* would have elapsed before a decision could be made as regards the listed Victoria warehouse opposite the appellant's premises, the condition of which made the closure necessary. The Town Clerk of the City of Kingston-upon-Hull had written on 7th August that it was probably unlikely that the matter could be resolved " *within the next year* ". It appears that a local enquiry was held into the future of the listed warehouse, and the Secretary of State on 20th March 1980 approved the Inspectors' report and granted consent for its demolition. On 30th September 1980 the Town Clerk informed the lessors that the estimated date for completion of the demolition was " sometime in late December 1980 or early January 1981 ". I think it is accepted that the re-opening of Kingston Street would immediately follow.

34. So the position is that the parties to the lease contemplated, when Kingston Street was first closed, that the closure would probably last for a year or a little longer. In fact it seems likely to have lasted for just over eighteen months. Assuming that the street is re-opened in January 1981, the lease will have three more years to run.

35. My Lords, no doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of ten years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased. This is a case, similar to others, where the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end. The obligation to pay rent under the lease is unconditional, with a sole exception for the case of fire, as to which the lease provides for a suspension of the obligation. No provision is made for suspension in any other case: the obligation remains. I am of opinion therefore that the lessee has no defence to the action for rent, that leave to defend should not be given and that the appeal must be dismissed.

Lord Simon of Glaisdale, my lords,

36. By a lease dated 12th July 1974 the respondents as landlord let to the appellants (who carry on business of warehousing) as tenant premises which were described in the lease as *" warehouse premises . . . comprising warehouse no. 2 "*. Included in the demise was *" a right of way for purposes " connected with the occupation of the said premises . . . "*: this was along a road called Kingston Street, the only road giving access to the premises. The lease was for 10 years as from 1st January 1974 at a rent of £6,500 during the first 5 years of the term: as for the remainder, a rent review clause provided that *" the yearly rent payable during the last " 5 years of the said term . . . shall be the fair yearly rent of the said* " premises let in the open market for the purpose of a warehouse at the " *commencement of such period ",* being determinable by arbitration in default of agreement. The landlord's reservation of services was subject to compensation to the tenant for disturbance of the tenant's business. Amongst other tenant's covenant's (mostly common form) were the following: —

" (5) To insure and keep insured the said premises to the full value " thereof . . .in the joint names of the landlord and the tenant against " loss or damage by fire and such other risks as may from time to time " be required by the landlord . . .

" (13) Not to do or omit to do or suffer to be done or omitted to be " done in or upon the said premises any act or thing which will render " any increased or extra premium payable for the insurance of the " said premises, or any adjoining property of the landlord . . . provided " always that the tenant's business of warehousing to be carried on " upon the premises shall not constitute any such act or thing as is " referred to in this clause and the tenant shall not be liable in respect " of any increased premiums by virtue of activities in accordance with " the ordinary course of such business.

" (15) Not without the consent in writing of the landlord to use the " said premises or any part thereof or permit or suffer the same to be " used for any other purpose than that of warehousing in connection " with the tenant's business and in particular that they shall not be used " for residential purposes or for any person to sleep thereon or in any " manner which would constitute a change of use under the Town and " Country Planning Acts.

" (17) That no act or thing which shall or may be or become a " nuisance [etc.] to the landlord or the landlord's tenants [etc.] shall " be done upon the said premises or any part thereof save that any " activities properly carried on in the ordinary course of the tenant's " business shall not constitute a breech of this clause.

" (20) Not to use or permit or suffer to be used the said premises " or any part thereof as a factory or workshop . . ."

37. By clause 3 the landlord covenanted in usual terms for the tenant's quiet enjoyment of the premises during the term.

38. Clause 4(1) is the rent review clause. Clause 4(2) deals with destruction or damage by fire. It provides for abatement of the rent pending reinstatement, and for the landlord's right to determine the tenancy in the event of complete destruction or substantial damage by fire of the demised premises or the landlord's adjoining property. Clause 4(3) provides for the landlord's right to determine in the event of the premises being " required " in connection with the proper operation of the British Railways undertaking " and Part III of the Landlord and Tenant Act 1954 shall not apply."

39. The rent review clause was in fact operated so that the yearly rent for the last 5 years of the term was agreed to be £13,300.

40. The lease makes it clear that the parties contemplated that the demised premises, which were purpose-built as a warehouse, should be used as such throughout the term; rent was geared to this use; and no other use was contemplated.

41. The demised warehouse has a loading bay and large doors at the entrance from Kingston Street. Immediately opposite stood a large derelict Victorian warehouse, a building listed by the Department of the Environment. The Kingston upon Hull City Council believed that building to be a dangerous structure; and they applied to the Secretary of State for the Environment for listed-building consent to demolish it: this must have been some time between April 1978 and July 1979. Demolition was opposed by a number of conservation groups; and at the time the evidence was filed (September 1979) the Secretary of State was to appoint a Public Inquiry into the matter. In April 1978 the City Council made an order under section 12(1) of the Road Traffic Regulation Act 1967, as amended, restricting the passage of vehicular and pedestrian traffic in Kingston Street. On the 16th May 1979 the City Council made a further order, this time closing Kingston Street to all vehicular and pedestrian traffic from 18th May 1979. The order of 16th May 1979 was continued by order of the Secretary of State for the Environment; and it was still effective when the evidence was filed. No question turns on the *vires* of these orders. There being no other form of access to the demised premises than along Kingston Street, the closure of

that street made it impossible for the appellants to continue to use the demised premises as a warehouse; nor have they used it for any other purpose.

42. An affidavit sworn on behalf of the appellants deposed the opinion that in those circumstances well over a year would elapse between application for listed-building consent and the ministerial decision. An exhibited letter from the Town Clerk of 7th August 1979 stated that "*it is probably* " unlikely that the matter can be resolved within the next year." From evidence placed before your Lordships it appears that a Public Inquiry had been held in the meantime, that demolition of the derelict warehouse was sanctioned and that on the 30th September 1980 the Town Clerk informed the respondents that the estimated date for demolition was late December 1980 or early January 1981, The appellants apparently accept that Kingston Street would thereupon be again open to all traffic.

43. The appellants ceased to pay rent to the respondents as from 18th May 1979, the date of total closure of the highway. By a writ issued on 9th July 1979 the respondents demanded the rent which would have been due under the lease in the sum of £5,115.38. On 27th July 1979 the appellants filed a defence claiming that by reason of the closure of Kingston Street the lease had been frustrated on 18th May 1979, and they counterclaimed a declaration that the lease had been discharged by frustration. On 20th September 1979 Master Waldman heard the respondents' summons for summary judgment under RSC Order 14. He was bound by authority *(**Cricklewood Investment Trust Limited v. Leighton's Investment Trust Limited*** [1943] 1 K.B. 493; *Denman* v. *Brise* [1949] 1 K.B. 22) to hold that the submission that a lease could be discharged by frustration was not open to the appellants to argue to any court below your Lordships' House (see ***Cricklewood Property v. Leighton's Investment Trust Limited*** [1945] A.C.221). The appellants appealed from the order of the learned Master. Sheen J., being similarly bound by such authority, by consent dismissed the appeal; and, since the Court of Appeal would also be similarly bound, he granted the appellants a certificate under section 12 of the Administration of Justice Act 1969 (leapfrogging). An Appeal Committee of your Lordships' House in due course gave leave to appeal.

44. The appeal raises three questions: —

1. Is the doctrine of frustration inherently incapable of application to a lease?
2. If not inherently and generally inapplicable to leases, is the doctrine of frustration capable of applying to this lease in particular?
3. If yes, have the appellants demonstrated a triable issue that this lease has been discharged by frustration?

Unless the appellants can demonstrate that the answer to (1) is 'No', and to (2) and (3) ' Yes', the respondents are entitled to summary judgment, and the appeal must be dismissed.

45. 1. Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

46. Whether the doctrine can apply to a lease is of more than academic interest, considerable though that is. In the *Cricklewood Property* case Viscount Simon, who favoured the extension of the doctrine to leaseholds, nevertheless considered it likely to be limited to cases where "*some vast* " convulsion of nature swallowed up the property altogether, or buried it " in the depth of the sea " (p.229). But I think this puts the matter too catastrophically, even in the case of a long lease. There are several places on the coast of England where sea-erosion has undermined a cliff causing property on the top of the cliff to be totally lost for occupation: obviously occupation of a dwelling house is something significantly different in nature from its aqualung contemplation after it has suffered a sea-change. And in the case of a short lease something other than such natural disaster—the sort of occurrence, for example, that has been held to be the frustrating event in a charter-party—might in practice have a similar effect on parties to a lease. Take the case of a demise-chartered oil tanker lying alongside an oil storage tank leased for a similar term, and an explosion destroying both together.

47. The question is entirely open in your Lordships' House, as was recognised in the ***Cricklewood Property* case**. In my view a lease is not inherently unsusceptible to the application of the doctrine of frustration.

48. In the first place, the doctrine has been developed by the law as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances. As Lord Sumner said, giving the opinion of a strong Privy Council in **Hirji Mulji v. Cheong Yue Steamship Co. Ltd.** [1926] A.C. 497, 510: *" It is really a device, by which the rules as to absolute contracts are " reconciled with a special exception which justice demands. "*

Justice might make a similar demand as to the absolute terms of a lease.

49. Secondly, in the words of Lord Wright in the ***Cricklewood Property* case** (p.241): *' The doctrine of frustration is modern and flexible and is not subject " to being constricted by an arbitrary formula ".*

It is therefore on the face of it apt to vindicate justice wherever owing to relevant supervening circumstances the enforcement of any contractual arrangement in its literal terms would produce injustice.

50. Thirdly, the law should if possible be founded on comprehensive principles: compartmentalism, particularly if producing anomaly, leads to the injustice of different results in fundamentally analogous circumstances. To deny the extension of the doctrine of frustration to leaseholds produces a number of undesirable anomalies. It is true that theoretically it would create an anomalous distinction between the conveyance of a freehold interest and of a leasehold of, say, 999 years. But it would be only in exceptional circumstances that a lease for as long as 999 years would in fact be susceptible of frustration. On the other hand, to deny the application of the doctrine would create an anomalous distinction between the charter of a ship by demise (see ***Blane Steamships Ltd. v. Minister of Transport*** [1951] 2 K.B. 965; Law Reform (Frustrated Contracts) Act 1943. section 2(5) (a)) and a demise of land: compare, for example, a short lease of an oil storage tank and a demise charter for the same term of an oil tanker of a peculiar class to serve such a storage tank, and a supervening event then frustrating the demise charter and equally affecting the use of the oil storage tank. Again, a time charter has much in common with a service tenancy of furnished accommodation. Then there would be the distinction between a lease and other chattel interests—say, under a hire-purchase agreement. But most striking of all is the fact that the doctrine of frustration undoubtedly applies to a licence to occupy land: see, e.g., ***Krell v. Henry*** [1903] 2 K.B. 740 and the other ***Coronation cases***. However, the distinction between a licence and a lease is notoriously difficult to draw, and, when it comes to the application of a doctrine imported to secure justice, even more difficult to justify. The point is well put by Treitel, the Law of Contract, 5th edition (1979) pp.669, 670. I am clearly of opinion that the balance of anomaly indicates that the doctrine of frustration should be applied to a lease. Moreover, I shall venture to refer later to the effect of an agreement to grant a lease operating to create an equitable term of years: if, as would seem to be the case, the doctrine of frustration applies to such an agreement, there would be yet another anomaly.

51. Fourthly, a number of theories have been advanced to clothe the doctrine of frustration in juristic respectability, the two most in favour being the " implied term theory " (which was potent in the development of the doctrine and which still provides a satisfactory explanation of many cases) and the " *theory of a radical change in obligation* " or " *construction theory* " (which appears to be the one most generally accepted today). My noble and learned friends who have preceded me have enumerated the various theories; and the matter is discussed in *Chitty on Contracts,* 23rd Edition (1968), volume 1, pp. 585-592. Of all the theories put forward the only one, I think, incompatible with the application of the doctrine to a lease is that which explains it as based on a total failure of consideration. Though such may be a feature of some cases of frustration, it is plainly inadequate as an exhaustive explanation: there are many cases of frustration where the contract has been partly executed. (I shall deal later with the argument that " *the foundation of the contract*" in a lease is the conveyance of the term of years, which is accomplished once for all and can never be destroyed.)

52. Fifthly, a lease may be prematurely determined in a considerable variety of circumstances. Perhaps forfeiture by denial of title is the most relevant (though now largely of historical interest), since it depended on a rule of law extraneous to any term of the lease or to agreement of the parties whereby the lease was prematurely discharged. I can see no reason why a rule of law should not similarly declare that a lease is automatically discharged on the happening of a frustrating event.

53. Sixthly, it seems that authorities in some other common law jurisdictions have felt no inherent difficulty in applying the doctrine of frustration to a lease. This appears especially in the American cases on the frustration of leases of premises to sell liquor by the advent of constitutional Prohibition (see *Corbin on Contracts,* 1951 ed., volume 6, pp.338 *et seq.* for a general discussion and pp.388-390 for a discussion of the Prohibition cases in particular). *Corbin's* summary (p.391) has relevance to such a lease as is under your Lordships' instant consideration: " *If there was one principal use contemplated by the lessee, known " to the lessor, and one that played a large part in fixing rental value, " a governmental prohibition or prevention of that use has been held " to discharge the lessee from his duty to pay the rent. It is otherwise " if other substantial uses, permitted by the lease and in the " contemplation of the parties, remain possible to the lessee.* " (See also the passage quoted by my noble and learned friend, Lord Wilberforce). Then there is the judgment of Isaacs J. in ***Firth v. Halloran*** (1926) 38 C.L.R. 261, 269. Less directly in point, but important and relevant for its general reasoning, is the judgment of the Canadian Supreme Court delivered by Laskin J. in ***Highway Properties Ltd. v. Kelly Douglas & Co. Ltd.*** (1971) 17 D.L.R. 3rd 710, holding that the contractual doctrine of repudiation, with its remedies independent of the landlord/tenant relationship, is applicable to a lease.

54. Lastly, then, from Laskin J.'s judgment (p.721): " *It is no longer sensible to pretend that a commercial lease ... is simply a conveyance and not also a contract.*"

55. The doctrine of frustration, no less than the doctrine of repudiation, is applicable to a contract. It must therefore be determined whether there is anything in a lease-as-conveyance which repels the doctrine of frustration inherent in the lease-as-contract—outweighing the demands of justice, of consistency, of juristic theory accounting for the doctrine, of analogy and of authoritative opinion in other common law jurisdictions.

56. I therefore turn to consider the arguments to the contrary. Counsel for the respondents advanced six arguments of principle against the extension of the doctrine of frustration to a lease. I shall not here set them out: they will, I trust, appear when this appeal is fully reported. Several would, it seems to me, apply equally to a licence to occupy land and/or to the charter of a ship, both unquestionably susceptible of frustration. I shall consider the others along with the arguments collected from the speeches of Lord Russell of Killowen and Lord Goddard in the ***Cricklewood Property*** case. The arguments are, I think, fourfold:

57. The lease itself is the "*venture*" or "*undertaking*" on which the parties have embarked. In so far as the lease is contractual, the " *foundation* " of the contract is the transfer of the landlord's possession of the demised property for a term of years in return for rent; that happens once for all on the execution of the lease; so that its contractual " *foundation* " is never destroyed.

58. The lease is more than a contract: it creates a legal estate or interest in land; and, added counsel for the respondents, it operates *in rem*.

59. The contractual obligations in a lease are merely incidental to the relationship of landlord and tenant.

60. On the conveyance the " *risk* " of unforeseen events passes to the lessee, as it does to the purchaser of land.

61. I presume to think that the third proposition adds nothing to the first two, from which it necessarily follows if they are valid. As for the lease itself being the "*venture*" or "*undertaking*" the same might be said of a licence or of a demise charter. So, too, it may be said that the "*foundation*" of a demise charter is that the shipowner parts with his possession of the demised property for a term of years in return for hire. In truth, "*venture*", "*undertaking*" and "*foundation*" are picturesque or metaphorical terms: though useful in illuminating the doctrine, they are too vague to be safe for juristic analysis. The real questions, in my respectful submission, are the second and fourth—namely, whether the fact that a legal estate or interest in land has been created makes a lease inherently unsusceptible of the application of the doctrine of frustration, and that the risk of what might otherwise be a frustrating event passes irrevocably to the lessee on execution of the lease.

62. As for the significance of the creation of a legal estate or interest in land, it is convenient to note at this stage the case of an agreement to grant a lease. This can operate to create an equitable term of years *(**Walsh v. Lonsdale*** (1882) 21 Ch.D. 9). *Cheshire's Modern Law of Real Property,* 12th ed. (1976), p.388, states specifically: " An *equitable* term of years may pass to the person who holds " under a contract for a lease." (book's italics.)

63. See also Megarry & Wade, *The Law of Real Property,* 4th ed. (1976), pp.625 *et seq*. So take the case of an agreement to grant a lease of a house on a clifftop which, before execution of any lease, collapses into the sea. It was conceded that equity would not grant specific performance at the suit of the prospective lessor, the subject-matter having disappeared. Nor, since the subject-matter of the agreement cannot now be delivered, could he recover damages for breach of contract. Nor could any obligation to pay rent be enforced, since rent is payable under the lease, which will not now be decreed. Faced with this situation, counsel for the respondents gave two alternative answers: first, the doctrine of frustration is not applicable to an agreement for a lease; and, secondly, if it is. it does not apply after the conveyance. But in the postulated case no conveyance follows; and in any case the second answer is a mere reiteration of the general conclusion (which is in question) that the doctrine of frustration does not apply to a lease. As for the first alternative, the situation involves that the agreement for a lease has been frustrated *de facto*—it cannot be further performed, and neither party has any obligation to or remedy against the other. It would be ridiculous for the law to close its eyes to the reality of this situation or to refuse it its proper name. Moreover, an agreement to grant a lease is certainly an interest in land; it is registrable as an estate contract Class C (iv): see Land Charges Act 1925, section 10; Land Charges Act 1972, section 2(4). So here we have the case of an agreement being effectually discharged by frustration notwithstanding that it has created an estate or interest in land, albeit equitable. The rule can hardly depend on whether the estate or interest in land is legal or equitable : no one has so suggested; and it would create an even more absurd anomaly than those to which I have ventured already to refer.

64. I cite ***Denny Mott & Dickson Ltd. v. James B. Fraser Ltd.*** [1944] A.C. 265 with some hesitation, since your Lordships did not have the benefit of adversary argument on it. But it was a case where both a contract to grant a lease (which may have operated as a lease) and an option to purchase land were held to be frustrated. It is true that they were part of a larger agreement including trading arrangements which had been frustrated; but I do not think that this can affect the force of the decision as regards the frustration of the contract for a lease of (or the lease) and of the option. It is also true that it was a Scottish appeal; but Lord Macmillan (p.272) stated that the incidence of the Scots doctrine of frustration was the same as the English (though the consequences might be different); and none of their Lordships indicated that the decision depended on any peculiar rule of Scots land law.

65. Again, although ***Rom Securities, Ltd. v. Rogers (Holdings) Ltd.*** (1967) 205 Estates Gazette 427 was cited to your Lordships, no argument was developed on it. Goff J. was faced with an agreement for a lease entered into on the unexpressed assumption that relevant planning permission would be granted, whereas in the event it was refused. Though the learned judge " *was far from satisfied that the doctrine of frustration could not be applied to an agreement for a lease* " at least before entry into possession, in fact he held that the agreement was discharged under an implied term that this should be the effect if planning permission was refused—that is, he applied a similar line of reasoning to that of Blackburn J., giving the judgment of the Court of Queen's Bench, in ***Taylor v. Caldwell*** (1863) 3 B. & S. 826, the *fons et origo* of the modern doctrine of frustration. In my view ***Rom Securities*** was a case of frustration.

66. I can for myself see nothing about the fact of creation of an estate or interest in land which repels the doctrine of frustration. It cannot be that land, being relatively indestructible, is different from other subject-matter of agreement: that would perhaps make a lease so much the less likely to be frustrated in fact, but would not constitute inherent repugnance to the doctrine. In any case, we are concerned with legal interests in the land rather than the land itself. It cannot be because a lease operates *in rem :* so, for example, does a contract for

seamen's wages, since that gives rise to a maritime lien, yet can presumably like other contracts for personal services be frustrated by ill-health or death. Moreover, the criterion of operation *in rem* hardly matches counsel's first submission on agreements for a lease, which operate *in personam*. It cannot be because, once vested, a lease cannot be divested except by agreement of the parties. That would be to beg the question: if frustration applies, it can be so divested. Moreover, as I have tried to demonstrate, quite apart from frustration it can be so divested by operation of law in the doctrine of denial of title. And, as my noble and learned friend, Lord Wilberforce, has pointed out, there is nothing illogical in implying a term in a lease that it shall be discharged on the occurrence of a frustrating event. Nor, finally, is it realistic to argue that on execution of the lease the lessee got all that he bargained for. The reality is that this lessee, for example, bargained, not for a term of years, but for the use of a warehouse owned by the lessor—just as a demise charterer bargains for the use of the ship.

67. I turn, then, to the second main contention—namely, that the risk of unforeseen mischance passes irrevocably to the lessee at the moment of conveyance. This, too, begs the question whether the doctrine of frustration applies to leaseholds. If it does, such risk does not pass in all circumstances. Moreover, the sale of land is a false analogy. A fully executed contract cannot be frustrated; and a sale of land is characteristically such a contract. But a lease is partly executory: rights and obligations remain outstanding on both sides throughout its currency. Even a partly executed contract is susceptible of frustration in so far as it remains executory: there are many such cases in the books.

68. As for the authorities, I have had the advantage of reading in draft the speeches of my noble and learned friends who have preceded me and of my noble and learned friend, Lord Roskill. I agree with, and beg to adopt, their analyses and conclusions. I would only add a comment on ***Paradine v. Jane*** (1647) Aleyn 26, since that seems to be the starting point of those who deny the applicability of the doctrine of frustration to leases. But it did not turn at all on the fact that a leasehold was in question. It went on the then prevalent rule of the law of contract that a party who *" by his own contract creates a duty or charge upon himself, he is " bound to make it good, if he may, notwithstanding any accident by " inevitable necessity, because he might have provided against it by his " contract."*

A rule in such terms can hardly stand since the development of the doctrine of frustration.

My conclusion on the first issue is therefore that the doctrine of frustration is in principle applicable to leases.

69. **II.** Counsel for the appellants claimed that this was a " commercial " lease ", a class at any rate to which the doctrine of frustration is applicable. In a sense every lease is commercial insofar as it is a matter of business between landlord and tenant. On the other hand, a lease and its subject-matter may be more or less closely connected with commerce, trade or industry. The answer which I ventured to propose to the first issue facing your Lordships indicates my view that there is no class of lease to which the doctrine is inherently inapplicable. But, as with any other agreement, the terms and subject-matter of a lease will affect the circumstances in which it might be frustrated. The more commercial the character of an agreement, the more various are the circumstances in which it is liable to frustration.

70. In a lease, as in a licence or a demise charter, the length of the unexpired term will be a potent factor. So too, as the American cases show, will be any stipulations about, particularly restrictions on, user. In the instant case the lease was for a short term/and had only about four-and-a-half years to run at the time of the alleged frustrating event—the closure of Kingston Street. The demised premises were a purpose-built warehouse, and both parties contemplated its use as a warehouse throughout the term. This use, in C*orbin's* words, "*played a large part in fixing rental value,"* as the rent review clause shows. After the closure of Kingston Street it could no longer be used as a warehouse. No " *other substantial use, permitted* " by the lease and in the contemplation of the parties," remained possible to the lessee.

71. Therefore, although I do not think that there is any definable class of lease which is specifically susceptible of frustration, the facts of the case as I have summarised them in the previous paragraph indicate that this lease is very much the sort that might be frustrated in the circumstances that have occurred.

72. III. The question therefore arises whether the appellants have demonstrated a triable issue that the lease has been frustrated. The matter must be considered as it appeared at the time when the frustrating event is alleged to have happened. Commercial men must be entitled to act on reasonable commercial probabilities at the time they are called upon to make up their minds (Scrutton J. in ***Embiricos v. Sydney Reid & Co.*** [1914] 3 K.B. 45, 54). What we know has in fact happened is, however, available as an aid to determine the reasonable probabilities at the time when decision was called for (Lord Wright in ***Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*** [1944] A.C. 265, 277, 278).

73. Favourably to the appellant's case, the road would remain closed for " well over a year" from application for listed-building consent to demolition. Still more favourable is that it will in fact remain closed for some twenty months.

74. The appellants were undoubtedly put to considerable expense and inconvenience. But that is not enough. Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative—what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract differ so significantly from

what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms? In the instant case, at the most favourable to the appellants' contention, they could, at the time the road was closed, look forward to pristine enjoyment of the warehouse for about two-thirds of the remaining currency of the lease. The interruption would be only one-sixth of the total term. Judging by the drastic increase in rent under the rent review clause (more than doubled), it seems likely that the appellants' occupation towards the end of the first quinquennium must have been on terms very favourable to them, as it would probably be again at the end of the second. The parties can hardly have contemplated that the expressly-provided-for fire risk was the only possible source of interruption of the business of the warehouse—some possible interruption from some cause or other cannot have been beyond the reasonable contemplation of the parties. Weighing all the relevant factors, I do not think that the appellants have demonstrated a triable issue that the closure of the road so significantly changed the nature of the outstanding rights and obligations under the lease from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations.

75. It follows that in my judgment the appellants fail on the third issue; and I would therefore dismiss the appeal.

76. I would, however, presume to suggest that consideration should be given to whether the English doctrine of frustration could be made more flexible in relation to leases. The 1943 Act seems unlikely to vouchsafe justice in all cases. As often as not there will be an all-or-nothing situation, the entire loss caused by the frustrating event falling exclusively on one party, whereas justice might require the burden to be shared. Nor is this situation confined to leases.

Lord Russell of Killowen, MY LORDS,

77. I am prepared to accept that the termination of a lease may be involved in the frustration of a commercial adventure when, as merely incidental to the overall commercial adventure, and a subordinate factor, a lease has been granted. To that extent at least I accept that there may be frustration of a lease, and that the second answer of the *Pinafore's* captain on the subject of *mal-de-mer* is to be preferred to his first.

78. But the instant case is in no way such a case. It is simply a lease of the land with the building on it. I cannot accept that it is to the point to say that the use to which it was assumed and intended that the building on the demised land was to be put was commercial. That does not bring the lease into the field of a commercial adventure, so as for that reason to bring it within the scope of frustration. The only adventure was the granting and acceptance of a demise of the land, as in the case of any lease, at a rent.

79. Land is of its nature different from a chattel, however small the plot and however large the chattel. A leasehold interest is described as a chattel real, but that distinction touched only on questions of descent and inheritance. Originally perhaps sounding only in contract or covenant it has long since come to man's estate as a legal estate in land—indeed now one of the only two.

80. Land has in general a quality of indestructibility lacking in any chattel. Under a grant of the freehold estate in the fee simple the land passes as to its surface and below its surface, and the airspace above, subject to exclusions, e.g. of minerals: though " flying" freeholds require special consideration. Under the grant of the leasehold interest the land similarly passes for its duration, subject to the ability to determine that duration by either the lessor or the lessee according to the terms of the lease. And I remark at this stage that I cannot see the force in the suggestion that, because according to its terms the lease may in certain circumstances be determined otherwise than by the expiry of its term, there can be no objection to its determination by application of the doctrine of frustration.

81. Another distinction between the nature of land and of chattels is that in certain situations—riparian or by the seashore—there may be accretion to the land and therefore to the site comprised in the lease. A vessel under a so-called time charter demise can only acquire barnacles.

82. It is my understanding of the law that the purchaser of land, whether for a freehold or a leasehold interest, takes the risk that it may be or may turn out to be less suitable or quite unsuitable for the purpose he has in mind, unless the vendor or lessor has taken upon himself by warranty or otherwise some liability in that event. A freehold purchaser cannot in that event, after completion, return the land and ask for his money back: though in an appropriate case he might be able to resist specific performance while the contract remained outstanding. So also in the case of a lease for which a premium has been paid in addition to rent: the lessee cannot require repayment of the premium and refuse to pay the rent: nor where there is no premium can he refuse to pay the covenanted rent.

83. Under the bargain between lessor and lessee the land for the term has passed from the lessor to the lessee, with all its advantages and disadvantages. In the instant case a disadvantage existed, or rather supervened, in that access to the building preventing its use for any purpose was blocked by administrative action which we must assume was legally permitted, and for which we were not told that any compensation could be claimed. If a principle of achieving justice be anywhere at the root of the principle of frustration, I ask myself why should justice require that a useless site be returned to the lessor rather than remain the property of the lessee? (It is not suggested that a just solution can be achieved by somehow sharing the bad luck between lessor and lessee by, for example, a reduction of rent.)

84. I would reserve consideration of cases of physical destruction of flying leaseholds: and of the total disappearance of the site comprised in the lease into the sea so that it no longer existed in the form of a piece of terra firma and

could not be the subject of re-entry or forfeiture. In that last case I would not need the intervention of any court to say that the term of years could not outlast the disappearance of its subject matter: the site would no longer have a freeholder lessor, and the obligation to pay rent, which issues out of the land, could not survive its substitution by the waves of the North Sea.

85. It will be sufficiently seen from what I have said that I am not able to go so far as do your Lordships on the potential applicability of the doctrine of frustration to leases, and would with minor qualification adhere to the views expressed in the ***Cricklewood* case** in this House by Lord Russell of Killowen and Lord Goddard. These views expressed, as Lord Goddard said, the general view taken of the law by the profession, and there has been some statutory recognition of that view in giving relief to lessees where war damage had made the building on the leased site useless for its purpose as a dwelling house. In the instant case I would have denied a case of frustration even if the closing of the access to the site had followed only a year after the commencement of the lease and were to last for the whole of its remaining duration.

86. Having regard to the powerful expressions of opinion of the others of your Lordships, I do not think that any useful purpose would be served by elaboration on my part

87. I am, on the assumption that in general your Lordships are correct, entirely in agreement with the view that on the facts of this case, as now known, the appellant does not establish a triable issue of frustration, and accordingly I concur in the view that this appeal must be dismissed. I trust that those advising lessees will mark well the " hardly ever " approach, and that litigation will be little encouraged by this cautious departure from what may previously have been thought to be the law.

Lord Roskill, MY LORDS,

88. The appellants are the lessees of a warehouse in Kingston Street, Hull, of which the respondents are the lessors. Their lease was dated the 12th July 1974 and its term was 10 years from the 1st January 1974. It therefore expires on the 31st December 1983. It is beyond question that since the 18th May 1979 the appellants have been deprived of the beneficial use of the warehouse by the closure of Kingston Street both for vehicles and pedestrians, but their possession of the warehouse under the demise from the respondents has in no way been disturbed. It is not necessary in this appeal to consider precisely the powers under which the closure order was finally made, upon which the information before your Lordships' House was regrettably sparse. It can be assumed that that order was lawfully made and is still in force. The cause of the closure was the unsafe condition of a derelict Victorian warehouse opposite. That warehouse is now being demolished with permission and the recent correspondence placed before your Lordships shows that that demolition should be complete by the end of this year or the beginning of next. If this prediction proves accurate, the appellants will once again have the necessary access to their warehouse and its beneficial use will once again be available to them. Upon the basis of those dates the appellants will have lost their beneficial use for about 20 months. There was at the time of the first closure order just over 4 1/2 years of the term of 10 years unexpired and there will be some 3 years remaining when the beneficial use is likely to be restored.

89. The respondents have claimed rent throughout the period of closure. The obligation to pay rent is, it is said, absolute and unqualified and the risk of loss of beneficial use falls on the lessees. The appellants refused to pay. They claimed that their obligation to pay rent had come to an end because of frustration brought about by the closure of Kingston Street and the denial to them of the beneficial use of the warehouse. The respondents issued a writ on the 9th July 1979 in respect of rent due on the 1st April and 1st July 1979. Your Lordships were told that there was no dispute on figures and if the appellants are liable the sum due is that claimed. I would only observe that on any view of this case I find it difficult to see what defence there could be to the claim for rent due on the 1st April 1979 since the event relied upon for excusing liability, namely the street closure order, did not take effect until the 18th May 1979 and under the lease rent was payable in advance. But if the appellants be right they would have a defence to the claim for rent for the quarter beginning the 1st July 1979.

90. The respondents sought judgment under Order 14. The learned master gave judgment for the amount claimed. The appellants appealed to the judge in chambers, Sheen J. That learned judge rightly dismissed the appeal on the 16th October 1979. Your Lordships were told that he did so without giving a reasoned judgment because he was bound by the decision of the Court of Appeal in ***Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd.*** [1943] K.B. 493 that as a matter of law the doctrine of frustration could not apply to a lease. Accordingly there could be no defence to the respondents' claim. The learned judge was clearly bound by that decision as the Court of Appeal would have been had the present appeal first proceeded to that court.

91. The learned judge then certified under section 12 of the Administration of Justice Act 1969 that a point of law of general public importance was involved in respect of which he was bound by a decision of the Court of Appeal and accordingly gave the appellants a certificate for leave to present a petition of appeal to your Lordships' House. That petition your Lordships subsequently granted. The course so adopted, very naturally in the circumstances, has had the result that this important and long debated question of law—can a lease ever be frustrated—comes before your Lordships for decision in Order 14 proceedings without your Lordships having the benefit of judgments of the trial judge or of the Court of Appeal and on facts the supply of which has certainly been economical.

92. My Lords, this question was last before your Lordships' House some 35 years ago on appeal in the ***Cricklewood*** case [1945] A.C. 221. There were then sitting in your Lordships' House Viscount Simon L.C., the second Lord Russell

of Killowen, Lord Wright, Lord Porter and Lord Goddard. All their lordships were agreed that if the doctrine of frustration could apply to a lease it did not apply to the building lease in question. But upon the issue now before your Lordships there was a sharp division of opinion, Viscount Simon L.C. and Lord Wright taking the view that the doctrine could apply to a lease, albeit extremely rarely, and the second Lord Russell of Killowen and Lord Goddard emphatically taking the view that it could never apply to a lease. Lord Porter declined to express a view, leaving the point to be decided when it arose for decision. My Lords, some 35 years later the point does arise for decision. In the interval there has been much debate and much learning which view should prevail.

93. One thing at least is plain. This question has never yet been the subject of direct decision in your Lordships' House. My Lords, what is now called the doctrine of frustration was first evolved during the nineteenth century when notwithstanding the express language in which the parties had concluded their bargain the courts declined in the event which occurred to hold them to the strict letter of that bargain. ***Taylor v. Caldwell*** (1863) 3 B & S 826; 122 E.R. 309 is perhaps the most famous mid-nineteenth century case, in which the relevant principle was laid down by Blackburn J. (as he then was) giving the judgment of the Court of Queen's Bench. The dispute in that case arose under a document which was expressed in the language of the lease but which was held to be a licence. There was no demise of the premises. But the licensee was relieved of his obligation to pay " rent" because of the fire which destroyed the premises and so made performance impossible. One can find what might be called anticipatory traces of the doctrine enunciated in ***Taylor v. Caldwell*** in some of the earlier nineteenth century cases, principally in relation to contracts of personal service made impossible of performance by death or illness, but no useful purpose would be presently served by reviewing them. What is important is not what happened before ***Taylor v. Caldwell*** but what happened thereafter.

94. The doctrine evolved slowly especially in the field of commercial law. It was invoked in the Coronation cases. As late as ***Matthey v. Curling*** [1922] 2 A.C. 180, Younger L.J. (as he then was) said in the Court of Appeal at p.210 of the report that the doctrine of frustration was not one to be extended, a view much falsified in the event. It is interesting to observe, in view of the respondents' insistence that the doctrine had no application to a lease, that for a while it was thought that the doctrine had no application to the ordinary form of time charter party under which no possession passes to the time charterer. In ***Admiral Shipping Co. Ltd. v. Weidner Hopkins & Co.*** [1916] 1 K.B. 429 as experienced a judge as Bailhache J. expressed the view that this was so and some support for his view can be found in the speech of Lord Parker of Waddington in ***Tamplin's case*** [1916] 2 A.C. 397 at pages 424/5. But your Lordships' House in ***Bank Line Ltd. v. Arthur Capel & Co.*** [1919] A.C. 435 determined the law beyond all doubt—that such a time charter-party could be determined by frustration if the facts of the particular case justified that conclusion. That decision did not, however, expressly at least, embrace a charter by demise where possession passes to the demise charterer and Mr. Godfrey Q.C. for the respondents was able to show that as recently as ***Blane Steamships Ltd. v. Minister of Transport*** [1951] 2 K.B. 965 counsel for the appellants were able—see page 975 of the report—on the strength of the ***Cricklewood case*** to argue (albeit wholly unsuccessfully) that the doctrine had no application to a charter by demise. It is now clear beyond question that the doctrine applies to time charters by demise as well as to other forms of time or voyage charter-parties.

95. 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 successfully 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.

96. My Lords, I think it can at the present time be safely said that, leases and tenancy agreements apart, there is no class of contract in relation to which the doctrine could not be successfully invoked if the particular case justified its implication, however slow and however hesitant the common law may have been in developing the doctrine thus far. Clearly it is likely to be able to be more successfully invoked in some classes of case than others, for example, where the requisition of a ship under time charter which is likely to outlast the remaining period of the charter—e.g. ***Bank Line Ltd. v. Capel & Co.*** *(supra),* though not if the requisition is likely to be short in its duration—***Port Line Ltd. v. Ben Line Steamers Ltd.*** [1958] 2 Q.B. 146. It will not often (if at all) be able to be successfully invoked by a seller of goods who is likely to invoke it on a rising market merely because the mode of

performance contemplated when the contract was made proves impossible but some other and, according to the tribunal of fact, not fundamentally different but more expensive mode of performance remains available—***Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H.*** [1962] A.C. 93 and the other Suez cases.

97. If, therefore, this doctrine, developed as it has pragmatically and empirically, has advanced thus far by the last quarter of the twentieth century, I ask what the reasons are in principle why it should not now be held capable of embracing leases and tenancy agreements? Some of the reasons are certainly formidable and have undoubtedly attracted weighty support hi your Lordships' House from, the second Lord Russell of Killowen and Lord Goddard. First, it is said that the lessee has secured full consideration for his covenant to pay rent, namely the conveyance of the leasehold interest for the relevant term of years with all the attendant benefits and burdens. Then it is said that it is a basic principle of land: law not now to be disturbed hi your Lordships' House which has prevailed both in relation to the conveyance of freeholds and leases—that the incidence of the risk of accidents passes to the purchaser or lessee. Then it is said, quite correctly, that a lease creates an estate in land and third parties may acquire rights thereunder so that to apply the doctrine of frustration would or might destroy the interests of third parties against their wishes. It is also said that it is the lease and therefore the estate in land which is the adventure and that the attached contractual conditions are but ancillary provisions to that estate in land.

98. But there are also formidable arguments the other way. The law should not be compartmentalised. In principle a common law doctrine ought not to be held capable of applying only in one field of contract but not hi another. To preserve the dichotomy between leases on the one hand and other types of contract on the other can undoubtedly create anomalies. Thus if a ship is demise-chartered for the purpose of storing oil and explodes without fault of either party, the demise charter would clearly be frustrated. If the same demise charterer also leases an adjacent shore installation for the same purpose and the same explosion destroys that installation along with the demise-chartered ship, rent for that storage installation would remain payable in full for the unexpired period of the lease though liability for demise charter hire had ceased upon the frustration of the demise charter party.

99. My Lords, another consideration is surely this. There are many reported cases in recent years, especially in connection with attempts to avoid the operation of the Rent Acts, where disputes have arisen whether a particular agreement is a lease or tenancy agreement on the one hand or a licence on the other. Such cases often turn on narrow distinctions. But it is difficult to justify a state of the law which would uphold the application of the doctrine of frustration where the agreement is held to be a licence but would deny the application of that doctrine where the agreement is held to be a lease or tenancy agreement In so stating I have not lost sight of the contrary anomaly to which my noble and learned friend Lord Russell of Killowen drew attention during the argument and which could in theory arise if the appellants' submissions are allowed to prevail; for their submission would deny the invocation of the doctrine where the conveyance was of a freehold but would allow its invocation, at least in legal theory if not in reality, if the conveyance were only of a lease for 999 years. Yet another consideration which is relevant is this. However much weight one may give to the fact that a lease creates an estate in land in favour of the lessee, in truth it is by no means always in that estate in land in which the lessee is interested. In many cases he is interested only in the accompanying contractual right to use that which is demised to him by the lease and the estate in land which he acquires has little or no meaning for him. In Professor Treitel's book on Contract (5th edition at pages 669-70) the learned author mentions the case of a cottage leased for a period as a holiday home. In many such cases the holiday maker's rights are not only a licence to use but include a demise with the concomitant right to exclusive possession. The holiday maker acquires an estate in land. But that, my Lords, has little meaning for him. He acquires that estate in land, it is true, but only in order to enjoy for a while that exclusive right to the demised premises for his holiday. I find it difficult to see why in principle such a lease should be incapable of being frustrated if the facts justify that result, especially as the doctrine would clearly be applicable had the holiday maker's rights derived from a licence and not from a lease.

100. My Lords, if your Lordships are now to say that a lease can never be frustrated, it must be for some reason of policy. I unreservedly accept that hitherto whenever the argument that a lease can be frustrated has been advanced, that argument has failed. In passing it is interesting to note that, although all members of your Lordships' House thought otherwise, Asquith J. (as he then was), the trial judge in the ***Cricklewood case,*** would have held the building lease there in question to be frustrated had he felt free to hold that the doctrine was capable of application to leases.

101. My Lords, in a matter of this kind while it is right for your Lordships to look back to the past, it is surely more important to look forward and consider what rule of law should henceforth prevail. Historic considerations alone cannot justify the preservation of a rule if that rule has ceased to serve any useful purpose and is unlikely to serve any useful purpose in the years immediately ahead.

102. One submission in favour of preserving the old rule was that to hold that the doctrine is applicable to leases would encourage unmeritorious litigation by lessees denying liability for rent which was plainly due. This is the not unfamiliar " floodgates " argument invariably advanced whenever it is suggested that the law might be changed. My Lords, such an argument should have little appeal. If a defence of frustration be plainly unarguable, it will always be open to the master or judge in chambers so to hold and to give summary judgment for the lessors on the ground that the lessees have failed to show any arguable defence. I respectfully agree with Viscount Simon L.C. and Lord Wright in the ***Cricklewood c***ase that the cases in which the doctrine will be able to be successfully

invoked are likely to be rare, most frequently though not necessarily exclusively where the alleged frustrating event is of a catastrophic character. If that be so the " floodgates " argument ceases to have any weight.

103. Your Lordships were referred to a decision of Goff J. (as he then was) in ***Rom Securities, Ltd. v. Rogers (Holdings) Ltd.*** (1968) 205 Estates Gazette 427, in which that learned judge expressed himself as far from satisfied that the doctrine of frustration could not be applied to an agree- ment for a lease. My Lords, if that view be right, as I think it is, and the doctrine is applicable to an agreement for a lease, I find it difficult to see why a different view should apply in the case of a lease because in the latter case there has been a demise whereas in the former there has not; equity presumes that to have been done which should be done.

104. Thus far, my Lords, I have sought to examine the crucial question on principle and without detailed regard to the many authorities to which your Lordships have referred. The three principal English cases relied upon by the respondents are ***London and Northern Estates Co. Ltd. v. Schlesinger*** [1916] 1 K.B. 20, ***Whitehall Court Ltd. v. Ettlinger*** [1920] 1 K.B. 680, and ***Matthey v. Curling*** [1922] 2 A.C. 180. In the first of these cases Lush J. at page 24 stated as a ground for denying the applicability of the doctrine that a term of years has been created by the agreement in question, but the decision was plainly right upon the true construction of the lease and the facts of that case. The lease properly construed did not contemplate only personal residence by the defendant. Similarly ***Whitehall Court Ltd. v. Ettlinger*** was rightly decided on the true construction of the lease and the particular facts of that case. Like Lord Wright in the ***Cricklewood*** case I do not regard the passage in the judgment of Lord Reading C.J.—be it noted that it was an *extempore* judgment— at page 685 as holding that a lease Is incapable of frustration.

105. My Lords, I think Mr. Godfrey Q.C. was right in saying that the genesis of the suggestion that a lease is capable of frustration lies in the dissenting judgment of Atkin L.J. (as he then was) in the Court of Appeal in ***Matthey v. Curling*** [1922] A.C. at 119/200. I have read and re-read the speeches in your Lordships' House. I am clearly of the view that the majority of your Lordships' House though disagreeing with that dissenting judgment were deciding that case (a singularly harsh decision from the tenant's point of view) by reference to the particular lease and the particular facts of the *case*. I do not think that decision in any way assists the determination of the present question. Nor, with respect, is any assistance to be gained from the Scottish case of ***Tay Salmon Fisheries Co. Ltd. v. Speedie*** 1929 S.C. 593 which was decided under a system of law different in the crucial respect from that applicable to ***Matthey v. Curling***. In my judgment the Court of Appeal in the ***Cricklewood*** case was wrong in asserting categorically that those three English cases to which I have referred were decisive in favour of the proposition that the doctrine of frustration had no application to a lease, even though in the first there is a dictum to that effect. I find myself in respectful agreement with what Viscount Simon L.C. and Lord Wright said with regard to those three cases.

106. Your Lordships were referred to certain United States authorities collected in *Williston on Contracts* (3rd Edition 1978), volume 18, paragraph 1955. Clearly there are United States decisions —none it seems of the highest authority—both ways. Many of these cases arose from the Eighteenth Amendment and its effect upon leases of premises entered into solely for the sale of liquor. I respectfully doubt whether much help is to be gained from such decisions. It is however interesting to observe that Professor *Corbin* in his work on Contracts (1951 Edition), volume 6, paragraph 1356, takes the view at page 387 that the argument in favour of the non- applicability of the doctrine of frustration based upon the view that the lessee had assumed the risk " *has long since ceased to be convincing*" adding " *Whether the frustration of the tenant's purposes operates in " discharge of his duty depends upon all the circumstances, especially upon* " the extent of that frustration and the prevailing practices of men in like " *cases.*"

107. Your Lordships were helpfully referred to one Canadian and one Australian decision, the former of the Supreme Court of Canada, the latter of the High Court of Australia. In the former, ***Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*** (1971) 17 D.L.R. (3d) 710 Laskin J. (as he then was) delivering the judgment of the Supreme Court, said: " *There are some general considerations that support the view that " I would take. It is no longer sensible to pretend that a commercial " lease, such as the one before this court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort " to the full armoury of remedies ordinarily available to redress " repudiation of covenants, merely because the covenants may be " associated with an estate in land.* "

108. In the latter case, ***Firth v. Halloran*** (1926) 38 C.L.R. 261, Isaacs J. (as he then was), though agreeing with other members of the court in holding that in a particular case there was no frustration, said at page 269: *" I do not agree that, because the contractual obligation relied on by the plaintiff is created by an instrument of lease, the doctrine of frustration is necessarily excluded. The nature of the relation of landlord and tenant, the history of the doctrine of frustration, its inherent meaning and the judicial determination of relevant cases would lead me to reject so sweeping a rule. Nor do I think the consequences of terminating the relation of landlord and tenant any more extraordinary than that of terminating any other legal relation which by hypothesis is expressly and impliedly created on a mutual and fundamental basis of existence or continuance which fails at a given point. . . .*"

109. It is, however, right to say that he alone of the members of the High Court of Australia took that view and certainly two other members of that court agreed with the court below in holding that the doctrine had no application to a lease.

110. My Lords, I do not find anything in these writings and decisions which affords a compelling reason for maintaining the view that the doctrine is inapplicable to leases. The inclination of these writings and decisions is to my mind the

other way. The learned authors of *Megarry & Wade's Law of Real Property* (4th edition) at page 674, not surprisingly in view of the difference of opinion in the *Cricklewood* case, treat the question as open.

111. My Lords, I do not find it necessary to examine in detail the jurisprudential foundation upon which the doctrine of frustration supposedly rests. At least five theories have been advanced at different times: see the speech of my noble and learned friend Lord Wilberforce in ***Liverpool City Council v. Irwin*** [1977] A.C. 239 at pages 253/4. At one time without doubt the implied term theory found most favour, and there is high authority in its support. But weighty judicial opinion has since moved away from that view. What is sometimes called the construction theory has found greater favour. But my Lords, if I may respectfully say so, I think the most satisfactory explanation of the doctrine is that given by Lord Radcliffe in ***Davis Contractors v. Fareham U.D.C.*** [1956] A.C. 696 at page 728. There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say—" *this was not the bargain which these parties made and their bargain " must be treated as at an end* " —a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the Aeneid " *non haec " in foedera veni".* Since in such a case the crucial question must be answered as one of law—see the decision of your Lordships' House in the ***Tsakiroglou*** case—by reference to the particular contract which the parties made and to the particular facts of the case in question, there is, I venture to think, little difference between Lord Radcliffe's view and the so-called construction theory.

112. My Lords, it follows that on the question of principle, I find it impossible to justify compartmentalisation of the law or to agree that the doctrine of frustration applies to every type of contract save a lease. I can see no logical difference between frustration of a demise charterparty and frustration of a lease. In principle the doctrine should be equally capable of universal application in all contractual arrangements. I therefore find myself in respectful agreement with the reasoning of Viscount Simon L.C. and Lord Wright and in respectful disagreement with the views of the second Lord Russell of Killowen and Lord Goddard in the ***Cricklewood*** case.

113. But to hold that the doctrine is capable of applying to leases does not mean that it should be readily applied. Viscount Simon L.C. and Lord Wright both indicated in the ***Cricklewood*** case some of the limitations to which the invocation of the doctrine would be subject. I respectfully agree with what was there said but I do not think any useful purpose would presently be served by attempting to categorise those cases where the doctrine might be successfully invoked and those where it might not. Circumstances must always vary infinitely. I am, however, clearly of the view in common with all your Lordships that the doctrine cannot possibly be invoked in the present case for the reasons given by my noble and learned friend Lord Wilberforce. I would therefore dismiss this appeal with costs.