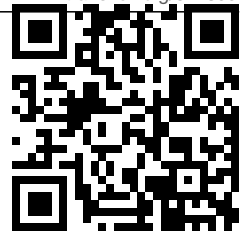


Title:

Tsakiroglou & Co Ltd v Noble Thorl GmbH, The Law Report 1962 at Page 7 et seq.

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Sale of Goods--C.i.f.--Route--"Usual and customary"--Customary route blocked--Availability of alternative route--Whether alternative route must be used.

Contract--Frustration--C.i.f. contract--Usual and customary route via Suez blocked--Whether performance "a thing radically different from that which was undertaken by the contract"--Whether parties "must have made" contract on basis of continued availability of canal.

Contract--Implied term--Reasonable performance--C.i.f. contract--Usual route--Time when route usual.

"Shipment."

Contract--Frustration--Fact or law--Finding by jury or arbitrator regarding commercial or fundamental difference.

Fact or Law.

Arbitration--Special case--Findings of fact--Primary facts--Whether court bound by findings of fact.

By a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg during November/December, 1956. On November 2 the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was more than twice as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings the umpire held that the sellers were in default and the appeal board upheld the umpire's award.

The appeal board found that "the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal":-

Held, (1) that a term that shipment should be (a) via Suez, or (b) by the usual and customary route at the date of the contract, should not be implied into the contract.

In re L. Sutro & Co. and Heilbut, Symons & Co.[1917] 2 K.B. 348; 33 T.L.R. 359, C.A. considered.

(2) That since the Suez Canal was unusable during the relevant period the sellers' duty was to ship the goods to the required port by a reasonable and practicable route if available.

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(3) That although the route via the Cape involved a change in the method of performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated.

Carapanayoti & Co. Ltd. v. E. T. Green. Ltd. [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 overruled.

Per Viscount Simonds. It does not automatically follow that, because one term of a contract becomes impossible of performance, the whole contract is thereby abrogated (post, p. 112).

(4) That the shipment was not prevented by war or force majeure within the meaning of the contract; placing the goods on board a vessel for the right destination was not prevented.

Observations of Bailhache J. in *In re inputter Commercial Anversois and Power, Son & Co.* [1920] 1 K.B. 868, 878, C.A. applied.

(5) That the finding of the appeal board that shipment via the Cape was not commercially or fundamentally different from shipment via the Canal was not binding on the court for it involved a question of law (post, pp. 116, 119, 123, 129, 134).

Decision of the Court of Appeal [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A. affirmed.

APPEAL from the Court of Appeal (Sellers, Ormerod and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 28, 1960, in favour of the respondents, Noble Thorl G.m.b.H., affirming the order of Diplock J., dated December 9, 1958, whereby it was adjudged that an award in a special case stated by the board of appeal of the Incorporated Oil Seed Association dated April 21, 1958, was correct. By that award the board of appeal upheld an award of an umpire dated February 20, 1957, awarding the respondents £5,625 against the appellants, Tsakiroglou & Co. Ltd., as damages for breach of contract.

The appeal arose out of a dispute between the appellants as sellers and the respondents as buyers under a written contract dated October 4, 1956, incorporating the terms of contract form No. 38 of the Incorporated Oil Seed Association, whereby the appellants agreed to sell to the respondents 300 tons of Sudanese groundnuts at £50 per 1,000 kilos including bags c.i.f. Hamburg, shipment during November/December, 1956. No goods were shipped by the appellants in fulfillment of this contract, and in consequence the respondents claimed damages for breach of contract. The appellants denied that they had committed any breach of contract. The principal question raised by this appeal was whether the appellants were relieved of their obligation to ship such goods during November/December, 1956, by reason of the

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fact that the Suez Canal was blocked on November 2, 1956, and remained closed to shipping until April 9, 1957. Because of the clear of the Suez Canal it was impossible on and at all material times after November 2, 1956, to ship goods to Hamburg on board a vessel proceeding via the Suez Canal. The appellants contended, inter alia, that by virtue of this event the contract became impossible of performance, or alternatively, that the happening of the event destroyed a basic but tacit assumption of the contract (namely, that the Suez Canal would at all material times remain open for shipping), which thereby became discharged through the operation of the doctrine of frustration. The umpire to whom the dispute was originally referred, the board of appeal, Diplock J. and the Court of Appeal, all rejected this contention and held the appellants liable to the respondents.

By a contract in writing dated Hamburg, October 4, 1956, between Tsakiroglou & Co. Ltd. of Khartoum as sellers, and the respondents, Noble Thorl G.m.b.H. of Hamburg/Harburg as buyers, through agents, the sellers agreed to sell and the buyers to buy about 300 tons of Sudanese groundnuts in the Shell basis 3 per cent. admixture new crop 1956/57 at £50 per 1,000 kilos including bags c.i.f. Hamburg. Shipment November/December, 1956, with payment cash against documents on first presentation for 95 per cent. of the amount of provisional invoice, balance to be paid after the analysis on final invoice. The contract form was to be the Incorporated Oil Seed Association Contract No. 38 (hereinafter called "I.O.S.A. Contract No. 38") with arbitration in London, and that contract was signed by the Hamburg agents. Clause 1 of I.O.S.A. Contract No. 38 provided for "Shipment from a West African port ... by steamer or steamers (tankers excluded) direct or indirect with or without transshipment." It was found as a fact in the case stated that both parties contracted on the basis that the goods would be shipped from Port Sudan. Clause 6 of the contract provided: "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

On October 29, 1956, the Israelis invaded Egypt; on November 1 Britain and France commenced military operations, and on November 2 the Suez Canal was blocked to shipping and remained blocked until April 9 1957.

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No goods were shipped under the contract, the sellers claiming that they were prevented from doing so by events which

had occurred in the Middle East.

When the contract of October 4, 1956, was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. After the closing of the Canal the shortest and a practicable route to Hamburg was via the Cape of Good Hope. The sea route via Suez to Hamburg was approximately 4,386 miles, and via the Cape 11,137 miles.

From November 10, 1956, a 25 per cent. freight surcharge was placed on goods shipped on vessels proceeding via the Cape of Good Hope and this was increased to 100 per cent. on December 13, 1956.

The sellers' claim that the contract was at an end because of the closure of the Suez Canal was not accepted by the buyers.

In arbitration proceedings, the umpire, by an award dated February 20, 1957, awarded that the sellers were in default and should pay to the buyers as damages the sum of £5,625 together with £79 15s. costs of the award. The sellers were dissatisfied with the award, and a board of appeal appointed to hear the appeal on January 28, 1958, dismissed the appeal and upheld the umpire's award.

The following findings of fact are relevant: "1. Sudanese groundnuts are harvested at the end of October or beginning of November and the customary port for shipment of such groundnuts is Port Sudan. All groundnuts exported from Sudan to Europe are shipped from Port Sudan which is the only suitable port. " Paragraph 2: "At the date when the contract was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at all times when the Suez Canal was open." Paragraph 6: "The closure of the Suez Canal prevented transport of the contract goods from Port Sudan to Hamburg via the Suez Canal and the impossibility of transportation by that route continued until April, 1957. The sellers could have transported the goods from Port

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Sudan to Hamburg via the Cape during November or December, 1956. 7. The distance from Port Sudan to Hamburg via the Suez Canal is approximately 4,386 miles and the distance from Port Sudan to Hamburg via the Cape of Good Hope is approximately 11,137 miles. The distance from Port Sudan to Suez is 694 miles. 8. The freight ruling at the time of the contract for the shipment of groundnuts from Port Sudan to Hamburg via the Suez Canal was about £7 10s. per ton. After the closure of the Canal the Port Sudan- U.K. Conference imposed the following surcharges for goods shipped on vessels proceeding via the Cape of Good Hope, viz., as from November 10, 1956, 25 per cent., and as from December 13, 1956, 100 per cent." Paragraph 10: "At the date when the contract was made both parties contemplated that shipment would be made via the Suez Canal."

The board of appeal's award was in these terms:

"So far as it is a question of fact we find and as far as it is a question of law we hold:

(i) There were hostilities but not war in Egypt at the material time.

(ii) Neither war nor force majeure prevented shipment of the contract goods during the contract period if the word 'shipment' means placing the goods on board a vessel destined for the Port of Hamburg.

(iii) If the word 'shipment' includes not only the placing of the contract goods on board a vessel but also their transportation to the contract destination then shipment via the Suez Canal was prevented during the contract period of shipment by reason of force majeure but shipment via the Cape was not so prevented.

(iv) It was not an implied term of the contract that shipment or transportation should be made via the Suez Canal.

(v) The contract was not frustrated by the closure of the Suez Canal.

(vi) The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

Eustace Roskill Q.C. and R. A. MacCrindle for the appellants. This is the first of the "Suez" frustration cases to come to this House. There are four such cases, two of which, apart from the present, also concern c.i.f. contracts. They have given rise to a difference of judicial opinion at first instance. The critical issue is whether the closure of the Suez Canal frustrated this c.i.f. contract and relieved the appellants from shipping the contract

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goods. In the first of these cases, *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*,¹ McNair J. held on facts similar to those here that the closure of the Suez Canal did frustrate the contract and that the sellers there were accordingly relieved of their obligation to ship. In the second case, which was tilted at first instance Diplock J.² distinguished *Carapanayoti*³ on the ground that here there was a special finding of fact in the case stated that there was no commercial or fundamental difference between shipping goods on a vessel routed via the Cape of Good Hope and shipping goods on a vessel routed via the Suez Canal. In the third case, *Gaon (Albert D.) & Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*,⁴ Ashworth J. on facts indistinguishable from those in *Carapanayoti*⁵ declined to follow McNair J.'s decision. In the fourth case, *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*,⁶ Pearson J. held that a voyage charter party was frustrated by the closure of the Suez Canal, and distinguished the other three cases on the grounds that that case was not analogous to one of a contract for the sale of goods. No appeal was taken to the Court of Appeal in *Carapanayoti*,⁷ but the sellers in *Gaon's* case⁸ appealed to the Court of Appeal, and that appeal and that in the present case were both heard together.⁹ In dismissing both appeals the Court of Appeal held that *Carapanayoti*¹⁰ had been wrongly decided.

The first question in any problem of frustration is to ascertain what is the seller's relevant obligation, because it is from that obligation that the appellants seek to be excused by the doctrine of frustration. In the present case the relevant obligation is that of the sellers having to procure a contract of affreightment for the buyers whereby the goods will be conveyed to the contractual destination by the usual and customary route to be ascertained at the date of the contract: Kennedy on C.I.F. Contracts, 1st. ed., p. 39. In the case stated¹¹ the appellants have four findings of fact relevant to this argument in their favour: see paragraphs 2, 6, 8 and 10. It follows from these findings that if the sellers

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are held bound to this contract notwithstanding the closure of the Canal they will be held obliged to perform a contract in a manner which neither party contemplated and in a manner in which, if they had performed it before November 2, 1956, they would have been in breach. This has the extraordinary result that a method of performance which would have been a breach of contract before November 2, 1956, becomes an enforced contractual method of performance by reason of circumstances outside the contemplation of the contract.

It is fundamental in a c.i.f. contract of affreightment that the seller shall ship by the usual and customary route and that the buyer shall expect performance of the contract via that route. The parties contracted on the tacit assumption that the Canal would remain open throughout the contract period; if, therefore, at the time when the shipper could procure a ship the Canal was closed, the contract became frustrated and was at an end. Applying the observations of Asquith L.J. in *Parkinson (Sir Lindsay) & Co. Ltd. v. Commissioners of His Majesty's Works and Public Buildings*¹² to the present case, the closure of the Suez Canal was a "catastrophic event" which destroyed the basic, though tacit, assumption on which the parties had contracted, namely, that the Canal would remain open throughout the contract period November/December, 1956, and therefore by destroying this tacit assumption it extinguished the contract itself. *Davis Contractors Ltd. v. Fareham Urban District Council*¹³ is distinguishable, for that decision was concerned with whether there had been frustration by reason of delay, and there is no question of delay here. The vital point in the present case is that there was no room for shipment at a later date. There had to be shipment in November/December, 1956. It was a basic assumption of this contract that the Canal would remain open throughout the whole of this period.

There then arises the question whether this contract made in contemplation of performance via the Canal can embrace performance via the Cape when performance via the Canal becomes impossible. This involves consideration of the special finding by the board of appeal. As to this, the question of "fundamental difference" is a matter of law to be determined by the test propounded by Lord Reid and Lord Radcliffe in *Davis Contractors*

Ltd. v. Fareham Urban District Council.¹⁴ Pearson J.'s approach to the arbitrator's findings in *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*¹⁵ should be adopted here. If Diplock J.'s Judgment be upheld on this point, it follows that in every frustration case an arbitrator by his findings can put one or other of the parties completely out of court. A distinction has to be drawn between two different types of frustration: where the frustration relied on is delay, then questions of fact and degree arise, but where, as here, the frustration alleged arises by virtue of the necessity for a different method of performance than that stated in the contract during the time limited for performance, that involves a pure question of law. This is where Diplock J. erred, for he applied a test appropriate in cases of frustration by delay to an entirely different type of case. The distinction between the two types is between the same performance at a different time and a different performance at the same time. *Jackson v. Union Marine Insurance Co. Ltd.*¹⁶ is an example of the first type and, accordingly, Diplock J. was wrong to apply it to the facts here.

In *In re Comptoir Commercial Anversois and Power, Son & Co.*¹⁷ no question of delay arose and it was held that whether a term should be implied in the contracts providing for their dissolution on the ground of the frustration of the commercial adventure was a question of law for the court. The House is completely free to ignore the finding of the appeal board. If the present case had been tried at first instance before a jury the only question to be left to it would have been as to the surrounding circumstances. The question left by Brett J. to the jury in *Jackson v. Union Marine Insurance Co. Ltd.*,¹⁸ namely, whether the delay in question was "so long as to put an end in a commercial sense to the commercial speculation entered upon ..." seems only to have been applied subsequently in cases of alleged frustration by delay. The present case and the coronation cases fall into a different category because performance had to take place at a particular time.

In relation to the special finding reliance is placed on the following propositions: (1) Frustration is always a question of law. (2) The question is one of implication or construction for

the court. (3) The only relevant facts are the surrounding circumstances against which the contract was made. (4) The views of the tribunal of fact are relevant only where the frustration relied on is delay. (5) Where the court is concerned not with delay as such but with whether the contract embraces a second and alternative mode of performance, the view of the tribunal of fact as to the difference or similarity of one mode of performance or another is wholly irrelevant. There is no reported case which decides that where there is only one usual route, and that is not available at the time of performance, the seller under a c.i.f. contract is under an obligation to ship by an alternative route. Of course, in the case of a contract c.i.f. to ship from a new port, plainly the parties at that stage contemplate that shipment shall be by a reasonable and practicable route. But in the ordinary case it is shown by *In re L. Sutro & Co. and Heilbut, Symons & Co.*¹⁹ that a route alternative to the usual and customary route cannot be implied into a contract. The problem reduces itself to the question: can a mode of performance which on one day is a breach of contract become on the next day a compulsory mode of performance? The answer is, there has never been a case where such a heavy burden has been laid on a seller under a c.i.f. contract. *Evans, Sons & Co. v. Cunard Steamship Co. Ltd.*²⁰ and *Reardon Smith Line Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.*²¹ are distinguishable, for they were deviation cases and not c.i.f. contract cases. [Reference was also made to *Postlethwaite v. Freeland*.²²

As to the question whether the contract should be construed as if the words "via Suez" were contained therein, it is conceded that there is no authority on this point, but in principle there is no reason why the parties should not have contracted on the basis that shipment was to be by the route available at the date of the contract and not at some subsequent date: see *In re L. Sutro & Co. and Heilbut, Symons & Co.*²³

Reliance is also placed on clause 6 - the exceptions clause. The words "preventing the shipment" are not referable solely to the physical act of placing the goods on board ship, nor is the clause limited to events occurring at the port of shipment; "shipment" is referable to the totality of the performance of the contract. Alternatively, "shipment" within the meaning of this

clause connotes "intended shipment." The intended shipment was the shipment of the goods, which were in the

warehouse at Port Sudan, on one of the four ships on which the appellants had reserved space to carry the goods via the Suez Canal. The intended shipment was prevented in the period allowed for shipment, and, accordingly, there was an automatic extension of that period for two months on the expiry of which the contract was cancelled. [Reference was made to *Fairclough, Dodd & Jones Ltd. v. J. H. Vantol Ltd.*²⁴]

In fine, the decision of the Court of Appeal was wrong and the House is invited to adopt the reasoning of McNair J. in *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*²⁵ and allow the appeal.

A. A. Mocatta Q.C. and J. F. Donaldson for the respondents. It is important first to establish in general terms what were the appellants' obligations under this c.i.f. contract and to remember that one is dealing with a case where one party is a seller and the other is a buyer. A seller's obligations under a c.i.f. contract are set out by Lord Atkinson in *Johnson v. Taylor Bros. & Co. Ltd.*,²⁶ from which it appears that the seller is under an obligation to deliver the proper documents to the buyer and, if he does so, he is entitled to be paid even though the goods be at the bottom of the ocean. Not only does that emphasise that the seller does not carry the goods or is not even under an obligation to see that the goods reach the contract destination, but it also shows that the procurement by the seller of a contract of affreightment and the tender of a bill of lading is only part, and not the most onerous, of his obligations under a c.i.f. contract.

The respondents rely on the following propositions: (1) There is no justification for reading into this contract an implied term that the contract of affreightment should provide for carriage via Suez. (2) The obligation on the seller as to the nature of the contract of affreightment he must procure is determined by the circumstances prevailing at the date he chooses to ship and not at the date the contract was made. (3) The contract of affreightment must cover carriage from the port of shipment to the named destination. As to the route which the ship must follow, the most that can be said on the authorities, which are very scanty, is that the route must be a, or the, usual route, or, if there is

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no usual route, the practicable route, if there is only one, or a reasonably practicable route, if there is more than one. (4) The contract can only be frustrated by reason of an event affecting the route which occurs after the date of the contract if the effect of the event is to leave as the only available route one which would render performance of the contract of sale if that route be followed performance of something different in kind or radically different from that contemplated at the date of the contract. (5) On the facts found, the substitution of a contract of affreightment covering a voyage via the Cape instead of via Suez did not render performance of this contract of *sale* different in kind from that contemplated by the contract. (6) The special finding is either conclusive on (5), since it excludes any possible fact that might point the other way, or, if not conclusive, of the utmost relevance, as Sellers L.J. said,²⁷ in its determination. (7) Clause 6, the exceptions clause, is irrelevant if there was frustration and of no application on its true construction if there was no frustration, since shipment was not prevented.

As to (1) (*supra*), if there is an implied term it is for the appellants to prove it. This point merges into (2), namely, whether the relevant date is the date of shipment or the date of the contract. The appellants have said little about this point here. It was fully argued before McNair J. in *Carapanayoti*,²⁸ whose decision that the relevant date is the date of shipment has been followed in all the subsequent "Suez" decisions. McNair J.'s reasoning is very convincing. If the date of the contract were taken the most absurd results might ensue. It is to be noted that it is relatively rare for the contract of affreightment/bill of lading to specify the route to be followed. The contract of affreightment (a) must ensure cover from the specified port of origin to the specified port of destination; (b) it must be in a form usual in the trade. As to the nature of the contract of affreightment which the seller has to procure, see Kennedy on C.I.F. Contracts, 1st. ed., pp. 39, 40. [Reference was made to section 32 of the Sale of Goods Act, 1893.] It is conceded that if no contract of affreightment was obtainable at all, then the contract would be frustrated. But why should one judge the contract of affreightment as at October 4, 1956, when the seller has until December 31, 1956? The date of shipment is the appropriate date. In *In re L. Sutro & Co. and Heilbut, Symons*

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& Co.²⁹ this point was never in issue: see *per* Sellers and Ormerod L.J.J. in the Court of Appeal.³⁰

The authority of the passage in Kennedy, 1st. ed., p. 39, cited by the appellants is nil unless it be established that the author had in mind circumstances similar to those in the present case. It is evident, however, that this passage is not

concerned with such a case of abnormality as subsisted here. No authority has been cited which supports the appellants' airmail proposition that because the usual route has been blocked the seller under a c.i.f. contract is discharged. The decision in *Reardon Smith Line Ltd. v. Black Sea and Baltic General Insurance Co.*³¹ did not turn upon an express deviation clause, but is pure common law. Reliance is placed on *The Aello*³²; just as there it was held that the relevant date to determine when a ship is an arrived ship is the date when it is said to have arrived and not the date of the contract, so here, applying that decision by analogy, the relevant date to determine the nature of the contract of affreightment under a c.i.f. contract, which might be entered into months before the date of shipment, is not the date of the contract but the date the shipper exercises his option to ship.

As regards (3), section 32 (2) of the Sale of Goods Act, 1893, provides that the contract of carriage must be reasonable having regard to the nature of the goods and the other circumstances of the case. Plainly, if the longest route would destroy perishable goods, that would be an unreasonable contract. So long as it is possible to make a reasonable contract in the circumstances, there is no frustration. Here there is nothing to indicate that had such a contract been made performance of the sale contract would have been fundamentally different so as to frustrate the contract. There is nothing to suggest that the Cape route was unreasonable or damaging to the goods. The only thing that could be said was that there was an increase in freight, which in the circumstances was surprisingly small. It is submitted that this was a route for which a contract of affreightment should have been obtained. As to *In re L. Sutro & Co. and Heilbut, Symons & Co.*,³³ although the overland route there would have complied with section 32 of the Act of 1893, it conflicted with the express words of the contract. *Evans, Sons & Co. v. Cunard Steamship*

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Co. Ltd.,³⁴ which was approved in *Reardon Smith Line Ltd. v. Black Sea and Baltic General Insurance Co.*,³⁵ supports proposition (3): see also *Frenkel v. MacAndrews & Co.*³⁶

The Cape was a practicable route and a reasonable route in the circumstances of the present case. The onus is on the appellants to show the contrary. It is plain that after November 1, 1956, the Cape route was the usual route: see the special case. The appellants do not discharge that onus by showing that at the time the contract was made it was envisaged that the goods would be carried via the Canal. There appear to be no other authorities on this point, but the summary of the law on c.i.f. contracts in *Scrutton on Charterparties*, 12th ed., pp. 193-195; 16th ed., pp. 188, 189, 197, is of importance; there is no suggestion there that the contract of affreightment must make provision for the usual and customary route at the date the c.i.f. contract is entered into. The respondents adopt the observations of the Court of Appeal³⁷ on this point.

As to (4), this merely restates the principle of frustration as adumbrated in *Davis Contractors Ltd. v. Fareham Urban District Council*³⁸ in relation to the facts here. This leads to (5): the appellants cannot rely solely on the extra cost: see *per* Lord Sumner in *Larrinaga & Co. Ltd. v. Société Franco-Américaine des Phosphates de Medulla, Paris*.³⁹ Ultimately frustration is a question of fact.⁴⁰ It is to be observed that whenever a person enters into a c.i.f. contract as seller for forward dates he is speculating as to freight rates without having already booked shipping space. If cost is eliminated the only element left on which to base frustration is the greater length of voyage. But that did not affect the sellers at all, for they do not have to carry the goods but merely to ship them, procure a contract of affreightment and forward to the buyers the relevant documents.

As regards the buyers: (a) they entered into a contract at the beginning of October, 1956, and as to time the position was bound to be uncertain, since the sellers at their option could ship the goods any time during November/December, 1956. Further, (b) the sellers could ship the goods on any vessel they chose, which encompassed, therefore, any ship from an old slow tramp steamer to a modern fast liner. The possibility of storms or breakdowns also has to be taken into consideration. None of

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these factors affect the sellers. But as to the buyers, they urged that the goods should be shipped via the Cape. Reliance is placed on this in relation to the special finding. It shows that the goods would not deteriorate, miss any vital market or require any special method of stowage, and that the cost was not inordinate. All these factors are covered by the word "commercial" in this finding. In the present case all the duties which fall on a vendor under a c.i.f. contract as described by Lord Atkinson in *Johnson v. Taylor Bros. & Co. Ltd.*⁴¹ could be complied with. All the above matters under this head apply equally to McNair J.'s judgment in *Carapanayoti*.⁴² McNair J. loses sight of the fact that the contract was a contract of

sale and not a contract of carriage.

*Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*⁴³ is completely distinguishable, for that case concerned a contract of carriage and it was a term of the contract that the vessel should proceed via the Suez Canal. In a contract of carriage the essential obligation is to *carry* the goods in question; in a c.i.f. contract it is the *provision* of the goods. The appellants contend that the decision below poses a dilemma, namely, that whilst if the sellers before November 2, 1956, had shipped via the Cape that would have been a breach of contract, after that date shipment via the Cape became a compulsory method of performance. But that argument depends for its validity on the correct interpretation of the sellers' obligation. If the respondents' interpretation is right, then when the Canal became blocked it was the sellers' duty to procure a contract of effort ment via the Cape because that was the only reasonable route.

As to (6), the effect of the special finding, it is not necessary in order to succeed for the respondents to contend that it is conclusive, but, nevertheless, applying the observations of Lord Sumner in *Bank Line Ltd. v. Arthur Capel & Co.*,⁴⁴ if a tribunal of fact properly directed comes to such a finding, it is conclusive of the matter. The appellants, faced with *Jackson v. Union Marine Insurance Co. Ltd.*,⁴⁵ sought to draw a distinction between frustration caused by delay and other types of frustration, but that distinction is not tenable. The principles relating to frustration laid down in *Davis Contractors Ltd. v. Fareham Urban District Council*⁴⁶ apply to all types. [Reference was also made to *British and Beningtons Ltd. v. North Western Cachar Tea*

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*Co.*⁴⁷ and *Universal Cargo Carriers Corporation v. Citati*.⁴⁸] *In re Comptoir Commercial Anversois and Power, Son & Co.*⁴⁹ is distinguishable. It is not disputed that whether a term is to be implied and whether a contract is dissolved are questions of law, but where, as here, a tribunal of fact, having ascertained all the relevant facts, has determined that A is not different from B, that is conclusive of the matter. Alternatively, it is submitted that such a finding is of the utmost relevance even if it is not conclusive.

As regards (7), reliance is placed on *In re Comptoir Commercial Anversois and Power, Son & Co.*⁵⁰ The sellers were not prevented from obtaining a bill of lading in the circumstances prevailing here. *Fairclough's case*⁵¹ is plainly distinguishable, for in that case there were provisions both against prevention of shipment and shipment being delayed. Here there was a provision relating solely to the contingency of shipment being prevented within the time fixed, and, in the circumstances, the clause was inoperative. A similar argument by the sellers in *Carapanayoti*⁵² and in *Gaon*⁵³ was rejected by McNair J. and Ashworth J. respectively.

Roskill Q.C. in reply. It is plain that the respondents cannot hope to sustain the special finding, for whether something is "fundamental" and what is "commercial" are questions of law. In the *Citati* case⁵⁴ Devlin J. held that it was for the arbitrator to state what delay there was and for the court to state on this finding whether that delay amounted in law to frustration. In general, the principle is that an arbitrator should state his findings of fact and leave it to the court to hold whether or not on the facts as found the contract is frustrated. There is a relevant distinction between the *Jackson v. Union Marine Insurance Co. Ltd.*⁵⁵ type of case and the "coronation" type of case.

Section 32 of the Sale of Goods Act, 1893, does not assist the respondents. On the face of it section 32 is dealing with the ordinary physical delivery of goods to the buyer. It has always been difficult to relate this section to c.i.f. contracts, because under such a contract the seller retains his rights until delivery of the relevant documents to the buyer, and section 32 (2) has to be read with this in mind. Section 32 (2) is not an alternative obligation

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but an *additional* obligation, and, accordingly, the sellers' obligation under a c.i.f. contract is dual, namely, to ship the goods by a usual and customary route and also by a reasonable route: see Kennedy on C.I.F. Contracts, 1st. ed., p. 41; Chalmers on Sale of Goods, 13th ed., p. 112. It follows that if at the time of performance a usual and customary route is not available the contract is frustrated albeit that a bill of lading could be obtained for another reasonable route. It is conceded that the seller is under an obligation to tender the usual form of bill of lading, but this may, or may not, specify the route.

If the respondents are right, then the seller has to procure a different contract of affreightment by a different route. But in this connection the procurement of a different contract of affreightment is in the same category as the shipment of non-contract goods, and the doctrine of frustration applies because it is a wholly different obligation from that contemplated by the parties at the time of entering into the contract. It would be very strange if parties in an established trade, who had contracted against the usual route, were still to be held to their bargain even although at the time of performance that route was unavailable. It is submitted that the only cases in which the court would impose upon a seller a route other than that usual and customary would be (a) where the voyage was from a new port from which no usual route had been established; or (b) where the parties had entered into a contract at a date when the normal and customary route was unavailable. Reliance is placed on the paragraph beginning with the words "Shipping documents" in Scrutton on Charterparties, 10th ed., pp. 154, 155.

The sellers' duty is "to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract": *per* Hamilton J. in *Biddell Brothers v. E. Clemens Horst Co.*⁵⁶ As to the amount of deviation allowed, if the route taken is within the permitted limits of the termini of the voyage, A to B, laid down in the bill of lading, that is deemed compliance with the terms of the contract, but if the route taken is outside those limits, there is failure in performance. The authority of *Evans, Sons & Co. v. Cunard Steamship Co. Ltd.*⁵⁷ is not disputed but only the principle which the respondents seek to abstract from it. They contended that if there was a practicable way of performing a c.i.f. contract, then

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the sellers had to procure performance in that way. That involves holding that Wills J. in using the word "practicable" meant physically practicable, but it is submitted that that view cannot be supported. It is well established that evidence can be given as to what constitutes a practicable route from A to B, and that is all that that case⁵⁸ decides. The appellants have never disputed that the Cape route was physically practicable, but the whole question here is whether the sellers were bound to ship via the Cape, the Canal being closed. Accordingly, in the circumstances, no question of onus of proof arises, although, if it be held to the contrary, the appellants have discharged that onus.

As regards *The Aello*,⁵⁹ it is conceded that in certain classes of contract the obligations of the parties have to be determined at the time of performance (see *Postlethwaite v. Freeland*⁶⁰), but that case⁶¹ deals with very different questions from the present and is of no assistance or authority here. There is no authority which contradicts the appellants' proposition that to ascertain the usual and customary route under a sellers' c.i.f. contract one looks at the date of the contract. It is significant that in the *Sutro* case⁶² that date was thought to be the only relevant date. The respondents are wrong in their contention that a c.i.f. contract cannot be frustrated if there remains open a physically practicable route. Suppose a simple contract for the carriage of goods from Port Suez to Alexandria through the Canal. At the relevant date the Canal is closed. Although it would be physically practicable to carry the goods via the Cape, it is submitted that plainly in those circumstances the contract would be frustrated. If that be right in principle, then if a c.i.f. contract can be frustrated by the unavailability of the contemplated route, this is as strong a case as could be found for so holding for the reasons given by McNair J. and Pearson J. in *Carapanayoti*⁶³ and *Sidermar*⁶⁴ respectively.

As to increased cost being a factor in frustration, see *Lewis v. Louis Dreyfus & Co.*⁶⁵ and *Brauer & Co. (Great Britain) Ltd. v. Clark (James) (Brush Materials) Ltd.*⁶⁶

Their Lordships took time for consideration.

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March 28. VISCOUNT SIMONDS. My Lords, on April 21, 1958, the board of appeal of the Incorporated Oil Seed Association made an award by which they upheld the award of an umpire in an arbitration between the appellants and the respondents awarding the latter the sum of £5,625 against the former as damages for breach of contract. Upon case stated Diplock J. upheld the award. The decision was affirmed by the Court of Appeal. The matter now comes before this House. Not for the first time I venture to point out that the first two stages in proceedings which will ultimately be resolved in the highest court could conveniently be omitted.

The contract, for breach of which damages were awarded to the respondents, was made on October 4, 1956. It incorporated the terms of contract form No. 38 of the Incorporated Oil Seed Association and by it the appellants agreed to

sell to the respondents 300 tons of Sudanese groundnuts at £50 per 1,000 kilos including bags c.i.f. Hamburg, Shipment during November/ December, 1956. No goods were shipped by the appellants in fulfillment of this contract in the circumstances stated in the special case which I summarise.

All groundnuts exported from the Sudan to Europe are shipped from Port Sudan, which is the only suitable port. At the date of the contract (October 4, 1956), the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. Both parties then contemplated that shipment would be made by that route. It would have been unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape of Good Hope. Before the closure of the Suez Canal the appellants acquired 300 tons of Sudanese groundnuts in shell which were held to their order in warehouses at Port Sudan as from November 1, 1956. They also, before the closure, booked space for 300 tons of nuts in one or other of four vessels scheduled to call at Port Sudan between November 10 and December 26, 1956. The shipping company cancelled these bookings on November 4, 1956. British and French armed forces began military operations against Egypt on October 29, 1956. The Suez Canal was blocked on November 2 and remained closed for effective purposes until at least April 9, 1957. But the appellants could have transported the goods from Port Sudan to Hamburg via the Cape of Good Hope during November and December, 1956.

The distance from Port Sudan to Hamburg via the Suez Canal is about 4,386 miles, and via the Cape about 11,137 miles.

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The freight ruling at the time of the contract for the shipment of groundnuts from Port Sudan to Hamburg via the Canal was about £7 10s. per ton. After the closure of the Canal the Port Sudan United Kingdom Conference imposed the following surcharges for goods supplied on vessels proceeding via the Cape, namely, as from November 10, 1956, 25 per cent., and as from December 13, 1956, 100 per cent. The market price of Sudanese nuts in shell shipped from Port Sudan c.i.f. Hamburg was £68 15s. per ton between January 1 and 13, 1957. As has been already said the appellants did not ship any nuts. They claimed that they were entitled to consider the contract as cancelled, and to this view they adhered.

The contract provided by clause 6 that "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

The award was in these terms: "So far as it is a question of fact we find and as far as it is a question of law we hold:

- (i) There were hostilities but not war in Egypt at the material time:
- (ii) Neither war nor force majeure prevented shipment of the contract goods during the contract period if the word 'shipment' means placing the goods on board a vessel destined for the Port of Hamburg:
- (iii) If the word 'shipment' includes not only the placing of the contract goods on board a vessel but also their transportation to the contract destination then shipment via the Suez Canal was prevented during the contract period of shipment by reason of force majeure but shipment via the Cape was not so prevented:
- (iv) It was not an implied term of the contract that shipment or transportation should be made via the Suez Canal:
- (v) The contract was not frustrated by the closure of the Suez Canal:
- (vi) the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

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The first three of these findings relate to the claim of the appellants that the exceptions clause (clause 6 of the contract) absolved them from performance of the contract. I will deal with this at once and shortly.

Similar words to those in clause 6 fell to be construed in *In re Comptoir Commercial Anversois and Power, Son & Co.*¹ Bailhache J. said: "Now, if I give to the word 'shipment' the "widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on a ship prepared to carry them to their contractual destination." His judgment on this point was affirmed in the Court of Appeal.² It has never been questioned and I see no reason for questioning it. In *Fairclough, Dodd & Jones Ltd. v. J. H. Vantol Ltd.*³ the decision turned on the very particular words of the contract and is not in conflict with the earlier case.

I come then to the main issue and, as usual, I find two questions interlocked: (1) What does the contract mean? In other words, is there an implied term that the goods shall be carried by a particular route? (2) Is the contract frustrated?

It is convenient to examine the first question first, though the answer may be inconclusive. For it appears to me that it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because as a matter of construction a term cannot be implied, that the contract may not be frustrated by events. In the instant case, for example, the impossibility of the route via Suez, if that were assumed to be the implied contractual obligation, would not necessarily spell the frustration of the contract.

It is put in the forefront of the appellants' case that the contract was a contract for the shipment of goods via Suez. This contention can only prevail if a term is implied, for the contract does not say so. To say that that is nevertheless its meaning is to say in other words that the term must be implied. For this I see no ground. It has been rejected by the learned trial judge and each of the members of the Court of Appeal; and in two other cases, *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*⁴ and *Gaon (Albert D.) & Co. v. Société Interprofessionnelle des Oléagineux*

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Fluides Alimentaires,⁵ where the same question arose, it was rejected by McNair J. and Ashworth J. respectively. A variant of this contention was that there should be read into the contract by implication the words "by the usual and customary route" and that, as the only usual and customary route at the date of the contract was via Suez, the contractual obligation was to carry the goods via Suez. Though this contention has been viewed somewhat differently, I see as little ground for the implication. In this I agree with Harman L.J.,⁶ for it seems to me that there are precisely the same grounds for rejecting the one as the other. Both of them assume that sellers and buyers alike intended and would have agreed that, if the route via Suez became impossible, the goods should not be shipped at all. Inasmuch as the buyers presumably wanted the goods and might well have resold them, the assumption appears wholly unjustified. Freight charges may go up or down. If the parties do not specifically protect themselves against change, the loss must lie where it falls.

For the general proposition that in a c.i.f. contract the obligation, in the absence of express terms, is to follow the usual or customary route there is a significant absence of authority. Some reliance was placed on *In re L. Sutro & Co. and Heilbut, Symons & Co.*⁷ But the facts and the question arising upon them were widely different from those in the present case. The decision was that since the contract clearly contemplated carriage by sea from the loading port to the ultimate port of discharge it could not be performed by carriage partly by sea and partly by rail, though the arbitrators had found that that method of transport had become a usage in the trade. It is possible that, if the decision was reviewed in this House, it might not stand: it is unnecessary now to determine that question. For as I have said, the decisive fact there was that the actual route was different in kind from the contractual route. Apart from this authority the appellants relied on a passage in Kennedy on C.I.F. Contracts, 1st ed., p. 39: "In the "absence of express terms in the contract the customary or usual route must be followed." I cannot accept this general proposition without some qualification. In particular, since it is, in any case, clear that it is not the date of the contract but the time of performance that determines what is customary, the proposition must be qualified by adding to it some such words as "unless at the time of performance there is no customary or

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usual route." If those words are implied, the question arises: "What then?" The answer must depend on the

circumstances of each case. This leads me directly to section 32 (2) of the Sale of Goods Act, 1893, which provides that "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case." If there is no customary route, that route must be chosen which is reasonable. If there is only one route, that must be taken if it is practicable: see *Evans, Sons & Co. v. Cunard Steamship Co. Ltd.*,⁸ per Wills J.

I turn now to what was the main argument for the appellants: that the contract was frustrated by the closure of the Canal from November 2, 1956, till April 1957. Were it not for the decision of McNair J. in *Green's case*⁹ I should not have thought this contention arguable and I must say with the greatest respect to that learned judge that I cannot think he has given full weight to the decisions old and new of this House upon the doctrine of frustration. He correctly held upon the authority of *Reardon Smith Line Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.*¹⁰ that "where a contract, expressly or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for."¹¹ But he concluded¹² that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made and that to impose upon the sellers the obligation to ship by an emergency route via the Cape would be to impose upon them a fundamentally different obligation which neither party could at the time when the contract was performed have dreamed that the sellers would be required to perform. Your Lordships will observe how similar this line of argument is to that which supports the implication of a term that the route should be via Suez and no other. I can see no justification for it. We are concerned with a c.i.f. contract for the sale of goods, not a contract of affreightment, though part of the sellers' obligation will be to procure a contract of affreightment. There is no evidence that the buyers attached

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any importance to the route. They were content that the nuts should be shipped at any date in November or December. There was no evidence, and I suppose could not be, that the nuts would deteriorate as the result of a longer voyage and a double crossing of the Equator, nor any evidence that the market was seasonable. In a word, there was no evidence that the buyers cared by what route or, within reasonable limits, when the nuts arrived. What, then, of the sellers? I recall the well-known passage in the speech of Lord Atkinson in *Johnson v. Taylor Bros. & Co. Ltd.*¹³ where he states the obligations of the vendor of goods under a c.i.f. contract, and ask which of these obligations is (to use McNair J.'s word) "fundamentally" altered by a change of route. Clearly the contract of affreightment will be different and so may be the terms of insurance. In both these respects the sellers may be put to greater cost: their profit may be reduced or even disappear. But it hardly needs reasserting that an increase of expense is not a ground of frustration: see *Larrinaga & Co. Ltd. v. Société Franco-Américaine des Phosphates de Medulla, Paris.*¹⁴

Nothing else remains to justify the view that the nature of the contract was "fundamentally" altered. That is the word used by Viscount Simon in *British Movietonews Ltd. v. London and District Cinemas Ltd.*¹⁵ and by my noble and learned friend Lord Reid in *Davis Contractors Ltd. v. Fareham Urban District Council.*¹⁶ In the latter case my noble and learned friend Lord Radcliffe¹⁷ used the expression "radically different" and I think that the two expressions mean the same thing, as perhaps do other adverbs which have been used in this context. Whatever expression is used, I venture to say what I have said myself before and others more authoritatively have said before me: that the doctrine of frustration must be applied within very narrow limits. In my opinion this case falls far short of satisfying the necessary conditions. Reluctant as I am to differ from a judge so experienced in commercial law as McNair J., I am glad to find that my view is shared by Ashworth J. and all the members of the Court of Appeal.

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Upon this part of the case I have not thought it necessary to deal with Pearson J.'s decision in *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*¹⁸ There the question was whether a charter party was frustrated by the blocking of the Suez Canal. The learned judge held that it was, but was at pains to point out that the position was very different in a contract for the sale of goods. Upon that point I agree with him and need not discuss the matter further.

I come finally to a question which has given me some trouble. I refer to the sixth finding in the special case which I have already fully set out. It will be remembered that the vital words were "not commercially or fundamentally different." Diplock J., regarding this as a finding of fact, thought that the case was thereby concluded. I cannot regard this as a correct decision. It is a question of law whether a contract has been frustrated and it is commonly said that frustration occurs

when conditions arise which are fundamentally different from those contemplated by the parties. But it does not follow from the use by the arbitrator of the word "fundamentally" in describing the difference between the actual and the contemplated conditions that the court is precluded from forming its own judgment whether or not a contract has been frustrated. It is of great value to the court to know that lay arbitrators with special knowledge do or do not regard the new circumstances as so different from those contemplated that they think "fundamental" an appropriate word to use. But the value is evidential only. It has not the sanctity of a finding of fact. I do not say that an arbitrator should be debarred from the use of the word "fundamental" or "radical" or any other word which he thinks apt to give emphasis to his view. But if he does so he must not be taken indirectly to determine the question of law which the court must decide.

In my opinion the appeal should be dismissed with costs.

LORD REID. My Lords, the appellants agreed to sell to the respondents 300 tons of Sudan groundnuts at £50 per ton c.i.f.. Hamburg. Admittedly, the groundnuts had to be shipped from Port Sudan. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be November/December, 1956, but on November 2, 1956, the Canal was closed to traffic and it was not reopened until the following April.

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It is stated in the special case that "the sellers could have transported the goods from Port Sudan to Hamburg via the Cape during November or December 1956." The freight via Suez would have been about £7 10s. per ton. The freight via the Cape was increased by stages. It was £15 per ton after December 13. I shall assume in favour of the appellants that the proper comparison is between £7 10s. and £15 per ton.

The appellants refused to ship the goods via the Cape and on February 9 the respondents gave notice of their intention to buy in against the appellants. The question now is whether by reason of the closing of the Suez route the contract had been ended by frustration.

The appellants' first argument was that it was an implied term of the contract that shipment should be via Suez. It is found in the case that both parties contemplated that shipment would be by that route but I find nothing in the contract or in the case to indicate that they intended to make this a term of the contract or that any such term should be implied: they left the matter to the ordinary rules of law.

Admittedly the ordinary rule is that a shipper must ship by the usual and customary route, or, if there is no such route, then by a practicable and reasonable route. But the appellants' next contention was that this means the usual and customary route at the date of the contract, while the respondents maintain that the rule refers to the time of performance. There appears to be no decided case about this and perhaps that is not surprising because the point cannot often arise. Apart from the opinion of McNair J. in *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*¹⁹ and of the Court of Appeal in this case which are against the appellants, there are a few expressions of opinion on this matter but I shall not examine them as the precise point may not have been in the minds of their authors, and I am doing no injustice to the appellants because on the whole these opinions favour the respondents' contention. Regarding the question as an open one I would ask which is the more reasonable interpretation of the rule.

If the appellants are right, the question whether the contract is ended does not depend on the extent to which the parties or their rights and obligations are affected by the substitution of the new route for the old. If the new route made necessary by the closing of the old is substantially different the contract

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would be at an end however slight the effect of the change might be on the parties. That appears to me to be quite unreasonable: in effect it means writing the old route into the contract although the parties have chosen not to say anything about the matter. On the other hand, if the rule is to ascertain the route at the time of performance, then the question whether the sellers are still bound to ship the goods by the new route does depend on the circumstances as they affect them and the buyers: whether or not they are such as to infer frustration of the contract. That appears to me much

more just and reasonable and in my opinion that should be held to be the proper interpretation of the rule.

I turn then to consider the piscine after the Canal was closed, and to compare the rights and obligations of the parties thereafter, if the contract still bound them, with what their rights and obligations would have been if the Canal had remained open. As regards the sellers, the appellants, the only difference to which I find reference in the case - and indeed the only difference suggested in argument - was that they would have had to pay £15 per ton freight instead of £7 10s. They had no concern with the nature of the voyage. In other circumstances that might have affected the buyers, and it is necessary to consider the position of both parties because frustration operates without being invoked by either party and, if the market price of groundnuts had fallen instead of rising, it might have been the buyers who alleged frustration. There might be cases where damage to the goods was a likely result of the longer voyage which twice crossed the Equator, or perhaps the buyer could be prejudiced by the fact that the normal duration of the voyage via Suez was about three weeks whereas the normal duration via the Cape was about seven weeks. But there is no suggestion in the case that the longer voyage could damage the groundnuts or that the delay could have caused loss to these buyers of which they could complain. Counsel for the appellants rightly did not argue that this increase in the freight payable by the appellants was sufficient to frustrate the contract and I need not therefore consider what the result might be if the increase had reached an astronomical figure. The route by the Cape was certainly practicable. There could be, on the findings in the case, no objection to it by the buyers and the only objection to it from the point of view of the sellers was that it cost them more and it was not excluded by the contract. Where, then, is there any basis for frustration?

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It appears to me that the only possible way of reaching a conclusion that this contract was frustrated would be to concentrate on the altered nature of the voyage. I have no means of judging whether, looking at the matter from the point of view of a ship whose route from Port Sudan was altered from via Suez to via the Cape, the difference would be so radical as to involve frustration and I express no opinion about that. As I understood the argument it was based on the assumption that the voyage was the manner of performing the sellers' obligations and that therefore its nature was material. I do not think so. What the sellers had to do was simply to find a ship proceeding by what was a practicable and now a reasonable route - perhaps not via a usual route - to pay the freight and obtain a proper bill of lading, and to furnish the necessary documents to the buyers. That was their manner of performing their obligations, and for the reasons which I have given I think that such changes in these matters as were made necessary fell far short of justifying a finding of frustration. I agree that the appellants cannot rely on the provisions of clause 6 of the contract regarding prevention of shipment. I therefore agree that this appeal should be dismissed.

I should, perhaps, add a few words about the finding in the case that performance by shipping via the Cape of Good Hope was "not commercially or fundamentally different" from performance by shipping via Suez. This cannot be intended to mean that it was neither different commercially nor different fundamentally. Plainly there is a commercial difference between paying £7 10s. and paying £15 per ton freight. It must mean that performance was not fundamentally different in a commercial sense. But all commercial contracts ought to be interpreted in light of commercial considerations. I cannot imagine a commercial case where it would be proper to hold that performance is fundamentally different in a legal though not in a commercial sense. Whichever way one takes it the ultimate question is whether the new method of performance is fundamentally different and that is a question of law. The commercial importance of the various differences involved in the change of route - delay, risk to the goods, cost, etc. - is fact on which specific findings by arbitrators are entirely appropriate. But the inference to be drawn on a consideration of all the relevant factors must, in my view, be a matter of law - was there or was there not frustration.

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LORD RADCLIFFE. My Lords, I think that the outcome of this appeal depends upon a short point. The real issue, as I see it, is to determine how to define the obligation of the appellants, the vendors, under the sale contract of October 4, 1956, so far as it related to shipment of the goods sold and the provision of shipping documents. Once it is settled what that definition should be, there is not much difficulty in seeing what are the legal consequences that should follow, having regard to the facts found for us by the special case.

This is a sale of goods on c.i.f. terms. Such a sale involves a variety of obligations, both those written out in the contract itself and those supplied by implication of law for the business efficacy of the transaction. The only sector of these obligations that is relevant for the purpose of this case is the vendors' duty "to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract" (see *Biddell Brothers v. E. Clemens*

Horst Co.,²⁰ *per* Hamilton J.). Even within this sector, however, there are gaps which the law has to fill in: for instance, what form of contract of effort ment will meet the needs of the transaction, and what route or routes are permissible for the carrying vessel selected? In the present case nothing turns on the form of the bill of lading, which is not in evidence: everything turns on the question of route. The written contract makes no condition about this, its only stipulation being that shipment is to be from a West African port, by which we are asked to assume that the parties in fact meant Port Sudan. So the voyage was to begin at Port Sudan and to end at Hamburg. The primary duty under this part of the contract was to dispatch the groundnuts by sea from one port to the destination of the other.

At the date when the contract was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at any time when the Suez Canal was open. The Suez Canal was blocked on November 2, 1956, and remained blocked until April, 1957. Nevertheless, during the months of November/December, 1956, the period in which the vendors had to ship under the contract, it was feasible for them to transport the goods via the Cape of Good Hope. It would have involved a voyage of some 11,137

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miles as against 4,386 miles by way of Suez, and it would have meant a rise in freight rate of 25 per cent. (and in the last two weeks of December, 100 per cent.) above that ruling when the sale contract was made. These differences did not, however, in the opinion of the board of appeal of the Incorporated Oil Seed Association who state the case, render transport by the Cape route commercially or fundamentally different from transport by way of the Suez Canal.

Now in these circumstances were the appellants under obligation to procure a bill of lading for the transport of the goods by the Cape route, the Suez Canal not being available? That depends on how their obligation is defined. It is said on their behalf that the duty of shipment is a duty to ship by the "customary or usual route," a route which can be ascertained as that followed by settled and established practice (see Kennedy, C.I.F. Contracts, 1st ed., p. 39). Failing express provision on the point by the terms of the contract, that is, in my opinion, a correct general statement of what the law would imply; but I do not accept the further proposition which the appellants' argument requires, namely that, given the existence of such a route at the date of the contract, the whole of the vendor's obligation with regard to shipment is contained in this phrase, "the customary or usual route." Putting aside exceptional cases in which there never has become established any customary route at all from one port to the other, we have to consider the case in which, while there has been a customary route at or before the date of the sale, that route is not available at the time when the vendor is ready to ship. The appellants say that, since the whole obligation consists in shipping by the customary or usual route, the contract would in that event become unenforceable, either because its terms had become impossible of performance or because it was avoided by frustration. In this context the two alternatives would amount to the same thing. I think, however, that the vendor's obligation has to be determined in the light of matters as they stand at the date of shipment, and it may be proper for him to take a course in those circumstances which it would not have been proper for him to take at the date of the contract.

In my opinion there is no magic in the introduction of the formula "customary or usual route" to describe the term implied by law. It is only appropriate because it is in ordinary circumstances the test of what it is reasonable to impose upon the vendor in order to round out the imperfect form of the contract

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into something which, as mercantile men, the parties may be presumed to have intended. The corpus of commercial law has been built up largely by this process of supplying from the common usage of the trade what is the unexpressed intention of the parties. It is necessary first to ascertain what is the commercial nature or purpose of the adventure that is the subject of the contract; that ascertained, it has next to be asked what within this scope are the essential terms which, so far as not expressed, must be implied in order to make the contract efficacious as a business instrument. The natural way to answer this question is to find out what is the usual thing in the same line of business. Various adjectives or

phrases are employed to describe the point of reference. I can quote the following from judicial decisions: recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety: and, of course, reasonable. I put "reasonable" last because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract. The basic proposition is therefore that laid down by Brett M.R. in *Sanders v. MacLear*²⁷: "The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable."

Applying that proposition to the present case, I do not think that it is enough for the appellants to point out that the usual and customary route for the transport of groundnuts from Port Sudan to Hamburg was via the Suez Canal, and that at the date of the sale contract both parties contemplated that shipment would be by that route. This contract was a sale of goods, which involved dispatching the goods from Port Sudan to Hamburg; but, of course, the transport was not the whole but only one of the incidents of the contract, in which particular incident neither vendors nor buyers were directly implicated. There was nothing to prevent the vendors from dispatching the goods as contracted, unless they were impliedly bound as a term of the contract to use no other route than that of the Suez Canal. I do not see why that term should be implied and, if it is not implied, the true question seems to me to be, since shipment was due to be made by some route during November/December, whether it was a reasonable action for a mercantile man to perform his contract by putting the goods on board a ship going round the Cape of Good

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Hope and obtaining a bill of lading on this basis. A man may habitually leave his house by the front door to keep his appointments; but, if the front door is stuck, he would hardly be excused for not leaving by the back. The question, therefore, is what is the reasonable mercantile method of performing the contract at a time when the Suez Canal is closed, not at a time when it is open. To such a question the test of "the usual and customary route" is ex hypothesi inapplicable.

On the facts found by the special case I think that the answer is inevitable. The voyage would be a much longer one in terms of miles; but length reflects itself in such matters as time of arrival, condition of goods, increase of freight rates. A change of route may, moreover, augment the sheer hazard of the transport. There is nothing in the circumstances of the commercial adventure represented by the appellants' contract which suggests that these changes would have been material. Time was plainly elastic. Not only did the vendors have the option of choosing any date within a two-month period for shipment, but also there was a wide margin within which there might be variations of the speed capacity of the carrying vessel or vessels selected. There was no stipulated date for arrival at Hamburg. Nothing appears to suggest that the Cape voyage would be prejudicial to the condition of the goods or would involve special packing or stowing, nor does there seem to have been any seasonal market to be considered. With all these facts before them, as well as the measure of freight surcharge that would fall to the vendors' account, the board of appeal made their finding that performance by shipping on the Cape route was not "commercially or fundamentally different" from shipping via the Suez Canal. We have no material which would make it possible for us to differ from that conclusion.

It has been a matter of debate whether this finding ought to be treated as a finding of fact, by which a court would be bound, or as a holding of law, which, as such, would be open to review. It was treated as the first by the learned trial judge: it was treated more as the second by the Court of Appeal whose view of it was, I think, that, while of the utmost relevance for the determination of the final issue of the case, it did not bind the court so as to dictate what it should decide. So far as the distinction can be made between law and fact, I agree with the Court of Appeal. I regard it as a mixed question of fact and law whether transport via the Cape of Good Hope was so materially different

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from transport via the Suez Canal that it was not within the range of the c.i.f. contract or, alternatively, was so radically different that it left that contract frustrated. The ultimate conclusion is a conclusion of law, but in a case of this sort that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men.

I do not believe that in this, as in many other branches of commercial law, it is possible to analyse very precisely where law begins and fact ends. That is because in this field legal obligations and legal rights are largely founded upon usage

and practice, which themselves are established as matters of fact. Many things which are now regarded as settled principles of law originated in nothing more than common mercantile practice, and the existence and terms of this practice have been vouched sometimes by questions put to and answered by special juries, sometimes by the findings and views of commercial arbitrators and sometimes by the bare statements of the judges, founded upon their experience at the Bar or on the Bench. It would be difficult, for instance, to separate the judgments on commercial law delivered by three such masters as Lord Esher, Scrutton L.J. and Lord Sumner from their personal acquaintance with mercantile usages and their translation of the one into the terms of the other.

I do not think, therefore, that it is right to be very analytical in distinguishing between questions of law and questions of fact in matters of this kind. Since Lord Mansfield's day commercial law has been ascertained by a co-operative exchange between judge and jury, and now that arbitrators have taken the place of juries I do not think that we can start all over again with an absolute distinction between the respective spheres of judge and arbitrator. Generally speaking, I do not think that a finding in the form which we have here can ever be conclusive on the legal issue. When all necessary facts have been found it remains a question of law for the court what on the true construction of the contract are the obligations imposed or whether, having regard to the terms of the contract and the surrounding circumstances, any particular term is to be implied. But, when the implication of terms depends essentially upon what is customary or usual or accepted practice, it is inevitable that the findings of fact, whatever they may be, go virtually the whole way towards determining the legal result.

The finding in this case is perhaps unusual in that it does not speak for any usage or practice of trade - *ex hypothesi*, there was

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no established usage once the Suez Canal was blocked - but rather for the view of mercantile men as to the significance of adopting the alternative route. It is a summary way of stating that a voyage by that route would not involve any elements of difference that would be regarded as material by persons familiar with the trade. It would be contrary to common sense that a court, which cannot uninstructed assess the commercial significance of, say, a surcharge of £7 10s. per ton for freight in a c.i.f. contract of this kind, should not pay careful attention to such a view from such a source; just as it would be, I think, contrary to principle that a court should regard a view so expressed as finally conclusive of the legal issue.

I must add that I do not think that such a finding is altogether satisfactory for the purposes of a special case. It is in essence a summary of the commercial significance of several separate aspects of the Cape route as contrasted with the Suez Canal route, and it is embarrassing for a court which has to answer the question raised by the case to have before it only the summary and not the arbitrator's findings upon the individual aspects which make up the conclusion. I can see that, if this form came into general use, a court might feel obliged to send back the case containing it for further and more explicit findings. It would have been better if the special case had identified the several aspects of difference, length, time, cost, risk, etc., which, as it is, the court is left to infer, and had made with regard to them, both separately and together, the finding that was clearly intended, that they were not significant from the mercantile point of view.

I agree with the opinions already expressed by my noble and learned friends who have preceded me, that the exception clause, clause 6 of the contract, does not apply.

I would dismiss the appeal.

LORD HODSON. My Lords, the appellants have put in the forefront of their argument that it is an implied term of every c.i.f. contract, including the contract under consideration, that the goods shall be carried by the (or if more than one a) customary route. In this connection it is contended that the relevant moment of time for determining whether a route is customary is the time when the contract is concluded.

The first part of the proposition has been accepted by Diplock J. and by the majority of the Court of Appeal, while the

second part was rejected, it being held in both courts that the sellers' obligation, under a contract such as this, is to ship by a route

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usual and customary at the time of performance. If the whole of the proposition were accepted it would be equivalent in this contract to adding by implication the words "via Suez." For the reasons already given such implication is unnecessary and should be rejected.

Harman L.J. in the Court of Appeal did not accept either limb of the proposition and did not see the necessity of implying any such words as "by the usual and customary route." He pointed out that the sellers' duty was to ship the goods from Port Sudan to the named port by a ship leaving within the given period.

It is true that as the case finds: "At the date when the contract was made the parties contemplated that shipment would be made by the Suez Canal." This, however, is a contract of sale not of carriage and unless there is some special rule applicable to c.i.f. contracts the duty of the sellers is defined by section 32 of the Sale of Goods Act, 1893, which provides:

"32 - (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

Applying the provisions of that section to this case the sellers are bound to ship by a reasonable route having regard to the nature of the goods and the other circumstances of the case.

It might be, as Harman L.J. pointed out, that it was essential for the buyers to receive the goods within a given time and that this could only be done by sending them via Suez; moreover, the goods might be of a nature which would not stand a route crossing the Equator twice.

Unless persuaded by authority that this line of reasoning is wrong, I find it convincing for the Sale of Goods Act in effect codifies the relevant law.

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The appellants rely upon a passage to be found in Kennedy on C.I.F. Contracts, 1st ed., p. 39: "In the absence of express terms in the contract the customary or usual route must be followed."

This passage is not supported by any authority save that it was, I think, assumed to be correct by Scrutton L.J. in *In re L. Sutro & Co. and Heilbut, Symons & Co.*²² The actual decision in that case is not of assistance. The majority of the Court of Appeal held that, in a contract made in 1916 for the sale of rubber to be shipped from the East to New York, a tender of goods which had been transmitted by rail from the western seaboard of the United States to New York was not a good tender and the buyers were not bound to accept the same. Scrutton L.J., who dissented, was of opinion that the tender was good and the route taken by the rubber was at the time a usual route and not excluded by the terms of the contract from the means of performance open to the vendor. He did, however, use these words²³ :

"Where there is a contract to carry from A to B if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage, at the option of the carrier." This language is, I think, appropriate to a contract of affreightment but it is true that that sentence was used in a case where a c.i.f. contract was under consideration and is for that reason relied upon as an authoritative dictum, contained as it is in the judgment of a master of the law whose words carry great weight not least in matters appertaining to commercial transactions.

Notwithstanding the fact that the procuring of a contract of affreightment is part of the obligation of the seller under a c.i.f. contract, I am not persuaded that the proposition contended for by the appellants is sound and I am of the same opinion as Harman L.J., that it is not necessary to imply in this contract the words "by the usual and customary route."

On any view it would seem that the passage in Kennedy on C.I.F. Contracts requires some qualification for, if an event happened which prevented a particular route being used so that a slightly longer journey, perhaps outside permissible deviation, was necessary, then, other routes being available, the seller could surely not say he was free from his contract.

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If I have stated the obligation of the sellers correctly, one then looks to see what the position was after the closure of the Suez Canal rendered shipment impossible by what would have been the normal route but for the closure.

The contract was dated October 4, 1956, and provided for the sale of 300 tons of groundnuts at a price of £50 per 1,000 kilos c.i.f. Hamburg. Shipment November/December, 1956. On November 2, 1956, the canal was blocked and transportation by that route became impossible until April, 1957. Thus virtually the whole of the shipment period remained open to the sellers.

The freight ruling at the time of the contract for shipment of groundnuts from Port Sudan to Hamburg via the Suez Canal was £7 10s. per ton. After the closure the freight rates were increased by surcharges for goods proceeding by the Cape of Good Hope, namely, as from November 10, 1956, 25 per cent. and as from December 13, 1956, 100 per cent. The distance from Port Sudan to Hamburg via the Suez Canal is approximately 4,386 miles and the distance from Port Sudan to Hamburg via the Cape of Good Hope is approximately 11,137 miles. On January 15, 1957, the buyers brought in a quantity of groundnuts against the sellers at a price of £68 10s. per 1,000 kilos, the market price this time being £68 15s. per ton. Nothing was proved or found as to the nature of the goods or other circumstances which would render the route round the Cape unreasonable or impracticable and this route was at all times available.

Unless shipment by the Cape route was so onerous to the sellers as to make the performance of the contract fundamentally different in kind from any performance they had promised, the contract of October 4, 1956, remained binding between the parties.

The material date is the date of performance, when the seller chooses to ship the goods by a ship of his choice, which may be fast or slow, and during the shipment period it follows from the findings in the award that the Cape route was the only reasonable and practicable route. The freight was higher than that involved in the Suez route but even when increased by 100 per cent. still remained only a proportion of the purchase price of the groundnuts even though a significant proportion. Freight rates go up and down and it is exceedingly difficult in a commercial contract to escape from its terms on the ground of frustration by the increased expense involved when the time of performance is reached as compared with that contemplated when the contract is made. Indeed the appellants did not rest their frustration argument on the increase of freight, realising the difficulty

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of maintaining such a submission unless the increase were astronomical, but maintained that the "long haul round the Cape" was so fundamentally different from what had earlier been the usual route that the c.i.f. contract which included the obligation to procure a contract of affreightment had been frustrated by the closure of the Canal.

I see no ground as a matter of law on the true construction of this contract and the facts found in the special case upon which frustration can stand. Viscount Maugham pointed out in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*²⁴ : "The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made."

On the construction of the contract which appears to me to be correct having regard in particular to the dates for shipment extending over the period November/December, 1956, there is no room in my judgment for any application of the doctrine to this case.

I would add that I cannot agree with Diplock J. that the question in this case is answered simply by reference to the finding of mixed law and fact numbered (vi) in the special case where the arbitrators found in so far as it is a question of fact and held in so far as it is a question of law that "the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed by the Suez Canal."

This does not purport to be a finding of fact only, although it is true, I think, that a finding of fact can properly be extracted from it, namely, that nothing had been proved such as, for example, some characteristic of the goods, which would have rendered the performance commercially different in kind. This finding of fact is relevant, being a conclusion by commercial men who will know what difference is permissible, although ultimately the question whether or not there has been frustration is a question of law.

The ingredients of frustration are the facts and those facts are for the arbitrators whether they are facts found directly or by inference. For example, in *Jackson v. Union Marine Insurance Co. Ltd.*²⁵ the question left by Brett J. to the jury was: "whether the time necessary for getting the ship off the

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rocks and repairing her so as to be a cargo-carrying ship was ... so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers?" This question was characterised in the Court of Exchequer Chamber by Bramwell B.²⁶ as one which could not have been left in better terms although it might be paraphrased or amplified. I only comment that the actual question there related to delay, which is one of the relevant factors in reaching a conclusion as to frustration. It does not seem to me to involve that a finding of fact made by the arbitrators in such general language as that contained in clause (vi) of this award is conclusive as a matter of law in determining whether or not the contract has been frustrated. If such were the case the same set of facts could be decided by arbitrators either way in successive cases without the court having power to intervene.

There remains only for consideration the exception clause (No. 6). Since it was at all times possible for the appellants to effect shipment of the goods at Port Sudan on a vessel which would carry them to Hamburg this clause does not avail the appellants: see the judgment of Bailhache J. in *In re Comptoir Commercial Anversois and Power, Son & Co.*,²⁷ confirmed in the Court of Appeal.

I would dismiss the appeal.

LORD GUEST. My Lords, the relevant facts in this appeal are: (1) By contract of sale dated October 4, 1956, the respondents contracted with the appellants for the purchase of 300 tons Sudanese groundnuts at £50 per 1,000 kilos c.i.f. from Port Sudan to Hamburg, shipment November/December, 1956. (2) The usual and normal route from Port Sudan to Hamburg was at the date when the contract was made via the Suez Canal, the distance being approximately 4,386 miles. (3) The Suez Canal was blocked on November 2, 1956, and remained blocked until April 9, 1957. (4) An alternative route from Port Sudan to Hamburg via the Cape of Good Hope was available throughout November and December, 1956, the distance being approximately 11,137 miles, and the sellers could have transported the goods from Port Sudan to Hamburg during this period.

The appellants never shipped any goods or tendered any documents, and in answer to a claim for damages by the respondents contended that the contract had been frustrated by the closure of the Suez Canal.

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I may first dispose of a preliminary argument by the appellants. Mr. Roskill, for the appellants, argued that the obligation of the seller was to procure a contract of affreightment for the buyer whereby the goods would be conveyed to the contractual destination by the usual and customary route to be ascertained when the contract was made. Authority for this proposition was said to be found in Kennedy's C.I.F. Contracts, 1st ed., p. 39, where it is stated: "In the absence of express terms in the contract the customary or usual route must be followed." I will assume for the purposes of this argument that this is a correct statement of the law. Mr. Roskill's argument further proceeded that if it was a breach of the contract for the seller to provide a contract of

affreightment other than by the usual or customary route, then the closure of that route must result in frustration of the contract. "How can a route," he said, "which was in breach of the contract one day, be obligatory next day? " This is not, to my mind, a true dilemma. The fallacy of this argument, in my opinion, is to confuse a breach of contract for which damages may be due with the circumstances under which frustration of the contract occurs. It by no means follows that, assuming the sellers would have been in breach of contract to ship via the Cape of Good Hope, the sellers would be entitled to avoid the contract because the Suez Canal route was not available. This would depend on whether shipment via the Cape was a radically different thing from shipment via the Suez Canal.

The juridical basis of the doctrine of frustration was recently examined by this House in *Davis Contractors Ltd. v. Fareham Urban District Council*²⁸ and it is unnecessary to deal with the earlier cases on the subject. Whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands does not appear to me to matter in the circumstances of the present case. Lord Reid in *Davis*²⁹ approached the matter on the basis that frustration only occurred where a fundamentally different situation had arisen which the contract had not contemplated. Lord Radcliffe put the matter thus³⁰ : "So perhaps it would be simpler to say at the outset that frustration occurs wherever 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

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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."

The contract under consideration is a c.i.f. contract. Under such a contract the seller has to procure a contract of affreightment under which the goods will be delivered at the destination contemplated (*Johnson v. Taylor Bros. Co. Ltd.*,³¹ per Lord Atkinson). All that is contained in the contract is "Shipment from Port Sudan as per bill or bills of lading dated or to be dated November/December, 1956." No route is given or provided for. The sellers' obligation is governed by section 32 (2) of the Sale of Goods Act, 1893, whereby he has to make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. He must therefore procure a reasonable contract of affreightment. The appellants contended that the sellers' obligation was to procure a contract of affreightment which he could tender to the buyer where under the goods would be conveyed by the usual and customary route to the contractual destination, and that the usual and customary route must be ascertained at the date when the contract was made. The argument further proceeded that when this contract was entered into the usual and customary route was via the Suez Canal, and that as that route had been closed by the time shipment fell to be made the contract had been frustrated. The first and critical matter to ascertain is the date when the sellers' obligation in regard to the contract of affreightment is to be judged. Under the present contract the sellers' obligation was shipment by a bill of lading to be dated November/December, 1956. They could therefore fulfil their contractual obligation by shipping at any date up to December 31. By the date when performance was called for the Suez Canal was closed and the only available route was by the Cape of Good Hope. In my opinion the sellers' obligation is to be determined by the circumstances prevailing at the date when he chooses to ship the goods and not when the contract was made. No authority was quoted by the appellants for the contention that the *tempus inspiciendum* was the date of the contract. It is also in my view, contrary to common sense and the terms of this contract. In regard to the question of whether the usual or customary route must be followed reliance was placed on an obiter dictum of Scrutton L.J. in *In re L. Sutro &*

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*Co. and Heilbut, Symons & Co.*³² : "Where there is a contract to carry from A to B if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage, at the option of the carrier. If the other party wishes to exclude some usual route or method of carriage, he can do so by inserting such a term into the contract, but in the absence of such a term the option of selecting a usual method of performance is with the person who has to perform." The first part of the quotation is clearly dealing with a contract of affreightment where the carrier has the option of selecting a usual route. In the second part of the quotation I am not clear whether the learned Lord Justice is dealing with a c.i.f. contract or a contract of affreightment. I am not at all satisfied that this dictum, together with the quotation from Kennedy's C.I.F. Contracts, 1st ed., p. 39, previously referred to, is justification for implying into every c.i.f. contract an obligation on the seller to obtain a contract of affreightment by the usual and customary route. As Harman L.J. in the Court of Appeal said³³ : "Why it should be necessary to imply such words as 'by

the usual and customary route," I do not see." In my opinion, all that the seller has to do is to procure a reasonable contract of affreightment. In judging whether it was a reasonable contract of affreightment the question whether the route given is the usual or customary route may be of importance for consideration with all other relevant circumstances. Whether or not such a term is implied in the present case, at the time when performance was called for there was no usual or customary route because the Suez Canal was closed and the only practicable route was via the Cape of Good Hope. The sellers could have fulfilled their obligation by a bill of lading via the Cape. There was, accordingly, no frustration because there was no change of circumstances to justify the application of the doctrine.

The cases dealing with contracts of affreightment are, in my view, not helpful, because in such contracts very different considerations apply from those in a contract of sale. In a c.i.f. contract the seller does not have to deliver the goods. He only has to ship them at the port indicated with a contract of affreightment to the port of destination. An example of the frustration of a contract of affreightment is *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*,³⁴ where Pearson J. held that a

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charterparty was frustrated by the blocking of the Suez Canal on the ground that it was a term of the contract (express or implied) that the vessel was to go by the Suez Canal, and he was able to hold that the route via the Cape was so different that it was a fundamentally different voyage. There are no circumstances in the present case to justify the implication of a term that the route should be via the Suez Canal.

The only case in which a c.i.f. contract has been held to be frustrated by closure of the Suez Canal is *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*,³⁵ decided by McNair J. The circumstances were almost precisely similar to the present. The learned judge held that the nature and extent of the sellers' obligation in relation to the route was to be ascertained at the time of performance. He then proceeded, however, to find that the contract was frustrated because to impose on the sellers an obligation to ship via the Cape was to impose upon them a fundamentally different obligation from that which they undertook when the contract was made. The learned judge, I think, fell into the error which he had previously corrected in the sellers' argument by treating the date of the contract as the date when the sellers' obligation had to be ascertained. If the critical date is the time when performance is called for, there cannot be frustration.

It remains to consider the ground on which Diplock J. held that the appellants failed. He considered that what had been described as the "special finding" of the board of appeal - "(vi) The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal" - was a conclusion of fact with which he could not interfere and that he was accordingly bound by that finding to hold that there was no frustration. In my opinion the learned judge misinterpreted the finding. These findings are prefaced by the statement: "So far as it is a question of fact we find and as far as it is a question of law we hold:-" Finding (vi) in my view is clearly a finding in law, and if I had thought that there were no facts to justify this finding I should, for my part, not have hesitated to disregard it. But as a finding of fact it is, as Sellers L.J. said, of the utmost relevance in a case of frustration, although it is not, in my opinion, conclusive.

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The appellants' final argument was based on clause 6 of the contract, which is in the following terms: "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating the contract shall be cancelled."

It was contended that shipment was prevented by the closure of the Suez Canal and that, as the cause operated beyond two months, the contract was cancelled. In my opinion "shipment" in the context means bringing the goods to the port of shipment, and "prevention" means either physical or legal prevention (In re Comptoir Commercial Anversois and Power, Son & Co.³⁶). In no circumstances can it be said that shipment was prevented by the closure of the Suez Canal.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.; Bernard Samuel Berrick & Co.*

J. A. G.

¹[1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

²[1960] 2 Q.B. 318; [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45; affirmed [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.

³[1959] 1 Q.B. 131.

⁴[1960] 2 Q.B. 318; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693; affirmed [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.

⁵[1959] 1 Q.B. 131.

⁶[1961] 2 Q.B. 278; [1960] 3 W.L.R. 701; [1960] 2 All E.R. 529.

⁷[1959] 1 Q.B. 131.

⁸[1960] 2 Q.B. 318.

⁹*Ibid.*

¹⁰[1959] 1 Q.B. 131.

¹¹*Ante*, p.96.

¹²[1949] 2 K.B. 632, 665; [1950] 1 All E.R. 208, C.A.

¹³[1956] A.C. 696; [1956] 3 W.L.B. 37; [1956] 2 All E.R. 145, H.L.

¹⁴[1956] A.C. 696, 723, 729.

¹⁵[1960] 3 W.L.R. 701, 722 et seq.

¹⁶(1873) L.R. 8 C.P. 572; affirmed (1874) L.R. 10 C.P. 125, Ex.Ch.

¹⁷[1920] 1 K.B. 868; 36 T.L.R. 101, C.A.

¹⁸L.R. 8 C.P. 572, 573.

¹⁹[1917] 2 K.B. 348; 33 T.L.R. 359.

²⁰(1902) 18 T.L.R. 374.

²¹[1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.

²²(1880) 5 App.Cas. 599.

²³[1917] 2 K.B. 348.

²⁴[1957] 1 W.L.R. 136, 143-145; [1956] 3 All E.R. 921, H.L.

²⁵[1959] 1 Q.B. 131.

²⁶[1920] A.C. 144, 155; 36 T.L.R. 62, H.L.

²⁷[1960] 2 Q.B. 318, 364.

²⁸[1959] 1 Q.B. 131, 144-146.

²⁹[1917] 2 K.B. 348.

³⁰[1960] 2 Q.B. 318, 359, 366.

³¹A.C. 562, 573, 574, 579, 584.

³²[1961] A.C. 135; [1960] 3 W.L.R. 145; [1960] 2 All E.R. 578, H.L.

³³[1917] 2 K.B. 348.

³⁴(1902) 18 T.L.R. 374.

³⁵[1939] A.C. 562.

³⁶[1929] A.C. 545.

³⁷[1960] 2 Q.B. 318, 367, 369, 370.

³⁸[1956] A.C. 696.

³⁹(1923) 29 Com.Cas. 1, 18, H.L.

⁴⁰*Ibid.* 16.

⁴¹[1920] A.C. 144, 155.

⁴²[1959] 1 Q.B. 131.

⁴³[1960] 3 W.L.R. 701.

⁴⁴[1919] A.C. 435, 458-460; 35 T.L.R. 150, H.L.

⁴⁵L.R. 8 C.P. 572.

⁴⁶[1956] A.C. 696.

- ⁴⁷[1923] A.C. 48, H.L.
⁴⁸[1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
⁴⁹[1920] 1 K.B. 868.
⁵⁰ibid. 878, 885, 886, 892, 898.
⁵¹[1957] 1 W.L.R. 136.
⁵²[1959] 1 Q.B. 132, 149.
⁵³[1960] 2 Q.B. 318, 348.
⁵⁴[1957] 2 Q.B. 401.
⁵⁵L.R. 10 C.P. 125.
⁵⁶[1911] 1 K.B. 214, 220; 27 T.L.R. 47.
⁵⁷18 T.L.R. 374.
⁵⁸18 T.L.R. 374.
⁵⁹[1961] A.C. 135.
⁶⁰5 App.Cas. 599.
⁶¹[1961] A.C. 135.
⁶²[1917] 2 K.B. 348.
⁶³[1959] 1 Q.B. 131.
⁶⁴[1960] 3 W.L.R. 701.
⁶⁵(1926) 31 Com.Cas. 239, 250, C.A.
⁶⁶[1952] 2 T.L.R. 349, 355; [1952] 2 All E.R. 497; [1952] 2 Lloyd's Rep. 147, C.A.
¹[1920] 1 K.B. 868, 878, C.A.
²[1920] 1 K.B. 868, 885, 892, 898; 36 T.L.R. 101, C.A.
³[1957] 1 W.L.R. 136; [1956] 3 All E.R. 921, H.L.
⁴[1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.
⁵[1960] 2 Q.B. 318, 341; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.
⁶[1960] 2 Q.B. 318, 370.
⁷[1917] 2 K.B. 348; 33 T.L.R. 359, C.A.
⁸(1902) 18 T.L.R. 374, 375.
⁹[1959] 1 Q.B. 131.
¹⁰[1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.
¹¹[1959] 1 Q.B. 131, 145.
¹²ibid. 149.
¹³[1920] A.C. 144, 155; 36 T.L.R. 62, H.L.
¹⁴(1922) 38 T.L.R. 739; 28 Com. Cas. 1, C.A.; (1923) 39 T.L.R. 316; 29 Com.Cas 1, H.L.
¹⁵[1952] A.C. 166, 185; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617, H.L.
¹⁶[1956] A.C. 696, 723; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.
¹⁷[1956] A.C. 696, 729.
¹⁸[1961] 2 Q.B. 278; [1960] 3 W.L.R. 701; [1960] 2 All E.R. 529.
¹⁹[1959] 1 Q.B. 131.
²⁰[1911] 1 K.B. 214, 220; 27 T.L.R. 47.
²¹(1883) 11 Q.B.D. 327, 337, C.A.
²²[1917] 2 K.B. 348.
²³ibid. 362.
²⁴[1942] A.C. 154, 168; 57 T.L.R. 485; [1941] 2 All E.R. 165, H.L.
²⁵(1873) L.R. 8 C.P. 572, 573.
²⁶(1874) L.R. 10 C.P. 125, 141.
²⁷[1920] 1 K.B. 868, 875 et seq.
²⁸[1956] A.C. 696.
²⁹ibid. 723.
³⁰ibid. 728, 729.
³¹[1920] A.C. 144, 155, 156.
³²[1917] 2 K.B. 348, 362.
³³[1960] 2 Q.B. 318, 369.
³⁴[1960] 3 W.L.R. 701.
³⁵[1959] 1 Q.B. 131.
³⁶[1920] 1 K.B. 868.

VIII.1 - Hardship: Requirements