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Contract Performance and Temporary Impossibility

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CONTRACT PERFORMANCE AND TEMPORARY IMPOSSIBILITY

WHEN performance of a contract becomes impossible through no fault of either party, the courts today have little difficulty in deciding that the parties are excused from performing while the impossibility continues. The difficult question arises when the impossibility ceases and one party then insists on performance. Is the other party obligated to perform, or should the delay caused by the temporary impossibility excuse performance?

This was the question presented to the court in the case of *Pacific Trading Co., Inc. v. Mouton Rice Milling Co.*[1] Mouton contracted in October and November, 1941, to sell rice to Pacific. Shipment was to have been made in November, December or January. Pacific was a Japanese national. On December 7, 1941, the United States froze its assets and made performance on its part impossible until December 31, when it secured a license to perform under three of the contracts involved, and January 31, when it secured a license to perform under the remaining contract. There had been a sharp rise in the price of rice in November and December. Mouton refused to ship the rice, and Pacific sued for damages. The Court of Appeals for the Eighth Circuit held that Mouton was liable for damages and that the temporary impossibility merely postponed the time for performance.

The case of *Neumond v. Farmers' Feed Co. of New York*[2] involved the same question regarding an option contract for the sale of a trade mark. The New York Court of Appeals held that after the temporary impossibility caused by action of the United States in World War I had been removed, the parties were not obligated to perform because the value of the bargain had been materially impaired by the delay, which lasted from April, 1917, until the war was over in November, 1918.[3]

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[1] 184 F. 2d 141 (8th Cir. 1950).

[2] 244 N. Y. 202, 155 N. E. 100 (1926).

[3] "If the contract is still executory at the beginning of the war, if there are mutual

In *Patch v. Solar Corporation*[4] the Court of Appeals for the Seventh Circuit held that temporary impossibility of performance under an exclusive patent contract did not permanently excuse performance. The temporary impossibility in this case was caused by the Federal Government's action in prohibiting the manufacture of washing machines during World War II and extended from May, 1942, until the end of the war in 1945. The court stated that the delay did not frustrate entirely the object the parties had when they entered into the contract.[5]

In *Autry v. Republic Productions, Inc.*,[6] the temporary impossibility was caused by an actor's service in the Armed Forces during World War II from July, 1942, until July, 1945. The Supreme Court of California held that it would be unjust and inequitable to require the actor to perform under personal service contracts after the impossibility had ceased.[7]

The performance of a construction contract was rendered temporarily impossible by action of the United States during World War II in the case of *Village of Minnesota v. Fairbanks, Morse & Co.*[8] The Supreme Court of Minnesota decided that performance after the delay, which lasted from February, 1942, until October, 1945, would have been substantially different from that contemplated by the parties and found there was no obligation to perform after the impossibility ceased.[9]

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obligations that are yet to be fulfilled, the contract will be terminated when the essential purpose of the parties would be thwarted by delay, or the business efficacy or value of the bargain materially impaired." 155 N. E. at 101.

[4] 149 F. 2d 558 (7th Cir. 1945), *cert. denied*, 326 U. S. 741 (1945).

[5] "We do not think that the impossibility of performance has persisted or will persist long enough to frustrate entirely the object the parties had when they entered into the contract." *Id.* at 561.

[6] 30 Cal. 2d 144, 180 P. 2d 888 (1947).

[7] "It has been said that the doctrine of revival of contracts is one based on considerations of equity and justice, and cannot be invoked to restore a contract which it would be unjust or inequitable to revive." 180 P. 2d at 895.

[8] 226 Minn. 1, 31 N. W. 2d 920 (1948).

[9] "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor." 31 N. W. 2d at 926.

The Supreme Court of Louisiana, in a slightly different fact situation, reached a conclusion opposite to that reached in the *Mouton* case in *Pacific Trading Co., Inc. v. Louisiana State Rice Milling Co., Inc.*[10] The buyer was the same in both cases, and the reasons for the temporary impossibility were, therefore, the same. The duration of the delay was also approximately the same. In the *Louisiana* case the seller notified the buyer, as soon as it learned of the impossibility, that it was cancelling all shipments. The court said that the seller was justified in thus revoking the contract.

These cases are indicative of the recent trend of the law away from the early common law rule which required a strict enforcement of contracts even though performance was rendered extremely difficult by unforeseeable circumstances. Under the common law, impossibility excused performance only where there was a supervening illegality or death or illness in contracts for personal service.[11] If a person contracted to do an act, he was required to do it. If he failed to provide in the contract for contingencies or accidents, he was obliged to perform, even though performance was extremely difficult.[12] This early rule was not modified until the Nineteenth Century, when the case of *Taylor v. Caldwell*[13] was decided. Under this and subsequent cases a contract was held to be discharged if there was a destruction of any thing, the existence of which was essential to the contract. Since then there has been a gradual extension of the law of impossibility to excuse performance when justice demanded. Today the term impossibility includes not only strict impossibility but also impracticability be-

[10] 215 La. 1086, 42 So. 2d 855 (1949).

[11] 6 WILLISTON, CONTRACTS (Rev. Ed. 1938) § 1931.

[12] "... [W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Paradine v. Jane, 1 Aleyn 26, 27, 82 Eng. Rep. 897 (K. B. 1646).

[13] 3 B. & S. 826, 122 Eng. Rep. 309 (Q. B. 1863).

cause of extreme and unreasonable difficulty, expense, injury, or loss.[14]

Many recent decisions excusing performance of contracts in cases of extreme difficulty or expense have mentioned the doctrine of frustration, which dates back to the English coronation case of *Krell v. Henry*.[15] The courts have said that the essential purpose of the contract has been frustrated by subsequent events and that performance should be excused or obligations under the contract discharged under the theory of frustration. In the same decisions the courts have often mentioned the doctrine of impossibility as a basis for the judgments. It is often difficult to determine on which of the two theories a court is really basing its decision. Attempts have been made to distinguish the two on the grounds that frustration applies when there is no impossibility.[16] This distinction would have been a good one under the common law view of impossibility and the view of frustration as originally applied in the English coronation case. However, since the doctrine of impossibility has now been extended to include situations where performance is possible but would be impracticable because of extreme difficulty or expense, the distinction cannot now be made on this basis. There appears to be no real distinction between the two theories as they have been applied by the courts in recent cases. And whether the case is based on frustration or impossibility, the result is the same.[17]

A delay caused by temporary impossibility is one of the unforeseeable events which is often not provided for by the parties and which will sometimes, under the modern application of the theory of impossibility or under the theory of frustration, excuse performance. When will performance be excused in such cases?

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[14] 2 RESTATEMENT, CONTRACTS (1932) § 454.

[15] L. R. [1903] 2 K. B. 740.

[16] Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47 (1944).

[17] "Whether you call it impossibility of performance or frustration, the result is the same." Patch v. Solar Corporation, 149 F. 2d 558, 560 (7th Cir. 1945), *cert. denied*, 326 U. S. 741 (1945).

This question is one which the courts must answer after considering the contract itself along with the events leading to the delay and all the other facts in the particular case. If equity and justice demand that the promisor be excused, he will be excused. It is a matter of weighing the equities. In doing so the courts have asked several different questions. The question asked in the *Neumond* case was whether the value of the bargain had been materially impaired. In the *Patch* case one of the questions asked was whether the object the parties had when they entered into the contract had been frustrated. The court in the *Autry* case asked the general question whether it would be unjust and inequitable to require performance after the delay. The question which the court probably asked in the *Louisiana* case was whether the return promisor acted in good faith in revoking the contract when it learned of the impossibility. The *Village of Minnesota* case indicated that the question is whether performance after the delay would have been substantially different from that contemplated by the parties. We can conclude from the questions asked by the courts in these cases that where there is a delay caused by temporary impossibility, performance will be excused when there is a justified change of position. Performance will also be excused when the performance after the delay would be materially different from that contemplated by the parties when the contract was made. The length of the delay is important in determining materiality, but the nature of the contract must also be considered in such a determination. For example, lapse of a month's time might make a material difference in a rice sales contract; but in a personal service contract a longer delay would probably be necessary before it became material. Finally, since it is an equitable problem, the party seeking to be excused must be able to show that he acted in good faith throughout.

Turning back now to the *Mouton* case, was the decision reached by the court in that case a fair solution to the problem presented? This question has to be answered by considering the contracts

made by the parties and the subsequent unforeseen events occasioned by the war. Then, taking all the facts into consideration, it must be determined whether equity and justice demanded that Mouton be relieved of its contractual obligations. When this is done, the conclusion is that the court did arrive at the correct answer to the problem. Mouton should not be relieved of its obligations under the contracts. Mouton had failed to ship prior to the time of the impossibility and did not make its reasons for such failure clear to the buyer or to the court. It was informed that the buyer expected to receive a license to perform within the time specified in the contracts. It took no action which indicated clearly that at the time it learned of the impossibility it had reason to believe the impossibility would continue for a considerable length of time. It offered no evidence to indicate that shipment at a time other than during the time of the temporary impossibility would have involved extreme difficulty or expense. Its supply of rice after the delay was sufficient to meet all of its sales requirements. The rice could have been shipped within a few days after the time specified in the contracts for shipment. In view of these and the other facts in the case, the court correctly held that Mouton should not be excused from performing after the temporary impossibility ceased. There was no justified change of position. The delay did not last for a length of time sufficient to make performance after the delay materially different; and there was evidence that Mouton did not act in good faith. The court, therefore, reached the right decision, although its reasons could probably have been made clearer.

The courts will be called upon in the future to decide more and more cases in which a disappointed promisor is seeking to be relieved of his contractual obligations because of a delay caused by temporary impossibility or some other unforeseeable event. The modern trend of the law away from the common law rule of strict enforcement of contracts will, in itself, tend to increase the number of cases which will be brought to the courts for decision. The fact