Michigan Law Review

Volume 39 | Issue 1

1940

CONTRACTS - INTERVENING IMPOSSIBILITY - NATURE OF EXCUSE UNDER CASUALTY CLAUSE

Edmund R. Blaske
University of Michigan Law School

CONTRACTS — INTERVENING IMPOSSIBILITY — NATURE OF EXCUSE UNDER CASUALTY CLAUSE — The plaintiff sought to compel the performance of a contract by which the defendant obligated himself to make deliveries of logs in specified months. The contract contained the following casualty clause: "And the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by . . . strikes, lockouts, or labor disturbances. . . . Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days." When performance got under way, the longshoremen's strike intervened and for the period of three and a quarter months, the duration of the strike, the defendant was unable to make deliveries. After the

strike deliveries were made for the remaining months. The defendant contended that performance was permanently and not merely temporarily excused during the months of the strike. *Held*, for defendant. The contract clearly excuses non-performance and not mere non-delivery during the specified periods. *Dant & Russel, Inc. v. Grays Harbor Exportation Co.*, (C. C. A. 9th, 1939) 106 F. (2d) 911.

Although the court denies any uncertainty in the meaning of the "casualty clause" involved in the principal case, it takes comfort in that its "consideration of the many factors entering into the making of contracts of this character further reinforces the view [here] entertained." [1] Even in cases where the language of the casualty clause was thought not to be so decisive of the question, courts have held in accord with the principal case, that the excuse was permanent and not merely temporary.[2] In reaching this result some of the courts have talked of the burden or hardship that would be imposed on the parties by a contrary rule. It has been said that the seller would have to hold himself indefinitely ready to perform,[3] and the buyer would have to be prepared to accept a lump delivery upon the termination of the impossibility at some remotely future time.[4] Such reasoning is not convincing in cases where the intervening impossibility is of a relatively short duration, and it has been suggested that in such instances the excuse of performance should be only temporary.[5] Nevertheless it is commonly stated that a casualty clause permanently excuses performances interrupted by an intervening impossibility, unless the parties to the contract have expressly agreed on only temporary excuse.[6] Such a broad statement of the rule does not seem to be supported by the cases often cited for it. In some of the cases the parties stipulated, or the court construed the contract to the effect that time was to be of the essence.[7] In another type of case the impossibility has been of a relatively long duration.[8] In a third group of cases the casualty provision purported to excuse not merely delayed shipment or non-delivery but made the entire contract subject to the occurrence of the impossibility.[9] Under any of the above

[1] Principal case, 106 F. (2d) 911 at 912.

[2] Many cases are collected in 37 A. L. R. 1499 (1925); and 35 A. L. R. 721 (1925).

[3] Geipel v. Smith, L. R. 7 Q. B. 404, 26 L. T. (N. S.) 261 (1872), cited with approval in Black & Yates v. Negros-Phillippine Lumber Co., 32 Wyo. 248, 231 P. 398 (1924).

[4] For example: Atlantic Steel Co. v. Campbell Coal Co., (D. C. Ga. 1919) 262 F. 555.

[5] Geipel v. Smith, L. R. 7 Q. B. 404, 26 L. T. (N. S.) 361 (1872), quoted in Black & Yates v. Negros-Phillippine Lumber Co., 32 Wyo. 248, 231 P. 398 (1924).

[6] 6 WILLISTON, CONTRACTS, rev. ed., § 1968 (1936).

[7] Obear-Nester Glass Co. v. Mobile Drug Co., 205 Ala. 214, 87 So. 159 (1921); Haskins Trading Co. v. S. Pfeifer & Co., 14 La. App. 568, 130 So. 469 (1930); Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115 (1909).

[8] See, for example, Black & Yates v. Negros-Phillippine Lumber Co., 32 Wyo. 248, 231 P. 398 (1924). This case involved a contract for delivery of logs; the impossibility was of three years duration. Also see Geipel v. Smith, L. R. 7 Q. B. 404, 26 L. T. (N. S.) 361 (1872).

[9] Haskins Trading Co. v. S. Pfeifer & Co., 14 La. App. 568, 130 So. 469 (1930);

circumstances a holding to the effect that performance was permanently excused would seem to be in accord with the probable intent of the parties at the time of contracting. But where the time of performance is not of the essence, and the intervening impossibility is of short duration, or the entire contract is not conditioned upon the non-occurrence of an impossibility, it would seem that a presumption that the parties intended permanent excuse of non-performance is wholly unwarranted. If in the principal case the court had not thought the language of the casualty clause conclusive of the intent of the parties,[10] it might very sensibly have held that the performance was excused only temporarily. The comparatively short duration of the impossibility and its termination before the expiration of the contract suggest that the delay did not go to the essence of the contract, and that the parties probably would have intended to excuse non-performance only temporarily under such circumstances. It would seem that a rule or presumption which takes into consideration the duration of the impossibility of performance is more likely to arrive not only at the intent of the parties but at a more equitable resolution of any existing doubt. Under such a rule the burden or hardship upon the parties is not likely to be increased materially over that imposed by any rule of thumb. In any event the parties must hold themselves ready and able to perform up to the date indicated in the contract, and it would not seem to be outrageous to require them to continue to do so for a reasonable time thereafter, when it is so likely that such was their expectation upon entering the contract.

Edmund R. Blaske

Ladd Lime & Stone Co. v. MacDougald Const. Co., 29 Ga. App. 116, 114 S. E. 75 (1922), affd. 32 Ga. App. 709, 124 S. E. 551 (1924). See also Normandie Shirt Co. v. J. H. & C. K. Eagle, 238 N. Y. 218, 144 N. E. 507 (1924). Compare Jackson Phosphate Co. v. Caraleigh Phosphate & Fertilizer Works, 130 C. C. A. (4th) 257, 213 F. 743 (1914).

[10] To the writer it is not obvious that the clause "clearly excuses" non-performance rather than only non-delivery during the specified months.