

Michigan Law Review

Volume 47 | Issue 1

1948

CONTRACTS - IMPOSSIBILITY - EFFECT OF TEMPORARY INABILITY TO PERFORM

E. C.V. Greenwood S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Contracts Commons](#)

Recommended Citation

E. C. Greenwood S.Ed., *CONTRACTS - IMPOSSIBILITY - EFFECT OF TEMPORARY INABILITY TO PERFORM*, 47 MICH. L. REV. 117 ().

Available at: <https://repository.law.umich.edu/mlr/vol47/iss1/16>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONTRACTS — IMPOSSIBILITY — EFFECT OF TEMPORARY INABILITY TO PERFORM—On August 16, 1940, plaintiff village and defendant corporation entered into a contract under which defendant agreed to build for plaintiff an electric plant and distribution system. This contract contained two provisions that became significant in the light of the litigation that ensued: (1) a not uncommon provision for extension of time beyond the 180 days allotted for performance, in case of delay caused by the fault of the plaintiff, or by the fault of neither party, and (2) a provision for postponement of the commencement of performance until after termination favorable to plaintiff of a pending suit for declaratory judgment brought against plaintiff by a corporation claiming an electric service franchise to serve plaintiff until September, 1944. In

case of termination of this suit in a manner unfavorable to plaintiff, the construction contract with defendant was to be void. Work was never commenced on the construction contract. When in March, 1942, the plaintiff had won the franchise suit, inability to obtain preference rating certificates from the War Production Board made performance of the construction contract illegal until December, 1945. Plaintiff then brought suit for a declaratory judgment to rule that the contract was still in full force and effect and that under provision (1), above, the intervention of wartime restrictions merely suspended, but did not discharge defendant's obligations under the contract. The trial court rested heavily on provision (2) above and ruled that this provision showed the intention of the parties that delay without fault for any reason beyond September, 1944 should discharge the contract. On appeal, *held* affirmed. The appellate court rejected full reliance on provision (2), but used this provision as one factor pointing to a decision that the temporary impossibility arising in this case was serious enough to discharge the contract. *Village of Minnesota v. Fairbanks, Morse & Co.*, (Minn. 1948) 31 N.W. (2d) 920.

When performance of a contract is rendered temporarily impossible by an intervening act of sovereignty, there is usually little question that obligations of performance are at least suspended.¹ But it is quite another question whether or not in a given case the delay is serious enough to merit a holding of discharge.² As in cases of permanent impossibility, courts face the question of whether the risks of changed circumstances arising out of the delay would have been assumed by the parties if such a delay had been contemplated.³ The question is particularly challenging where, as in the principal case, the contract was made at a time when the prospects of war were not wholly obscure.⁴ The courts have struggled to find a test or series of tests that would aid in deciding whether in a given case the contract is discharged or merely suspended. Many courts and leading text writers have settled on the view that the result depends

¹ 4 WILLISTON, CONTRACTS, rev. ed., § 1957 (1938) and cases cited therein; GRISMORE, CONTRACTS, § 174 (1947).

² "Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists." 2 CONTRACTS RESTATEMENT, § 462 (1932). (Cited and relied on in the decision of the principal case). For a discussion by an English author of fact situations in which discharge is found, see Glanville Williams' introduction to McELROY, IMPOSSIBILITY OF PERFORMANCE xxxiii-xxxvii (1941).

³ At first blush, it would appear that relief is being given in temporary impossibility cases for mere financial hardship resulting from a general increase in the price level, but the real question is whether or not the contractor would be expected to carry the risk of substantial change in the price level throughout the period of this type of delay. For a general discussion of this and related problems see Schroeder, "The Impact of War on Private Contracts," 42 MICH. L. REV. 603 (1944).

⁴ Referring to this aspect of the principal case, the court spoke of the overwhelming nature of the war, from a business point of view, and minimized the opportunities for effective foresight by the parties in 1940. Principal case at 926-927.

upon whether performance after the delay would be substantially different from that contracted for.⁵ Still others have placed the emphasis on the length of the delay as it relates to the type of performance called for in the contract.⁶ It is suggested that under the latter view, the question is substantially one of enforcement mutually of the reasonable time of performance doctrine.⁷ If the court can determine from the language of the parties what period of time was contemplated for completion in any event, as the trial court attempted to do in the principal case, it is held that even excusable delay beyond such period results in discharge.⁸ If, on the other hand, no such period can be ascertained with any degree of certainty, the court must determine as a question of law, whether, under all the circumstances of the case, the excusable delay has been of such duration as to exceed a reasonable time for performance.⁹ Regardless of what test is relied on, extension of time clauses, such as those found in the contract of the principal case, are seldom construed as an absolute obstacle to discharge.¹⁰

E. C. V. Greenwood, S.Ed.

⁵ See *Edward Maurer Co., Inc. v. Tubeless Tire Co.*, (D.C. Ohio 1921) 272 F. 990; *Neumond v. Farmers' Feed Co.*, 244 N.Y. 202, 155 N.E. 100 (1926); and *Heidner v. St. Paul & Tacoma Lumber Co.*, 124 Wash. 652, 215 P. 1 (1923).

⁶ *Black & Yates, Inc. v. Lumber Co.*, 32 Wyo. 248, 231 P. 398 (1924); *Autry v. Republic Productions, Inc.*, (Cal. App. 1946) 170 P. (2d) 977, affirmed, 30 Cal. (2d) 144, 180 P. (2d) 888 (1947).

⁷ See Glanville Williams' introduction to *McELROY, IMPOSSIBILITY OF PERFORMANCE* xxxiv, note 3 (1941).

⁸ For a recent case applying this doctrine to a contract for personal services, see *Autry v. Republic Productions, Inc.*, (Cal. App. 1946) 170 P. (2d) 977, affirmed, 30 Cal. (2d) 144, 180 P. (2d) 888 (1947), noted 46 *MICH. L. REV.* 427 (1948).

⁹ In deciding this question, the court cannot escape an examination of the equities of the parties. Where, as in the principal case, the original delay was for plaintiff's benefit to bring about prior settlement of pending litigation, even though such delay was provided for in the contract, the court may find that a lesser amount of excusable delay will be sufficient in such case to discharge defendant's obligations. For an English case that supports this proposition, see *Bush v. Whitehaven Trustees*, reported in 2 *HUDSON, BUILDING CONTRACTS*, 4th ed., 118 (1907).

¹⁰ "In the case of building contracts, courts would appear to have been very reluctant to hold that an extension of time clause will defeat the operation of the principle of frustration . . . These, being 'measure and value' contracts, are peculiarly sensitive to the financial effects of delay, and a delay which lasts so long as to involve the contractor in heavy financial loss is presumed by the courts to be beyond the scope of an extension of time clause unless the terms of the clause shew clearly that the contractor was to take that particular risk." *McELROY, IMPOSSIBILITY OF PERFORMANCE* 209 (1941).