When “Force Majeure” Isn’t Enough: Lease Re-negotiation due to “Commercial Frustration” in the Era of COVID-19

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"A contract in its inception must possess the essentials of having competent parties, a legal object and a sufficient consideration. Lacking any one of these, no binding obligations result; hence a contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void."

- Industrial Development & Land Co. v. Goldschmidt (1922) 56 Cal. App. 507, 509.

"For the same reason a contract contemplates the doing of a thing, at first lawful but which afterward and during the running of the contract term becomes unlawful, is affected in the same way and ceases to be operative upon the taking effect of a prohibitory law."

- Industrial Development & Land Co. v. Goldschmidt (1922) 56 Cal. App. 507, 509.

"If performance is not inherently impossible, and there is an unconditional promise to perform, nonperformance is a breach where the obligator [*sic*] becomes unable to perform even though through [*sic]* causes beyond his control, since he might have provided against them in his contract."

- El Rio Oils Ltd. v. Pacific Coast Asphalt (1949) 95 Cal. App. 2d 186, 197.

Force-Majeure (Law French – a "superior force") Clause:

"A contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled."

- Black's Law Dictionary 7th ed.

Impossibility-of-performance Doctrine:

"The principle that a party may be released from a contract on the ground that uncontrollable circumstances have rendered performance impossible."

- Black's Law Dictionary 7th ed.

Commercial Frustration:

"An excuse for a party's nonperformance because of some unforeseeable and uncontrollable circumstance."

- Black's Law Dictionary 7th ed.

Question: What's the difference between Impossibility and Commercial Frustration?

- A defense of "impossibility" must arise "in the nature of things" and not in an inability of the promisor to perform it.

1 Witkin, Summary of California Law 11th ed., Contracts §855 (discussing Civil Code §1597)

Statement of the Doctrine of Impossibility

"[I]f performance of a contract is possible, it is none the less a breach, although the obligor himself may have become wholly unable to perform. The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it. If what is agreed to be done is possible and lawful, it must be done. Difficulty of accomplishing the undertaking will not avail the party who commits a breach of the contract."

- Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 725.

Application of the Doctrine of Impossibility (Not Tied to Cost)

"[W]here performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent."

- Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 292

The defense of "impossibility" originally embraced only "literal or physical impossibility of performance"

- Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 724

"[M]ere unforeseen difficulty or expense does not constitute impossibility and ordinarily will not excuse performance."

1 Witkin, Summary of California Law 11th ed., Contracts §855

However, impossibility may constitute a defense when performance is 'impracticable' or unreasonably difficult or expensive. (see Id.)

Question: Does this sound like double talk? What's the inference?

Further Question: Is this 'Degree of Difficulty or Expense' likely to require a factual or a legal determination?

"A performance may be so difficult and expensive that it is described as 'impracticable,' and enforcement may be denied on the ground of impossibility."

- Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 724

"The enlargement of the meaning of 'impossibility' as a defense, (which at common law originally meant literal or physical impossibility of performance) to include 'impracticability' is now generally recognized."

- Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 724

Impossibility Hypothetical (literal impossibility – not tied to cost)

- A contractor signs a contract to perform work on an existing building

- The building is subsequently destroyed without fault of either contractor or the property owner

- What's the effect on the contract?

- It is discharged and neither side is obligated to perform

Further Impossibility Examples:

- A contract to manufacture goods in a particular factory where the factory is destroyed (contract was discharged)

- A contract to ship goods on a specific ship which is lost at sea (contract was discharged)

Hackfeld & Co. v. Castle (1921) 186 Cal. 53, 57

Case Example (based on impossibility tied to cost)

Where the cost of taking submerged gravel was 10-12 times higher than the cost of taking available surface gravel, the defendant was excused from performing his contract due to "impossibility."

- Mineral Park Land Co. v. Howard (1916) 172 Cal. 289

Impossibility Not Present When Payment Remains to be Made

"There is no impossibility of performance when one party has performed as agreed and all that remains for the other party to do is pay the agreed compensation."

- Peoplesoft U.S.A., Inc. v. Softeck, Inc. (2002) 227 F. Supp.2d 1116, 1119

Contrasting Commercial Frustration Case Example

- Mitchell leased a burglar alarm system from FLC
- The alarm equipment worked flawlessly
- Following installation the United States District Court issued an injunction enjoining any use of the equipment (and all other equipment like it) because it interfered with "secret government radio frequencies"
- Neither Mitchell nor FLC had any knowledge of this problem when the lease was signed and the equipment installed

- Mitchell sought to rescind the lease
- FLC filed suit for the remaining lease payments
- The lease agreement provided: “If the equipment is not properly installed, does not operate as represented or warranted by supplier [a third party] . . . or is unsatisfactory for any reason, lessee shall make any claim on account thereof solely against supplier and shall, nevertheless, pay lessor all rent payable under this lease, lessee hereby waiving any such claims as against lessor.”
- On the basis of these facts, who wins?

- Judgment was for Mitchell (the lessee) due to the doctrine of "Commercial Frustration." Neither party was at fault, the lessor had retained title to the equipment, and the entire purpose of the lease (which was to provide a working alarm system) was frustrated due to an unanticipated supervening cause (i.e. the District Court injunction)

- Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 85 Cal. App. 3d Supp. 44

Distinction Between Impossibility and Commercial Frustration

"[A]lthough the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under [frustration] performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance."

- Autry v. Republic Productions (1947) 30 Cal. 2d 144, 148 (see Miller and Starr, California Real Estate 4th ed. §34:166)

Question: How does Force Majeure interact with Impossibility and Commercial Frustration?

- "Force Majeure" is typically a "boilerplate" or "additional" lease clause (and often is not carefully negotiated)

- These clauses often allocate the risk of loss between the parties in the event a contract cannot be performed (or if it becomes more difficult or expensive to perform) because of unforeseen events

- They typically provide an excuse for delayed performance (or non-performance) due to such things as:

- Strike, riot or civil unrest
- Labor shortages
- War
- Terrorism
- Fire, flood or other casualty
- Acts of God

"Force Majeure" clauses are recognized by statute:

Civil Code §1511(2)

"The want of performance of an obligation . . . is excused [w]hen it is prevented or delayed by an irresistible, superhuman cause . . .

unless the parties have expressly agreed to the contrary"

(emphasis supplied)

Case Example (upholding Force Majeure type clause)

- A city contracted for the construction of street improvements

- The contract provided that if federal regulations stopped the improvements the contractor would accept as full compensation a proportionate payment for work completed and the reasonable value of work on uncompleted items

- The work was (apparently) stopped due to federal regulations and the contractor filed suit for declaratory relief

- The court of appeal rendered judgment for the city by upholding the contract (which required the contractor to proceed with construction notwithstanding a long delay and increased construction costs)

(The court's decision turned on the contract's risk allocation as to an uncertain future event – the governmental orders)

- Mathes v. City of Long Beach (1953) 121 Cal. App. 2d 473

Case Example Recognizing Effectiveness of Force Majeure Clauses

Contracting party was not excused from its contract to sell oil to a third party for making asphalt solely because the entity from which such contracting party obtained oil refused to supply further oil to contracting party, since contracting party could have provided for such possibilities in its contract

El Rio Oils (Canada) Limited v. Pacific Coast Asphalt Co., Inc. (1949) 95 Cal. App. 2d 186

(Note: commercial frustration would probably not apply because an oil supply disruption wouldn't be unforeseeable by both parties)

Excuse Due to Operation of Law: Civil Code 1511(1)

"The want of performance of an obligation . . . Is excused . . . [w]hen such performance . . . Is prevented or delayed . . . by the operation of law

even though there may have been a stipulation that this shall not be an excuse" (emphasis supplied)

(This statute was not addressed in Mathes) (see annotations to Civil Code 1511(1) – "Operation of law" for further discussion)

Practical Comparison of Outcomes: Proceeding by "Force Majeure" clause or by Commercial Frustration

1. Besides allocating risk of loss due to events preventing contract performance, a Force Majeure clause in a commercial lease typically requires a tenant to *still pay the rent* (with limited exceptions, such as a delay by a landlord in completing construction of a property)

2. Leases don't contain "commercial frustration" clauses. Rather, the doctrine is applied to excuse a party's performance (continued on next slide)

even though the parties didn't agree to application of the doctrine by lease or contract (but many of the commercial frustration and impossibility case opinions expressly note that the contract between the parties did not expressly provide for certain unforeseen events – clearly inferring that such provisions may have materially affected the court's decision had the parties included them in their contracts)

3. A tenant is generally *excused from payment of rent* when the object (or purpose) of the contract has become "commercially frustrated"

Case Example: Impossibility or Commercial Frustration?

- A large hotel in Santa Barbara County wanted to provide its guests with golfing and country club privileges at a nearby, unaffiliated country club

- The hotel signed an agreement with the club whereby the hotel agreed to pay a monthly sum to the club; in exchange all hotel guests would be provided with golfing and country club privileges during their hotel stays

- The hotel subsequently burned to the ground (without fault of either the hotel or the country club)

- The hotel wasn't rebuilt and the hotel's land was sold
- The hotel refused to continue making the monthly payments
- The club filed suit
- Who wins?
- The hotel
- Is the applicable doctrine *impossibility* or *commercial frustration*?
- Commercial frustration
- La Cumbre Golf and Country Club v. Santa Barbara Hotel Co. (1926) 205 Cal. 422

Commercial Frustration Doctrine (as Applied to Real Estate)

"As a general rule, when premises are leased for a specific purpose, the tenant is obligated to perform the covenants of the lease though the premises are not suitable or useable for the intended purposes. However, in some cases, when the lease specifies and restricts the use of the premises to a specific purpose, the tenant may be given the right to terminate the lease under the doctrine of 'commercial frustration' if it cannot use the premises for that purpose."

- Miller and Starr, California Real Estate 4th ed. §34:166.

Example of Commercial Frustration in a Real Estate Context

- In July 1915 a commercial tenant signed a five year lease of real estate in Los Angeles

- The lease expressly provided that the tenant would use the property as a general winery and wholesale/retail liquor business (and for nothing else)

- In January of 1920 an important Amendment to the Constitution of the United States became effective:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

- 18th Amendment to the Constitution of the United States (Ratification occurred on January 16th, 1919; it became effective January 16th, 1920)

- The tenant offered to pay rent up through the effective date of the Amendment. The Landlord refused to accept the rent and instead filed suit for the unpaid rental amounts due through the end of the 5 year lease (i.e. June of 1920)

- Who wins?

- The tenant

Industrial Development and Land Company v. Goldschmidt (1922) 56 Cal. App. 507

Question: Different result if the lease had been signed in 1919?

Governmental Regulation

"Under the doctrine of commercial frustration, if some law or regulation is enacted after the lease is executed and its enactment was unknown and not foreseeable at the time when the lease was executed, the tenant may terminate the lease if the new law or regulation renders performance under the lease impossible."

- Miller and Starr, California Real Estate 4th ed. §34:166.

Case Example on Foreseeability

- See Lloyd v. Murphy (1944) 25 Cal. 2d 48 where a tenant leased space at a time when "[a]utomobile sales were soaring because the public anticipated that production would soon be restricted" due to the outbreak of WWII. Though the government restricted new car sales following execution of the lease, the defense of "commercial frustration" wasn't available to the tenant due in part to foreseeable possibility of such restrictions.

Application of the Doctrine

"The doctrine of commercial frustration is an exception to the general rule and applies only when certain limited conditions are present. 'Commercial frustration' can be relied upon by the tenant to excuse his or her performance of the lease only in cases of extreme hardship. There must be a complete, or nearly complete, impossibility of using the premises for the purpose for which they were leased; a mere 'substantial' frustration of purpose is not sufficient."

- Miller and Starr, California Real Estate 4th ed. §34:166.

Case Illustration of “Substantial Frustration”

- A guarantor guaranteed a lease allowing certain premises to be used for the “business of a saloon and cigar store, and for no other purpose.” (However, the lease allowed the tenant to sublease to a bootblack)

- During the lease term a “War-Time Prohibition Act” was passed which made it illegal to sell intoxicating liquor for beverage purposes

- After the Act was passed the tenant continued using the leased premises for the other purposes allowed by the lease (i.e. cigar store, bootblack, non-intoxicating beverages)

- The landlord sued the guarantor for unpaid amounts due under the lease

- The guarantor asserted the defense of “commercial frustration”

- Who wins?

- The landlord – since the premises remained partially usable (and were in fact used by the tenant)

- Grace v. Croninger (1936) 12 Cal. App. 2d 603

Contract Suspension v. Termination

California Contract law provides that an obligation to perform may be suspended under the doctrine of "Temporary Impossibility" until performance is possible.

Case Example of Contract Suspension (Due to Temporary Impossibility)

A seller sold and agreed to ship millions of pounds of barley from San Francisco to New Orleans at certain agreed prices. The time for delivery expired November 12, 1919.

Continued

Prior to the time for final delivery, the government issued an order requiring that certain permits be obtained prior to shipment of any barley from southern California to the Gulf of Mexico. The permits could not be obtained for two months; this order had the effect of an "embargo."

When seller could not obtain the permits seller declared that the contract was terminated and the seller was released from any obligation to supply the barley (the market value of such barley had materially increased between the time the contract was signed and the specified time of delivery).

Buyer filed suit for the difference between the agreed upon sales price and the market price at the time of the "embargo."

Who wins? The seller or the buyer?

The buyer

United States Trading Corporation v. Newmark Grain Company (1922) 56 Cal. App. 176, 186

Note: The Court in this case specifically found that "It has not been shown that there ever was any probability that the embargo would continue for such a length of time as to frustrate the object of defendant's engagements from a business point of view; nor was this government regulation of such a character that, in and of itself, it frustrated the real object of the contracts."

"Where performance of a contract after a temporary suspension does not impose a substantially greater burden upon such promisor his duty is suspended only during the period his performance was hindered and he must thereafter perform."

- Bergin v. Van Der Steen (1951) 107 Cal. App. 2d 8, 16

  (see also G. W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 334-337)

Case Example as to Substantial Frustration (and Length of Frustration)

- In 1941 a lessee leased “an electrical advertising display” consisting of several neon signs and tubing for installation at his “drive-in” restaurant

- The lessor retained title to the signs and tubing

- The block lettering on the signs made them visible during the daylight hours. But the purpose of the lease was to illuminate the “drive-in” at night

- In 1942 a governmental order prohibited the illumination of all outside neon or lighting equipment between the hours of sunset and sunrise (i.e. during WWII)

- The lessee offered to surrender the lease and allow the lessor to remove the signs, but the lessor refused. The lessee refused to pay and the lessor filed suit

- The government order restricting outdoor night-time lighting lasted 14 months

- The lessor claimed the governmental orders merely "suspended" the contract rather than terminating it

- Who wins?

- The lessee

- "On application of [the doctrine of commercial frustration] the promisor 'is discharged from the duty of performing his promise . . . [and] such a frustration brings the contract to an end forthwith, without more and automatically'"

- 20th Century Lites, Inc. v. Goodman (1944) 64 Cal. App. 2d Supp. 938

Continued Occupancy – a Key Point

Commercial Frustration excuses a tenant from performance under the lease agreement (and payment of rent) by allowing the tenant to terminate the lease. It does not excuse a tenant from paying rent where the tenant continues to occupy the leased premises. *Continued occupancy by a tenant renders that tenant liable for payment of rent even if the purpose of the lease has become commercially frustrated.*

In upholding a lower court opinion excusing a tenant from paying rent due to "commercial frustration" the California Supreme Court held:

"The opinion might be understood to hold that the lessee, in such a case, could continue to hold possession of the premises after the prescribed business became unlawful, and escape payment of the rent on the ground of such illegality, without surrendering to the lessor. We do not think this is the law and the opinion must not be so understood."

- Industrial Development & Land Co. v. Goldschmidt (1922) 56 Cal. App. 507, 512

The court in Grace v. Croninger reached the same conclusion:

"[A] lease is not terminated merely by the enactment of the law declaring such business unlawful, but liability under the lease continues as long as the lessee continues in possession."

- Grace v. Croninger (1936) 12 Cal. App. 2nd 603, 606.

One Possible COVID-19 Lease Analysis Based on the Foregoing:

Under the shelter-in-place orders and with respect to commercial leases:

- Was the supervening event unforeseeable by the parties?
- Was the supervening event uncontrollable by the parties?
- Is landlord's performance rendered impossible?
- Is the tenant's performance rendered impossible?

- Are the premises partially usable or fully unusable?

- Is tenant's performance (only) substantially more difficult or expensive because of the governmental orders?

- Did the parties allocate the risk of COVID-19 or something similar by contract (i.e. by Force Majeure clause?)

- Is the very purpose of the lease frustrated by the orders?

- Is the problem temporary or indefinite?

- Is the tenant still occupying the premises? If so, are they willing to vacate?

Practical Consideration

In every case the following key questions will be answered with the benefit of hindsight:

- Are the shelter-in-place orders a temporary, an indefinite or a permanent commercial frustration?

- If they are indefinite, does their reasonably likely length of enforcement justify invocation of the doctrine of commercial frustration?

- Is the tenant willing to vacate?

One size (of analysis) does not fit all:

- Banks and pharmacies (allowed full operation)
- Restaurants (partial operation – takeout only)
- Retail stores (hardware and auto parts operational, others may be closed)
- Nail salons (fully closed)
- Movie theaters (fully closed)

Negotiations

Tenants remain liable for rent payments and lease performance as long as they remain in the leased premises. Tenants who want to remain in their premises but need rent relief will need to negotiate workouts with their landlords. The value of the doctrine of commercial frustration in such negotiations will be mainly in connection with discussing the final, possibly drastic action of lease termination.

Negotiation Considerations

- Rent deferral (with delayed repayment)
- Rent deferral (with forgiveness absent further default)
- Rent abatement (immediate forgiveness)
    - Additional considerations – whether a forbearance request may:
    - Trigger a default under a secondary loan
    - Trigger a right to terminate an agreement for the tenant not having paid its obligations on time

Consider whether a forbearance request may:

- Trigger a right to remove a manager or general partner from managerial or oversight positions
- Trigger liability on a personal guarantee

Two takeaways

- Know your deal structure and the affected corporate documents
- Know your rental agreements

The points on the foregoing two slides were extracted from an excellent article at Law.com/corporatecounsel which lists key considerations for commercial Landlords and Tenants in exploring rent deferral or abatement. For the full article see

https://www.law.com/corpcounsel/2020/04/30/why-commercial-tenants-property-owners-should-be-cautious-when-seeking-rent-mortgage-relief/?kw=Why%20Commercial%20Tenants,%20Property%20Owners%20Should%20Be%20Cautious%20When%20Seeking%20Rent,%20Mortgage%20Relief

Commercial Frustration in a Cultural Context (Case Example)

- In 1940 a tenant of Japanese descent signed a lease for the entire second floor of a building in a neighborhood of Los Angeles informally known as “Little Tokio” [*sic]*

- The lease required that the tenant “personally occupy” the premises and further required that the premises be used only for a hotel and office space

- On May 3, 1942 the commanding officer of the United States Army on the Pacific coast issued an order whereby all persons of Japanese ancestry were to be excluded from that portion of Los Angeles where the leased premises were located

- The landlord waived any requirement that the tenant personally occupy the leased premises, and agreed that defendant could sub-lease the premises

- The tenant advised the landlord that the tenant was excluded from that portion of Los Angeles where the leased premises were located and it was impossible for him to comply with the terms of the lease

- The landlord filed suit for the amount due under the lease

- Who wins?

- The landlord

- The court found that the evacuation order did not make it impossible for the tenant to perform under the lease nor did the evacuation order discharge the tenant's obligations under the lease

- The tenant appealed. The appellate briefs alleged tenant could only perform as a result of "unconscionable hardship" and that the very persons who were tenants of the hotel had been evacuated along with the defendant and that "Little Tokio" [*sic*] had become a ghost town overnight

- What result on appeal?

- The court of appeal found the record insufficient for determining whether the contract had been commercially frustrated and whether or not given the evacuation order the property could be used as a hotel and office space. The court of appeal reversed the judgment for the landlord and sent the case back to the trial court for further proceedings. (A concurring justice wrote that the evacuation order made these evacuated persons "virtual prisoners of the army" and opined that judgment should be entered for the tenant)

- Brown v. Oshiro (1943) 58 Cal. App. 2d 190.

Leading Cases on Commercial Frustration

20th Century Lites, Inc. v. Goodman (1944) 64 Cal. App. 2d Supp. 938 (Tenant excused from lease payment obligations due to commercial frustration)

Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144 (Opinion discusses doctrine of temporary impossibility; holds movie actor discharged from further performance obligations on studio contract)

Brown v. Oshiro (1943) 58 Cal. App. 2d 190 (Judgment for landlord reversed and remanded for new trial to determine whether U.S. Army Japanese evacuation orders made it impossible for tenant to operate a hotel or rent office space in the leased premises)

Citrus Soap Company v. Peet Bros. Mfg. Co. (1920) 50 Cal. App. 246 (Buyer obligated to accept delivery of product several days later than contractually agreed to because of governmental order shutting down seller's production due to Spanish Flu pandemic, where contract included clause providing for contract suspension in case of fire, flood, explosion and other interferences)

Leading Cases (continued)

C.N.P. Ahlgren v. Julia Walsh (1916) 173 Cal. 27 (San Francisco Earthquake case, where construction on a building was completed less than 24 hours before the great San Francisco Earthquake. Payment was due upon issuance of a certificate by an architect, which didn't happen before the earthquake struck. Contractor would have lost but for force majeure clause that allocated risk in the event of disaster)

Davidson v. Goldstein (1943) 58 Cal. App. 2d Supp. 909 (Judgment for defendant tenant reversed and new trial ordered where governmental orders restricting tenant's sales didn't wholly prohibit conduct of tenant's business but only restricted it)

Dorn v. Goetz (1948) 85 Cal. App. 2d 407 (Sellers obligated to sell existing home even though such sale was contingent on construction of new home where construction of new home was prevented due to passage of Veterans' Emergency Housing Act of 1946 but parties contemplated possible difficulties in construction of new home)

El Rio Oils (Canada) Limited v. Pacific Coast Asphalt Co., Inc. (1949) 95 Cal. App. 2d 186 (Contracting party was not excused from its contract to sell oil to a third party for making asphalt solely because the entity from which such contracting party obtained oil refused to supply further oil to contracting party, since contracting party could have provided for such possibilities in its contract)

Leading Cases (continued)

Federal Leasing Consultants, Inc. v. Mitchell Lipsett Company Inc. (1978) 85 Cal. App. 3d Supp. 44 (Lessee of burglar alarm system excused from contract performance where United States District Court issued injunction requiring that the system be rendered inoperable because it interfered with secret government radio frequencies)

Grace v. Croninger (1936) 12 Cal. Ap. 2d 603 (Tenant who leased premises for saloon, cigar store and bootblack purposes not excused from lease performance where constitutional amendment only made illegal a portion of the saloon business)

Habitat Trust for Wildlife v. City of Rancho Cucamonga (2009) 175 Cal. App. 4th 1306 (Developer excused from performing contract due to impossibility and frustration of commercial purpose)

Hackfeld & Co., LTD. v. Castle (1921) 186 Cal. 53 (Defendant excused from purchasing Hawaiian honey when shipments became "a practical impossibility" due to WWI)

Industrial Development and Land Company v. Goldschmidt (1922) 56 Cal. App. 507 (Tenant excused from lease performance where leased premises were to be used only for winery and retail/wholesale of intoxicating liquors and passage of 18th Amendment to the Constitution made such business illegal)

Leading Cases (continued)

J. G. Keeling v. Schastey & Vollmer (1912) 18 Cal. App. 764 (Contractor agreed to construct repairs on the Cliff House in San Francisco. During construction the building was destroyed by fire. The court opined that a contractor cannot recover on a fixed price contract to construct a building, but may recover in quantum meruit for repairs and improvements on an existing building if it's destroyed)

Johnson v. Atkins (1942) 53 Cal. App. 2d 430 (Buyer excused from contract to purchase to be shipped from California to Colombia when Colombian authorities refused to accept further shipments)

Kennedy v. Reece (1964) 225 Cal. App. 2d 717 (Well driller who encountered unexpected subsurface rock was not excused from performing his contract due to "impossibility" when two other drillers offered to complete the well at an additional cost of $5.00 per foot)

La Cumbre Golf and Country Club v. Santa Barbara Hotel Company (1928) 205 Cal. 422 (Hotel excused from continued monthly payments to country club for golfing privileges for its hotel guests where hotel was totally destroyed by fire)

Lloyd v. Murphy (1944) 25 Cal. 2d 48 (Tenant not excused from lease obligations where future adverse developments were foreseeable and where notwithstanding such developments leased premises were still usable for leased purposes, though at a reduced level)

Leading Cases (continued)

Mineral Park Land Company v. P. A. Howard et al. (1916) 172 Cal. 289 (Bridge builder agreed to take all gravel needed to build bridge from specified location, but available surface gravel supply was exhausted prior to bridge completion and cost of extracting underwater gravel was 10-12 times more expensive than extraction of surface gravel. Builder excused from completing contract due to impossibility)

Mitchell v. Ceazan Tires (1944) 25 Cal. 2d 45 (Tenant selling car tires and supplies not excused from lease obligations even though government order restricted sale of tires and tubes to limited classes of persons)

Peoplesoft U.S.A., Inc. v. Softeck, Inc. (2002) 227 F. Supp. 2d 1116 (software developer was unable to avoid contractual liability for software purchase under theory of "impossibility" after end user terminated purchase order where 1) software developer had guaranteed payment to software vendor and 2) had agreed that developer's payment obligations were "noncancelable and nonrefundable." Under these facts court found that contract "plainly" assigned to the developer the risk of the end user's cancellation and thus such cancellation didn't provide developer with a defense of either "impossibility" or "commercial frustration")

United States Trading Corporation v. Newmark Grain Company (1922) 56 Cal. App. 176 (Barley supplier excused from performing for two months due to government ordered "embargo" due to temporary impossibility but thereafter obligated to perform when performance was again possible. Two months of delay pursuant to governmental orders did not rise to the level of "frustration.")

Leading Cases (continued)

Waegemann v. Montgomery Ward & Company, Inc. (1983) 713 F. 2d 452 (Where rental rates were tied to property taxes and adoption of Proposition 13 materially reduced future taxes, Tenant was not excused from lease obligations due to commercial frustration where the only effect of unexpected conditions was to make lease less profitable)

Note: the foregoing case list is neither exhaustive nor comprehensive on the topics of impossibility, commercial frustration or Force Majeure

Statutes

Civil Code 1441 (Impossible contract condition voids a contract)

Civil Code 1451 (If a contract contains alternatives and the law will not allow one, then the other is enforceable)

Civil Code 1511 (contract performance excused by operation of law or impossibility)

Civil Code 1596 (The contractual objective of a contract must be lawful when contract is made)

Treatises

1 Witkin, Summary of California Law 11th ed. Contracts §§853 – 871

Miller and Starr, California Real Estate 4th ed. 34:166 et seq.

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