

Case:

BGHZ 37, 44 V. Civil Senate

Date:

31 January 1967

Note:

Translated German Cases and Materials under the direction of Professors P. Schlechtriem, B. Markesinis and S. Lorenz

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By a contract dated 13 February 1959 the plaintiff purported to sell to the defendants three plots of land amounting to 13766 square metres as well as a part measuring 500 square metres of a fourth plot of land. In return the defendant was to build, within eight weeks of receiving the official building permit, upon a plot of the plaintiff an apartment house of 2,700 cubic metres containing twelve flats or, if permission for the project should not be forthcoming, two houses of corresponding size. If no permission at all should be obtainable, the defendant was to erect the building or buildings upon one of the plots purchased by himself and to re-transfer the plot so built upon to the seller.

The three plots so sold were registered in the name of the defendant, and a caution was registered for the benefit of the defendant in respect of the portions of the fourth plot. The defendant had not obtained the necessary permission to build when the action was brought, nor had he erected a building.

The plaintiff demanded that the three plots should be reconveyed to him and that the caution should be cancelled; in addition he asked for a declaration that the contract was invalid, either because it had been impossible from the beginning since neither the plot sold by him nor those remaining to him could be built upon as intended, seeing that no such official permission could possibly be forthcoming. Moreover, the plots could not be built on in the absence of a proper sewage connection, nor was such a connection to be forthcoming in the foreseeable future.

The District Court of Munich rejected the claim; the Court of Appeal of Munich allowed it. Upon a second appeal the decision of the Court of Appeal was quashed and the case was referred back for the following

Reasons

The Court of Appeal believes that the contract is void because, as far as the defendant's duty to build on the land was concerned, its performance was impossible from the beginning. As the court below found, the plots in question - both those still owned by the plaintiff as well as those

which he sold to the defendant - can only be built upon when it becomes possible to connect them with the sewerage system; this situation, in the absence of which no building permit could be obtained, would probably not materialise before 1968; possible this uncertainty might remain even longer. At least until 1964 no general building plan had been in existence and it was therefore impossible to predict what kinds of building would be permitted, once the land had become ready for development and open to building operations; in particular it was not possible to forecast whether the future building plan would allow houses of the size agreed upon in the contract or perhaps only single family houses. In assessing these facts as found, the Court of Appeal held that the contractual performance in question was not permanently impossible; instead the impossibility was tempered only. At the time when the contract was concluded it was reasonable to assume that, one day, the plots would become open to building, and it was still reasonable to assume it today. The Court of Appeal held, however, that the case before it was one where a temporary impediment of performance must be treated as if it were permanent, because it was doubtful whether the purpose of the contract could be achieved. For this reason the plaintiff was entitled according to good faith to regard himself as no longer bound by the contract [reference].

... the point of departure of the Court of Appeal is open to far-reaching legal objections ...

Para. 306 BGB regulates the legal consequences of an initial impossibility of a contractual performance, i.e. of an objective impossibility existing already at the time when the contract was concluded; in such a case the contract is void. The judgment under appeal states that this rule applies not only if the impossibility is permanent, but also when an impediment which rendered performance impossible for the time being can again be removed later on. In so holding it proceeds from the principles which the practice of this court has developed for the case where the performance which is owed becomes impossible as a result of an event which occurred after the obligation came into being para. 275 BGB. It is true that in this connection "impossibility" must be understood, as a rule, to indicate a situation where the performance of the obligation is precluded for ever [references]. Exceptionally, however, also a merely temporary impediment is equated to a permanent impossibility, especially in the case of obligations of long duration - namely if it puts in doubt the achievement of the purpose of the contract and if the other contracting partner cannot be expected, according to good faith, to comply with the agreement [references]. The fact that a performance which is owed becomes impossible subsequently does not destroy the contract as such. Instead the legal relationship between the parties is determined by the loss of far-reaching provisions of para. 275 ff., 323 ff. BGB [references]. It is doubtful whether the identical treatment of temporary and permanent impossibility, which is permissible in the case of subsequent impediments to performance, can be extended to para. 305 BGB - which alone sanctions to the serious consequence that the contract is void.

In this general formulation the question need not be decided here. Even if in the case of an initial impossibility in the meaning of para. 306 BGB it should not be excluded in principle also to treat an impediment which impedes performance temporarily on the same footing as one which is permanent, nevertheless it is not possible to do so where the contracting parties know of the existence of the present impediment but assumed mistakenly that it could be removed. In such cases, if it turns out later on that it will take considerably more time before the impediment is got out of the way than all the parties assumed when they concluded the contract, a mutual mistake has occurred, the legal consequences of which are not determined by para. 306 BGB. Instead they must be considered from the aspect as to whether the basis of the transaction has disappeared (para. 242 BGB); it is necessary to examine whether and to what extent as a result of the unforeseen delay in fixing the date of performance the situation as

seen originally by the contracting parties has been changed so fundamentally that according to good faith the contract can no longer be executed in the manner envisaged at the beginning [references]. The application of the principles concerning the failure of the basis of a transaction results only exceptionally in the total destruction of the contractual relationship; normally reasons of contractual fidelity and commercial security demand that the contract be maintained as far as possible and that it is to be adjusted in a form which takes into account the legitimate interests of both parties [references].

In the present case a mutual mistake has occurred concerning the basis of the transaction. Both parties in concluding the contract ... assumed that the contract would be carried out within a foreseeable time and, in particular, that the apartment house to be erected by the defendant would be built soon; certainly the construction was not to take place in the distant future. The parties were aware of the planning difficulties, but hoped nevertheless to obtain a building permit soon, even before a connection could be established with the sewerage system. The parties only realised later on that their hopes were unfounded. At the moment when the original hope that the plots could be built upon within a comparatively short period was disappointed, the legal relationship between the parties entered a new phase; henceforth it became uncertain what the waiting period would be before building could begin. This state of uncertainty remained in the ensuing period and persisted still at the time of the last hearing in the Court of Appeal. At that time, at least, it could seem doubtful whether the time which had elapsed as well as that which was likely to pass in the future before the plots would be right for development constituted such an important factor that the parties could no longer be expected to adhere to the substance of their previous agreement [reference]. The Court of Appeal has failed hitherto to examine this question.