Transatlantic Financing Corp. v. United States

363 F.2d 312 (D.C. Cir. 1966)

J. Skelly Wright, Circuit Judge:

This appeal involves a voyage charter between Transatlantic Financing Corporation, operator of the SS CHRISTOS, and the United States covering carriage of a full cargo of wheat from a United States Gulf port to a safe port in Iran. The District Court dismissed a libel filed by Transatlantic against the United States for costs attributable to the ship's diversion from the normal sea route caused by the closing of the Suez Canal. We affirm.

On July 26, 1956, the Government of Egypt nationalized the Suez Canal Company and took over operation of the Canal. On October 2, 1956, during the international crisis which resulted from the seizure, the voyage charter in suit was executed between representatives of Transatlantic and the United States. The charter indicated the termini of the voyage but not the route. On October 27, 1956, the SS CHRISTOS sailed from Galveston for Bandar Shapur, Iran, on a course which would have taken her through Gibraltar and the Suez Canal. On October 29, 1956, Israel invaded Egypt. On October 31, 1956, Great Britain and France invaded the Suez Canal Zone. On November 2, 1956, the Egyptian Government obstructed the Suez Canal with sunken vessels and closed it to traffic.

On or about November 7, 1956, Beckmann, representing Transatlantic, contacted Potosky, an employee of the United States Department of Agriculture, who appellant concedes was unauthorized to bind the Government, requesting instructions concerning disposition of the cargo and seeking an agreement for payment of additional compensation for a voyage around the Cape of Good Hope. Potosky advised Beckmann that Transatlantic was expected to perform the charter according to its terms, that he did not believe Transatlantic was entitled to additional compensation for a voyage around the Cape, but that Transatlantic was free to file such a claim. Following this discussion, the CHRISTOS changed course for the Cape of Good Hope and eventually arrived in Bandar Shapur on December 30, 1956.

Transatlantic's claim is based on the following train of argument. The charter was a contract for a voyage from a Gulf port to Iran. Admiralty principles and practices, especially stemming from the doctrine of deviation, require us to imply into the contract the term that the voyage was to be performed by the "usual and customary" route. The usual and customary route from Texas to Iran was, at the time of contract, via Suez, so the contract was for a voyage from Texas to Iran via Suez. When Suez was closed this contract became impossible to perform. Consequently, appellant's argument continues, when Transatlantic delivered the cargo by going around the Cape of Good Hope, in compliance with the Government's demand under claim of right, it conferred a benefit upon the United States for which it should be paid in quantum meruit

The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures of such tests as the "implied term" and the parties' "contemplation.". . . It is now recognized that "'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'" . . . RESTATEMENT, CONTRACTS § 454 (1932); UNIFORM COMMERCIAL CODE (U.L.A.) § 2-615, comment 3. The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.  When the issue is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom.

Finally, occurrence of the contingency must have rendered performance commercially impracticable.  Unless the court finds these three requirements satisfied, the plea of impossibility must fail.

The first requirement was met here. It seems reasonable, where no route is mentioned in a contract, to assume the parties expected performance by the usual and customary route at the time of contract. Since the usual and customary route from Texas to Iran at the time of contract was through Suez, closure of the Canal made impossible the expected method of performance. But this unexpected development raises rather than resolves the impossibility issue, which turns additionally on whether the risk of the contingency's occurrence had been allocated and, if not, whether performance by alternative routes was rendered impracticable.

Proof that the risk of a contingency's occurrence has been allocated may be expressed in or implied from the agreement. Such proof may also be found in the surrounding circumstances, including custom and usages of the trade. . . .

The contract in this case does not expressly condition performance upon availability of the Suez route. Nor does it specify "via Suez" or, on the other hand, "via Suez or Cape of Good Hope." Nor are there provisions in the contract from which we may properly imply that the continued availability of Suez was a condition of performance. Nor is there anything in custom or trade usage, or in the surrounding circumstances generally, which would support our constructing a condition of performance. . . . The doctrine of deviation supports our assumption that parties normally expect performance by the usual and customary route, but it adds nothing beyond this that is probative of an allocation of the risk

If anything, the circumstances surrounding this contract indicate that the risk of the Canal's closure may be deemed to have been allocated to Transatlantic. We know or may safely assume that the parties were aware, as were most commercial men with interests affected by the Suez situation, . . . that the Canal might become a dangerous area. No doubt the tension affected freight rates, and it is arguable that the risk of closure became part of the dickered terms. UNIFORM COMMERCIAL CODE § 2-615, comment 8.

We do not deem the risk of closure so allocated, however.  Foreseeability or even recognition of a risk does not necessarily prove its allocation.  Compare UNIFORM COMMERCIAL CODE § [2-615](http://www.kentlaw.edu/faculty/rwarner/courses/cases/Contract_Law2615__Excuse_by_Failure_of_Presu.htm), Comment 1; RESTATEMENT, CONTRACTS § 457 (1932). Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy.

Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted. The surrounding circumstances do indicate, however, a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen.

We turn then to the question whether occurrence of the contingency rendered performance commercially impracticable under the circumstances of this case. The goods shipped were not subject to harm from the longer, less temperate Southern route. The vessel and crew were fit to proceed around the Cape. Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services.

The only factor operating here in appellant's favor is the added expense, allegedly $43,972.00 above and beyond the contract price of $305,842.92, of extending a 10,000 mile voyage by approximately 3,000 miles. While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.

We conclude, therefore, as have most other courts considering related issues arising out of the Suez closure, that performance of this contract was not rendered legally impossible. Even if we agreed with appellant, its theory of relief seems untenable. When performance of a contract is deemed impossible it is a nullity. In the case of a charter party involving carriage of goods, the carrier may return to an appropriate port and unload its cargo, The Malcolm Baxter, Jr., 277 U.S. 323, 48 S. Ct. 516, 72 L. Ed. 901 (1928), subject of course to required steps to minimize damages. If the performance rendered has value, recovery in quantum meruit for the entire performance is proper. But here Transatlantic has collected its contract price, and now seeks quantum meruit relief for the additional expense of the trip around the Cape. If the contract is a nullity, Transatlantic's theory of relief should have been quantum meruit for the entire trip, rather than only for the extra expense. Transatlantic attempts to take its profit on the contract, and then force the Government to absorb the cost of the additional voyage. When impracticability without fault occurs, the law seeks an equitable solution, . . . and quantum meruit is one of its potent devices to achieve this end. There is no interest in casting the entire burden of commercial disaster on one party in order to preserve the other's profit. Apparently the contract price in this case was advantageous enough to deter appellant from taking a stance on damages consistent with its theory of liability. In any event, there is no basis for relief.

Affirmed.