

Interpretation of "Subject to Financing" Clauses in Interim Contracts for Sale of Property

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ing that this is surrender by a contestant in a bona fide contest giving rise to the estoppel.

States, in their concern to control the marital status of their residents, are defining areas in which foreign divorce decrees are subject to collateral attack. Although admission of fraud on the court is effectual when the facts proving it are present, the main area of collateral attack will continue to be failure of the foreign court to determine the jurisdictional question in a bona fide contest. Among the chief reasons for finding a lack of bona fide contest will be the fact that the defendant did not have counsel of his own choosing and the fact that waiver of notice and answer was signed before the filing of the proceedings. Personal appearance as such does not seem to be of controlling importance except in so far as when it is present it will serve as strong evidentiary proof that a bona fide contest was had. In final analysis whether a bona fide contest was had will have to be determined on a case to case basis.

ROBERT H. BICHLER

Conveyancing: Interpretation of "Subject to Financing" Clauses in Interim Contracts for Sale of Realty—Walter E. Pire and his wife Emily signed an offer to purchase the property of the Gerruth Realty Co. for \$30,000. Pire tendered a \$5,000 down payment in the form of a promissory note, payable at the time of closing. The offer was conditioned upon Pire's buying the adjacent property for \$40,000, the closing of the purchase of the two properties being scheduled to occur simultaneously. Although the Pires "thought they would have no difficulty in arranging financing," they insisted that this clause be inserted:

This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing.¹

Though no formal application was made, Pire was refused a \$75,000 first mortgage loan against the two properties from the Second National Bank of Beloit, due to the bank's policy of not loaning any individual over \$100,000 or more than 66⅔ per cent of the value of the security.² Gerruth and the owner of the adjacent property, Putterman, then offered to finance Pire to the extent of \$45,000. This proposal was refused as being inadequate.

The trial court held the "subject to financing" clause to be a condition precedent; found that Pire attempted in good faith to fulfill it; and dismissed a suit on the earnest money note. In affirming, the Supreme Court held the whole contract void for indefiniteness, and

¹ *Gerruth Realty Co. v. Pire* 17 Wis. 2d 89, 115 N.W. 2d 557 (1962).

² Presumably, Pike had previously borrowed at least \$25,000.

thereby failed to reach the question of good faith. *Gerruth Realty Co. v. Pire*.

The problem presented is whether there is sufficient evidence upon which this court can ascertain the intention of the parties, i.e., whether there was a meeting of the minds, even objectively, concerning the meaning of this clause.³

The general rule governing contracts deficient or ambiguous in some important detail is that whenever there is a possibility of ascertaining the meaning of the parties by inference, implication, or construction, with a reasonable degree of certitude, the courts will do so rather than let the whole contract fall for indefiniteness.⁴ The distinguishing feature of the principal case appears to be the total dearth of evidence concerning any details of the buyer's proposed financing. Several possibilities were explored by the court, and each was found wanting. To the appellant-vendor's contention that the parties intended to limit the amount and terms of financing anticipated to such amount and terms as the usual lending practices of the community would sustain, the court replied:

We cannot find in the evidence any indication upon which even a reasonable inference can be drawn that the parties contracted knowingly and in the light of any current practices in the community of Beloit with respect to financing of similar transactions.⁵

To the respondent-vendee's contention that the contract limited the purchaser only to such amount and terms as he might in good faith select, the court's rejoinder was somewhat less direct:

[W]e cannot agree that this clause gave the defendants the exclusive or absolute option or privilege to determine the proper amount of financing, without holding the contract illusory. [Emphasis supplied].⁶

Thus it is apparent that, to the court's mind, the simple standard of "good faith" cannot supply the most obvious specification of a subject to financing clause—that of the amount to be borrowed. This determination appears to proceed largely from a presupposition that a "good faith" determination of the amount is practically an option without limitation. "[A]ny interpretation which allows one party to a contract to determine without limitation and in a subjective manner the meaning of an ambiguous term, comes dangerously close to an illusory or aleatory contract, if it does not in fact reach it."⁷

³ *Supra* note 1.

⁴ WILLISTON, *CONTRACTS*, (rev. ed., 1936), §37, p. 100; *George v. Oswald*, 273 Wis. 380, 78 N.W. 2d 763 (1956); *Kelley v. Ellis*, 272 Wis. 333, 75 N.W. 2d 569 (1956); *Taylor v. Bricker*, 262 Wis. 377, 55 N.W. 2d 404 (1952); *Inglis v. Fohey*, 136 Wis. 28, 116 N.W. 857 (1908); 56 A.L.R. 2d 1267.

⁵ *Supra* note 1.

⁶ *Ibid.*

⁷ *Ibid.*

Aiken, "*Subject to Financing*" *Clauses in Interim Contracts for Sale of Realty*,⁸ cited by the court, suggests an option theory under which subject to financing clauses wanting in material detail may escape the challenge of fatal indefiniteness. By this theory, such clauses would be construed to empower the purchaser to select in good faith such financing as would meet his reasonable requirements.⁹ The theory finds its most direct decisional support in *Reese v. Walker*,¹⁰ in which the Ohio court was required to interpret the clause, "contingent upon securing necessary financing." The court construed the clause as giving to the buyer the broad power of determining in *good faith* what was "necessary financing." The buyer had made several efforts to secure financing (on his own terms) but failed. He sued for his down payment and recovered. The court ruled that the sellers, having signed a contract without specifying what financing was "necessary financing," were in no position to complain.¹¹ The trial court in the *Gerruth* case adopted the entire reasoning process of *Reese v. Walker*. But the Supreme Court stated:

In our view the good faith issue arises only after the determination of the meaning of the ambiguous phrase.¹²

In *Kovarik v. Vesely*, a contract which contained no details of a financing contingency, other than the amount to be borrowed and a prospective source of loan, was not held void for uncertainty, but was held to create a "discretion" in favor of the purchaser to select the missing terms. In *Gerruth*, the court distinguished *Kovarik v. Vesely*¹³ simply on the ground that in the latter the amount was specifically stated; without, apparently, considering the essential interdependence of all of the specifications of commercial financing. To illustrate: \$20,000 of financing may be procurable at 6% interest, or on a 10-year amortization; but not more than \$16,000 at 5½%, or on a 20-year amortization.

⁸ Aiken, "*Subject to Financing*" *Clauses In Interim Contracts For Sale of Realty*, 43 MARQ. L. REV. 265 (1960).

⁹ Professor Aiken's option theory is based on a concurring opinion of Owen, J. in *Kenner v. Edwards R. & F. Co.*, 204 Wis. 575, 236 N.W. 597 (1931). The Justice stated that the buyer empowered the seller to negotiate a \$30,000 mortgage for him "without any limitation as to the rate of interest it should bear or the length of time it should run." He goes on to say that the business wisdom of the buyer may be questioned, but not his right to invest the seller with such power. Professor Aiken reverses the position of buyer and seller and asks why the seller cannot place the same power in the hands of the buyer; "the party in whom is rested the power to determine the unstated details of the financing could be said to have an option to fix those details to suit his preference."

¹⁰ *Reese v. Walker*, 151 N.E. 2d 605 (Munic. Ct. Cincinnati, Ohio 1948).

¹¹ *Ibid* at p. 606.

¹² *Supra* note 1.

¹³ *Kovarik v. Vesely*, 3 Wis. 2d 573, 89 N.W. 2d 279 (1958). Although in *Kovarik* the issue did not turn on the definiteness of the contract but on whether or not the stated source of the buyer's financing was an "essential" part of the condition.

If the borrower is unable or unwilling to undertake a 2% "origination" charge, or a 1% prepayment penalty, the amount of financing procurable may be similarly reduced. Thus, the first question is whether the inherent "definiteness" of the statement of contingency is materially improved, simply by a recitation of the amount to be borrowed. In short, will it not be necessary to reach the good faith question "to determine the meaning of the ambiguous phrase" even though it fixes the basic loan amount, if, like *Kovarik*, it omits other essential details?

Regardless of the force of these considerations, it will be readily conceded that where circumstances permit, the safe legal course is to spell out each of the criteria of acceptability of financing. But is this solution generally possible or practical? In most instances, the details of financing are inherently ambiguous and tentative when the conditional contract is executed, because neither the buyer, seller, nor prospective third party lender has any definite idea as to what the ultimate financing terms will (or can) be. This is the precise reason for inserting a subject to financing clause. To the extent that detail is specifically stated it ordinarily amounts to no more than a general stipulation of the bounds of "reasonable diligence," or "reasonable acceptability," or "good faith" effort toward determining a future fact.

Thus the court is faced with the dilemma of either strictly interpreting such contracts (and therefore often holding them void, as did the principal case), or allowing the buyer a broad discretion in his selection of terms, and running the risk that such discretion may, in certain cases, be almost unlimited. From the decision of the principal case, it would not appear that any broadly-applicable choice has been made between the alternatives. The dilemma remains largely unresolved. It would now appear that only a total absence of specification of detail, either in the contract or in the surrounding circumstances, produces no contract.

PETER S. BALISTRERI

International Law: Effect Given by the United States Courts to Expropriation Decrees of Foreign Governments when in Violation of International Law—One of the defendants contracted to buy sugar from a subsidiary of an American-owned Cuban corporation, the latter to supply the cargo on vessels in Cuba, payment in New York on delivery. On the same day the sugar was to be loaded on board, a decree was issued by the Cuban government, nationalizing a number of Cuban corporations, including the vendor's parent corporation, it being among those corporations designated by the decree as being controlled by physical or corporate persons of the United States. The decree was based on defensive measures against alleged aggressive acts of the United States' government which reduced the Cuban sugar quota