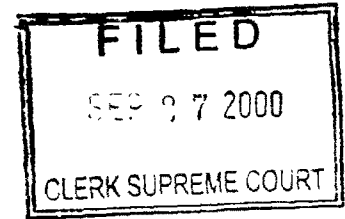


IN THE COURT OF APPEALS OF IOWA

No. 0-218 / 99-0234
Filed September 27, 2000

**FARMERS COOPERATIVE COMPANY,
FARNHAMVILLE, IOWA, an Iowa Cooperative,**
Plaintiff-Appellant,



vs.

BRAD LAMBERT,
Defendant-Appellee.

Appeal from the Iowa District Court for Webster County, Ronald H. Schechtman, Judge.

Farmers Cooperative Company appeals from a district court order finding seven of sixteen hedge-to-arrive contracts to be illegal off-exchange futures contracts. **REVERSED AND REMANDED.**

Richard K. Updegraff, Brenton D. Soderstrum, and Miranda L. Hughes of Brown Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for appellant.

Steven P. Wandro, Sandra K. Lyons, and Michelle M. Casper of Wandro & Associates, P.C., Des Moines, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Farmers Cooperative Company (Coop) appeals the decision of the district court which determined certain hedge-to-arrive (HTA) contracts it had with Brad Lambert were unenforceable. The Coop claims the contracts were not illegal off-exchange futures contracts. We reverse on appeal and remand for reinstatement of the jury's verdict.

From 1994 through 1996, Lambert entered into several HTA contracts with the Coop. Under a HTA contract, a farmer agrees to sell grain to a Coop on a future date for a specific price. In order to protect itself from any changes in the price of grain from the time of the contract to the time of delivery, the Coop hedges its purchase by simultaneously selling a "short" futures contract on the Chicago Board of Trade (CBOT). The Coop is only able to maintain its futures position if the farmer actually delivers the grain.

The Coop permitted Lambert to roll the contracts over and deliver the grain at a later date. When a HTA contract is rolled, the Coop must buy back its futures contract and purchase a new futures contract for the later date. If the price of grain has changed, the gain or loss is added or deducted from the new contract price the farmer will receive.

Lambert entered into HTA contracts for more grain than he was able to produce. He purchased some contracts back from the Coop, and rolled other contracts over. In May 1996, the Coop asked Lambert for assurance of his intention to deliver grain. Lambert would not provide assurances and the Coop

cancelled the contracts. At the same time it terminated its hedged position on the CBOT, resulting in financial losses.

The Coop brought suit against Lambert for breach of sixteen HTA contracts. Lambert testified that when he entered into some of the contracts he did not have any grain on hand and knew he would not produce any before the contract became due. He testified he intended to roll the contracts over until December 1996 or July 1997. He stated he felt the contracts could be rolled over for three or four years.

A jury found Lambert had breached his contracts and awarded the Coop damages of \$87,787.55. The district court determined, as a matter of law, seven of the sixteen HTA contracts were illegal off-exchange futures contracts. The court found at the time Lambert entered into these contracts, he did not have any intention of delivering the grain required by the contracts because he did not have any grain on hand and there was no production season prior to the date he was to deliver the grain. Under the court's decision, the Coop's judgment was reduced to \$25,992.10. The Coop appealed.

Scope of Review. This breach of contract action was tried at law and therefore our review is for correction of errors of law. *Land O' Lakes, Inc. v. Hanig*, 610 N.W.2d 518, 522 (Iowa 2000).

HTA Contracts. The federal Commodity Exchange Act makes it illegal to enter into a contract for the purchase or sale of a commodity for future delivery, unless the transaction is conducted on a board of trade. 7 U.S.C. § 6(a). There is an exception, however, for "any sales of any cash commodity for deferred

shipment or delivery." 7 U.S.C. § 1a(11). Contracts falling within the exception are generally considered "cash forward contracts." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 319 (6th Cir. 1998). In a cash forward contract, the parties contemplate physical transfer of the actual commodity. *Id.* at 320.

The Iowa Supreme Court recently stated:

Contracts that merely serve as an investment vehicle to the public are futures contracts. In contrast, contracts that are clearly intended to enable a producer to price his grain in advance of harvest in order to facilitate *the ultimate exchange of grain for money* are cash forward contracts.

Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 465 (Iowa 2000) (emphasis in original). The court noted in order to determine the nature of a contract, a court should consider the intentions of the parties, the terms of the contract, the course of dealing between the parties, and any other relevant factors to determine whether the parties contemplated physical delivery of the grain. *Id.* at 462 (quoting *Grain Land Coop. v. Kar Kim Farms, Inc.*, 199 F.3d 983, 990-91 (8th Cir. 1999)).

In *Top of Iowa Coop.*, the Iowa Supreme Court found the HTA contracts the parties had entered into were legal cash forward contracts because the obligation to deliver grain was implied by the contracts. *Id.* at 465. Also, Sime Farms had delivered grain to the elevator in the past. *Id.* Although the contracts permitted rolling, there was no indication the parties did not anticipate delivery at a future date. *Id.* The HTA contracts did not contain a cancellation provision. *Id.* In addition, both parties were in the business of buying and selling grain. *Id.*

Contract Language. In the present case, the Coop claims all of its HTA contracts with Lambert were legal cash forward contracts. It asserts the district court erred in finding seven of the sixteen HTA contracts were illegal futures contracts. The Coop contends the district court improperly focused on Lambert's subjective intent, instead of looking to the objective intent of the parties as found in the language of the contracts.

In determining whether a contract is a cash forward contract or a futures contract, our starting point must always be the words of the contract itself. *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 787 (7th Cir. 1999). Lambert's sixteen HTA contracts with the Coop contained identical language, except for the provision concerning the amount of grain and the delivery date. The contracts stated the seller, Lambert, "sells and promises to deliver" a certain amount of grain. The contracts covered the possibility of over-delivery or under-delivery of grain, and delivery of damaged or inferior grain. The contract provided, "This contract will be cancelled ONLY upon sufficient proof of inability to deliver." There was no provision in the contract for rolling the contract over. Looking at the language of the contracts, we determine the objective intent of the parties was clearly the physical delivery of grain.

Course of Dealing. In addition to looking at the language of the contracts, to gain the fullest understanding possible of the parties' agreement and their purpose, we often must consider the course of dealing between the parties and the totality of the business relationship. *Lachmund*, 191 F.3d at 787. Here, the parties' course of dealing allowed Lambert to buy out the contracts or roll them

over. However, the mere possibility of infinite rolling is not dispositive; whether actual delivery is contemplated remains the focal point. *Andersons*, 166 F.3d at 321. Not even a contract's cancellation provision is viewed as sufficient to transform a HTA contract into a futures contract. *Top of Iowa Coop.*, 608 N.W.2d at 463. Therefore, the fact the parties by practice agreed to allow Lambert to buy out his contracts or roll them over does not change the essential nature of the contracts.

When we look at the totality of the parties' business relationship, we look at whether: (1) the contract contains idiosyncratic terms, so it is not fungible with other contracts; (2) the contract is between industry participants, such as farmers and other grain merchants; and (3) delivery cannot be deferred forever because the farmer is required to pay a charge for rolling. *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 441 (7th Cir. 2000). The contracts between Lambert and the Coop contain idiosyncratic terms regarding the amount of grain and date of delivery. The contract is between a farmer and an elevator in the business of buying grain. Lambert admitted delivery could not be deferred forever. He testified he felt the contracts could be rolled over for three or four years. In addition, the Coop charged farmers one cent per bushel to roll over a contract. Under this test, we find the contract should be deemed a forward contract.

Subjective Intent. Under all of the factors discussed above, the HTA contracts in this case would be considered legal cash forward contracts. The district court determined Lambert's subjective intent made seven of the sixteen contracts illegal. A similar issue regarding subjective intent was addressed in

Johnson v. Land O' Lakes, Inc., 18 F. Supp. 2d 985, 994 (N.D. Iowa 1998), where farmers argued they never intended to deliver grain under their HTA contracts because they had the opportunity to roll or buy out the contracts rather than delivering the grain. The federal court stated:

The only reasonable inference to arise from an assertion that the contract could be deferred by rolling or as part of a multi-year plan, or extinguished by a buyout, is that there was indeed a recognized obligation to deliver grain on the contract that had to be deferred by rolling or extinguished by buying it out.

Id. at 996. In addition, a federal court of appeals has stated, "although the [farmers] may have lacked a subjective intent to deliver corn, they are unequivocally required to do so by the HTAs." *Haren v. Conrad Coop.*, 198 F.3d 683, 684 (8th Cir. 1999). In both cases, the courts determined the HTA contracts were legal cash forward contracts. *Id.*; *Johnson*, 18 F. Supp. 2d at 996. Thus, in these cases the courts found the farmers' subjective intent could not make an otherwise legal HTA contract an illegal futures contract.

Even if we were to consider Lambert's subjective intent, we find the evidence shows Lambert realized delivery of grain was required by the HTA contracts. Lambert testified:

Q. Let me see if I got this right. Did you think you could roll these contracts forever? A. Yes.

Q. Never had to deliver grain? A. You could roll them till they worked.

Q. And that could be theoretically forever? A. Theoretically it could be three, four years.

Q. Three, four years or fifteen years? A. I don't think fifteen years would be.

* * *

Q. Now, before you got that letter, what was your intentions with respect to your July contract when you didn't have any grain? A.

My intentions were to roll ahead, roll to December of '96, and maybe even July '97. Roll them out.

The evidence shows Lambert intended to deliver the grain in December 1996, or possibly July 1997, and at most roll the contracts over for three or four years. Clearly he understood he eventually would have to deliver the grain required by the contracts.

Summary. We conclude the district court erred in concluding Lambert's subjective intent made seven of the sixteen HTA contracts illegal futures contracts. The HTA contracts were legal cash forward contracts. We determine Lambert's subjective intent alone should not transform some of the HTA contracts into illegal futures contracts. We reverse the decision of the district court and remand for reinstatement of the jury's verdict. Costs of this appeal are assessed to Lambert.

REVERSED AND REMANDED.