

substantiality of expected damage rather than on the objective of the legal system. The Supreme Court, in contrast, has maintained the theory of “interest protected by a statutory provision”, putting emphasis on the object of certain provisions. However, the Supreme Court’s decision in the instant case has undoubtedly approached the “interests deserving legal protection” theory in its substance.

Prof. SHIGEYUKI SUDOH
TAKATOSHI MUNENO

2. Law of Property and Obligations

- 1. A case in which foreseeability and responsibility for landslides in a golf course after formation of a golf club membership contract were decided with respect to the club management company, which had first entered into the contract. (A case to which the Changed Circumstances Rule (*jijō henkō*) was held to be inapplicable.)**

Decision by the Third Petty Bench of the Supreme Court on July 1, 1997. Case No, (o) 255 of 1996. A case in which plaintiffs claim the existence of a golf club membership should be confirmed. 51-6 *Minshu* 2452; 1617 *Hanrei jihō* 64; 953 *Hanrei Taimuzu* 99.

[Reference: Civil Code, Article 1 (2) and Vol.3 Chap.2.]

[Facts]

X and others (plaintiffs, *kōso* respondents, *jōkoku* appellants) acquired membership in this golf club through a contract with Company A, which managed this golf course, or through transfer from other members. Later the business of this golf course was transferred from Company A to Company B, and from Company B to Y (defendant, *kōso* appellant, *jōkoku* respondents). Y took over the rights and duties of the membership contract in the relation to X and others. Landslides, which have occurred frequently since the opening of this golf

course, finally made the operation of the business impossible. Company B closed this golf course, and carried out overall renovation. Y, who acquired the business of this golf course by transfer from Company B, demanded that X and the others to pay an additional deposit or leave the golf club after accepting the repayment of the deposit which they had paid previously. In response to Y's demand X and others claimed their membership to be confirmed, in particular with respect to their priority use of this golf course and other facilities.

The court of first instance (Osaka District Court) upheld X and the others' claim. Y appealed. The court of second instance (Osaka High Court) dismissed X and the others' claim. It found as follows: (1) at the time that the business of this golf course was transferred from Company A, Company B didn't and couldn't foresee any necessity to undertake such a large renovation; (2) the cost spent on this renovation was necessary and the minimum to prevent natural disasters such as landslides; (3) as a matter of fact it is impossible to require Company A, that is, the first company managing this golf course, to bear the repair cost, since the business and assets of Company A are found to be uncertain at present. It was held that, in view of these facts, it is remarkably unfair, under the Good Faith Performance Rule (Civil Code, Article 1 (2)), to recognize X and the others' priority as an enforceable right based on the membership contract; therefore, according to the Changed Circumstances Rule, X and the others have no priority in spite of their membership contract. X and the others appealed to the Supreme Court.

[Opinion of the Court]

Reversed.

After X and the others contracted with Company A to acquire membership in this golf club, landslides occurred and made the renovation necessary. The circumstances, on which this contract was based, have changed after its formation. To apply the Changed Circumstance Rule, it is necessary: (1) that the change of circumstances after formation of the contract is unforeseeable by the contracting parties and arises from causes for which the parties were not responsible at all; and (2) that when all rights and duties of a party are transferred to

another the foreseeability and responsibility are decided with respect to the original contracting party, i.e., not the transferee but the transferor. Besides, generally speaking, companies managing golf courses which modify the shape of the land and develop courses, can foresee and make themselves responsible for landslides on the golf courses, except in special excuses. Accordingly the Changed Circumstances Rule is inapplicable in this case, in which such a special excuse isn't claimed and proven by Y.

[Comment]

The Changed Circumstances Rule is the rule that, when circumstances, on which a contract is based, have changed unforeseeably after formation of the contract and it becomes unfair to retain the enforceability of the contract, the right to revise or cancel is given to the disadvantaged party. This rule isn't prescribed by statute, but acknowledged by case law (the leading case is the decision of the Great Court of Judicature, the former supreme court in 1944) and doctrines on the ground of the Good Faith Performance Rule (Civil Code, Article 1-2). Moreover the point or meaning of this rule is expressed in some statutory provisions. Examples include Article 609 of the Civil Code, Articles 11 and 32 of the Land and House Lease Act. Since the end of the Second World War, however, the Supreme Court has not yet applied this rule in a concrete case. This case goes along with the trend of decisions of the Supreme Court. From comparative law viewpoint, the Changed Circumstances Rule, which can be traced back to the European medieval rule expressed by the maxim *clausula rebus sic stantibus*, corresponds to the Anglo-Saxon theory of frustration, the American theory of impracticability, the French theory of *imprévision* and the German theory of *Wegfall der Geschäftsgrundlage*.

There are several doctrinal views stating requirements for applying the Changed Circumstances Rule. The following requirements are those which are may be commonly accepted: (1) the circumstances on which a contract is based have changed; (2) the contracting parties didn't or couldn't foresee the change of circumstances; (3) the parties aren't responsible for it; and (4) according to the Good Faith Performance Rule, it is remarkably unfair to keep the contract enforceable

despite the change of circumstances.

A contract for golf club membership is formed between a company which manages golf courses and incidental facilities, and those who intend to play golf or invest in the membership as a negotiable instrument. The membership includes the priority to use golf courses and other facilities, the right to return of the deposits which members paid when they joined the club, and the right to transfer membership to another. In recent years, many and various judicial disputes have occurred concerning membership in golf clubs, since the market prices of membership have fallen radically due to the influence of depression. This case is the one of those disputes.

In this case the Supreme Court considered foreseeability and responsibility not of Company A but of Company B as prerequisites for the application of the Changed Circumstances Rule. In other words, when the status of the first contracting party has been transferred to another, foreseeability and responsibility have to be judged with respect to the contracting party as transferor. Since rights and duties are transferred in a body to transferee when the status of the original contracting party is transferred, transfer's rights and duties are determined by the original contract. Furthermore a party who could foresee the change of circumstances ought to have provided for it. When a party nevertheless did nothing to provide for it, then he is considered to personally bear the risk resulting from the change of circumstances. In this case, the rights and duties of Company B, to which the business of this golf course was transferred from Company A, are determined by the membership contract between Company A and X and others, and Company B had no chance to provide for the change of circumstances at the time the business was transferred. For that reason, foreseeability and responsibility should not be judged with respect to Company B, but with respect to Company A.

In this case, it was also found that companies managing golf courses could foresee and therefore in principle made themselves responsible for landslides in golf courses because they modified the shape of the land artificially and developed the golf courses. The changes of circumstances which may excuse contracting parties must result from irresistible forces, such as war, a natural disaster, inflation

and a revision of statutes. Since facilities like golf courses are developed through the artificial modification of the shape of the land, it is impossible to deny the fact that a major disaster could occur in the future. Therefore, the Supreme Court found that the necessity to take measures against such a disaster is foreseeable.

According to this opinion of the Supreme Court, companies managing golf courses have to bear the risk resulting from the change of circumstances after forming the membership contract in almost all cases in which golf courses have been developed artificially. In this case Y, who manages this golf course at present, has to wholly bear the cost for the renovation. However it is problematic if such a result isn't unfair, that is to say, against the Good Faith Performance Rule. In contrast to the Supreme Court, the High Court had considered not only the existence of the foreseeability but also the degree. It is feared that the scope of the Changed Circumstances Rule is limited unreasonably by considering the existence of the foreseeability only in the abstract.

TAKAHIRO FUJITA

3. Family Law

1.

Decision by the First Petty Bench of the Supreme Court, April 10, 1997 Case No, (o) 1993. 51 *Minshū* 1972, 958 *Hanrei Taimuzu* 158, 1620 *Hanrei Jihō* 78.

[Reference: Civil Code, Articles 766, 711, Law of Procedure in Actions relating to Personal Status Article 15]

[Facts]

X (wife, plaintiff) and Y (husband, defendant) were married in 1988. A (the daughter of X and Y) was born in 1989.

X learned that Y ran a restaurant with Y's family. X and Y lived with Y's family and X had to work together with Y in the restaurant when they married.