Contracts 2023

Richard Warner

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Lefkowitz v. Great Minneapolis Surplus Store

86 N.W.2d 689 (Minn. 1957)

This is an appeal from an order of the Municipal Court of Minneapolis denying the motion of the defendant for amended findings of fact, or, in the alternative, for a new trial. The order for judgment awarded the plaintiff the sum of $138.50 as damages for breach of contract.

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on April 6, 1956, the defendant published the following advertisement in a Minneapolis newspaper:

"Saturday 9 a.m. sharp
3 Brand New Fur Coats
Worth to $ 100.00
First Come, First Served
$ 1 Each"

On April 13, the defendant again published an advertisement in the same newspaper as follows:

"Saturday 9 a.m.
2 Brand New Pastel Mink 3-Skin Scarfs
Selling for $ 89.50
Out they go Saturday.
Each . . . . $ 1.00
1 Black Lapin Stole
Beautiful, worth $ 139.50 . . . $ 1.00
First Come, First Served"

The record supports the findings of the court that on each of the Saturdays following the publication of the above-described ads the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a "house rule" the offer was intended for women only and sales would not be made to men, and on the second visit that plaintiff knew defendant's house rules.

The trial court properly disallowed plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were "Worth to $100.00," how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the "1 Black Lapin Stole \* \* \* worth $139.50 \* \* \*" the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the $1 quoted purchase price.

1.  The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price is a "unilateral offer" which may be withdrawn without notice. He relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms. . . .

The defendant relies principally on *Craft v. Elder & Johnston Co*. *supra*. In that case, the court discussed the legal effect of an advertisement offering for sale, as a one-day special, an electric sewing machine at a named price. The view was expressed that the advertisement was (34 Ohio L.A. 605, 38 N.E. [2d] 417) "not an offer made to any specific person but was made to the public generally. Thereby it would be properly designated as a unilateral offer and not being supported by any consideration could be withdrawn at will and without notice." It is true that such an offer may be withdrawn before acceptance. Since all offers are by their nature unilateral because they are necessarily made by one party or on one side in the negotiation of a contract, the distinction made in that decision between a unilateral offer and a unilateral contract is not clear. On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance.

There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract. . . .

The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, Contracts (Rev. ed.) § 27.

The authorities above cited emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. The most recent case on the subject is Johnson v. Capital City Ford Co. (La. App.) 85 So. (2d) 75, in which the court pointed out that a newspaper advertisement relating to the purchase and sale of automobiles may constitute an offer, acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer.

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. Annotation, 157 A.L.R. 744, 751; 77 C.J.S., Sales, § 25b; 17 C.J.S., Contracts, § 389. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.

2.  The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. . .

Affirmed.

 Douglas v. Talk America

495 F.3d 1062 (9th Cir. 2007)

PER CURIAM:

We consider whether a service provider may change the terms of its service contract by merely posting a revised contract on its website.

**Facts**

Joe Douglas contracted for long distance telephone service with America Online. Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL's former customers. Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.

After becoming aware of the additional charges, Douglas filed a class action lawsuit in district court, charging Talk America with violations of the Federal Communications Act, breach of contract and violations of various California consumer protection statutes. Talk America moved to compel arbitration based on the modified contract and the district court granted the motion. Because the Federal Arbitration Act, 9 U.S.C. § 16, does not authorize interlocutory appeals of a district court order compelling arbitration, Douglas petitioned for a writ of mandamus.

**Analysis**

. . .

**1.** Douglas alleges that Talk America changed his service contract without notifying him. He could only have become aware of the new terms if he had visited Talk America's website and examined the contract for possible changes. The district court seems to have assumed Douglas had visited the website when it noted that the contract was available on “the web site on which Plaintiff paid his bills.” However, Douglas claims that he authorized AOL to charge his credit card automatically and Talk America continued this practice, so he had no occasion to visit Talk America's website to pay his bills. Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.FN1 Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. *Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.,* 549 F.2d 114, 118 (9th Cir.1976). This is because a revised contract is merely an offer and does not bind the parties until it is accepted. *Matanuska Val Farmers Cooperating Ass'n v. Monaghan,* 188 F.2d 906, 909 (9th Cir.1951). And generally “an offeree cannot actually assent to an offer unless he knows of its existence.” 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:13, at 365 (4th ed.1990); *see also Trimble v. N.Y. Life Ins. Co.,* 234 A.D. 427, 255 N.Y.S. 292, 297 (1932) (“An offer may not be accepted until it is made and brought to the attention of the one accepting.”). Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes. Douglas claims that no such notice was given.

FN1. Nor would a party know *when* to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed.

. . .

The district court thus erred in holding that Douglas was bound by the terms of the revised contract when he was not notified of the changes. The error reflects fundamental misapplications of contract law and goes to the heart of petitioner's claim.

Dougherty v. Salt

125 N.E. 94 (1919)

Cardozo, J.

The plaintiff, a boy of eight years, received from his aunt, the defendant's testatrix, a promissory note for $3,000, payable at her death or before. Use was made of a printed form, which contains the words ‘value received.’ How the note came to be given was explained by the boy's guardian, who was a witness for his ward. The aunt was visiting her nephew.

‘When she saw Charley coming in, she said, ‘Isn't he a nice boy?’ I answered her, Yes; that he is getting along very nice, and getting along nice in school; and I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child; that she loved him very much. I said, ‘I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk. ’She said, ‘I don't intend to take it out in talk; I would like to take care of him now. ’I said, ‘Well, that is up to you.’ She said, ‘Why can't I make out a note to him? ’I said, ‘You can, if you wish to.’ She said, ‘Would that be right?’ And I said, ‘I do not know, but I guess it would; I do not know why it would not.’ And she said, ‘Well, will you make out a note for me?’ I said, ‘Yes, if you wish me to,’ and she said, ‘Well, I wish you would.”

A blank was then produced, filled out, and signed. The aunt handed the note to her nephew, with these words:

‘You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable.’

The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.

We reach a different conclusion. The inference of consideration to be drawn from the form of the note has been so overcome and rebutted as to leave no question for a jury. This is not a case where witnesses, summoned by the defendant and friendly to the defendant's cause, supply the testimony in disproof of value.  Strickland v. Henry, 175 N. Y. 372, 67 N. E. 611. This is a case where the testimony in disproof of value comes from the plaintiff's own witness, speaking at the plaintiff's instance. The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforceable promise of an executory gift. Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Holmes v. Roper, 141 N. Y. 64, 66,36 N. E. 180. This child of eight was not a creditor, nor dealt with as one. The aunt was not paying a debt.  She was conferring a bounty.  Fink v. Cox, 18 Johns. 145, 9 Am. Dec. 191.

The promise was neither offered nor accepted with any other purpose. . . . A note so given is not made for ‘value received,’ however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law.  . . .  The plaintiff through his own witness, has explained the genesis of the promise, and consideration has been disproved. Neg. Instr. Law, § 54 (Consol. Laws, c. 38).

We hold, therefore, that the verdict of the jury was contrary to law, and that the trial judge was right in setting it aside. . . .

The judgment of the Appellate Division should be reversed, and the judgment of the Trial Term modified by granting a new trial, and, as modified, affirmed, with costs in all courts to abide the event.

HISCOCK, C. J., and CHASE, COLLIN, HOGAN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

 Schnell v. Nell

17 Ind. 29 (1861)

Perkins, J.

Action by *J. B. Nell* against *Zacharias Schnell,* upon the following instrument:

This agreement, entered into this 13th day of *February,* 1856, between *Zach. Schnell,* of *Indianapolis, Marion* county, State of *Indiana,* as party of the first part, and *J. B. Nell,* of the same place, *Wendelin Lorenz,* of *Stilesville, Hendricks* county, State of *Indiana,* and *Donata Lorenz,* of *Frickinger, Grand Duchy of Baden, Germany,* as parties of the second part, witnesseth: The said *Zacharias Schnell* agrees as follows: whereas his wife, *Theresa Schnell,* now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said *Theresa Schnell,* deceased, in her own name, at the time of her death, and all property held by *Zacharias* and *Theresa Schnell* jointly, therefore reverts to her husband; and whereas the said *Theresa Schnell* has also been a dutiful and loving wife to the said *Zach. Schnell,* and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said *Zach, Schnell,* agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said *J. B. Nell;* $200 to the said *Wendelin Lorenz;* and $200 to the said *Donata Lorenz,* in the following installments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66 2/3 each year, or as they may agree, till each one has received his full sum of $200.

And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said *Schnell,* and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said *Theresa Schnell,* deceased.

In witness whereof, the said parties have, on this 13th day of *February,* 1856, set hereunto their hands and seals.

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered. . . .

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, *Theresa,* at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c. . . .

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. . . .

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against *Zacharias Schnell.* It specifies . . . distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property. . . .

The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so.

As the will and testament of *Schnell's* wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. . . . The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for *Schnell's* promise, on two grounds:

1. They are past considerations.

2. The fact that *Schnell* loved his wife, and that she had been industrious, constituted no consideration for his promise to pay *J. B. Nell,* and the *Lorenzes,* a sum of money. . . . Nor is the fact that *Schnell* now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Stevenson v. Druley,* 4 Ind. 519.

*Per Curiam.*

The judgment is reversed, with costs. Cause remanded &c.

Linder v Mid-Continent Petroleum Corp.

252 S.W.2d 631 (1952)

George Rose Smith, Justice.

This is an action by Mid-Continent Petroleum Corporation to recover possession of a filling station owned by Cora Lee Lindner and leased by her to Mid-Continent.  The theory of the complaint is that Mrs. Lindner wrongfully attempted to cancel the lease and thereafter unjustifiably withheld possession from the plaintiff. There was also involved certain equipment appurtenant to the filling station, but the arguments advanced on appeal present no issue with respect to this equipment. The defenses below were that Mrs. Lindner's lease to Mid-Continent was void for lack of mutuality and that the lessee was in default in the payment of rent. Trial before a jury resulted in a verdict awarding possession to the plaintiff.

The jury may have concluded from the proof that on March 19, 1949, Mid-Continent wished to rent the station as an outlet for the sale of its petroleum products, Mrs. Lindner desired to lease the property to Mid-Continent, and Mrs. Lindner's husband, the other appellant, wanted to undertake the operation of the station. In furtherance of these ends the parties executed four instruments on the date mentioned. First, Mrs. Lindner, for a rental of one cent for each gallon of motor fuel sold on the premises, leased the filling station to Mid-Continentfor a term of three years with an option by which the lessee might extend the lease for two more years. In this lease the lessee reserved the privilege of termination at any time upon ten days' notice to the lessor. Second, Mid-Continent in turn rented the property to Paul Lindner upon a month-to-month basis at the same rental, both parties retaining the privilege of terminationupon ten days' notice. Third, the Lindners authorized Mid-Continent to offset the rents against each other, so that Mid-Continent would not be required to collect the rent monthly from Lindner and pay over an identical amount to Mrs. Lindner. Fourth Mid-Continent and Lindner agreed upon the price schedule at which the company would sell petroleum products to Lindner, this Contract also being cancelable upon ten days' notice by either party.

These arrangements appear to have been satisfactory until the year 1951, when Lindner removed Mid-Continent's advertising from the service station and began buying gas and oil from a competing company. On July 23, 1951, Mid-Continent gave notice that it elected to terminate its lease to Paul Lindner and its agreement to sell petroleum products to him. Three days later the Lindners retaliated by attempting to cancel Mrs. Lindner's lease to Mid-Continent. When the latter demanded possession at the expiration of the ten-day notice by which its sublease to Paul Lindner had been canceled the defendants refused to give up the property. This suit was then filed.

It is argued by the appellants that the lease from Mrs. Lindner to Mid-Continent is lacking in mutuality in that the lessee can terminate the contract upon ten days' notice, while no similar privilege is granted to the lessor.

This contention is without merit. Williston has pointed out that the use of the term ‘mutuality’ in this connection ‘is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be a valid consideration.’  Williston on Contracts, § 141. As we held in Johnson v. Johnson, 188 Ark. 992, 68 S.W.2d 465, the requirement of mutuality does not mean that the promisor's obligation must be exactly coextensive with that of the promisee.  It is enough that the duty unconditionally undertaken by each party be regarded by the law as a sufficient consideration for the other's promise.  Of course a promise which is merely illusory, such as an agreement to buy only what the promisor may choose to buy, falls short of being a consideration for the promisee's undertaking, and neither is bound.  El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S.W. 460; Williston, § 104. If, however, each party's binding duty of performance amounts to a valuable consideration, the courts do no insist that the bargain be precisely as favorable to one side as to the other.

In this view it will be seen that Mid-Continent's option to cancel the lease upon ten days' notice to Mrs. Lindner is not fatal to the validity of the contract. This is not an option by which the lessee may terminate the lease at pleasure and without notice; at the very least the lessee bound itself to pay rent for ten days. Even lesser duties than this are held to be a sufficient consideration to support a contract. Williston, §§ 103F and 105. . . .

Affirmed.

In Re Zappos.Com, Inc., Customer Data Security Breach Litigation

893 F.Supp.2d 1058 (D.Nev.,2012)

**Order**

R. JONES, District Judge

This Multidistrict Litigation ("MDL") proceeding arises out of a security breach of servers belong to Defendants Amazon.com, Inc. (“Amazon"), doing business as Zappos.com, and Zappos.co, Inc. ("Zappos") in January 2012. Now pending is Defendant Zappos' Motion to Compel Arbitration and Stay action (#3).

**I. Relevant Factual Background**

Zappos is an online retailer of apparel, shoes, handbags, home furnishing, beauty products, and accessories. Plaintiffs are Zappos customers who gave personal information to Zappos in order to purchase goods via Zappos.com and/or 6PM.com. In mid-January 2012, a computer hacker attacked Zappos.com and attempted to download files containing customer information such as names and addresses from a Zappos server (the "Security Breach"). Plaintiffs allege that on January 16, 2012, Zappos notified Plaintiffs via email that their personal customer account information had been compromised by hackers. Plaintiffs have filed complaints in federal district courts across the country seeking relief pursuant to state and federal statutory and common law for damages resulting from the Security Breach.

**II. Procedural Background**

. . . The Court held a hearing on the motion and heard the parties' oral arguments on September 19, 2012.

**III. Legal Standard**

The Federal Arbitration Act ("FAA") provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 U.S.C. § 2](http://www.bloomberglaw.com/ms/document/XEH1F4003?jcsearch=9%20U.S.C.%20%202&amp;summary=yes#jcite) . . .

**IV. Discussion**

The arbitration agreement at issue, founds in the Disputes section of the Terms of Use of the Zappos.com website, provides as follows:

Any dispute relating in any way to your visit to the Site or to the products you purchase through the Site shall be submitted to confidential arbitration in Las Vegas, Nevada, except that to the extent you have in any manner violated or threatened to violate our intellectual property rights, we may seek injunctive or other appropriate relief in any state or federal court in the State of Nevada. You hereby consent to, and waive all defense of lack of personal jurisdiction and forum non conveniens with respect to venue and jurisdiction in the state and federal courts of Nevada. Arbitration under these Terms of Use shall be conducted pursuant to the Commercial Arbitration Rules then prevailing at the American Arbitration Association. The arbitrator's award shall be final and binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class action proceedings or otherwise. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of, related to or connected with the use of the Site or this Agreement must be filed within one (1) year after such claim or cause of action arose or be forever banned.

Additionally, the first paragraph of the Terms of Use provides in relevant part: "We reserve the right to change this Site and these terms and conditions at any time. **ACCESSING, BROWSING OR OTHERWISE USING THE SITE INDICATES YOUR AGREEMENT TOALL THE TERMS AND CONDITIONS IN THIS AGREEMENT, SO PLEASE READ THISAGREEMENT CAREFULLY BEFORE PROCEEDING."**

. . .

**B. The Terms of Use Constitutes an Illusory Contract**

The Priera Plaintiffs argue that because the Terms of Use grants Zappos the unilateral right to revise the Arbitration Clause, the contract is illusory and therefore unenforceable. In other words, Plaintiffs argue that the Arbitration Clause is illusory because Zappos can avoid the promise to arbitrate simply by amending the provision, while Zappos.com users are simultaneously bound to arbitration.

Most federal courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify, the other parties to the contract . . .

Here, the Terms of Use gives Zappos the right to change the Terms of Use, including the Arbitration Clause, at any time without notice to the consumer. On one side, the Terms of Use purportedly binds any user of the Zappos.com website to mandatory arbitration. However, if a consumer sought to invoke arbitration pursuant to the Terms of Use, nothing would prevent Zappos from unilaterally changing the Terms and making those changes applicable to that pending dispute if it determined that arbitration was no longer in its interest. In effect, the agreement allows Zappos to hold its customers and users to the promise to arbitrate while reserving its own escape hatch. By the terms of the Terms of Use, Zappos is free at any time to require a consumer to arbitrate and/or litigate anywhere it sees fit, while consumers are required to submit to arbitration in Las Vegas, Nevada. Because the Terms of Use binds consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation. We join those other federal courts that find such arbitration agreements illusory and therefore unenforceable.

. . .

**V. Conclusion**

A court cannot compel a party to arbitrate where that party has not previously agreed to arbitrate. The arbitration provision found in the Zappos.com Terms of Use purportedly binds all users of the website by virtue of their browsing. However, the advent of the Internet has not changed the basic requirements of a contract, . . . even if Plaintiffs could be said to have consented to the terms, the Terms of Use constitutes an illusory contract because it allows Zappos to avoid arbitration by unilaterally changing the Terms at any time, while binding any consumer to mandatory arbitration in Las Vegas, Nevada . . .

Wickham & Burton Coal Co. v. Farmers' Lumber Co.

179 N.W. 417 (1920)

Salinger, J.

I. The counterclaim alleges that about August 18, 1916, defendant, through an agent, entered into an oral agreement “whereby plaintiff agreed to furnish and to deliver to defendant orders given them” for carload shipments of coal from defendant f. o. b. mines, “to be shipped to defendant at such railroad yard stations as defendant might direct, at the price of $1.50 a ton on all orders up to September 1, 1916, and $1.65 a ton on all orders from then to April 1, 1917. ”It is further alleged that “said coal ordered would be and consist” of what was known as plaintiff's Paradise 6 lump, 6x3 egg, or 3 x2 nut coal. It is next alleged that defendant has for several years last past been engaged in owning and operating what is commonly known as a line of lumber yards, located at different railroad station points tributary to Ft. Dodge, where defendant has its principal place of business; that at these several lumber yards, among other merchandise and commodities, the defendant handles coal in carload lots, with purpose of selling the same at retail to its patrons. Then comes an allegation that the agent made oral agreement “that plaintiff would furnish unto defendant coal in carload lots, that defendant would want to purchase from plaintiff” on stated terms, with character of the coal described, and that the oral contract was confirmed by the letter Exhibit 1. It is of date August 21, 1916, and recites that plaintiff is in receipt of a letter from their agent--

“asking us to name you a price [repeating the price and coal description found in the counterclaim]. Although this is a very low price, our agent, Mr. Spalding, has recommended that we quote you this price, and we hereby confirm it. Any orders received between now and September 1st are to be shipped at $1.50. We would like to have a letter from you accepting these prices, and if this is satisfactory will consider same as a contract.”

On August 26, 1916, the defendant responded:

“We have your favor of the 21st accepting our order for coal for shipment to March 31, 1917.”

The basis of the counterclaim, so far as damages are concerned, is the allegation that a stated amount of coal had to be purchased by defendant in the open market at a greater than the contract price, and that therefore there is due the defendant from the plaintiff the sum of $3,090.

The demurrer asserts that the alleged contract is void because there is no consideration between the parties, because it appears affirmatively that the offer was simply an offer on part of plaintiff, which might be accepted by giving an order until such time as it was actually withdrawn or expired by limitation, each order and acceptance of a carload lot constituting a separate and distinct contract, and void because the agreement could not be enforced by the plaintiff on any certain or specified amount of tonnage, or for the payment of any specified tonnage.

II. The demurrer makes, in effect, three assertions: (a) That the arrangement between the parties is void for uncertainty; (b) that it lacks consideration; (c) that it lacks mutuality of obligation. We have given the argument and the citations on the first two propositions full consideration. But we conclude these first two are of no importance if mutuality is wanting.

. . . [W]hile a writing may be so uncertain as not to be enforceable, a perfectly definite writing may still be unenforceable because there is no mutuality of obligation.

And the asserted lack of consideration is bottomed on the claim that mutuality is lacking. Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. . . .

The question of first importance, then, is whether there is a lack of mutuality. In the last analysis the counterclaim is based on the allegation that plaintiff undertook to furnish defendant such described coal “as defendant would want to purchase from plaintiff.” The defendant never “accepted.” Indeed, it is its position that it gave orders, and that plaintiff did the accepting. But concede, for argument's sake, that defendant did accept. What was the acceptance? At the utmost, it was a consent that plaintiff might ship it such coal as defendant “would want to purchase from plaintiff.” What obligation did this fasten upon defendant? It did not bind itself to buy all it could sell. It did not bind itself to buy of plaintiff only. It merely “agreed” to buy what it pleased. It may have been ascertainable how much it would need to buy of some one. But there was no undertaking to buy that much, or, indeed, any specified amount of coal of plaintiff.

The situation is well stated in some of the cases. In Crane v. Crane, 105 Fed. at 872, 45 C. C. A. 96, 99, it is put thus:

“Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would by that much increase their ratio of profits, and probably come into a situation to outbid competitors, and increase also the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued. On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured both by the increase of the ratio of profits and the probable increase of the quantum of orders.”

In American Cotton Oil Co. v. Kirk, 68 Fed. 793, 15 C. C. A. 540, 542, it is said:

“If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere and at the lower price, resorting to the contract when, and only when, the price stated was lower than the market price, and this without respect to time. Such a contract is one-sided and without mutuality.”

The “contract” on part of appellee is to buy if it pleased, when it pleased, to buy if it thought it advantageous, to buy much, little, or not at all, as it thought best.

A contract of sale is mutual where it contains an agreement to sell on the one side, and an agreement to purchase on the other. But it is not mutual where there is an obligation to sell, but no obligation to purchase, or an obligation to purchase, but no obligation to sell. 13 Corpus Juris, 339.

There is no mutuality or enforceability where the agreement is that, on 60 days' notice, either party might cancel same “for good cause.” Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 530. A provision that it is understood the purchase of apples commences “as soon as it is deemed advisable by both parties to this contract, when apples can be purchased in sufficient quantities to insure getting a carload in a reasonable length of time, not to exceed three days on fall apples,” lacks mutuality. This because no party is compelled to deem anything advisable, and the courts cannot deem it for them. Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664.There is such uncertainty as to destroy mutuality where the obligation to take is conditioned upon being “as long as we can make it pay.” Davie v. Lumbermen's Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357. It is said that, under such an agreement, plaintiffs must be presumed to be the sole judges of whether it would or would not pay them to do the work and of how long they should continue it, and that the defendant has no voice on whether or not plaintiffs could make it pay, and no right to say in what manner they should conduct the work in order to make it pay.

[The decision continues with a number of similar examples.]

. . .

The demurrer should have been sustained.

Reversed.

Wood v. Lucy, Lady Duff-Gordon

118 N.E. 214 (1917)

Cardozo, J.

The defendant styles herself ‘a creator of fashions.’ Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of ‘all profits and revenues' derived from any contracts he might make.

The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62,117 N. Y. Supp. 775;Moran v. Standard Oil Co., 211 N. Y. 187, 198,105 N. E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. . . Many other terms of the agreement point the same way. We are told at the outset by way of recital that:

‘The said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon, has approved.’

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business ‘efficacy, as both parties must have intended that at all events it should have.’ Bowen, L. J., in the Moorcock, 14 P. D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. . . .

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

CUDDEBACK, McLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., and CHASE and CRANE, JJ., dissent.

Order reversed, etc.

Laclede Gas Co. v. Amoco Oil Co.

522 F.2d 33 (1975)

Ross, Circuit Judge.

The Laclede Gas Company (Laclede), a Missouri corporation, brought this diversity action alleging breach of contract against the Amoco Oil Company (Amoco), a Delaware corporation. It sought relief in the form of a mandatory injunction prohibiting the continuing breach or, in the alternative, damages. The district court held a bench trial on the issues of whether there was a valid, binding contract between the parties and whether, if there was such a contract, Amoco should be enjoined from breaching it.  It then ruled that the “contract is invalid due to lack of mutuality” and denied the prayer for injunctive relief. The court made no decision regarding the requested damages. Laclede Gas Co. v. Amoco Oil Co., 385 F.Supp. 1332, 1336 (E.D.Mo.1974). This appeal followed, and we reverse the district court's judgment.

On September 21, 1970, Midwest Missouri Gas Company (now Laclede), and American Oil Company (now Amoco), the predecessors of the parties to this litigation, entered into a written agreement which was designed to provide central propane gas distribution systems to various residential developments in Jefferson County, Missouri, until such time as natural gas mains were extended into these areas. The agreement contemplated that as individual developments were planned the owners or developers would apply to Laclede for central propane gas systems. If Laclede determined that such a system was appropriate in any given development, it could request Amoco to supply the propane to that specific development. This request was made in the form of a supplemental form letter, as provided in the September 21 agreement; and if Amoco decided to supply the propane, it bound itself to do so by signing this supplemental form.

Once this supplemental form was signed the agreement placed certain duties on both Laclede and Amoco. Basically, Amoco was to “(i)nstall, own, maintain and operate . . . storage and vaporization facilities and any other facilities necessary to provide (it) with the capability of delivering to (Laclede) commercial propane gas suitable . . . for delivery by (Laclede) to its customers' facilities.” Amoco's facilities were to be “adequate to provide a continuous supply of commercial propane gas at such times and in such volumes commensurate with (Laclede's) requirements for meeting the demands reasonably to be anticipated in each Development while this Agreement is in force.” Amoco was deemed to be “the supplier,” while Laclede was “the distributing utility.”

For its part Laclede agreed to “(i)nstall, own, maintain and operate all distribution facilities” from a “point of delivery” which was defined to be “the outlet of (Amoco) header piping.”  Laclede also promised to pay Amoco “the Wood River Area Posted Price for propane plus four cents per gallon for all amounts of commercial propane gas delivered” to it under the agreement.

Since it was contemplated that the individual propane systems would eventually be converted to natural gas, one paragraph of the agreement provided that Laclede should give Amoco 30 days written notice of this event, after which the agreement would no longer be binding for the converted development.

Another paragraph gave Laclede the right to cancel the agreement. However, this right was expressed in the following language:

This Agreement shall remain in effect for one (1) year following the first delivery of gas by (Amoco) to (Laclede) hereunder. Subject to termination as provided in Paragraph 11 hereof (dealing with conversions to natural gas), this Agreement shall automatically continue in effect for additional periods of one (1) year each unless (Laclede) shall, not less than 30 days prior to the expiration of the initial one (1) year period or any subsequent one (1) year period, give (Amoco) written notice of termination.

There was no provision under which Amoco could cancel the agreement.

For a time the parties operated satisfactorily under this agreement, and some 17 residential subdivisions were brought within it by supplemental letters. However, for various reasons, including conversion to natural gas, the number of developments under the agreement had shrunk to eight by the time of trial. These were all mobile home parks.

During the winter of 1972-73 Amoco experienced a shortage of propane and voluntarily placed all of its customers, including Laclede, on an 80% Allocation basis, meaning that Laclede would receive only up to 80% of its previous requirements. Laclede objected to this and pushed Amoco to give it 100% of what the developments needed. Some conflict arose over this before the temporary shortage was alleviated.

Then, on April 3, 1973, Amoco notified Laclede that its Wood River Area Posted Price of propane had been increased by three cents per gallon. Laclede objected to this increase also and demanded a full explanation. None was forthcoming. Instead Amoco merely sent a letter dated May 14, 1973, informing Laclede that it was “terminating” the September 21, 1970, agreement effective May 31, 1973. It claimed it had the right to do this because “the Agreement lacks ‘mutuality.’ ”

The district court felt that the entire controversy turned on whether or not Laclede's right to “arbitrarily cancel the Agreement” without Amoco having a similar right rendered the contract void “for lack of mutuality” and it resolved this question in the affirmative. We disagree with this conclusion and hold that settled principles of contract law require a reversal.

I

A bilateral contract is not rendered invalid and unenforceable merely because one party has the right to cancellation while the other does not. There is no necessity “that for each stipulation in a contract binding the one party there must be a corresponding stipulation binding the other.”  James B. Berry's Sons Co. v. Monark Gasoline & Oil Co., 32 F.2d 74, 75 (8th Cir. 1929) . . .

The important question in the instant case is whether Laclede's right of cancellation rendered all its other promises in the agreement illusory so that there was a complete failure of consideration. This would be the result had Laclede retained the right of immediate cancellation at any time for any reason.  1 S. Williston, Law of Contracts s 104, at 400-401 (3d ed. 1957). However, Professor Williston goes on to note:

Since the courts . . . do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or is based on some other objective standard.

. . .

Here Laclede's right to terminate was neither arbitrary nor unrestricted. It was limited by the agreement in at least three ways. First, Laclede could not cancel until one year had passed after the first delivery of propane by Amoco. Second, any cancellation could be effective only on the anniversary date of the first delivery under the agreement. Third, Laclede had to give Amoco 30 days written notice of termination. These restrictions on Laclede's power to cancel clearly bring this case within the rule.

A more difficult issue in this case is whether or not the contract fails for lack of “mutuality of consideration” because Laclede did not expressly bind itself to order all of its propane requirements for the Jefferson County subdivisions from Amoco.

While there is much confusion over the meaning of the terms “mutuality” or “mutuality of obligation” as used by the courts in describing contracts, . . . our use of this concept here is best described by Professor Williston:

Sometimes the question involved where mutuality is discussed is whether one party to the transaction can by fair implication be regarded as making any promise; but this is simply an inquiry whether there is consideration for the other party's promise.

1 S. Williston, supra, s 105A, at 423. (Footnote omitted.) . . .

Once Amoco had signed the supplemental letter agreement, thereby making the September 21 agreement applicable to any given Jefferson County development, it was bound to be the propane supplier for that subdivision and to provide a continuous supply of the gas sufficient to meet Laclede's reasonably anticipated needs for that development. It was to perform these duties until the agreement was cancelled by Laclede or until natural gas distribution was extended to the development.

For its part, Laclede bound itself to purchase all the propane required by the particular development from Amoco. This commitment was not expressly written out, but it necessarily follows from an intelligent, practical reading of the agreement.

Laclede was to “(i)nstall, own, maintain and operate all distribution facilities from the point of delivery as defined in Paragraph 3(b) . . . .” Paragraph 3(b) provided: “the point of delivery shall be at the outlet of (Amoco) header piping.” Also under Paragraph 3(b) Amoco was to own and operate all the facilities on the bulk side of that header piping. Laclede thus bound itself to buy all its requirements from Amoco by agreeing to attach its distribution lines to Amoco's header piping; and even if a change of suppliers could be made under the contract, Laclede could not own and operate a separate distribution system hooked up to some other supplier's propane storage tanks without substantially altering the supply route to its distribution system or making a very substantial investment in its own storage equipment and site. As a practical matter, then, Laclede is bound to buy all the propane it distributes from Amoco in any subdivision to which the supplemental agreement applies and for which the distribution system has been established.

When analyzed in this manner, it can be seen that the contract herein is simply a so-called “requirements contract.”  Such contracts are routinely enforced by the courts where, as here, the needs of the purchaser are reasonably foreseeable and the time of performance is reasonably limited. . . .

We conclude that there is mutuality of consideration within the terms of the agreement and hold that there is a valid, binding contract between the parties as to each of the developments for which supplemental letter agreements have been signed. . . .

Gray v. Martino

103 A. 24 (1918)

Minturn, J.

The plaintiff occupied the position of a special police officer in Atlantic City, and incidentally was identified with the work of the prosecutor of the pleas of the county. He possessed knowledge concerning the theft of certain diamonds and jewelry from the possession of the defendant, who had advertised a reward for the recovery of the property. In this situation he claims to have entered into a verbal contract with defendant whereby she agreed to pay him $500 if he could procure for her the names and addresses of the thieves. As a result of his mediation with the police authorities the diamonds and jewelry were recovered, and plaintiff brought this suit to recover the promised reward. The district court, sitting without a jury, awarded plaintiff a judgment for the amount of the reward, and hence this appeal.

Various points are discussed in the briefs, but to us the dominant and conspicuous inquiry in the case is, Was the plaintiff during the period of this transaction a public officer, charged with the enforcement of the law?

The testimony makes it manifest that he was a special police officer to some extent identified with the work of the prosecutor's office, and that position upon well-settled grounds of public policy required him to assist at least, in the prosecution of offenders against the law.

The services he rendered in this instance must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo.

The cases on the subject are collected in a footnote to Somerset Bank v. Edmund, 10 App. Cas. p. 726 (76 Ohio St. 396, 81 N. E. 641,11 L. R. A. [N. S.] 1170), the headnote to which reads:

‘Public policy and sound morals alike forbid that a public officer should demand or receive, for services performed by him in the discharge of official duty, and other or further remuneration or reward than that prescribed and allowed by law.’

. . .

The judgment below for that reason must be reversed.

De Cicco v. Schweizer

117 N.E. 807 (1917)

Cardozo, J.

On January 16, 1902, ‘articles of agreement’ were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy:

‘Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli: Now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in france, the first payment of said amount to be made on the 20th day of January, 1902.’

. . .

At the time of this case, a promise to marry was legally enforceable; therefore, since Blanche (the daughter) and Oberto (the Count) had each promised to marry the other, both were, at the time the above document was executed, legally obligated to marry.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity. That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment of an existing legal duty. For this reason, it is insisted, consideration was lacking.

Under the preexisting duty rule, a promise to do what one is already legally obligated to do cannot be consideration.

The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. . . .

The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void.  . .  . If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

. . . The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. . . . In doing so, she made herself a party to the contract. . . . That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forebore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. . . .

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. . . .

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made a*nimo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise ‘unless the parties have dealt with it on that footing.’ Holmes, Common Law, p. 292; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 579, 12 Sup. Ct. 84 (35 L. Ed. 860). ‘Nothing is consideration that is not regarded as such by both parties.’  Philpot v. Gruninger, 14 Wall. 570, 577 (20 L. Ed. 743); Fire Ins. Ass'n v. Wickham, supra. But here the very formality of the agreement suggests a purpose to effect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the ‘consideration’ for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. Phalen v. U. S. Trust Co., 186 N. Y. 178, 181,78 N. E. 943,7 L. R. A. (N. S.) 734,9 Ann. Cas. 595.It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115,2 L. R. A. 372;Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305,10 L. R. A. (N. S.) 590, 117 Am. St. Rep. 709,10 Ann. Cas. 563.It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

Lingenfelder v. Wainwright Brewing Co.
15 S.W. 844 (1891)

    This was an action by Phillip J. Lingenfelder and Leo Rassieur, executors of Edmund Jungenfeld against the Wainwright Brewery Company upon a contract for services as an architect. . . . [Jungenfeld had entered a contract with Wainwright to design and build a brewery.]

        The controversy in the court below . . . turned upon the single question whether or not, upon the facts found by the referee and the evidence returned by him, the deceased was entitled to commissions on the cost of the refrigerator plant. In considering the subject it should be borne in mind that Jungenfeld's contract with the brewery company was made on or about the 16th of June, 1883; that under and by it he undertook to design the buildings; and superintend their erection to completion; that the superintending or placing of machinery in the building was no part of his contract, and that the claim for commissions on the cost of the refrigerator plant is based solely on a subsequent promise, the facts of which are thus found and stated by the referee: The refrigerator plant

"was ordered not only without Mr. Jungenfeld's assistance, but against his wishes. He was in no way connected with its erection. Plaintiffs' claim as to this item rests on a distinct ground, as to which I make the following finding of facts: Mr. Jungenfeld was president of the Empire Refrigerating Company, and was largely interested therein. The De la Vergne Ice-Machine Company was a competitor in business. Against Mr. Jungenfeld's wishes, Mr. Wainwright awarded the contract for the refrigerating plant to the De la Vergne Company. The brewery was at the time in process of erection, and most of the plans were made. When Mr. Jungenfeld heard that the contract was awarded he took away his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect to fill Mr. Jungenfeld's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances, Mr. Wainwright promised to give Mr. Jungenfeld five percent on the cost of the De la Vergne ice machine if he would resume work. Mr. Jungenfeld accepted, and fulfilled the duties of superintending architect till the completion of the brewery. . . . What was the consideration for defendant's promise to pay five percent on the cost of the refrigerating plant, in addition to the regular charges? . . .  Plaintiffs . . . contend that the original contract between the parties was abrogated; that a new contract was entered into between the parties, differing from the old only in the fact that the defendant was to pay a sum over and above the compensation agreed on in the discarded, original contract. The services to be performed (and thereafter actually performed) by Jungenfeld would, in this view, constitute a sufficient consideration. . . . find in the evidence no substitution of one contract for another. As I understand the facts, and as I accordingly formally find, defendant promised Mr. Jungenfeld a bonus to resume work, and complete the original terms. This case seems to me analogous to that of seamen who, when hired for a voyage, under threats of desertion in a foreign port receive promises of additional compensation. It has been uniformly held they could not recover. I accordingly submit that in my view defendants' promise to pay Mr. Jungenfeld five percent on the cost of the refrigerating plant was without consideration, and recommend that the claim be not allowed."

. . .

        Was there any consideration for the promise of Wainwright to pay Jungenfeld the 5 percent on the refrigerator plant? If there was not, plaintiffs cannot recover the $3,449.75, the amount of that commission. The report of the referee and the evidence upon which it is based alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms. It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do any more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to render under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed?No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of 5 percent on the refrigerator plant as the condition of his complying with his contract already entered into. Nor was there even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld himself put it upon the simple proposition that "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration" is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. . . .

        . . .  Nothing we have said is intended as denying parties the right to modify their contracts or make new contracts, upon new or different considerations, and binding themselves thereby. What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation, therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong. So holding, we reverse the judgment of the circuit court of St. Louis to the extent that it allows the plaintiffs below (respondents here) the sum of $3,449.75, the amount of commission at 5 percent on the refrigerator plant, and at the request of both sides we proceed to enter the judgment here which, in our opinion, the circuit court of St. Louis should have entered, and accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs, as executors of Edmund Jungenfeld, the sum of $1,492.17, so found by the referee, with interest from March 9, 1887.

Angel v. Murray
322 A.2d 630 (R.I. 1974)

OPINION

This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr., Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of $20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum. The case was heard by a justice of the Superior Court, sitting without a jury, who entered a judgment ordering Maher to repay the sum of $ 20,000 to the city of Newport. Maher is now before this court prosecuting an appeal.

The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1, 1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive $ 137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

In June of 1967 Maher requested an additional $ 10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year.

After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by members of the city council, the city council agreed to pay him an additional $ 10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional $10,000 for the year ending on June 30, 1969.

The trial justice found that each such $ 10,000 payment was made in violation of law. . . . [H]e found that Maher was not entitled to extra compensation because the original contract already required him to collect all refuse generated within the city and, therefore, included the 400 additional units . . . and thus there was no consideration for the two additional payments . . . .

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-- A --

As previously stated, the city council made two $ 10,000 payments. The first was made in June of 1967 for the year beginning on July 1, 1967, and ending on June 30, 1968. Thus, by the time this action was commenced in October of 1968, the modification was completely executed. That is, the money had been paid by the city council, and Maher had collected all of the refuse. Since consideration is only a test of the enforceability of executory promises, the presence or absence of consideration for the first payment is unimportant because the city council's agreement to make the first payment was fully executed at the time of the commencement of this action. However, since both payments were made under similar circumstances, our decision regarding the second payment (Part B, infra) is fully applicable to the first payment.

-- B --

It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration . . . .

The primary purpose of the preexisting duty rule is to prevent what has been referred to as the "hold-up game." See 1A Corbin, supra, § 171. A classic example of the "hold-up game" is found in Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902). There 21 seamen entered into a written contract with Domenico to sail from San Francisco to Pyramid Harbor, Alaska. They were to work as sailors and fishermen out of Pyramid Harbor during the fishing season of 1900. The contract specified that each man would be paid $50 plus two cents for each red salmon he caught. Subsequent to their arrival at Pyramid Harbor, the men stopped work and demanded an additional $50. They threatened to return to San Francisco if Domenico did not agree to their demand. Since it was impossible for Domenico to find other men, he agreed to pay the men an additional $50.

After they returned to San Francisco, Domenico refused to pay the men an additional $50. The court found that the subsequent agreement to pay the men an additional $50 was not supported by consideration because the men had a preexisting duty to work on the ship under the original contract, and thus the subsequent agreement was unenforceable.

Another example of the "hold-up game" is found in the area of construction contracts. Frequently, a contractor will refuse to complete work under an unprofitable contract unless he is awarded additional compensation. The courts have generally held that a subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract. See, e.g., Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1891), which is a leading case in this area. . . .

These examples clearly illustrate that the courts will not enforce an agreement that has been procured by coercion or duress and will hold the parties to their original contract regardless of whether it is profitable or unprofitable. However, the courts have been reluctant to apply the pre-existing duty rule when a party to a contract encounters unanticipated difficulties and the other party, not influenced by coercion or duress, voluntarily agrees to pay additional compensation for work already required to be performed under the contract. For example, the courts have found that the original contract was rescinded, Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907); abandoned, Connelly v. Devoe, 37 Conn. 570 (1871), or waived, Michaud v. MacGregor, 61 Minn. 198, 63 N.W. 479 (1895). Although the preexisting duty rule has served a useful purpose insofar as it deters parties from using coercion and duress to obtain additional compensation, it has been widely criticized as a general rule of law. With regard to the preexisting duty rule, one legal scholar has stated: "There has been a growing doubt as to the soundness of this doctrine as a matter of social policy. \* \* \* In certain classes of cases, this doubt has influenced courts to refuse to apply the rule, or to ignore it, in their actual decisions. Like other legal rules, this rule is in process of growth and change, the process being more active here than in most instances. The result of this is that a court should no longer accept this rule as fully established. It should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case, to the moral deserts of the parties, and to the social feelings and interests that are involved. It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall." 1A Corbin, supra, § 171; see also Calamari & Perillo, supra, § 61.

The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.

Under the Uniform Commercial Code, § 2-209(1), which has been adopted by 49 states, "[an] agreement modifying a contract [for the sale of goods] needs no consideration to be binding." See G. L. 1956 (1969 Reenactment) § 6A-2-209(1). Although at first blush this section appears to validate modifications obtained by coercion and duress, the comments to this section indicate that a modification under this section must meet the test of good faith imposed by the Code, and a modification obtained by extortion without a legitimate commercial reason is unenforceable.

The modern trend away from a rigid application of the preexisting duty rule is reflected by § 89D(a) of the American Law Institute's Restatement Second of the Law of Contracts, which provides:

"A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made \* \* \*."

We believe that § 89D(a) is the proper rule of law and find it applicable to the facts of this case. It not only prohibits modifications obtained by coercion, duress, or extortion but also fulfills society's expectation that agreements entered into voluntarily will be enforced by the courts. See generally Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917 (1974). Section 89D(a), of course, does not compel a modification of an unprofitable or unfair contract; it only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted the modification were unanticipated by the parties, and (3) the modification is fair and equitable.

The evidence, which is uncontradicted, reveals that in June of 1968 Maher requested the city council to pay him an additional $ 10,000 for the year beginning on July 1, 1968, and ending on June 30, 1969. This request was made at a public meeting of the city council, where Maher explained in detail his reasons for making the request. Thereafter, the city council voted to authorize the Mayor to sign an amendment to the 1954 contract which provided that Maher would receive an additional $ 10,000 per year for the duration of the contract. Under such circumstances we have no doubt that the city voluntarily agreed to modify the 1964 contract.

Having determined the voluntariness of this agreement, we turn our attention to the three criteria delineated above. First, the modification was made in June of 1968 at a time when the five-year contract which was made in 1964 had not been fully performed by either party. Second, although the 1964 contract provided that Maher collect all refuse generated within the city, it appears this contract was premised on Maher's past experience that the number of refuse-generating units would increase at a rate of 20 to 25 per year. Furthermore, the evidence is uncontradicted that the 1967-1968 increase of 400 units "went beyond any previous expectation." Clearly, the circumstances which prompted the city council to modify the 1964 contract were unanticipated. Third, although the evidence does not indicate what proportion of the total this increase comprised, the evidence does indicate that it was a "substantial" increase. In light of this, we cannot say that the council's agreement to pay Maher the $ 10,000 increase was not fair and equitable in the circumstances.

The judgment appealed from is reversed, and the cause is remanded to the Superior Court for entry of judgment for the defendants.

Springstead v. Nees

109 N.Y.S. 148 (N.Y. App. Div. 1908)

Jenks, J.

This action was tried by stipulation as a common law action before the court without a jury. The parties are all of the surviving children of Nees, deceased, who died intestate, leaving them his sole heirs at law. Nees died the owner and seised of realty called the "Sackett Street Property" and the owner of realty, called the "Atlantic Avenue Property," which he held by deed to him as trustee for his children, Sophia and George. Shortly after Nees' death all of the parties, an attorney at law, and friends met in Nees' house. Nees' strong box was opened, and when the deed to the Atlantic avenue property was found therein the attorney handed it to Sophia, saying: "This is yours." The evidence for the plaintiffs is that they, or some of them, were surprised to learn that this deed was to their father in trust for two of the children; for theretofore they had believed that he was the owner and seised in fee.

The point is that Sophia and George own the Atlantic Avenue property, and the other three children have no claim on it what so ever.

They expressed their surprise, and there were murmurings. Thereupon Sophia spoke up, saying, "We will give you our share in the Sackett street property if you don't bother us about the Atlantic avenue property," and George assented. The Sackett street property was sold thereafter. This action is brought by the other three children against Sophia and George, upon that alleged promise of Sophia and George, to recover their proportionate share of the proceeds of that sale. Sophia and George testified that no such promise ever was made. The learned court gave judgment for the defendants, dismissing the complaint, with costs.

After finding the preliminary facts, which were not disputed, the court found that the defendants, after the death of their father, were seised in fee simple of the Atlantic avenue property and held indefeasible title thereto; that

the plaintiffs had no color of right in the Atlantic avenue property, and did not at any time threaten or attempt to assert any claim of right hostile to the defendants in that property; that there was no compromise, either wholly or partly executed, between the parties, affecting rights which the plaintiffs might have in that property; that the plaintiffs had given up no rights in that property, nor had they changed their position therein;

and that a promise (referring to which I have heretofore described as shown by the testimony for the plaintiffs) made by the defendants to the plaintiffs that, if the plaintiffs "would not 'molest,' or 'bother or 'make a fuss' about, the defendants' rights on the Atlantic avenue property, the defendants would give the plaintiffs their share in the Sackett street property, if made, would have been without consideration."

The plaintiffs appeal.

The record sustains the facts found.

Assuming that such promise was made, I am of opinion that there was no consideration shown. . . .

The consideration for the promise cannot be found in the fact that there was a compromise of a disputed claim, for there is no evidence thereof.

It must rest, then, upon the forbearance to exercise a legal right. Forbearance to assert either a legal or an equitable claim is sufficient consideration, as we have seen. . . . It seems unnecessary to consider the conflict over the question whether forbearance as to a claim without foundation can constitute good consideration. . . . It seems to be the rule with us that it is not essential that the claim should be valid; but it is enough if it could be regarded as doubtful or colorable. . . . But if the claim be not even doubtful, or colorable, or plausible, in that there is no reason for an honest belief that it has some foundation in law or in equity, then forbearance applied to it is not good consideration. . . .

In the case at bar the court, as I have said, found properly that the plaintiffs had no color of right in the Atlantic avenue property; nor did they at any time threaten or attempt to assert any claim. The evidence of the plaintiffs is that, when they were surprised to find that the deed to the Atlantic avenue property was in trust for but two of their number, thereupon and without any further reason, save that they expressed surprise and were dissatisfied, the defendants made the promise in question. The promise was not even in response to any suggestion of any possible claim then or thereafter against the deed, or despite it, or of any action adverse to it. There was no suggestion, then or at any time thereafter, made that the deed was invalid for any reason, or of any ground upon which it was open to attack. Indeed, I can discover no reason upon the evidence how any of the parties could seriously suppose that even a doubtful or a colorable claim could be asserted then or thereafter. It does not appear that anything was ever done, then or thereafter, in consequence of the alleged promise, or that the rights of the parties were in any way thereby changed or affected.

I think that the judgment must be affirmed, with costs. All concur, except Hooker, J., who dissents.

Mullen v. Hawkins

40 N.E. 797 (1895)

[Mullen wished to take out a loan on land that he owned. The lenders were worried that Hawkins might have a claim to the land, and hence that Mullen's title was not clear. Mullen asked Hawkins to sign a quit-claim deed to the land. The court notes that Hawkins told Mullen that Hawkins "had no interest in said land; that he had theretofore conveyed it to one of [Mullen's] remote grantors, but, the [Mullen] continued to insist on the deed, and offered him $50 if [Hawkins] and his wife would go to Marion--about seven miles--and execute the deed, he accepted the offer, went with his wife to Marion, and executed the quitclaim deed, for which appellant executed to him [a promissory note for $50]." Mullen later refused to pay off the note, and Hawkins sued for the money.]

It is sufficient to say that “it is well settled that, in the absence of covenants of warranty or for title or proof of fraud, a failure of title is no defense to an action for the purchase money of real estate” Stratton v. Kennard, 74 Ind. 302 . . . If such failure of title is no defense, then it does not amount to a failure of consideration for the note executed to procure the conveyance.

Where a party voluntarily and without fraud or deception enters into a contract, and receives all he contracted for, he cannot be relieved on the ground of inadequacy or want of consideration. . . . Hardesty v. Smith, 3 Ind. 39. . . .

The evidence on behalf of the appellee was sufficient to warrant the trial court in finding that there was a sufficient consideration to support the note . . . , even though appellee had no interest in the real estate quitclaimed. . . . We think . . . that the trial court did not err in overruling the motion for a new trial. Judgment affirmed.

Central London Property Trust Limited V. High Trees House Limited

[KING'S BENCH DIVISION]

1946 July 18.

Denning J.

By a lease under seal made on September 24, 1937, the plaintiffs, Central London Property Trust Ld., granted to the defendants, High Trees House Ld., a subsidiary of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l*. a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to 1,250*l*. per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company.

. . . The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was 2,500*l*. On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that arrears amounting to 7,916*l*. were due. Subsequently, he instituted the present friendly proceedings to test the legal position in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover 625*l*., being the amount represented by the difference between rent at the rate of 2,500*l*. and 1,250*l*. per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250*l*. only, and that such agreement related to the whole term of the lease, (2.) they pleaded in the alternative that the plaintiff company were estopped from alleging that the rent exceeded 1,250*l*. per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250*l*. before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights in respect of any rent, in excess of that at the rate of 1,250*l*., which had accrued up to September 24, 1945.

. . . If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l*. a year from the beginning of the term, . . .

But what is the position in view of developments in the law in recent years? . . . There has been a series of decisions over the last fifty years . . . in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on.

In such cases the courts have said that the promise must be honoured. . . In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. **.** . . In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes v. Beer* [(1884) 9 App. Cas. 605](http://www.justis.com/J-Net/J-Web.dll?Link?0&(1884)%209%20App.%20Cas.%20605). At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l*. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

 Mills v. Wyman
3 Pick. [20 Mass.] 207 (1825)
Supreme Judicial Court of Massachusetts

This was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expense had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses.

There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the court of common pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction, the plaintiff filed exception.

PARKER, C. J.

General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscietiæ*to perform.

This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preexisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preexisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. . . .

If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

. . .

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

Webb v. McGowin

168 So. 196 (Ala. Ct. App. 1935)

Bricken, Presiding Judge.

This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

"On the 3d day of August, 1925, appellant while in the employ of the W. T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having, prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continucd to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the forgoing statement of facts."

In other words, the complaint as amended averred in substance: (1) That on August 3, 1925 appellant saved J. Greeley McGowin, appellee's testator from death or grievous bodily harm; (2) that in doing so appellant sustained bodily injury crippling him for life; (3) that in consideration of the services rendered and the injuries received by appellant, McGowin agreed to care for him the remainder of appellant's life, the amount to be paid being $15 every two weeks; (4) that McGowin complied with this agreement until he died on January 1, 1934, and the payments were kept up to January 27, 1934, after which they were discontinued.

The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit.

The principal grounds of demurrer to the original and amended complaint are: (1) It states no cause of action; (2) its averments show the contract was without consideration; (3) it fails to allege that McGowin had, at or before the services were rendered, agreed to pay appellant for them; . . .

The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service because of the material benefit received
. . .

In Boothe v. Fitzpatrick, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promise saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, au theorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforecable contract.

2.  It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor . . . .

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. Park Falls State Bank v. Fordyce, supra. Here the promisor received a material benefit constituting a valid consideration for his promise.

3.  Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from thepromisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made. McMorris v. Herndon, 2 Bailey (S.C.) 56, 21 Am.Dec. 515; Chadwick v. Knox, 31 N.H. 226, 64 Am.Dec. 329; Kenan v. Holloway, 16 Ala. 53, 50 Am.Dec. 162; Ross v. Pearson, 21 Ala. 473.

Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appelant had done raising the presumption that the services had been rendered at McGowin's request.

4.  The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. Fisher v. Bartlett, 8 Greenl. (Me.) 122, 22 Am.Dec. 225; State ex rel. Bayer v. Funk, supra.

5.  Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary.

. . .

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say, in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

Samford, Judge (concurring).

The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in Hoffman v. Porter, Fed. Cas. No. 6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

Hamer v. Sidway

27 N.E. 256 (N.Y. 1891)

Opinion

Parker, J.

The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, \* \* \* William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration.

. . . The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."  . . .

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to thepromisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense.

. . .

    The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Embry v. Hargadine-McKittrick Dry Goods Co.

105 S.W. 777 (Mo. Ct. App. 1907)

Goode, J.

. . . The appellant was an employee of the respondent company under a written contract to expire December 15, 1904, at a salary of $2,000 per annum. His duties were to attend to the sample department of respondent, of which he was given complete charge. It was his business to select samples for the traveling salesmen of the company, which is a wholesale dry goods concern, to use in selling goods to retail merchants. Appellant contends that on December 23, 1903, he was re-engaged by respondent, through its president, Thos. H. McKittrick, for another year at the same compensation and for the same duties stipulated in his previous written contract. On March 1, 1904, he was discharged, having been notified in February that, on account of the necessity of retrenching expenses, his services and that of some other employees would no longer be required. The respondent company contends that its president never re-employed appellant after the termination of his written contract, and hence that it had a right to discharge him when it chose. The point with which we are concerned requires an epitome of the testimony of appellant and the counter testimony of McKittrick, the president of the company, in reference to the alleged re-employment.

Appellant testified: That several times prior to the termination of his written contract on December 15, 1903, he had endeavored to get an understanding with McKittrick for another year, but had been put off from time to time. That on December 23d, eight days after the expiration of said contract, he called on McKittrick, in the latter's office, and said to him that as appellant's written employment had lapsed eight days before, and as there were only a few days between then and the 1st of January in which to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year, or he would quit respondent's service then and there. That he had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry. That McKittrick asked him how he was getting along in his department, and appellant said he was very busy, as they were in the height of the season getting men out -- had about 110 salesmen on the line and others in preparation. That McKittrick then said: "Go ahead, you're all right. Get your men out, and don't let that worry you." That appellant took McKittrick on his word and worked until February 15th without any question in his mind. It was on February 15th that he was notified his services would be discontinued on March 1st. McKittrick denied this conversation as related by appellant, and said that, when accosted by the latter on December 23d, he (McKittrick) was working on his books in order to get a report for a stockholders' meeting, and, when appellant said if he did not get a contract he would leave, that he (McKittrick) said: "Mr. Embry, I am just getting ready for the stockholders' meeting tomorrow. I have no time to take it up now. I have told you before I would not take it up until I had these matters out of the way. You will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road. I may have asked him one or two other questions relative to the department, I don't remember. The whole conversation did not take more than a minute."

Embry also swore that, when he was notified he would be discharged, he complained to McKittrick about it, as being a violation of their contract, and McKittrick said it was due to the action of the board of directors, and not to any personal action of his, and that others would suffer by what the board had done as well as Embry. Appellant requested an instruction to the jury setting out, in substance, the conversation between him and McKittrick according to his version, and declaring that those facts, if found to be true, constituted a contract between the parties that defendant would pay plaintiff the sum of $2,000 for another year, provided the jury believed from the evidence that plaintiff commenced said work believing he was to have $2,000 for the year's work. This instruction was refused, but the court gave another embodying in substance appellant's version of the conversation, and declaring it made a contract "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment for one year from and including December 23, 1903, at a salary of $2,000 per annum." Embry swore that, on several occasions when he spoke to McKittrick about employment for the ensuing year, he asked for a renewal of his former contract, and that on December 23d, the date of the alleged renewal, he went into Mr. McKittrick's office and told him his contract had expired, and he wanted to renew it for a year, having always worked under year contracts. Neither the refused instruction nor the one given by the court embodied facts quite as strong as appellant's testimony, because neither referred to appellant's alleged statement to McKittrick that unless he was re-employed he would stop work for respondent then and there.

It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occurred as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of $2,000. If it appeared from the record that there was a dispute between the parties as to the terms on which appellant wanted re-employment, there might have been sound reason for inserting this clause in the instruction; but no issue was made that they split on terms; the testimony of McKittrick tending to prove only that he refused to enter into a contract with appellant regarding another year's employment until the annual meeting of stockholders was out of the way. Indeed, as to the proposed terms McKittrick agrees with Embry, for the former swore as follows: "Mr. Embry said he wanted to know about the renewal of the contract. Said if he didn't have the contract made he would leave." As the two witnesses coincided as to the terms of the proposed re-employment, there was no reason for inserting the above-mentioned clause in the instruction in order that it might be settled by the jury whether or not plaintiff, if employed for one year from December 23, 1903, was to be paid $2,000 a year. Therefore it remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry, was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely: Did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. . . . In exceptional cases a promisor may be bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him." . . . In Brewington v. Mesker, 51 Mo. App. 348, 356, it is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intention of the parties, but by their expressed intention, which may be wholly at variance with the former . . .

In view of those authorities, we hold that, though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

The next question is whether or not the language used was of that character, namely, was such that Embry, as a reasonable man, might consider he was re-employed for the ensuing year on the previous terms, and act accordingly. We do not say that in every instance it would be for the court to pronounce on this question, because, peradventure, instances might arise in which there would be such an ambiguity in the language relied on to show an assent by the obligor to the proposal of the obligee that it would be for the jury to say whether a reasonable mind would take it to signify acceptance of the proposal. . . . Embry was demanding a renewal of his contract, saying he had been put off from time to time, and that he had only a few days before the end of the year in which to seek employment from other houses, and that he would quit then and there unless he was reemployed. McKittrick inquired how he was getting along with the department and Embry said they, i.e., the employees of the department were very busy getting out salesmen. Whereupon McKittrick said: "Go ahead, you are all right. Get your men out, and do not let that worry you." We think no reasonable man would construe that answer to Embry's demand that he be employed for another year, otherwise than as an assent to the demand, and that Embry had the right to rely on it as an assent. The natural inference is, though we do no not find it testified to, that Embry was at work getting samples ready for the salesmen to use during the ensuing season. Now, when he was complaining of the worry and mental distress he was under because of his uncertainty about the future, and his urgent need, either of an immediate contract with respondent, or a refusal by it to make one, leaving him free to seek employment elsewhere, McKittrick must have answered as he did for the purpose of assuring appellant that any apprehension was needless, as appellant's services would be retained by the respondent. The answer was unambiguous, and we rule that if the conversation was according to appellant's version, and he understood he was employed, it constituted in law a valid contract of re-employment, and the court erred in making the formation of a contract depend on a finding that both parties intended to make one. It was only necessary that Embry, as a reasonable man, had a right to and did so understand.

The judgment is reversed, and the cause remanded. All concur.

Spaulding v. Morse

76 N.E.2d 137 (Mass. 1947)

Dolan, Justice.

By this bill in equity the plaintiff, as he is succeeding trustee under an instrument in writing entered into by the defendant and Ruth D. Morse, with one Baldwin, as original trustee, seeks to enforce the provisions made therein for the maintenance and education of Richard, the minor son of said Ruth D. Morse and the defendant.

The case was heard by the judge upon a statement of agreed facts which incorporated therein a copy of the trust instrument. Its pertinent provisions will be recited hereinafter. The other agreed facts are that 'the \* \* \* [plaintiff] is the succeeding trustee in accordance with the terms of said agreement. That the \* \* \* [defendant] has paid the \* \* \* [plaintiff] and his predecessor, C. Harold Baldwin, one hundred dollars ($ 100) per month in accordance with the terms of said agreement up to February 1, 1946, and that he ceased making payments at that time. That Richard D. Morse, the beneficiary under said agreement, completed his high school grades on February 5, 1946, and he was inducted into the United States Army on February 6, 1946, and has been continuously in the service and that he has not yet entered any college, university or higher institution of learning.' The statement of agreed facts concludes thus: 'The sole question before the court is whether or not the \* \* \* [defendant] is excused from performance under the agreement while the beneficiary is in the armed services of the United States.' After hearing, the judge in findings and order for decree found the facts to be as set forth in the statement of agreed facts and in accordance with his order for decree a final decree was entered: '1. That the \* \* \* [defendant] pay to the \* \* \* [plaintiff] forthwith the sum of fifteen hundred dollars ($ 1,500). 2. That the \* \* \* [defendant] pay to the \* \* \* [plaintiff], beginning May 1, 1947, the sum of one hundred dollars ($ 100) per month until such time, if any as the beneficiary enters college, and, thereupon, and for a period not to exceed four (4) years thereafter, to pay the sum of twenty-two hundred dollars ($ 2,200) per year to the \* \* \* [plaintiff] payable in monthly payments.'

The trust agreement was executed on July 30, 1937. It appears from its recitals that the defendant and Ruth D. Morse were married on March 26, 1921; that on June 14, 1932, Mrs. Morse obtained a decree of divorce from the defendant in the Second Judicial District Court of the State of Nevada, in which decree provision was made for the 'care, custody, maintenance and support' of their two children, Merilyn Morse, born July 25, 1923, and Richard D. Morse, born October 11, 1927; and that disputes had arisen between the defendant and Mrs. Morse, as a result of which they entered into the agreement in question with the trustee named. Provision was made in the instrument for a lump sum payment to be made by the defendant to Mrs. Morse in certain installments as alimony, and it was agreed therein that the defendant should have the custody of the daughter Merilyn.

The question before us for determination is concerned solely with the provisions made therein for the custody, maintenance, and education of the son Richard. The trust instrument provided that his mother was to have the care and custody of Richard, 'unlimited so far as any interference with the same by the said George D. Morse is concerned, and the said George D. Morse shall have the right to visit Richard at all reasonable times and places, and the said Ruth D. Morse shall not be restricted in the care and custody of her son Richard, and may take him for any period and keep him at any place within the continental limits of the United States. The said George D. Morse shall and will pay to the said trustee in trust for his said minor son Richard the sum of twelve hundred dollars ($ 1,200) per year, payable in equal monthly installments on the first day of each month until the entrance of Richard D. Morse into some college, university or higher institution of learning beyond the completion of the high school grades, and thereupon, instead of said payments, amounting to twelve hundred dollars ($ 1,200) yearly, he shall and will then pay to the trustee payments in the sum of twenty-two hundred dollars ($ 2,200) per year for a period of said higher education but not more than four years, upon such installments, in amounts and at times as is required by the trustee to meet the general provisions of this paragraph.

The said trustee shall turn over said trust payments to the said Ruth D. Morse or to such guardian or legal representative of the said Richard D. Morse as may be appointed, to be applied by her or the trustee upon or toward the maintenance and education and benefit of said Richard, so long as she shall maintain and educate said Richard to the satisfaction of the said trustee,' and that 'This agreement is intended to supersede in so far as the provisions herein contained are concerned, provisions made for the benefit of Ruth D. Morse, said minor children Merilyn and Richard Morse in a decree of divorce in the Second Judicial District Court of the State of Nevada in and for the County of Washoe dated, June 14, 1932, so far as it is lawful and competent on the part of the parties so to do \* \* \*.' The defendant's appeal from the decree entered by the judge brings the case before us.

'Every instrument in writing is to be interpreted, with a view to the material circumstances of the parties at the time of the execution, in the light of the pertinent facts within their knowledge and in such manner as to give effect to the main end designed to be accomplished. \* \* \* [The] instrument is to be so construed as to give effect to the intent of the \* \* \* [parties] as manifested by the words used illumined by all the attendant factors, unless inconsistent with some positive rule of law or repugnant to other terms of the instrument. An omission to express an intention cannot be supplied by conjecture. But if the instrument as a whole produces a conviction that a particular result was fixedly desired although not expressed by formal words, that defect may be supplied by implication and the underlying intention \* \* \* may be effectuated, provided it is sufficiently declared by the entire instrument.' Dittemore v. Dickey, 249 Mass. 95, 104, 105, 144 N.E. 57, 60 . . .

Examining the instrument before us, guided by the settled rule of interpretation set forth above, it is manifest that the main purpose of the parents of Richard was to arrive at an agreement for his maintenance and education and to provide security therefor. At the time of the execution of the agreement he was almost ten years of age. His custody had already been awarded to his mother by the decree of divorce of the Nevada court, concerning the validity of which no question is raised. This being so, it is a fair inference that in so far as Richard was concerned his maintenance and education were the main purposes sought to be accomplished by the trust agreement, the parties to the agreement having in mind his age and recognizing the necessity of his being supported during the years to come, and of his being properly educated in a manner appropriate to the defendant's financial ability and station in life. The instrument specifically provided that the payments to be made by the defendant to the trustee for Richard's benefit should 'be applied by \* \* \* [his mother] or the trustee upon or toward the maintenance and education and benefit of said Richard, so long as she shall maintain and educate said Richard to the satisfaction of the said trustee.'

But, as appears by the agreed facts and the record, the education of Richard was interrupted by the second World War and his induction into the armed forces of the United States on February 6, 1946, the day following the completion of high school grades onFebruary 5, 1946. Since then he had been continuously, and at the time of the hearing and order for decree in the court below was, in the service of the armed forces of the nation. Thus he was actually under the command of his superior officers in that service, his maintenance was provided for during the period here involved by the government, and he was not in the actual custody of his mother and was not a student in any higher institution of learning. Thus neither of the main objects for which the defendant had bound himself to provide existed within the meaning of the trust instrument during the period for which the plaintiff claims payment.

In these circumstances we are of opinion that the proper construction of the trust instrument is that the defendant is not required under its terms to perform provisions for the maintenance and education of Richard while he was or is in the armed service of the United States.

While in the statement of agreed facts it was stated that the issue just above disposed of was the sole question 'before the \* \* \* [trial judge],' the decree entered by him on April 10, 1947, as appears above, also ordered the defendant to pay to the plaintiff $ 100 on May 1, 1947, and each month thereafter until Richard enters college, and thereupon and for a period not to exceed four years to pay to the plaintiff the sum of $ 2,200 per year in monthly payments. Treating the bill as one for specific performance, and the plaintiff so deals with it in argument, the judge was without authority to order payments which were not then due (Whitney v. Whitney, 316 Mass. 367, 370, 55 N.E.2d 601, and cases cited), and which were predicated on future contingencies. If the prayers of the bill be regarded as sufficient to constitute a bill for a declaratory judgment not only as to present but also as to future rights, we are of opinion that the judge in the exercise of his discretion should have declined to make a declaration as to possible future rights under the trust. National Shawmut Bank v. Morey, 320 Mass. 492, 497, 498, 70 N.E.2d 316, and cases cited; Young v. Jackson, 321 Mass. 1, 71 N.E.2d 386; Burn v. McAllister, 321 Mass. -- , 75 N.E.2d 114. Compare Hogan v. Hogan, 320 Mass. 658, 662, 663, 70 N.E.2d 821.

It follows from what we have said that the decree entered by the judge must be reversed and that instead a final decree must be entered after rescript dismissing the bill with costs of the appeal.

So ordered.

Berwick & Smith Co. v. Salem Press, Inc.

117 N.E.2d 825 (Mass. 1953)

In this action of contract the plaintiff had a verdict which was recorded under leave reserved. The question for decision is whether the judge erred in denying the defendant's motion to enter a verdict in its favor. In determining whether such a motion should be granted the same test is applied as in the case of a motion for a directed verdict. . . .

The plaintiff is a corporation engaged in the business of printing books. The defendant, also a corporation, proposed to publish a two volume work called "Masterplots" and desired to have the plaintiff print and bind the work and to supply the paper for it. During the period here material one Walton C. Allen was manager of the plaintiff. He had been in the publishing business since 1920 and during that time had "estimated many thousands of jobs for publishers." In April, 1949, the plaintiff was requested by one Lightbown to submit to Frank N. Magill, general manager and principal officer of the defendant and the author of "Masterplots," estimates for the paper, printing, and binding involved in publishing this work. On April 25, 1949, the plaintiff submitted an estimate for the paper and printing of "Masterplots 2 Volumes Quantity 5,000 each/10,000 each." The plaintiff concedes that this was an estimate for 5,000 or 10,000 sets. Two days later, April 27, the plaintiff submitted a bid for binding "Masterplots Volumes I & II Quantity 5,000/10,000." The price was quoted as "5,000 copies at .561 10,000 copies at .538."

On May 12 Allen and Magill met for the first time and Magill requested Allen to proceed with the work. On May 16 the defendant by one Brown wrote to Allen confirming the "verbal order placed with you on May 12 by Mr. Frank N. Magill, for 5,000 copies of a two volume book known as Masterplots." It is agreed that Brown was authorized to act for the defendant. The books were subsequently printed and delivered to the defendant and a bill was sent to it on July 30, 1949. In the bill the charge for binding was $ .561 per volume. Shortly thereafter the defendant directed the plaintiff's attention to the fact that it had been overcharged with respect to the binding. The defendant's position was that the plaintiff's bid of $ .561 was the price for a set of two volumes; the plaintiff contended that the bid was on a per volume basis. It appeared that "Masterplots" was the defendant's first publication, and that although Magill "was familiar with the printing of books" when he first met Allen "he had never had a book printed before." Allen testified that binding estimates are submitted on a per volume basis and "that is a well recognized custom in the book production business and that he was aware of it when he first met Magill." . . .

. . . The controversy here stems from the different interpretations placed by the parties on the expression "5,000 copies at .561 10,000 copies at .538" contained in the plaintiff's bid of April 27. But this expression was not unambiguous and it was permissible for the plaintiff to explain its meaning by resort to usages of the trade. . . . Restatement: Contracts, § 248 (2), illustration 5. The existence of the usage is a question of fact to be determined by the jury. . . . That Magill may not have known of the usage in the publishing trade referred to in Allen's testimony is not controlling. "Where the usage is established the presumption is that the parties contracted with reference to it." . . . That is especially true where both parties are engaged in the same trade. Restatement: Contracts, § 248 (2). The plaintiff was not obliged to prove actual knowledge of the usage on the part of the defendant. . . . The case was rightly submitted to the jury.

Exceptions overruled.

Hawkins v. McGee

146 A. 641 (N.H. 1929)

BRANCH, J.

1. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred percent perfect hand or a hundred percent good hand." The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand."

It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred percent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "experiment on skin grafting," in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

2. The substance of the charge to the jury on the question of damages appears in the following quotation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and for what injury he has sustained over and above what injury he had before." To this instruction the defendant seasonably excepted. By it, the jury was permitted to consider two elements of damage: (1) Pain and suffering due to the operation, and (2) positive ill effects of the operation upon the plaintiff's hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but, when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

"By 'damages,' as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract." . . . The purpose of the law is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." 3 Williston Cont. § 1338; Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 150 N. C. 150, 63 S. E. 676, 134 Am. St. Rep. 899.

The measure of recovery "is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended." 3 Williston Cont. § 1341. "The only losses that can be said fairly to come within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms." Davis v. New England Cotton Yarn Co., 77 N. H. 403, 404, 92 A. 732, 733, Hurd v. Dunsmore, 63 N. H.

The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied, and it is held that the measure of damages is the difference between the value of the machine, if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew, or ought to have known, would probably result from a failure to comply with its terms. . . .

The rule thus applied is well settled in this state. "As a general rule, the measure of the vendee's damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor's failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided." Union Bank v. Blanchard, 65 N. H. 21, 23, 18 A. 90, 91; Hurd v. Dunsmore, supra; Noyes v. Blodgett, 58 N. H. 502; P. L. ch. 166, § 69, subd. 7.

We therefore conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages (4th Ed.) § 92. Damages not thus limited, although naturally resulting, are not to be given.

The extent of the plaintiff's suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. . . . it furnished no test of the value of a good hand or the difference between the value of the hand which the defendant promised and the one which resulted from the operation.

It was also erroneous and misleading to submit to the jury as a separate element of damage any change for the worse in the condition of the plaintiff's hand resulting from the operation, although this error was probably more prejudicial to the plaintiff than to the defendant. Any such ill effect of the operation would be included under the true rule of damages set forth above, but damages might properly be assessed for the defendant's failure to improve the condition of the hand, even if there were no evidence that its condition was made worse as a result of the operation

It must be assumed that the trial court, in setting aside the verdict, undertook to apply the same rule of damages which he had previously given to the jury, and, since this rule was erroneous, it is unnecessary for us to consider whether there was any evidence to justify his finding that all damages awarded by the jury above $500 were excessive.

New trial.

MARBLE, J., did not sit; the others concurred

Rockingham Cty. v. Luten Bridge Co.

35 F.2d 301 (4th Cir. 1929)
Opinion

Parker, Circuit J.

This was an action at law instituted in the court below by the Luten Bridge Company, as plaintiff, to recover of Rockingham county, North Carolina, an amount alleged to be due under a contract for the construction of a bridge. The county admits the execution and breach of the contract, but contends that notice of cancellation was given the bridge company before the erection of the bridge was commenced, and that it is liable only for the damages which the company would have sustained, if it had abandoned construction at that time. The judge below . . . instructed a verdict for plaintiff for the full amount of its claim. From the judgment on this verdict the county has appealed.

The facts out of which the case arises, as shown by the affidavits and offers of proof appearing in the record, are as follows: On January 7, 1924, the board of commissioners of Rockingham county voted to award to plaintiff a contract for the construction of the bridge in controversy. Three of the five commissioners favored the awarding of the contract and two opposed it. Much feeling was engendered over the matter, with the result that on February 11, 1924, W. K. Pruitt, one of the commissioners who had voted in the affirmative, sent his resignation to the clerk of the superior court of the county. The clerk received this resignation on the same day, and immediately accepted same and noted his acceptance thereon. Later in the day, Pruitt called him over the telephone and stated that he wished to withdraw the resignation, and later sent him written notice to the same effect. The clerk, however, paid no attention to the attempted withdrawal, and proceeded on the next day to appoint one W. W. Hampton as a member of the board to succeed him.

After his resignation, Pruitt attended no further meetings of the board, and did nothing further as a commissioner of the county. Likewise Pratt and McCollum, the other two members of the board who had voted with him in favor of the contract, attended no further meetings. Hampton, on the other hand, took the oath of office immediately upon his appointment and entered upon the discharge of the duties of a commissioner. He met regularly with the two remaining members of the board, Martin and Barber, in the courthouse at the county seat, and with them attended to all of the business of the county. Between the 12th of February and the first Monday in December following, these three attended, in all, 25 meetings of the board.

At one of these meetings, a regularly advertised called meeting held on February 21st, a resolution was unanimously adopted declaring that the contract for the building of the bridge was not legal and valid, and directing the clerk of the board to notify plaintiff that it refused to recognize same as a valid contract, and that plaintiff should proceed no further thereunder. This resolution also rescinded action of the board theretofore taken looking to the construction of a hard-surfaced road, in which the bridge was to be a mere connecting link. The clerk duly sent a certified copy of this resolution to plaintiff.

At the regular monthly meeting of the board on March 3d, a resolution was passed directing that plaintiff be notified that any work done on the bridge would be done by it at its own risk and hazard, that the board was of the opinion that the contract for the construction of the bridge was not valid and legal, and that, even if the board were mistaken as to this, it did not desire to construct the bridge, and would contest payment for same if constructed. A copy of this resolution was also sent to plaintiff. At the regular monthly meeting on April 7th, a resolution was passed, reciting that the board had been informed that one of its members was privately insisting that the bridge be constructed. It repudiated this action on the part of the member and gave notice that it would not be recognized. At the September meeting, a resolution was passed to the effect that the board would pay no bills presented by plaintiff or any one connected with the bridge. At the time of the passage of the first resolution, very little work toward the construction of the bridge had been done, it being estimated that the total cost of labor done and material on the ground was around $1,900; but, notwithstanding the repudiation of the contract by the county, the bridge company continued with the work of construction.

On November 24, 1924, plaintiff instituted this action against Rockingham county . . .

As the county now admits the execution and validity of the contract, and the breach on its part, the ultimate question in the case is one as to the measure of plaintiff's recovery, and the exceptions must be considered with this in mind. [The question is] whether plaintiff, if the notices are to be deemed action by the county, can recover under the contract for work done after they were received, or is limited to the recovery of damages for breach of contract as of that date.

. . .

As to the measure of plaintiff's recovery -- we do not think that, after the county had given notice, while the contract was still executory, that it did not desire the bridge built and would not pay for it, plaintiff could proceed to build it and recover the contract price. It is true that the county had no right to rescind the contract, and the notice given plaintiff amounted to a breach on its part; but, after plaintiff had received notice of the breach, it was its duty to do nothing to increase the damages flowing therefrom.  If A enters into a binding contract to build a house for B, B, of course, has no right to rescind the contract without A's consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages.

His remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages, as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses which may have resulted to him. In the case at bar, the county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances.  When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

. . .  The American rule and the reasons supporting it are well stated by Prof. Williston as   follows:

"There is a line of cases running back to 1845 which holds that, after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it had been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise."

. . .

It follows that there was error in directing a verdict for plaintiff for the full amount of its claim. The measure of plaintiff's damage, upon its appearing that notice was duly given not to build the bridge, is an amount sufficient to compensate plaintiff for labor and materials expended and expense incurred in the part performance of the contract, prior to its repudiation, plus the profit which would have been realized if it had been carried out in accordance with its terms. . . .

The judgment below will accordingly be reversed, and the case remanded for a new trial.

Reversed.

Hadley v. Baxendale

In the Court of Exchequer, 1854.
9 Exch. 341.

. . . At the trial before Crompton. J., . . . it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 21. 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, would be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with ₤251. damages beyond the amount paid into Court.

 . . .

The judgment of the Court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case; but, in so doing we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages. . . .

"There are certain established rules," this Court says, in *Alder v. Keighley* (15 M. & W. 117), "according to which they jury ought to find."  And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: - Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either (1) arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or (2) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury, which would ordinarily follow from a breach of contract under these circumstances so known and communicated. But, on the other had, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such breach of contract.

For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions to from this, and as governed by the conventional rule. But as, in such cases, both parties must suppose to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back their broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But, it is obvious that, in the great multitude of cases millers sending off broken shafts to third parties by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follow, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

EVRA Corp. v. Swiss Bank Corp.

673 F.2d 951 (7th Cir. 1982)

OPINION

The question--one of first impression--in this diversity case is the extent of a bank's liability for failure to make a transfer of funds when requested by wire to do so. The essential facts are undisputed. In 1972 Hyman-Michaels Company, a large Chicago dealer in scrap metal, entered into a two-year contract to supply steel scrap to a Brazilian corporation. Hyman-Michaels chartered a ship, the Pandora, to carry the scrap to Brazil. The charter was for one year, with an option to extend the charter for a second year; specified a fixed daily rate of pay for the hire of the ship during both the initial and the option period, payable semi-monthly "in advance"; and provided that if payment was not made on time the Pandora "s owner could cancel the charter. Payment was to be made by deposit to the owner's account in the Banque de Paris et des Pays-Bas (Suisse) in Geneva, Switzerland.

The usual method by which Hyman-Michaels, in Chicago, got the payments to the Banque de Paris in Geneva was to request the Continental Illinois National Bank and Trust Company of Chicago, where it had an account, to make a wire transfer of funds. Continental would debit Hyman-Michaels' account by the amount of the payment and then send a telex to its London office for retransmission to its correspondent bank in Geneva-Swiss Bank Corporation--asking Swiss Bank to deposit this amount in the Banque de Paris account of the Pandora’s owner. The transaction was completed by the crediting of Swiss Bank's account at Continental by the same amount.

When Hyman-Michaels chartered the Pandora in June 1972, market charter rates were very low, and it was these rates that were fixed in the charter for its entire term-two years if Hyman-Michaels exercised its option. Shortly after the agreement was signed, however, charter rates began to climb and by October 1972 they were much higher than they had been in June. The Pandora "s owners were eager to get out of the charter if they could. At the end of October they thought they had found a way, for the payment that was due in the Banque de Paris on October 26 had not arrived by October 30, and on that day the Pandora "s owner notified Hyman-Michaels that it was canceling the charter because of the breach of the payment term. Hyman-Michaels had mailed a check for the October 26 installment to the Banque de Paris rather than use the wire-transfer method of payment. It had done this in order to have the use of its money for the period that it would take the check to clear, about two weeks. But the check had not been mailed in Chicago until October 25 and of course did not reach Geneva on the twenty-sixth.

When Hyman-Michaels received notification that the charter was being canceled it immediately wired payment to the Banque de Paris, but the Pandora "s owner refused to accept it and insisted that the charter was indeed canceled. The matter was referred to arbitration in accordance with the charter. On December 5, 1972, the arbitration panel ruled in favor of Hyman-Michaels. The panel noted that previous arbitration panels had "shown varying degrees of latitude to Charterers"; "In all cases, a pattern of obligation on Owners' part to protest, complain, or warn of intended withdrawal was expressed as an essential prerequisite to withdrawal, in spite of the clear wording of the operative clause. No such advance notice was given by Owners of M/V Pandora." One of the three members of the panel dissented; he thought the Pandora "s owner was entitled to cancel.

Hyman-Michaels went back to making the charter payments by wire transfer. On the morning of April 25, 1973, it telephoned Continental Bank and requested it to transfer $27,000 to the Banque de Paris account of the Pandora "s owner in payment for the charter hire period from April 27 to May 11, 1973. Since the charter provided for payment "in advance," this payment arguably was due by the close of business on April 26. The requested telex went out to Continental's London office on the afternoon of April 25, which was nighttime in England. Early the next morning a telex operator in Continental's London office dialed, as Continental's Chicago office had instructed him to do, Swiss Bank's general telex number, which rings in the bank's cable department. But that number was busy, and after trying unsuccessfully for an hour to engage it the Continental telex operator dialed another number, that of a machine in Swiss Bank's foreign exchange department which he had used in the past when the general number was engaged. We know this machine received the telexed message because it signaled the sending machine at both the beginning and end of the transmission that the telex was being received. Yet Swiss Bank failed to comply with the payment order, and no transfer of funds was made to the account of the Pandora "s owner in the Banque de Paris.

No one knows exactly what went wrong. One possibility is that the receiving telex machine had simply run out of paper, in which event it would not print the message although it had received it. Another is that whoever took the message out of the machine after it was printed failed to deliver it to the banking department. Unlike the machine in the cable department that the Continental telex operator had originally tried to reach, the machines in the foreign exchange department were operated by junior foreign exchange dealers rather than by professional telex operators, although Swiss Bank knew that messages intended for other departments were sometimes diverted to the telex machines in the foreign exchange department.

At 8:30 a.m. the next day, April 27, Hyman-Michaels in Chicago received a telex from the Pandora "s owner stating that the charter was canceled because payment for the April 27-May 11 charter period had not been made. Hyman-Michaels called over to Continental and told them to keep trying to effect payment through Swiss Bank even if the Pandora "s owner rejected it. This instruction was confirmed in a letter to Continental dated April 28, in which Hyman-Michaels stated: "please instruct your London branch to advise their correspondents to persist in attempting to make this payment. This should be done even in the face of a rejection on the part of Banque de Paris to receive this payment. It is paramount that in order to strengthen our position in an arbitration that these funds continue to be readily available." Hyman-Michaels did not attempt to wire the money directly to the Banque de Paris as it had done on the occasion of its previous default. Days passed while the missing telex message was hunted unsuccessfully. Finally Swiss Bank suggested to Continental that it retransmit the telex message to the machine in the cable department and this was done on May 1. The next day Swiss Bank attempted to deposit the $ 27,000 in the account of the Pandora "s owner at the Banque de Paris but the payment was refused.

Again the arbitrators were convened and rendered a decision. In it they ruled that Hyman-Michaels had been "blameless" up until the morning of April 27, when it first learned that the Banque de Paris had not received payment on April 26, but that "being faced with this situation," Hyman-Michaels had "failed to do everything in (its) power to remedy it. The action taken was immediate but did not prove to be adequate, in that (Continental) Bank and its correspondent required some 5/6 days to trace and effect the lost instruction to remit. (Hyman-Michaels) could have ordered an immediate duplicate payment-or even sent a Banker's check by hand or special messengers, so that the funds could have reached owner's Bank, not later than April 28th." By failing to do any of these things Hyman-Michaels had "created the opening" that the Pandora "s owner was seeking in order to be able to cancel the charter. It had "acted imprudently." The arbitration panel concluded, reluctantly but unanimously, that this time the Pandora "s owner was entitled to cancel the agreement. The arbitration decision was confirmed by a federal district court in New York. Hyman-Michaels then brought this diversity action against Swiss Bank, seeking to recover its expenses in the second arbitration proceeding plus the profits that it lost because of the cancellation of the charter. The contract by which Hyman-Michaels had agreed to ship scrap steel to Brazil had been terminated by the buyer in March 1973 and Hyman-Michaels had promptly subchartered the Pandora at market rates, which by April 1973 were double the rates fixed in the charter. Its lost profits are based on the difference between the charter and subcharter rates.

**. . .**

The case was tried to a district judge without a jury. In his decision, 522 F. Supp. 820 (N.D.Ill.1981), he first ruled that the substantive law applicable to Hyman-Michaels' claim against Swiss Bank was that of Illinois, rather than Switzerland as urged by Swiss Bank, and that Swiss Bank had been negligent and under Illinois law was liable to Hyman-Michaels for.$ 2.1 million in damages. This figure was made up of about $ 16,000 in arbitration expenses and the rest in lost profits on the subcharter of the Pandora.

**. . .**

Logically the first question we should address is choice of law. The parties seem agreed that if Swiss law applies, Hyman-Michaels has no claim against Swiss Bank, because under Swiss law a bank cannot be held liable to someone with whom it is not in privity of contract and there was no contract between Swiss Bank and Hyman-Michaels. Illinois does not have such a privity requirement. But this creates a conflict of laws only if Hyman-Michaels has a good claim against Swiss Bank under Illinois law; if it does not, then our result must be the same regardless of which law applies. Because we are more certain that Hyman-Michaels cannot recover against Swiss Bank under Illinois law than we are that Swiss rather than Illinois law applies to this case under Illinois choice-of-law principles (which we must apply in a diversity suit tried in Illinois . . , we shall avoid the choice-of-law question and discuss Swiss Bank's liability to Hyman-Michaels under Illinois law without deciding-for, to repeat, it would make no difference to the outcome whether it really is Illinois law or Swiss law that governs.

When a bank fails to make a requested transfer of funds, this can cause two kinds of loss. First, the funds themselves or interest on them may be lost, and of course the fee paid for the transfer, having bought nothing, becomes a loss item. These are "direct" (sometimes called "general") damages. Hyman-Michaels is not seeking any direct damages in this case and apparently sustained none. It did not lose any part of the $ 27,000; although its account with Continental Bank was debited by this amount prematurely, it was not an interest-bearing account so Hyman-Michaels lost no interest; and Hyman-Michaels paid no fee either to Continental or to Swiss Bank for the aborted transfer. A second type of loss, which either the payor or the payee may suffer, is a dislocation in one's business triggered by the failure to pay. Swiss Bank's failure to transfer funds to the Banque de Paris when requested to do so by Continental Bank set off a chain reaction which resulted in an arbitration proceeding that was costly to Hyman-Michaels and in the cancellation of a highly profitable contract. It is those costs and lost profits-" consequential" or, as they are sometimes called, "special" damages--that Hyman-Michaels seeks in this lawsuit, and recovered below. It is conceded that if Hyman-Michaels was entitled to consequential damages, the district court measured them correctly. The only issue is whether it was entitled to consequential damages.

If a bank loses a check, its liability is governed by Article 4 of the Uniform Commercial Code, which precludes consequential damages unless the bank is acting in bad faith. See Ill.Rev.Stat. ch. 26, | 4-103(5). If Article 4 applies to this transaction, Hyman-Michaels cannot recover the damages that it seeks, because Swiss Bank was not acting in bad faith. Maybe the language of Article 4 could be stretched to include electronic fund transfers, see section 4-102(2), but they were not in the contemplation of the draftsmen. For purposes of this case we shall assume, as the Second Circuit held in *Delbrueck & Co. v. Manufacturers Hanover Trust Co*., 609 F.2d 1047, 1051 (2d Cir. 1979), that Article 4 is inapplicable, and apply common law principles instead.

*Hadley v. Baxendale*[,](http://www.kentlaw.edu/faculty/rwarner/classes/contracts/interactive/hadley/Hadley_v_Baxendale.htm) 9 Ex. 341, 156 Eng.Rep. 145 (1854), is the leading common law case on liability for consequential damages caused by failure or delay in carrying out a commercial undertaking. The engine shaft in plaintiffs' corn mill had broken and they hired the defendants, a common carrier, to transport the shaft to the manufacturer, who was to make a new one using the broken shaft as a model. The carrier failed to deliver the shaft within the time promised. With the engine shaft out of service the mill was shut down. The plaintiffs sued the defendants for the lost profits of the mill during the additional period that it was shut down because of the defendants' breach of their promise. The court held that the lost profits were not a proper item of damages, because "in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences (the stoppage of the mill and resulting loss of profits) would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants." 9 Ex. at 356, 156 Eng.Rep. at 151.

The rule of *Hadley v. Baxendale*--that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them--has been applied in many Illinois cases, and *Hadley*cited approvingly. See, e.g., *Underground Constr. Co. v. Sanitary Dist. of Chicago*, 367 Ill. 360, 369, 11 N.E.2d 361, 365 (1937); *Western Union Tel. Co. v. Martin*, 9 Ill.App. 587, 591-93 (1882); *Siegel v. Western Union Tel. Co.*, 312 Ill.App. 86, 92-93, 37 N.E.2d 868, 871 (1941); *Spangler v. Holthusen*, 61 Ill.App.3d 74, 80-82, 18 Ill.Dec. 840, 378 N.E.2d 304, 309-10 (1978).

In *Siegel*, the plaintiff had delivered $200 to Western Union with instructions to transmit it to a friend of the plaintiff's. The money was to be bet (legally) on a horse, but this was not disclosed in the instructions. Western Union misdirected the money order and it did not reach the friend until several hours after the race had taken place. The horse that the plaintiff had intended to bet on won and would have paid $ 1650 on the plaintiff's $200 bet if the bet had been placed. He sued Western Union for his $ 1450 lost profit, but [the court held](http://www.kentlaw.edu/faculty/rwarner/classes/contracts/interactive/evra/siegel_comment.htm) that under the rule of *Hadley v. Baxendale* Western Union was not liable, because it "had no notice or knowledge of the purpose for which the money was being transmitted." 312 Ill.App. at 93, 37 N.E.2d at 871.

The present case is similar, though Swiss Bank knew more than Western Union knew in *Siegel*; it knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora. But it did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels. And it did not know that Hyman-Michaels knew the Pandora’s owner would try to cancel the charter, and probably would succeed, if Hyman-Michaels was ever again late in making payment, or that despite this peril Hyman-Michaels would not try to pay until the last possible moment and in the event of a delay in transmission would not do everything in its power to minimize the consequences of the delay. Electronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of $2 million. Cf. *Snell v. Cottingham*, 72 Ill. 161, 169-70 (1874); *Flug v. Craft Mfg.* Co., 3 Ill.App.2d 56, 67, 120 N.E.2d 666, 671 (1954).

It is true that in both *Hadley* and *Siegel* there was a contract between the parties and here there was none. We cannot be certain that the Illinois courts would apply the principles of those cases outside of the contract area. As so often in diversity cases, there is an irreducible amount of speculation involved in attempting to predict the reaction of a state's courts to a new issue. The best we can do is to assume that the Illinois courts would look to the policies underlying cases such as *Hadley* and *Siegel* and, to the extent they found them pertinent, would apply those cases here. We must therefore ask what difference it should make whether the parties are or are not bound to each other by a contract. On the one hand, it seems odd that the absence of a contract would enlarge rather than limit the extent of liability. After all, under Swiss law the absence of a contract would be devastating to Hyman-Michaels' claim. Privity is not a wholly artificial concept. It is one thing to imply a duty to one with whom one has a contract and another to imply it to the entire world.

On the other hand, contract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor's control--a strike, a fire, the failure of a supplier to deliver an essential input. See Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543-44, 23 S. Ct. 754, 755-56, 47 L. Ed. 1171 (1903). And while such contract doctrines as impossibility, impracticability, and frustration relieve promisors from liability for some failures to perform that are beyond their control, many other such failures are actionable although they could not have been prevented by the exercise of due care. The district judge found that Swiss Bank had been negligent in losing Continental Bank's telex message and it can be argued that Swiss Bank should therefore be liable for a broader set of consequences than if it had only broken a contract. But *Siegel*implicitly rejects this distinction. Western Union had not merely broken its contract to deliver the plaintiff's money order; it had "negligently misdirected" the money order. "The company's negligence is conceded." 312 Ill.App. at 88, 91, 37 N.E.2d at 869, 871. Yet it was not liable for the consequences.

*Siegel*, we conclude, is authority for holding that Swiss Bank is not liable for the consequences of negligently failing to transfer Hyman-Michaels' funds to Banque de Paris; reason for such a holding is found in the animating principle of *Hadley v. Baxendale*, which is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so. In *Hadley*the untoward consequence was the shutting down of the mill. The carrier could have avoided it by delivering the engine shaft on time. But the mill owners, as the court noted, could have avoided it simply by having a spare shaft. 9 Ex. at 355-56, 156 Eng.Rep. at 151. Prudence required that they have a spare shaft anyway, since a replacement could not be obtained at once even if there was no undue delay in carting the broken shaft to and the replacement shaft from the manufacturer.

The court refused to imply a duty on the part of the carrier to guarantee the mill owners against the consequences of their own lack of prudence, though of course if the parties had stipulated for such a guarantee the court would have enforced it. The notice requirement of *Hadley v. Baxendale* is designed to assure that such an improbable guarantee really is intended.

This case is much the same, though it arises in a tort rather than a contract setting. Hyman-Michaels showed a lack of prudence throughout. It was imprudent for it to mail in Chicago a letter that unless received the next day in Geneva would put Hyman-Michaels in breach of a contract that was very profitable to it and that the other party to the contract had every interest in canceling. It was imprudent thereafter for Hyman-Michaels, having narrowly avoided cancellation and having (in the words of its appeal brief in this court) been "put ... on notice that the payment provision of the Charter would be strictly enforced thereafter," to wait till arguably the last day before payment was due to instruct its bank to transfer the necessary funds overseas. And it was imprudent in the last degree for Hyman-Michaels, when it received notice of cancellation on the last possible day payment was due, to fail to pull out all the stops to get payment to the Banque de Paris on that day, and instead to dither while Continental and Swiss Bank wasted five days looking for the lost telex message. Judging from the obvious reluctance with which the arbitration panel finally decided to allow the Pandora’s owner to cancel the charter, it might have made all the difference if Hyman-Michaels had gotten payment to the Banque de Paris by April 27 or even by Monday, April 30, rather than allowed things to slide until May 2.

This is not to condone the sloppy handling of incoming telex messages in Swiss Bank's foreign department. But Hyman-Michaels is a sophisticated business enterprise. It knew or should have known that even the Swiss are not infallible; that messages sometimes get lost or delayed in transit among three banks, two of them located 5000 miles apart, even when all the banks are using reasonable care; and that therefore it should take its own precautions against the consequences--best known to itself--of a mishap that might not be due to anyone's negligence.

We are not the first to remark the affinity between the rule of *Hadley v. Baxendale* and the doctrine, which is one of tort as well as contract law and is a settled part of the common law of Illinois, of avoidable consequences. See Dobbs, Handbook on the Law of Remedies 831 (1973); cf. Benton v. J. A. Fay & Co., 64 Ill. 417 (1872). If you are hurt in an automobile accident and unreasonably fail to seek medical treatment, the injurer, even if negligent, will not be held liable for the aggravation of the injury due to your own unreasonable behavior after the accident. See, e.g., Slater v. Chicago Transit Auth., 5 Ill.App.2d 181, 185, 125 N.E.2d 289, 291 (1955). If in addition you failed to fasten your seat belt, you may be barred from collecting the tort damages that would have been prevented if you had done so. See, e.g., Mount v. McClellan, 91 Ill.App.2d 1, 5, 234 N.E.2d 329, 331 (1968). Hyman-Michaels' behavior in steering close to the wind prior to April 27 was like not fastening one's seat belt; its failure on April 27 to wire a duplicate payment immediately after disaster struck was like refusing to seek medical attention after a serious accident. The seat-belt cases show that the doctrine of avoidable consequences applies whether the tort victim acts imprudently before or after the tort is committed. See Prosser, Handbook of the Law of Torts 424 (4th ed. 1971). Hyman-Michaels did both.

The rule of *Hadley v. Baxendale* links up with tort concepts in another way. The rule is sometimes stated in the form that only foreseeable damages are recoverable in a breach of contract action. E.g., Restatement (Second) of Contracts § 351 (1979). So expressed, it corresponds to the tort principle that limits liability to the foreseeable consequence of the defendant's carelessness. See, e.g., Neering v. Illinois Cent. R.R. Co., 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943). The amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care. See, e.g., United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Bezark v. Kostner Manor, Inc., 29 Ill.App.2d 106, 111-12, 172 N.E.2d 424, 426-27 (1961). If he does not know what that probability and magnitude are, he cannot determine how much care to take. That would be Swiss Bank's dilemma if it were liable for consequential damages from failing to carry out payment orders in timely fashion. To estimate the extent of its probable liability in order to know how many and how elaborate fail-safe features to install in its telex rooms or how much insurance to buy against the inevitable failures, Swiss Bank would have to collect reams of information about firms that are not even its regular customers. It had no banking relationship with Hyman-Michaels. It did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the Pandora's owner was. These were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should have more intelligent machines or should install more machines in the cable department, any more than the falling of a platform scale because a conductor jostled a passenger who was carrying fireworks was a prospect that could have influenced the amount of care taken by the Long Island Railroad. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); cf. Ney v. Yellow Cab Co., 2 Ill.2d 74, 80-84, 117 N.E.2d 74, 78-80 (1954).  In short, Swiss Bank was not required in the absence of a contractual undertaking to take precautions or insure against a harm that it could not measure but that was known with precision to Hyman-Michaels, which could by the exercise of common prudence have averted it completely.

As Chief Judge Cardozo (the author of Palsgraf ) remarked in discussing the application of Hadley v. Baxendale to the liability of telegraph companies for errors in transmission, "The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great.... The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided." [Kerr S.S. Co. v. Radio Corp. of America](http://www.kentlaw.edu/faculty/rwarner/classes/contracts/interactive/evra/kerr_commentary.htm), 245 N.Y. 284, 291-92, 157 N.E. 140, 142 (1927).

But *Kerr* is a case from New York, not Illinois, and Hyman-Michaels argues that two early Illinois telegraph cases compel us to rule in its favor against Swiss Bank.[*Postal Tel. Cable Co. v. Lathrop*,](http://www.kentlaw.edu/faculty/rwarner/classes/contracts/interactive/evra/lathrop_commentary.htm) 131 Ill. 575, 23 N.E. 583 (1890), involved the garbled transmission of two telegrams from a coffee dealer-who as the telegraph company knew was engaged in buying and selling futures contracts-to his broker. The first telegram (there is no need to discuss the second) directed the broker to buy 1000 bags of August coffee for the dealer's account. This got changed in transmission to 2000 bags, and because the price fell the dealer sustained an extra loss for which he sued the telegraph company. The court held that the company had had notice enough to make it liable for consequential damages under the rule of *Hadley v. Baxendale*. It knew it was transmitting buy and sell orders in a fluctuating market and that a garbled transmission could result in large losses. There was no suggestion that the dealer should have taken his own precautions against such mistakes. In [*Providence-Washington Ins. Co. v. Western Union Tel. Co*](http://www.kentlaw.edu/faculty/rwarner/classes/contracts/interactive/evra/providence_commentary.htm)*.,* 247 Ill. 84, 93 N.E. 134 (1910), a telegram from an insurance company canceling a policy was misdirected, and before it turned up there was a fire and the insurance company was liable on the policy. This was the precise risk created by delay, it was obvious on the face of the telegram, and the telegraph company was therefore liable for the insurance company's loss on the policy. Again there was no suggestion that the plaintiff had neglected any precaution. Both cases are distinguishable from the present case: the defendants had more information and the plaintiffs were not imprudent.

The legal principles that we have said are applicable to this case were not applied below. Although the district judge's opinion is not entirely clear, he apparently thought the rule of *Hadley v. Baxendale* inapplicable and the imprudence of Hyman-Michaels irrelevant. See 522 F. Supp. at 833. He did state that the damages to Hyman-Michaels were foreseeable because "a major international bank" should know that a failure to act promptly on a telexed request to transfer funds could cause substantial damage; but *Siegel*--and for that matter *Lathrop* and Providence-Washington--make clear that that kind of general foreseeability, which is present in virtually every case, does not justify an award of consequential damages.

We could remand for new findings based on the proper legal standard, but it is unnecessary to do so. The undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank.

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The judgment in favor of Hyman-Michaels against Swiss Bank is reversed with directions to enter judgment for Swiss Bank . . .

SO ORDERED.

Rombola v. Cosindas

220 N.E.2d 919 (Mass. 1966)

. . . By the terms of a written contract with Cosindas, Rombola agreed to train, maintain and race Cosindas's horses, Margy Sampson and Margy Star, for the period November 8, 1962, to December 1, 1963. The present action relates only to the horse Margy Sampson. Rombola was to assume all expenses and to receive seventy-five per cent of all gross purses; Cosindas was to receive the remaining twenty-five per cent. Rombola took possession of Margy Sampson and, because there was no winter racing in the area, maintained and trained her at his stable throughout the winter. In the spring and summer of 1963, Rombola entered the horse in a total of twenty-five races, run at four racing meets which were held at three different racetracks. In the fall, Rombola entered Margy Sampson in six stake races in a thirty-three day meet to be held at Suffolk Downs. The expiration date of Rombola's contract coincided with the closing date of the meet. In stake races, horses run against others in their own class. Horses are classified or rated according to the amount of money they have won. Margy Sampson had already raced against several of the horses who were entered in the six stake races scheduled for the Suffolk Downs meet. On October 25, 1963, before the meet started, Cosindas, without Rombola's knowledge or consent, took possession of the horse at Suffolk Downs and thereby deprived Rombola of his right to race the horse. The horse did not race between October 25 and December 1, 1963.

To recover damages for breach of contract, the plaintiff must prove the damages with reasonable certainty. In certain situations, a court will hold that, as a matter of law, damages cannot be proven with reasonable certainty, and hence that the plaintiff is prohibited from introducing evidence in regard to the extent of the damages. The issue in this case is whether Rombola can introduce evidence of the extent of his damages.

On the issue of damages Rombola would show that generally, in a stake race, there are eight or nine starters and that the purse is shared by the first five finishers at diminishing percentages. The purse is determined before the race and is not affected by the amount of money wagered by patrons at the track. In the year preceding the contract, Margy Sampson as a three-year old had won a total of approximately $400-$450 in four races. In the year of the contract, of the twenty-five races in which the horse was entered by Rombola, she had won ten and shared in the purse money in a total of twenty races, earning, in all, purses approximating $12,000. In the year following the expiration of Rombola's contract with Cosindas, the horse raced twenty-nine times and won money in an amount almost completely consistent percentagewise with the money won during the period of the contract. . .

In determining the amount of damages to be awarded, mathematical accuracy of proof is not required. . . . The likelihood of prospective profits may be proved by an established earnings record. . . . Expert opinion may be introduced to substantiate the amount of prospective profits. . . .

We apply these principles to the present case. It appears that Margy Sampson had already been accepted as a participant in the stake races and transported to the site of the meet. She had already proved her ability both prior to and while under Rombola's management and training, over an extended period of time, against many competitors and under varying track conditions. Her consistent performance in the year subsequent to the breach negates any basis for an inference of a diminution in ability or in earning capacity at the time of the Suffolk Downs meet. While it is possible that no profits would have been realized if Margy Sampson had participated in the scheduled stake races, that possibility is inherent in any business venture. It is not sufficient to foreclose Rombola's right to prove prospective profits. . . . Her earnings record, while not conclusive, is admissible as evidence of the extent of damages caused by the breach...

Security Stove & Mfg. Co. v. American Ry. Express Co.

51 S.W. 2d 572 (Mo. Ct. App. 1932)

Bland, J.

This is an action for damages for the failure of defendant to transport, from Kansas City to Atlantic City, New Jersey, within a reasonable time, a furnace equipped with a combination oil and gas burner. The cause was tried before the court without the aid of a jury, resulting in a judgment in favor of plaintiff in the sum of $801.50 and interest, or in a total sum of $1,000.00. Defendant has appealed.

The facts show that plaintiff manufactured a furnace equipped with a special combination oil and gas burner it desired to exhibit at the American Gas Association Convention held in Atlantic City in October, 1926. The president of plaintiff testified that plaintiff engaged space for the exhibit for the reason "that the Henry L. Dougherty Company was very much interested in putting out a combination oil and gas burner; we had just developed one, after we got through, better than anything on the market and we thought this show would be the psychological time to get in contact with the Dougherty Company"; that "the thing wasn't sent there for sale but primarily to show"; that at the time the space was engaged it was too late to ship the furnace by freight so plaintiff decided to ship it by express, and, on September 18th, 1926, wrote the office of the defendant in Kansas City, stating that it had engaged a booth for exhibition purposes at Atlantic Association, for the week beginning October 11th; that its exhibit consisted of an oil burning furnace, together with two oil burners which weighed at least 1,500 pounds; that, "In order to get this exhibit in place on time it should be in Atlantic City not later than October the 8th. What we want you to do is to tell us how much time you will require to assure the delivery of the exhibit on time."

Note the timing:  The plaintiff, Security Stove, rented the booth *before* it contracted with American Express.

Mr. Bangs, chief clerk in charge of the local office of the defendant, upon receipt of the letter, sent Mr. Johnson, a commercial representative of the defendant, to see plaintiff. Johnson called upon plaintiff taking its letter with him. Johnson made a notation on the bottom of the letter giving October 4th as the day that defendant was required to have the exhibit in order for it to reach Atlantic City on October 8th.

On October 1st, plaintiff wrote the defendant at Kansas City, referring to its letter of September 18th, concerning the fact that the furnace must be in Atlantic City not later than October 8th, and stating what Johnson had told it, saying: "Now Mr. Bangs, we want to make doubly sure that this shipment is in Atlantic City not later than October 8th and the purpose of this letter is to tell you that you can have your truck call for the shipment between 12 and 1 o'clock on Saturday, October 2nd for this." On October 2d, plaintiff called the office of the express company in Kansas City and told it that the shipment was ready. Defendant came for the shipment on the last mentioned day, received it and delivered the express receipt to plaintiff. The shipment contained 21 packages. Each package was marked with stickers backed with glue and covered with silica of soda, to prevent the stickers being torn off in shipping. Each package was given a number. They ran from 1 to 21.

Plaintiff's president made arrangements to go to Atlantic City to attend the convention and install the exhibit, arriving there about October 11th. When he reached Atlantic City he found the shipment had been placed in the booth that had been assigned to plaintiff. The exhibit was set up, but it was found that one of the packages shipped was not there. This missing package contained the gas manifold, or that part of the oil and gas burner that controlled the flow of gas in the burner. This was the most important part of the exhibit and a like burner could not be obtained in Atlantic City.

Wires were sent and it was found that the stray package was at the "over and short bureau" of defendant in St. Louis. Defendant reported that the package would be forwarded to Atlantic City and would be there by Wednesday, the 13th. Plaintiff's president waited until Thursday, the day the convention closed, but the package had not arrived at the time, so he closed up the exhibit and left. About a week after he arrived in Kansas City, the package was returned by the defendant.

Bangs testified that the reasonable time for a shipment of this kind to reach Atlantic City from Kansas City would be four days; that if the shipment was received on October 4th, it would reach Atlantic City by October 8th; that plaintiff did not ask defendant for any special rate; that the rate charged was the regular one; that plaintiff asked no special advantage in the shipment; that all defendant, under its agreement with plaintiff was required to do was to deliver the shipment at Atlantic City in the ordinary course of events; that the shipment was found in St. Louis about Monday afternoon or Tuesday morning; that it was delivered at Atlantic City at the Ritz Carlton Hotel, on the 16th of the month. There was evidence on plaintiff's part that the reasonable time for a shipment of this character to reach Atlantic City from Kansas City was not more than three or four days.

The petition upon which the case was tried alleges that . . . "relying upon defendant's promise and the promises of its agents and servants, that said parcels would be delivered at Atlantic City by October 8th, 1926, if delivered to defendant by October 4th, 1926, plaintiff herein hired space for an exhibit at the American Gas Association Convention at Atlantic City, and planned for an exhibit at said Convention and sent men in the employ of this plaintiff to Atlantic City to install, show and operate said exhibit, and that these men were in Atlantic City ready to set up this plaintiff's exhibit at the American Gas Association Convention on October 8th, 1926."

"That the package not delivered by defendant contained the essential part of plaintiff's exhibit which plaintiff was to make at said convention on October 8th, was later discovered in St. Louis, Missouri, by the defendant herein, and that plaintiff, for this reason, could not show his exhibit."

Plaintiff asked damages, which the court in its judgment allowed as follows: $147.00 express charges (on the exhibit); $45.12 freight on the exhibit from Atlantic City to Kansas City; $101.39 railroad and pullman fare to and from Atlantic City, expended by plaintiff's president and a workman taken by him to Atlantic City; $48.00 hotel room for the two; $150.00 for the time of the president; $40.00 for wages of plaintiff's other employee and $270.00 for rental of the booth, making a total of $801.51. .  . .

There is no evidence of claim in this case that plaintiff suffered any loss of profits by reason of the delay in the shipment. . . .

. . . It is no doubt, the general rule that where there is a breach of contract, the party suffering the loss can recover only that which he would have had, had the contract not been broken . . .

But this is merely a general statement of the rule and is not inconsistent with the holdings that, in some instances, the injured party may recover expenses incurred in relying upon the contract, although such expenses would have been incurred has the contract not been breached. . . .

The case at bar was to recover damages for loss of profits by reason of the failure of the defendant to transport the shipment within a reasonable, time, so that it would arrive in Atlantic City for the exhibit. There were no profits contemplated. The furnace was to be shown and shipped back to Kansas City. There was no money loss, except the expenses, that was of such a nature as any court would allow as being sufficiently definite or lacking in pure speculation. Therefore, unless plaintiff is permitted to recover the expenses that it went to, which were a total loss to it by reason of its inability to exhibit the furnace and equipment, it will be deprived of any substantial compensation for its loss. The law does not contemplate any such injustice. It ought to allow plaintiff, as damages, the loss in the way of expenses that it sustained, and which it would not have been put to if it had not been for its reliance upon the defendant to perform its contract. There is no contention that the exhibit would have been entirely valueless and whatever it might have accomplished defendant knew of the circumstances and ought to respond for whatever damages plaintiff suffered. In cases of this kind the method of estimating the damages should be adopted which is the most definite and certain and which best achieves the fundamental purpose of compensation. . . .

While, it is true that plaintiff already had incurred some of these expenses, in that it had rented space at the exhibit before entering into the contract with defendant for the shipment of the exhibit and this part of plaintiff's damages, in a sense, arose out of a circumstance which transpired before the contract was even entered into, yet, plaintiff arranged for the exhibit knowing that it could call upon defendant to perform its common law duty to accept and transport the shipment with reasonable dispatch. The whole damage, therefore, was suffered in contemplation of defendant performing its contract, which it failed to do, and would not have been sustained except for the reliance by plaintiff upon defendant to perform it. It can, therefore, be fairly said that the damages or loss suffered by plaintiff grew out of the breach of the contract, for had the shipment arrived on time, plaintiff would have had the benefit of the contract, which was contemplated by all parties, defendant being advised of the purpose of the shipment.

The judgment is affirmed.

All Concur.

Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.

361 N.E.2d 1015 (N.Y. 1977)

The principal issue on this appeal is whether a provision in a truck lease agreement which requires the payment of a specified amount of money to the lessor in the event of the lessee's breach is an enforceable liquidated damages clause, or, instead, provides for an unenforceable penalty.

Defendant Puritan Farms 2nd, Inc. (Puritan), was in the business of furnishing milk and milk products to customers through home delivery. In January, 1969, Puritan leased a fleet of 25 new milk delivery trucks from plaintiff Truck Rent-A-Center for a term of seven years commencing January 15, 1970. Under the provisions of a truck lease and service agreement entered into by the parties, the plaintiff was to supply the trucks and make all necessary repairs. Puritan was to pay an agreed upon weekly rental fee. It was understood that the lessor would finance the purchase of the trucks through a bank, paying the prime rate of interest on the date of the loan plus 2%. The rental charges on the trucks were to be adjusted in the event of a fluctuation in the interest rate above or below specified levels. The lessee was granted the right to purchase the trucks, at any time after 12 months following commencement of the lease, by paying to the lessor the amount then due and owing on the bank loan, plus an additional $ 100 per truck purchased.

Article 16 of the lease agreement provided that if the agreement should terminate prior to expiration of the term of the lease as a result of the lessee's breach, the lessor would be entitled to damages, "liquidated for all purposes", in the amount of all rents that would have come due from the date of termination to the date of normal expiration of the term less the "re-rental value" of the vehicles, which was set at 50% of the rentals that would have become due. In effect, the lessee would be obligated to pay the lessor, as a consequence of breach, one half of all rentals that would have become due had the agreement run its full course. The agreement recited that, in arriving at the settled amount of damage, "the parties hereto have considered, among other factors, Lessor's substantial initial investment in purchasing or reconditioning for Lessee's service the demised motor vehicles, the uncertainty of Lessor's ability to re-enter the said vehicles, the costs to Lessor during any period the vehicles may remain idle until re-rented, or if sold, the uncertainty of the sales price and its possible attendant loss. The parties have also considered, among other factors, in so liquidating the said damages, Lessor's saving in expenditures for gasoline, oil and other service items."

. . . After nearly three years, the lessee sought to terminate the lease agreement. On December 7, 1973, Puritan wrote to the lessor complaining that the lessor had not repaired and maintained the trucks as provided in the lease agreement. Puritan stated that it had "repeatedly notified" plaintiff of these defaults, but plaintiff had not cured them. Puritan, therefore, exercised its right to terminate the agreement "without any penalty and without purchasing the trucks". (Emphasis added.) On the date set for termination, December 14, 1973, plaintiff's attorneys replied to Puritan by letter to advise it that plaintiff believed it had fully performed its obligations under the lease and, in the event Puritan adhered to the announced breach, would commence proceedings to obtain the liquidated damages provided for in article 16 of the agreement. Nevertheless, Puritan had its drivers return the trucks to plaintiff's premises, where the bulk of them have remained ever since. At the time of termination, plaintiff owed $ 45,134.17 on the outstanding bank loan.

Plaintiff followed through on its promise to commence an action for the payment of the liquidated damages. Defendant counterclaimed for the return of its security deposit. At the nonjury trial, plaintiff contended that it had fully performed its obligations to maintain and repair the trucks. Moreover, it was submitted, Puritan sought to cancel the lease because corporations allied with Puritan had acquired the assets, including delivery trucks, of other dairies and Puritan believed it cheaper to utilize this "shadow fleet". The home milk delivery business was on the decline and plaintiff's president testified that efforts to either re-rent or sell the truck fleet to other dairies had not been successful. Even with modifications in the trucks, such as the removal of the milk racks and a change in the floor of the trucks, it was not possible to lease the trucks to other industries, although a few trucks were subsequently sold. The proceeds of the sales were applied to the reduction of the bank balance. The other trucks remained at plaintiff's premises, partially protected by a fence plaintiff erected to discourage vandals. The defendant countered with proof that plaintiff had not repaired the trucks promptly and satisfactorily.

At the close of the trial, the court found, based on the evidence it found to be credible, that plaintiff had substantially performed its obligations under the lease and that defendant was not justified in terminating the agreement. Further, the court held that the provision for liquidated damages was reasonable and represented a fair estimate of actual damages which would be difficult to ascertain precisely. "The parties, at the time the agreement was entered into, considered many factors affecting damages, namely: the uncertainty of the plaintiff's ability to re-rent the said vehicles; the plaintiff's investment in purchasing and reconditioning the vehicles to suit the defendant's particular purpose; the number of man hours not utilized in the non-service of the vehicles in the event of a breach; the uncertainty of reselling the vehicles in question; the uncertainty of the plaintiff's savings or expenditures for gasoline, oil or other service items, and the amount of fluctuating interest on the bank loan." The court calculated that plaintiff would have been entitled to $ 177,355.20 in rent for the period remaining in the lease and, in accordance with the liquidated damages provision, awarded plaintiff half that amount, $ 88,677.60. The resulting judgment was affirmed by the Appellate Division, with two Justices dissenting. (51 AD2d 786.)

The primary issue before us is whether the "liquidated damages" provision is enforceable. Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract. . . .In effect, a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. . . . Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy. . . . Provisions for liquidated damage have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage. In such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury. . . .

On the other hand, liquidated damage provisions will not be enforced if it is against public policy to do so and public policy is firmly set against the imposition of penalties or forfeitures for which there is no statutory authority. . . . It is plain that a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for penalty and is unenforceable. . . . A liquidated damage provision has its basis in the principle of just compensation for loss. . . . A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promisee, in the event of default, would reap a windfall well above actual harm sustained.

. . . The rule is now well established. A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. . . . If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced. . . .

In applying these principles to the case before us, we conclude that the amount stipulated by the parties as damages bears a reasonable relation to the amount of probable actual harm and is not a penalty. Hence, the provision is enforceable and the order of the Appellate Division should be affirmed.

**Looking forward from the date of the lease, the parties could reasonably conclude, as they did, that there might not be an actual market for the sale or re-rental of these specialized vehicles in the event of the lessee's breach. To be sure, plaintiff's lost profit could readily be measured by the amount of the weekly rental fee. However, it was permissible for the parties, in advance, to agree that the re-rental or sale value of the vehicles would be 50% of the weekly rental. Since there was uncertainty as to whether the trucks could be re-rented or sold, the parties could reasonably set, as they did, the value of such mitigation at 50% of the amount the lessee was obligated to pay for rental of the trucks. This would take into consideration the fact that, after being used by the lessee, the vehicles would no longer be "shiny, new trucks", but would be used, possibly battered, trucks, whose value would have declined appreciably. The parties also considered the fact that, although plaintiff, in the event of Puritan's breach, might be spared repair and maintenance costs necessitated by Puritan's use of the trucks, plaintiff would have to assume the cost of storing and maintaining trucks idled by Puritan's refusal to use them. Further, it was by no means certain, at the time of the contract, that lessee would peacefully return the trucks to the lessor after lessee had breached the contract.**

. . .

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed.

Lake River Corp. v. Carborundum

769 F.2d 1284 (7th Cir. 1985)

Posner, Circuit Judge.

This diversity suit between Lake River Corporation and Carborundum Company requires us to consider questions of Illinois commercial law, and in particular to explore the fuzzy line between penalty clauses and liquidated-damages clauses.

Carborundum manufactures "Ferro Carbo," an abrasive powder used in making steel. To serve its midwestern customers better, Carborundum made a contract with Lake River by which the latter agreed to provide distribution services in its warehouse in Illinois. Lake River would receive Ferro Carbo in bulk from Carborundum, "bag" it, and ship the bagged produce to Carborundum's customers. The Ferro Carbo would remain Carborundum's property until delivered to the customers.

Carborundum insisted that Lake River install a new bagging system to handle the contract. In order to be sure of being able to recover the cost of the new system ($89,000) and make a profit of 20 percent of the contract price, Lake River insisted on the following minimum-quantity guarantee:

In consideration of the special equipment [i.e., the new bagging system] to be acquired and furnished by LAKE-RIVER for handling the product, CARBORUNDUM shall, during the initial three-year term of this Agreement, ship to LAKE-RIVER for bagging a minimum quantity of [22,500 tons]. If, at the end of the three-year term, this minimum quantity shall not have been shipped, LAKE-RIVER shall invoice CARBORUNDUM at the then prevailing rates for the difference between the quantity bagged and the minimum guaranteed.

If Carborundum had shipped the full minimum quantity that it guaranteed, it would have owed Lake River roughly $533,000 under the contract.

After the contract was signed in 1979, the demand for domestic steel, and with it the demand for Ferro Carbo, plummeted, and Carborundum failed to ship the guaranteed amount. When the contract expired late in 1982, Carborundum had shipped only 12,000 of the 22,500 tons it had guaranteed. Lake River had bagged the 12,000 tons and had billed Carborundum for this bagging, and Carborundum had paid, but by virtue of the formula in the minimum-guarantee clause Carborundum still owed Lake River $241,000-the contract price of $533,000 if the full amount of Ferro Carbo had been shipped, minus what Carborundum had paid for the bagging of the quantity it had shipped.

When Lake River demanded payment of this amount, Carborundum refused, on the ground that the formula imposed a penalty. At the time, Lake River had in its warehouse 500 tons of bagged Ferro Carbo, having a market value of $269,000, which it refused to release unless Carborundum paid the $241,000 due under the formula. Lake River did offer to sell the bagged product and place the proceeds in escrow until its dispute with Carborundum over the enforceability of the formula was resolved, but Carborundum rejected the offer and trucked in bagged Ferro Carbo from the East to serve its customers in Illinois, at an additional cost of $31,000.

Lake River brought this suit for $241,000, which it claims as liquidated damages. Carborundum counterclaimed for the value of the bagged Ferro Carbo when Lake River impounded it and the additional cost of serving the customers affected by the impounding. The theory of the counterclaim is that the impounding was a conversion, and not as Lake River contends the assertion of a lien. The district judge, after a bench trial, gave judgment for both parties. Carborundum ended up roughly $42,000 to the good: $269,000 + $31,000-$241,00-$17,000, the last figure representing prejudgment interest on Lake River's damages. (We have rounded off all dollar figures to the nearest thousand.) Both parties have appealed.

The only issue that is not one of damages is whether Lake River had a valid lien on the bagged Ferro Carbo that it refused to ship to Carborundum's customers-that, indeed, it holds in its warehouse to this day. Although Ferro Carbo does no deteriorate with age, the domestic steel industry remains in the doldrums and the product is worth less than it was in 1982 when Lake River first withheld it. If Lake River did not have a valid lien on the product, then it converted it, and must pay Carborundum the $269,000 that the Ferro Carbo was worth back then. . . .

[The court held there was no valid lien.]

The hardest issue in the case is whether the formula in the minimum-guarantee clause imposes a penalty for breach of contract or is merely an effort to liquidate damages. Deep as the hostility to penalty clauses runs in the common law, see Loyd, Penalties and Forfeitures, 29 Harv. L. Rev. 117 (1915), we still might be inclined to question, if we thought ourselves free to do so, whether a modern court should refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments.

Penalty clauses provide an earnest of performance. The clause here enhanced Carborundum's credibility in promising to ship the minimum amount guaranteed by showing that it was willing to pay the full contract price even if it failed to ship anything. On the other side it can be pointed out that by raising the cost of a breach of contract to the contract breaker, a penalty clause increases the risk to his other creditors; increases (what is the same thing and more, because bankruptcy imposes "deadweight" social costs) the risk of bankruptcy; and could amplify the business cycle by increasing the number of bankruptcies in bad times, which is when contracts are most likely to be broken. But since little effort is made to prevent businessmen from assuming risks, these reasons are no better than makeweights.

A better argument is that a penalty clause may discourage efficient as well as inefficient breaches of contract. Suppose a breach would cost the promisee $12,000 in actual damages but would yield the promisor $20,000 in additional profits. Then there would be a net social gain from breach. After being fully compensated for his loss the promissee would be no worse off than if the contract had been performed, while the promisor would be better off by $8,000. But now suppose the contract contains a penalty clause under which the promisor if he breaks his promise must pay the promisee $25,000. The promisor will be discouraged from breaking the contract, since $25,000, the penalty, is greater than $20,000, the profits of the breach; and a transaction that would have increased value will be forgone.

On this view, since compensatory damages should be sufficient to deter inefficient breaches (that is, breaches that cost the victim more than the gain to the contract breaker), penal damages could have no effect other than to deter some efficient breaches. But this overlooks the earlier point that the willingness to agree to a penalty clause is a way of making the promisor and his promise credible and may therefore be essential to inducing some value-maximizing contracts to be made. It also overlooks the more important point that the parties (always assuming they are fully competent) will, in deciding whether to include a penalty clause in their contract, weigh the gains against the costs--costs that include the possibility of discouraging an efficient breach somewhere down the road--and will include the clause only if the benefits exceed those costs as well as all other costs.

On this view the refusal to enforce penalty clauses is (at best) paternalistic--and it seems odd that courts should display parental solicitude for large corporations. But however this may be, we must be on guard to avoid importing our own ideas of sound public policy into an area where our proper judicial role is more than usually deferential. The responsibility for making innovations in the common law of Illinois rests with the courts of Illinois, and not with the federal courts in Illinois. And like every other state, Illinois, untroubled by academic skepticism of the wisdom of refusing to enforce penalty clauses against sophisticated promisors, see, e.g., Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle, 77 Colum. L. Rev. 554 (1977), continues steadfastly to insist on the distinction between penalties and liquidated damages. . . . To be valid under Illinois law a liquidation of damages must be a reasonable estimate at the time of contracting of the likely damages from breach, and the need for estimation at that time must be shown by reference to the likely difficulty of measuring the actual damages from a breach of contract after the breach occurs. If damages would be easy to determine then, of if the estimate greatly exceeds a reasonable upper estimate of what the damages are likely to be, it is a penalty. . . .

The distinction between a penalty and liquidated damages is not an easy one to draw in practice but we are required to draw it and can give only limited weight to the district court's determination. Whether a provision for damages is a penalty clause or a liquidated-damages clause is a question of law rather than fact, . . . , and unlike some courts of appeals we do not treat a determination by a federal district judge on an issue of state law as if it were a finding of fact, and reverse only if persuaded that clear error has occurred, though we give his determination respectful consideration. . . .

Mindful that Illinois courts resolve doubtful cases in favor of classification as a penalty, . . . , we conclude that the damage formula in this case is a penalty and not a liquidation of damages, because it is designed always to assure Lake River more than its actual damages. The formula--full contract price minus the amount already invoiced to Carborundum--is invariant to the gravity of the breach. When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as a penalty becomes unmistakable. . . . This case is within the gravitational field of these principles even though the minimum-guarantee clause does not fix a single sum as damages.

Suppose to begin with that the breach occurs the day after Lake River buys its new bagging system for $89,000 and before Carborundum ships any Ferro Carbo. Carborundum would owe Lake River $533,000. Since Lake River would have incurred at that point a total cost of only $89,000, its net gain from the breach would be $444,000. This is more than four times the profit of $107,000 (20 percent of the contract price of $533,000) that Lake River expected to make from the contract if it had been performed: a huge windfall.

Next suppose (as actually happened here) that breach occurs when 55 percent of the Ferro Carbo has been shipped. Lake River would already have received $293,000 from Carborundum. To see what its costs then would have been (as estimated at the time of contracting), first subtract Lake River's anticipated profit on the contract of $107,000 from the total contract price of $533,000. The difference-Lake River's total cost of performance-is $426,000. Of this, $89,000 is the cost of the new bagging system, a fixed cost. The rest ($426,000-$89,000=$337,000) presumably consists of variable costs that are roughly proportional to the amount of Ferro Carbo bagged; there is no indication of any other fixed costs. Assume, therefore, that if Lake River bagged 55 percent of the contractually agreed quantity, it incurred in doing so 55 percent of its variable costs, or $185,000. When this is added to the cost of the new bagging system, assumed for the moment to be worthless except in connection with the contract, the total cost of performance to Lake River is $274,000. Hence a breach that occurred after 55 percent of contractual performance was complete would be expected to yield Lake River a modest profit of $19,000 ($293,000-$274,000). But now add the "liquidated damages" of $241,000 that Lake River claims, and the result is a total gain from the breach of $260,000, which is almost two and a half times the profit that Lake River expected to gain if there was no breach. And this ignores any use value or salvage value of the new bagging system, which is the property of Lake River-though admittedly it also ignores the time value of money; Lake River paid $89,000 for that system before receiving any revenue from the contract.

To complete the picture, assume that the breach had not occurred till performance was 90 percent complete. Then the "liquidated damages" clause would not be so one-sided, but it would be one-sided. Carborundum would have paid $480,000 for bagging. Against this, Lake River would have incurred its fixed cost of $89,000 plus 90 percent of its variable costs of $337,000 or $303,000. Its total costs would thus be $392,000, and its net profit $88,000. But on top of this it would be entitled to "liquidated damages" of $53,000, for a total profit of $141,000-more than 30 percent more that its expected profit of $107,000 if there was no breach.

The reason for these results is that most of the costs to Lake River of performing the contract are saved if the contract is broken, and this saving is not reflected in the damage formula. As a result, at whatever point in the life of the contract a breach occurs, the damage formula gives Lake River more than its lost profits form the breach-dramatically more if the breach occurs at the beginning of the contract; tapering off at the end, it is true. Still, over the interval between the beginning of Lake River's performance and nearly the end, the clause could be expected to generate profits ranging from 400 percent of the expected contract profits to 130 percent of those profits. And this is on the assumption that the bagging system has no value apart from the contract. If it were worth only $20,000 to Lake River, the range would be 434 percent to 150 percent.

Lake River argues that it would never get as much as the formula suggests, because it would be required to mitigate its damages. This is a dubious argument on several grounds. First, mitigation of damages is a doctrine of the law of court-assessed damages, while the point of a liquidated-damages clause is to substitute party assessment; and that point is blunted, and the certainty that liquidated-damages clauses are designed to give the process of assessing damages impaired, if a defendant can force the plaintiff to take less than the damages specified in the clause, on the ground that the plaintiff could have avoided some of them. It would seem therefore that the clause in this case should be read to eliminate any duty of mitigation, that what Lake River is doing is attempting to rewrite the clause to make it more reasonable, and that since actually the clause is designed to give Lake River the full damages it would incur from breach (and more) even if it made no effort to find a substitute use for the equipment that it brought to perform the contract, this is just one more piece of evidence that it is a penalty clause rather than a liquidated-damages clause. . . . But in any event mitigation would not mitigate the penal character of this clause. If Carborundum did not ship the guaranteed minimum quantity, the reason was likely to be-the reason was-that the steel industry had fallen on hard times and the demand for Ferro Carbo was therefore down. In these circumstances Lake River would have little prospect of finding a substitute contract that would yield it significant profits to set off against the full contract price, which is the method by which it proposes to take account of mitigation. At argument Lake River suggested that it might at least have been able to sell the new bagging equipment to someone for something, and the figure $40,000 was proposed. If the breach occurred on the first day when performance under the contract was due and Lake River promptly sold the bagging equipment for $40,000, its liquidated damages would fall to $493,000. But by the same token its costs would fall to $49,000. Its profit would still be $444,000, which as we said was more than 400 percent of its expected profit on the contract. The penal component would be unaffected.

. . .

The fact that the damage formula is invalid does not deprive Lake River of a remedy. The parties did not contract explicitly with reference to the measure of damages if the agreed-on damage formula was invalidated, but all this means is that the victim of the breach is entitled to his common law damages. See, e.g., Restatement, Second, Contracts § 356, comment a (1981). In this case that would be the unpaid contract price of $241,000 minus the costs that Lake River saved by not having to complete the contract (the variable costs on the other 45 percent of the Ferro Carbo that it never had to bag). The case must be remanded to the district judge to fix these damages.. . .

The judgment of the district court is affirmed in part and reversed in part, and the case is returned to that court to redetermine both parties' damages in accordance with the principles in this opinion. The parties may present additional evidence on remand, and shall bear their own costs in this court. Circuit Rule 18 shall not apple on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Laclede Gas Co. v. Amoco Oil Co.

522 F.2d 33 (8th Cir. 1975)

Ross, Circuit Judge.

 The Laclede Gas Company (Laclede), a Missouri corporation, brought this diversity action alleging breach of contract against the Amoco Oil Company (Amoco), a Delaware corporation. It sought relief in the form of a mandatory injunction prohibiting the continuing breach or, in the alternative, damages. The district court held a bench trial on the issues of whether there was a valid, binding contract between the parties and whether, if there was such a contract, Amoco should be enjoined from breaching it. It then ruled that the "contract is invalid due to lack of mutuality" and denied the prayer for injunctive relief. The court made no decision regarding the requested damages. Laclede Gas Co. v. Amoco Oil Co., 385 F. Supp. 1332, 1336 (E.D. Mo. 1974). This appeal followed, and we reverse the district court's judgment.

 On September 21, 1970, Midwest Missouri Gas Company (now Laclede), and American Oil Company (now Amoco), the predecessors of the parties to this litigation, entered into a written agreement which was designed to provide central propane gas distribution systems to various residential developments in Jefferson County, Missouri, until such time as natural gas mains were extended into these areas. The agreement contemplated that as individual developments were planned the owners or developers would apply to Laclede for central propane gas systems. If Laclede determined that such a system was appropriate in any given development, it could request Amoco to supply the propane to that specific development. This request was made in the form of a supplemental form letter, as provided in the September 21 agreement; and if Amoco decided to supply the propane, it bound itself to do so by signing this supplemental form.

 Once this supplemental form was signed the agreement placed certain duties on both Laclede and Amoco. Basically, Amoco was to "install, own, maintain and operate . . . storage and vaporization facilities and any other facilities necessary to provide [it] with the capability of delivering to [Laclede] commercial propane gas suitable . . . for delivery by [Laclede] to its customers' facilities." Amoco's facilities were to be "adequate to provide a continuous supply of commercial propane gas at such times and in such volumes commensurate with [Laclede's] requirements for meeting the demands reasonably to be anticipated in each Development while this Agreement is in force." Amoco was deemed to be "the supplier," while Laclede was "the distributing utility."

For its part Laclede agreed to "install, own, maintain and operate all distribution facilities" from a "point of delivery" which was defined to be "the outlet of [Amoco] header piping." Laclede also promised to pay Amoco "the Wood River Area Posted Price for propane plus four cents per gallon for all amounts of commercial propane gas delivered" to it under the agreement.

Since it was contemplated that the individual propane systems would eventually be converted to natural gas, one paragraph of the agreement provided that Laclede should give Amoco 30 days written notice of this event, after which the agreement would no longer be binding for the converted development. . . .

 Then, on April 3, 1973, Amoco notified Laclede that its Wood River Area Posted Price of propane had been increased by three cents per gallon. Laclede objected to this increase also and demanded a full explanation. None was forthcoming. Instead Amoco merely sent a letter dated May 14, 1973, informing Laclede that it was "terminating" the September 21, 1970, agreement effective May 31, 1973.

II.

 Since he found that there was no binding contract, the district judge did not have to deal with the question of whether or not to grant the injunction prayed for by Laclede. He simply denied this relief because there was no contract. Laclede Gas Co. v. Amoco Oil Co., supra, 385 F. Supp. at 1336.

 Generally the determination of whether or not to order specific performance of a contract lies within the sound discretion of the trial court. . . . However, this discretion is, in fact, quite limited; and it is said that when certain equitable rules have been met and the contract is fair and plain "specific performance goes as a matter of right." Miller v. Coffeen, 365 Mo. 204, 280 S.W.2d 100, 102 (1955), quoting, Berberet v. Myers, 240 Mo. 58, 77, 144 S.W. 824, 830 (1912). (Emphasis omitted.)

 With this in mind we have carefully reviewed the very complete record on appeal and conclude that the trial court should grant the injunctive relief prayed. We are satisfied that this case falls within that category in which specific performance should be ordered as a matter of right. . . .

 Amoco contends that four of the requirements for specific performance have not been met. Its claims are: (1) there is no mutuality of remedy in the contract; (2) the remedy of specific performance would be difficult for the court to administer without constant and long-continued supervision; (3) the contract is indefinite and uncertain; and (4) the remedy at law available to Laclede is adequate. The first three contentions have little or no merit and do not detain us for long.

 There is simply no requirement in the law that both parties be mutually entitled to the remedy of specific performance in order that one of them be given that remedy by the court. . . .

 While a court may refuse to grant specific performance where such a decree would require constant and long-continued court supervision, this is merely a discretionary rule of decision which is frequently ignored when the public interest is involved. . . .

 Here the public interest in providing propane to the retail customers is manifest, while any supervision required will be far from onerous.

 Section 370 of the RESTATEMENT OF CONTRACTS (1932) provides:

Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.

We believe these criteria have been satisfied here. As discussed in part I of this opinion, as to all developments for which a supplemental agreement has been signed, Amoco is to supply all the propane which is reasonably foreseeably required, while Laclede is to purchase the required propane from Amoco and pay the contract price therefor. . . . the fact that the agreement does not have a definite time of duration is not fatal since the evidence established that the last subdivision should be converted to natural gas in 10 to 15 years. This sets a reasonable time limit on performance and the district court can and should mold the final decree to reflect this testimony.

 It is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law. . . . This is especially true when the contract involves personal property as distinguished from real estate.

 However, in Missouri, as elsewhere, specific performance may be ordered even though personalty is involved in the "proper circumstances." Mo. Rev. Stat. § 400.2-716(1); RESTATEMENT OF CONTRACTS, supra, § 361. And a remedy at law adequate to defeat the grant of specific performance "must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance." National Marking Mach. Co. v. Triumph Mfg. Co., 13 F.2d 6, 9 (8th Cir. 1926). . . .

 One of the leading Missouri cases allowing specific performance of a contract relating to personalty because the remedy at law was inadequate is Boeving v. Vandover, 240 Mo. App. 117, 218 S.W.2d 175, 178 (1949). In that case the plaintiff sought specific performance of a contract in which the defendant had promised to sell him an automobile. At that time (near the end of and shortly after World War II) new cars were hard to come by, and the court held that specific performance was a proper remedy since a new car "could not be obtained elsewhere except at considerable expense, trouble or loss, which cannot be estimated in advance."

 We are satisfied that Laclede has brought itself within this practical approach taken by the Missouri courts. As Amoco points out, Laclede has propane immediately available to it under other contracts with other suppliers. And the evidence indicates that at the present time propane is readily available on the open market. However, this analysis ignores the fact that the contract involved in this lawsuit is for a long-term supply of propane to these subdivisions. The other two contracts under which Laclede obtains the gas will remain in force only until March 31, 1977, and April 1, 1981, respectively; and there is no assurance that Laclede will be able to receive any propane under them after that time. Also it is unclear as to whether or not Laclede can use the propane obtained under these contracts to supply the Jefferson County subdivisions, since they were originally entered into to provide Laclede with propane with which to "shave" its natural gas supply during peak demand periods. Additionally, there was uncontradicted expert testimony that Laclede probably could not find another supplier of propane willing to enter into a long-term contract such as the Amoco agreement, given the uncertain future of worldwide energy supplies. And, even if Laclede could obtain supplies of propane for the affected developments through its present contracts or newly negotiated ones, it would still face considerable expense and trouble which cannot be estimated in advance in making arrangements for its distribution to the subdivisions.

 Specific performance is the proper remedy in this situation, and it should be granted by the district court.

CONCLUSION

 For the foregoing reasons the judgment of the district court is reversed and the cause is remanded for the fashioning of appropriate injunctive relief in the form of a decree of specific performance as to those developments for which a supplemental agreement form has been signed by the parties.

Peevyhouse v. Garland Coal & Mining Co.

382 P.2D 109 (Okla. 1962)

Jackson, Justice.

In the trial court, plaintiffs Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Company, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A 'strip-mining' operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the 'diminution in value' of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract -- that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it might consider the cost of performance of the work defendant agreed to do, 'together with all of the evidence offered on behalf of either party'.

It thus appears that the jury was at liberty to consider the 'diminution in value' of plaintiffs' farm as well as the cost of 'repair work' in determining the amount of damages.

It returned a verdict for plaintiffs for $5000.00 -- only a fraction of the 'cost of performance', but more than the total value of the farm even after the remedial work is done.

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance 'limited, however, to the total difference in the market value before and after the work was performed'.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the 'cost of performance' rule as-opposed to the 'value' rule. The result was to authorize a jury to give plaintiff damages in the amount of $60,000, where the real estate concerned would have been worth only $12,160, even if the work contracted for had been done.

It may be observed that Groves v. John Wunder Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon Sandy Valley & E. R. Co., v. Hughes, 175 Ky. 320, 194 S.W. 344; Bigham v. Wabash-Pittsburg Terminal Ry. Co., 223 Pa. 106, 72 A. 318; and Sweeney v. Lewis Const. Co., 66 Wash. 490, 119 P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the 'value' rule instead of the 'cost of performance' rule. It is of some significance that three out of four appellate courts have followed the diminution in value rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of 'improvements' upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that '\* \* \* in cases where the defect is one that can be repaired or cured without undue expense' the cost of performance is the proper measure of damages, but where '\* \* \* the defect in material or construction is one that cannot be remedied without an expenditure for reconstruction disproportionate to the end to be attained', the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:  'The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.'

It thus appears that the prime consideration in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the 'end to be attained' -- in other words, the 'relative economic benefit'.

In view of the unrealistic fact situation in the instant case, we are of the opinion that the 'relative economic benefit' is a proper consideration here. This is in accord with the recent case of Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that '\* \* \* the defects are remediable from a practical standpoint and the costs are not grossly disproportionate to the results to be obtained'.

We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however . . . where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of non-performance of the remedial work was $300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record.

We are asked by each party to modify the judgment in accordance with the respective theories advanced, and it is conceded that we have authority to do so.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $300.00, and as so modified it is affirmed.

WELCH, DAVISON, HALLEY, and JOHNSON, JJ., concur.

WILLIAMS, C. J., BLACKBIRD, V. C. J., and IRWIN and BERRY, JJ., dissent.

Irwin, Justice (dissenting).

By the specific provisions in the coal mining lease under consideration, the defendant agreed as follows:

7b Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.

7c Lessee agrees to smooth off the top of the spoil banks on the above premises.

7d Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

7f Lessee further agrees to leave no shale or dirt on the high wall of said pits.

Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

Although the contract speaks for itself, there were several negotiations between the plaintiffs and defendant before the contract was executed. Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.

In consideration for the lease contract, plaintiffs were to receive a certain amount as royalty for the coal produced and marketed and in addition thereto their land was to be restored as provided in the contract.

Defendant received as consideration for the contract, its proportionate share of the coal produced and marketed and in addition thereto, the right to use plaintiffs' land in the furtherance of its mining operations.

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

Defendant has received its benefits under the contract and now urges, in substance, that plaintiffs' measure of damages for its failure to perform should be the economic value of performance to the plaintiffs and not the cost of performance.

If a peculiar set of facts should exist where the above rule should be applied as the proper measure of damages, (and in my judgment those facts do not exist in the instant case) before such rule should be applied, consideration should be given to the benefits received or contracted for by the party who asserts the application of the rule.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties.

In the instant action defendant has made no attempt to even substantially perform. The contract in question is not immoral, is not tainted with fraud, and was not entered into through mistake or accident and is not contrary to public policy. It is clear and unambiguous and the parties understood the terms thereof, and the approximate cost of fulfilling the obligations could have been approximately ascertained. There are no conditions existing now which could not have been reasonably anticipated when the contract was negotiated and executed. The defendant could have performed the contract if it desired. It has accepted and reaped the benefits of its contract and now urges that plaintiffs' benefits under the contract be denied. If plaintiffs' benefits are denied, such benefits would inure to the direct benefit of the defendant.

Therefore, in my opinion, the plaintiffs were entitled to specific performance of the contract and since defendant has failed to perform, the proper measure of damages should be the cost of performance. Any other measure of damage would be holding for naught the express provisions of the contract; would be taking from the plaintiffs the benefits of the contract and placing those benefits in defendant which has failed to perform its obligations; would be granting benefits to defendant without a resulting obligation; and would be completely rescinding the solemn obligation of the contract for the benefit of the defendant to the detriment of the plaintiffs by making an entirely new contract for the parties.

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

Osteen v. Johnson

473 P.2d 184 (Colo. Ct. App. 1970)

Dufford, Judge.

. . .

This was an action for breach of an oral contract. Trial was to the court, which found that the plaintiffs had paid the sum of $2,500. In exchange, the defendant had agreed to "promote" the plaintiff's daughter, Linda Osteen, as a singer and composer of country-western music. More specifically, it was found that the defendant had agreed to advertise Linda through various mailings for a period of one year; to arrange and furnish the facilities necessary for Linda to record several songs; to prepare two records from the songs recorded; to press and mail copies of one of the records to disc jockeys throughout the country; and, if the first record met with any success, to press and mail out copies of the second record.

The trial court further found that the defendant did arrange for several recording sessions, at which Linda recorded four songs. A record was prepared of two of the songs, and 1,000 copies of the record were then pressed. Of the pressed records, 340 copies were mailed to disc jockeys, 200 were sent to the plaintiffs, and the remainder were retained by the defendant. Various mailings were made to advertise Linda; flyers were sent to disc jockeys throughout the country; and Linda's professional name was advertised in trade magazines. The record sent out received a favorable review and a high rating in a trade magazine.

Upon such findings the trial court concluded that the defendant had substantially performed the agreement. However, a judgment was entered in favor of the plaintiffs in the sum of $1.00 and cost on the basis that the defendant had wrongfully caused the name of another party to appear on the label of the record as co-author of a song which had been written solely by Linda. The trial court also ordered the defendant to deliver to the plaintiffs certain master tapes and records in the defendant's possession.

RIGHT OF RESTITUTION

Although plaintiffs' reasons are not clearly defined, they argue here that the award of damages is inadequate, and that the trial court erred in concluding that the defendant had substantially performed the agreement. However, no evidence was presented during the trial of the matter upon which an award of other than nominal damages could be based.

In our opinion, the remedy which plaintiffs proved and upon which they can rely is that of restitution. . . . This remedy is available where there has been a contract breach of vital importance, variously defined as a substantial breach or a breach which goes to the essence of the contract. . . .

BREACH OF CONTRACT

The essential question here then becomes whether any breach on the part of the defendant is substantial enough to justify the remedy of restitution. Plaintiffs argue that the defendant breached the contract in the following ways: First, the defendant did not promote Linda for a period of one year as agreed; secondly, the defendant wrongfully caused the name of another party to appear on the label as co-author of the song which had been composed solely by Linda; and thirdly, the defendant, failed to press and mail out copies of the second record as agreed.

The first argument is not supported by the record. Plaintiff's brought the action within the one-year period for which the contract was to run. There was no evidence that during this period the defendant had not continued to promote Linda through the use of mailings and advertisements. Quite obviously the mere fact that the one-year period had not ended prior to the commencement of the action does not justify the conclusion that the defendant had breached the agreement. Plaintiffs' second argument overlooks the testimony offered on behalf of the defendant that listing the other party as co-author of the song would make it more likely that the record would be played by disc jockeys.

The plaintiffs' third argument does, however, have merit. It is clear from the record and the findings of the trial court that the first record had met with some success. It is also clear that copies of the second record were neither pressed nor mailed out. In our opinion the failure of the defendant to press and mail out copies of the second record after the first had achieved some success constituted a substantial breach of the contract and, therefore, justifies the remedy of restitution. . . . Both parties agree that the essence of their contract was to publicize Linda as a singer of western songs and to make her name and talent known to the public. Defendant admitted and asserted that the primary method of achieving this end was to have records pressed and mailed to disc jockeys.

. . .

DETERMINING DAMAGES

It is clear that the defendant did partially perform the contract, and under applicable law, should be allowed compensation for the reasonable value of his services. . . .

It shall, therefore, be the ultimate order of this court that prior to restoring to the plaintiffs the $2,500 paid by them to the defendant further proceedings be held during which the trial court shall determine the reasonable value of the services which the defendant rendered on plaintiff' behalf.

The judgment is reversed, and this case is remanded with directions that a new trial be held to determine the one issue of the amount to which the plaintiffs are entitled by way of restitution. Such amount shall be the $2,500 paid by plaintiffs to defendant less the reasonable value of the services which the defendant performed on behalf of plaintiffs.

COYTE and PIERCE, JJ., concur.

K & G Constr. Co. v. Harris

164 A.2d 451 (Md. 1960)

Feeling aggrieved by the action of the trial judge of the Circuit Court for Prince George's County, sitting without a jury, in finding a judgment against it in favor of a subcontractor, the appellant, the general contractor on a construction project, appealed.

The principal question presented is: Does a contractor, damaged by a subcontractor's failure to perform a portion of his work in a workmanlike manner, have a right, under the circumstances of this case, to withhold, in partial satisfaction of said damages, an installment payment, which, under the terms of the contract, was due the subcontractor, unless the negligent performance of his work excused its payment?

. . .

          [The relevant sequence of events was as follows:

**July 25**: the subcontractor performed work under the contract during July for which it submitted a requisition by the 25th of July, as required by the contract, for work done prior to the 25th of July, payable under the terms of the contract by the contractor on or before August 10.

**August 9**:   The subcontractor had a bulldozer accident that damaged the seriously damaged a wall that was part of the contractor’s construction project.

**August 10**:  The contractor refused to pay the subcontractor's requisition due on August 10 because the subcontractor had not repaired or paid for bulldozer damage.  The subcontractor regarded the accident and the refusal to repair or pay for the damage as a breach of the subcontractor’s contractual obligation to perform “[a]ll work . . . in a workmanlike manner, and in accordance with the best practices.”

**September 12**:  The subcontractor discontinued working on the project because of the contractor's refusal to pay.

The value of the work completed by the subcontractor on the project for which they had not been paid was $ 1,484.50.  If it had completed the remaining work to be done under the contract, it would have made a profit of $1,340.00 on the remaining uncompleted portion of the contract. It cost the Contractor $450.00 over the contract price to have another excavating contractor complete the remaining work required under the contract.]

It is immediately apparent that our decision turns upon the respective rights and liabilities of the parties under that portion of their contract whereby the subcontractor agreed to do the excavating and earth-moving work in "a workmanlike manner, and in accordance with the best practices," with time being of the essence of the contract, and the contractor agreed to make progress payments therefor on the 10th day of the months following the performance of the work by the subcontractor. The subcontractor contends, of course, that when the contractor failed to make the payment due on August 10, 1958, he breached his contract and thereby released him (the subcontractor) from any further obligation to perform. The contractor, on the other hand, argues that the failure of the subcontractor to perform his work in a workmanlike manner constituted a material breach of the contract, which justified his refusal to make the August 10 payment; and, as there was no breach on his part, the subcontractor had no right to cease performance on September 12, and his refusal to continue work on the project constituted another breach, which rendered him liable to the contractor for damages. The vital question, more tersely stated, remains: Did the contractor have a right, under the circumstances, to refuse to make the progress payment due on August 10, 1958?

. . . Promises are mutually dependent if the parties intend performance by one to be conditioned upon performance by the other, and, if they be mutually dependent, they may be (a) precedent, i.e., a promise that is to be performed before a corresponding promise on the part of the adversary party is to be performed, (b) subsequent, i.e., a corresponding promise that is not to be performed until the other party to the contract has performed a precedent covenant, or (c) concurrent, i.e., promises that are to be performed at the same time by each of the parties, who are respectively bound to perform each.

. . . The modern rule, which seems to be of almost universal application, is that there is a presumption that mutual promises in a contract are dependent and are to be so regarded, whenever possible. . . .

Considering the presumption that promises and counter-promises are dependent and the statement of the case, we have no hesitation in holding that the promise and counter-promise under consideration here were mutually dependent, that is to say, the parties intended performance by one to be conditioned on performance by the other; and the subcontractor's promise was, by the explicit wording of the contract, precedent to the promise of payment, monthly, by the contractor.

In *Shapiro Eng. Corp. v. Francis O. Day Co.*, 215 Md. 373, 380, 137 A. 2d 695, we stated that it is the general rule that where a total price for work is fixed by a contract, the work is not rendered divisible by progress payments. It would, indeed, present an unusual situation if we were to hold that a building contractor, who has obtained someone to do work for him and has agreed to pay each month for the work performed in the previous month, has to continue the monthly payments, irrespective of the degree of skill and care displayed in the performance of work, and his only recourse is by way of suit for ill-performance. If this were the law, it is conceivable, in fact, probable, that many contractors would become insolvent before they were able to complete their contracts. . . .

We hold that when the subcontractor's employee negligently damaged the contractor's wall, this constituted a breach of the subcontractor's promise to perform his work in a "workmanlike manner, and in accordance with the best practices." . . . And there can be little doubt that the breach was material: the damage to the wall amounted to more than double the payment due on August 10. . .

Professor Corbin, [Contracts] in para. 954, states further: “The unexcused failure of a contractor to render a promised performance when it is due is always a breach of contract . . .  Such failure may be of such great importance as to constitute what has been called herein a ‘total’ breach. . . For a failure of performance constituting such a 'total' breach, an action for remedies that are appropriate thereto is at once maintainable. Yet the injured party is not required to bring such an action. He has the option of treating the non-performance as a ‘partial’ breach only.” In permitting the subcontractor to proceed with work on the project after August 9, the contractor, obviously, treated the breach by the subcontractor as a partial one. As the promises were mutually dependent and the subcontractor had made a material breach in his performance, this justified the contractor in refusing to make the August 10 payment; hence, as the contractor was not in default, the subcontractor again breached the contract when he, on September 12, discontinued work on the project, which rendered him liable (by the express terms of the contract) to the contractor for his increased cost in having the excavating done -- a stipulated amount of $450.

. . .

Judgment against the appellant reversed; and judgment entered in favor of the appellant against the appellees for $450, the appellees to pay the costs.

Walker & Co. v. Harrison

81 N.W.2d 352 (Mich. 1957)

Smith, J.

This is a suit on a written contract. The defendants are in the dry-cleaning business. Walker & Company, plaintiff, sells, rents, and services advertising signs and billboards. These parties entered into an agreement pertaining to a sign. The agreement is in writing and is termed a "rental agreement." It specifies, in part, that:

The lessor agrees to construct and install, at its own cost, one 18 feet 9 inch high x 8 feet 8 inch wide pylon type d.f. neon sign with electric clock and flashing lamps. \* \* \* The lessor agrees to and does hereby lease or rent unto the said lessee the said sign for the term, use and rental and under the conditions, hereinafter set out, and the lessee agrees to pay said rental. \* \* \*

(a) The term of this lease shall be 36 months.
(b) The rental to be paid by lessee shall be $148,50 per month for each and every calendar month during the term of this lease; \* \* \*

(c) Maintenance. Lessor at its expense agrees to maintain and service the sign together with such equipment as supplied and installed by the lessor to operate in conjunction with said sign under the terms of this lease; this service is to include cleaning and repainting of sign in original color scheme as often as deemed necessary by lessor to keep sign in first-class advertising condition and make all necessary repairs to sign and equipment installed by lessor.

. . .

The sign was completed and installed in the latter part of July, 1953. The first billing of the monthly payment of $148.50 was made August 1, 1953, with payment thereof by defendants on September 3, 1953. This first payment was also the last. Shortly after the sign was installed, someone hit it with a tomato. Rust, also, was visible on the chrome, complained defendants, and in its corners were "little spider cobwebs." In addition, there were "some children's sayings written down in here." Defendant Herbert Harrison called Walker for the maintenance he believed himself entitled to under subparagraph (d) above. It was not forthcoming. He called again and again. "I was getting, you might say, sorer and sorer. \* \* \* Occasionally, when I started calling up, I would walk around where the tomato was and get mad again. Then I would call up on the phone again." Finally, on October 8, 1953, plaintiff not having responded to his repeated calls, he telegraphed Walker that:

YOU HAVE CONTINUALLY VOIDED OUR RENTAL CONTRACT BY NOT MAINTAINING SIGNS AS AGREED AS WE NO LONGER HAVE A CONTRACT WITH YOU DO NOT EXPECT ANY FURTHER REMUNERATION.

Walker's reply was in the form of a letter. After first pointing out that "your telegram does not make any specific allegations as to what the failure of maintenance comprises," and stating that "We certainly would appreciate your furnishing us with such information,". . . and concludes as follows:

We would like to call your attention to paragraph G in our rental contract, which covers procedures in the event of a breach of agreement. In the event that you carry out your threat to make no future monthly payments in accordance with the agreement, it is our intention to enforce the conditions outlined under paragraph G\* through the proper legal channels. We call to your attention that your monthly rental payments are due in advance at our office not later than the 10th day of each current month. You are now approximately 30 days in arrears on your September payment. Unless we receive both the September and October payments by October 25th, this entire matter will be placed in the hands of our attorney for collection in accordance with paragraph G which stipulates that the entire amount is forthwith due and payable.

\*(g) Breach of agreement. Lessee shall be deemed to have breached this agreement by default in payment of any installment of the rental herein provided for; abandonment of the sign or vacating premises where the sign is located; termination or transfer of lessee's interest in the premises by insolvency, appointment of a receiver for lessee's business; filing of a voluntary or involuntary petition in bankruptcy with respect to lessee or the violation of any of the other terms or conditions hereof. In the event of such default, the lessor may, upon notice to the lessee, which notice shall conclusively be deemed sufficient if mailed or delivered to the premises where the sign was or is located, take possession of the sign and declare the balance of the rental herein provided for to be forthwith due and payable, and lessee hereby agrees to pay such balance upon any such contingencies. Lessor may terminate this lease and without notice, remove and repossess said sign and recover from the lessee such amounts as may be unpaid for the remaining unexpired term of this agreement. Time is of the essence of this lease with respect to the payment of rentals herein provided for. Should lessee after lessor has declared the balance of rentals due and payable, pay the full amount of rental herein provided, he shall then be entitled to the use of the sign, under all the terms and provisions hereof, for the balance of the term of this lease. No waiver by either party hereto of the nonperformance of any term, condition or obligation hereof shall be a waiver of any subsequent breach of, or failure to perform the same, or any other term, condition or obligation hereof. It is understood and agreed that the sign is especially constructed for the lessee and for use at the premises now occupied by the lessee for the term herein provided; that it is of no value unless so used and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign for the period of time provided herein and for the payment of the full rental for such term.

No additional payments were made and Walker sued in assumpsit for the entire balance due under the contract, $5,197.50, invoking paragraph (g) of the agreement. Defendants filed answer and claim of recoupment, asserting that plaintiff's failure to perform certain maintenance services constituted a prior material breach of the agreement, thus justifying their repudiation of the contract and grounding their claim for damages. The case was tried to the court without a jury and resulted in a judgment for the plaintiff. The case is before us on a general appeal.

Defendants urge upon us again and again, in various forms, the proposition that Walker's failure to service the sign, in response to repeated requests, constituted a material breach of the contract and justified repudiation by them . . . Repudiation is one of the weapons available to an injured party in event the other contractor has committed a material breach. But the injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the clam of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.

What is our criterion for determining whether or not a breach of contract is so fatal to the undertaking of the parties that it is to be classed as "material"? There is no single touchstone. Many factors are involved. They are well stated in 1 Restatement, Contracts, § 275, in the following terms:

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The willful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

We will not set forth in detail the testimony offered concerning the need for servicing. Granting that Walker's delay (about a week after defendant Herbert Harrison sent his telegram of repudiation Walker sent out a crew and took care of things) in rendering the service requested was irritating, we are constrained to agree with the trial court that it was not of such materiality as to justify repudiation of the contract . . . The trial court, on this phase of the case, held as follows:

Now Mr. Harrison phoned in, so he testified, a number of times. He isn't sure of the dates but he set the first call at about the 7th of August and he complained then of the tomato and of some rust and some cobwebs. The tomato, according to the testimony, was up on the clock; that would be outside of his reach, without a stepladder or something. The cobwebs are within easy reach of Mr. Harrison and so would the rust be. I think that Mr. Bueche's argument that these were not materially a breach would clearly be true as to the cobwebs and I really can't believe in the face of all the testimony that there was a great deal of rust 7 days after the installation of this sign. And that really brings it down to the tomato. And, of course, when a tomato has been splashed all over your clock, you don't like it. But he says he kept calling their attention to it, although the rain probably washed some of the tomato off. But the stain remained, and they didn't come. I really can't find that that was such a material breach of the contract as to justify rescission. I really don't think so.

Nor, we conclude, do we. There was no valid ground for defendants' repudiation and their failure thereafter to comply with the terms of the contract was itself a material breach, entitling Walker, upon this record, to judgment.

. . .

Affirmed. Costs to appellee.

Hochster v. De La Tour

In the Queen's Bench, 1853

2 Ellis & Bl. 678

This was an action for breach of contract. On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who, in April, 1852, was engaged by defendant to accompany him on a tour to commence on June 1st, 1852, on the terms mentioned in the declaration. On May 11th, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on May 22d. The plaintiff, between the commencement of the action and June 1st, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till July 4th. . . .

[What follows is the discussion between the judges and the attorneys, Hugh Hill and Deighton, representing De La Tour.]

Crompton, J. When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word “rescind” implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: “Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.” This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal. . . .

Hugh Hill and Deighton, contra. . . .[T[he defendant's position . . .is . . . that an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal; but till then it may be retracted. . .

Crompton, J. May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?

[Hugh Hill and Deighton] If he adopts the defendant's notice, which is in legal effect an offer to rescind, he must adopt it altogether.

Lord Campbell, C.J. So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle.

Erle, J. Do you go one step further? Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on the 1st of June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?

[Hugh Hill and Deighton] It would be, in such a case, a question of fact for a jury, whether there had not been an exoneration. . . .

LORD CAMPBELL, C.J., now delivered the judgment of the Court.

On this motion in arrest of judgment, the question arises, whether if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement before that day to give a right of action.

. . .

If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st of June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise “to start with the defendant on such travels on the day and year,” and that he must then be properly equipped in all respects as a courier for a three months’ tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it.  Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation to the damages to which he would otherwise be entitled for a breach of the contract.

It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind.

If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.

. . . The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

. . .

Judgment for plaintiff.

Hathaway v. Sabin

22 A. 633 (Vt. 1891)

Munson, J.

The plaintiff declares as "George H. Hathaway, doing business under the name of the 'Redpath Lyceum Bureau.'" . . .

The contract required the defendant to furnish a hall for the concert, and to pay $75 after the entertainment. The plaintiff alleged readiness to perform on his part, and assigned as the breach the defendant's failure to furnish a hall. The court directed a verdict for the plaintiff for $75 and interest. . . . The plaintiff was ready to give the concert, and on giving it would have been entitled to the $75, but he was prevented from giving it by the defendant's failure to furnish a hall. . . .

The defendant . . . contends that he was excused from opening and heating the hall by the apparent impossibility of the musicians' reaching the town. During the 36 hours preceding the evening appointed for the concert a snow-storm of unusual violence prevailed in Montpelier and vicinity which early on the day of the concert rendered the streets of that village and the roads from the surrounding country practically impassable. The quartette by which the concert was to be given was in Barre, having gone from Montpelier the evening before, and trains on the spur from Montpelier to Barre were suspended. Late in the afternoon, however, an irregular train went to Barre, and on this the musicians returned to Montpelier, arriving early in the evening, and going to the hall at the time appointed. It is claimed that the defendant's conduct must be tested by the situation as it was at the time when action on his part became necessary, and that he is saved from liability by the doctrine that, when one party ascertains that the other will not be able to perform what he has undertaken, the party ascertaining this is excused from performing the obligations resting upon him.

It is doubtless true that, **[1]** when one party has put it out of his power to perform, the other party can maintain an action without having tendered performance on his part. **[2]** But a party who becomes involved in difficulties for which he is not responsible, if ultimately able to perform, is not to be deprived of the benefits of his contract because of an assumption by the other party that the difficulties would prove insurmountable.

**[3]** Here the defendant was mistaken in supposing that the plaintiff would not be able to perform, and we know of no rule which permits him to plead reasonable cause to believe so in excuse for the failure on his part.  It is apparent, also, that the defendant's course was determined before the time when action on his part became necessary. It was not necessary to commence the heating of the hall until 4 o'clock in the afternoon, but about 10 o'clock in the forenoon the defendant telephoned the manager that, owing to the condition of the streets in Montpelier, it would be impossible to have the entertainment that evening.

It is evident from this that the defendant based his action upon his belief that there would be no audience, rather than upon the supposition that the musicians could not reach the place of entertainment.  He did not wait until it was necessary to take action about the hall before deciding that there could be no concert. But, at the time when action on his part became necessary, there was nothing in the situation which could relieve him from liability. The contract contains no provision for his protection from such a misfortune, and the loss must fall on him.

. . .

Judgment affirmed.

Taylor v. Caldwell

In the Queen's Bench, 1863.
Best & S. 826

Blackburn, J.

        In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night fetes, at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

        . . . The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfillment of the contract, such entertainments as the parties contemplated in their agreement could not be given without it.

        After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. [The damages claimed in the declaration were for moneys paid by the plaintiffs in advertising the concerts and for sums expended and expenses incurred by them in preparing for the concerts.] The parties--when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

        There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied;

and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

        There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition....

        We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

        Rule absolute.

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.

United States v. Wegematic Corp.

360 F.2d 674 (2nd Cir. 1966)

OPINION

FRIENDLY, Circuit Judge:

The facts developed at trial in the District Court for the Southern District of New York, fully set forth in a memorandum by Judge Graven, can be briefly summarized: In June 1956 the Federal Reserve Board invited five electronics manufacturers to submit proposals for an intermediate-type, general-purpose electronic digital computing system or systems; the invitation stressed the importance of early delivery as a consideration in determining the Board's choice. Defendant, a relative newcomer in the field, which had enjoyed considerable success with a smaller computer known as the ALWAC III-E, submitted a detailed proposal for the sale or lease of a new computer designated as the ALWAC 800. It characterized the machine as "a truly revolutionary system utilizing all of the latest technical advances," and featured that "maintenance problems are minimized by the use of highly reliable magnetic cores for not only the high speed memory but also logical elements and registers." Delivery was offered nine months from the date the contract or purchase order was received. In September the Board acted favorably on the defendant's proposal, ordering components of the ALWAC 800 with an aggregate cost of $231,800. Delivery was to be made on June 30, 1957, with liquidated damages of $100 per day for delay. The order also provided that in the event the defendant failed to comply "with any provision" of the agreement, "the Board may procure the services described in the contract from other sources and hold the Contractor responsible for any excess cost occasioned thereby." Defendant accepted the order with enthusiasm.

The first storm warning was a suggestion by the defendant in March 1957 that the delivery date be postponed. In April it informed the Board by letter that delivery would be made on or before October 30 rather than as agreed, the delay being due to the necessity of "a redesign which we feel has greatly improved this equipment"; waiver of the stipulated damages for delay was requested. The Board took the request under advisement. On August 30 defendant wrote that delivery would be delayed "possibly into 1959"; it suggested use of ALWAC III-E equipment in the interim and waiver of the $100 per day "penalty." The Board also took this request under advisement but made clear it was waiving no rights. In mid-October defendant announced that "due to engineering difficulties it has become impracticable to deliver the ALWAC 800 Computing System at this time"; it requested cancellation of the contract without damages. The Board set about procuring comparable equipment from another manufacturer; on October 6, 1958, International Business Machines Corporation delivered an IBM 650 computer, serving substantially the same purpose as the ALWAC 800, at a rental of $102,000 a year with an option to purchase for $410,450.

In July 1958 the Board advised defendant of its intention to press its claim for damages; this suit followed. The court awarded the United States $46,300 for delay under the liquidated damages clause, $179,450 for the excess cost of the IBM equipment, and $10,056 for preparatory expenses useless in operating the IBM system -- a total of $235,806, with 6% interest from October 6, 1958.

The principal point of the defense, which is the sole ground of this appeal, is that delivery was made impossible by "basic engineering difficulties" whose correction would have taken between one and two years and would have cost a million to a million and a half dollars, with success likely but not certain. Although the record does not give an entirely clear notion what the difficulties were, two experts suggested that they may have stemmed from the magnetic cores, used instead of transistors to achieve a solid state machine, which did not have sufficient uniformity at this stage of their development. Defendant contends that under federal law, which both parties concede to govern, see Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745, 751-753 (2 Cir. 1960), the "practical impossibility" of completing the contract excused its defaults in performance.

We agree with the defendant that the decisions most strongly relied on by the Government are not controlling; much of the seeming confusion in this field of law stems from failure to make necessary distinctions as to who is suing whom for what. Thus Day v. United States, 245 U.S. 159, 38 S. Ct. 57, 62 L. Ed. 219 (1917), and Fritz-Rumer-Cooke Co. v. United States, 279 F.2d 200, 6 Cir. (1960), involved no question of nonperformance but an attempt by a contractor who had fully performed to secure added compensation for surmounting unexpected difficulties. While Austin Co. v. United States, 314 F.2d 518, 161 Ct.Cl. 76, cert. denied, 375 U.S. 830, 84 S. Ct. 75, 11 L. Ed. 2d 62 (1963), did involve failure by a manufacturer to perform because of engineering problems, it was not an effort to resist damages, which the Government did not seek; the contractor was attempting to recover costs incurred prior to termination under a special clause in the contract without which, as Professor Corbin has noted, it "would not have had the shadow of a claim." 6 Corbin, Contracts § 1328 n. 40 (1964 Pocket Part). Consolidated Airborne Systems, Inc. v. United States, 172 Ct. Cl. 588, 348 F.2d 941 (Ct.Cl.1965), was a case of financial inability peculiar to the contractor and is distinguishable under the doctrine of "subjective impossibility," that a promisor's duty is never discharged "by the mere fact that supervening events deprive him of the ability to perform, if they are not such as to deprive other persons, likewise, of ability to render such a performance." 6 Corbin, Contracts | 1332, at 361 (1962). And in Carnegie Steel Co. v. United States, 240 U.S. 156, 36 S. Ct. 342, 60 L. Ed. 576 (1916), which is most nearly apposite in that it concerned a claim by the promisee for delay occasioned by an unanticipated technological problem encountered by the promisor, the precise issue was whether the difficulty came within a clause excusing delays resulting from "unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc." 240 U.S. at 163, 36 S. Ct. at 344. On the other hand, the mere fact that the Government's cases do not dictate decision in its favor does not mean that defendant wins; it means only that we must seek guidance elsewhere.

We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the "federal" law of sales. The Code has been adopted by Congress for the District of Columbia, 77 Stat. 630 (1963), has been enacted in over forty states, and is thus well on its way to becoming a truly national law of commerce, which, as Judge L. Hand said of the Negotiable Instruments Law, is "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson." New York, N.H. & H.R. Co. v. Reconstruction Finance Corp., 180 F.2d 241, 244 (2 Cir. 1950). When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.

Section 2-615 of the UCC, entitled "Excuse by failure of presupposed conditions," provides that:

"Except so far as a seller may have assumed a greater obligation. . . delay in delivery or non-delivery. . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made. . . "

The latter part of the test seems a somewhat complicated way of putting Professor Corbin's question of how much risk the promisor assumed. Recent Developments in the Law of Contracts, 50 Harv.L.Rev. 449, 465-66 (1937); 2 Corbin, Contracts § 1333, at 371. We see no basis for thinking that when an electronics system is promoted by its manufacturer as a revolutionary breakthrough, the risk of the revolution's occurrence falls on the purchaser; the reasonable supposition is that it has already occurred or, at least, that the manufacturer is assuring the purchaser that it will be found to have when the machine is assembled. As Judge Graven said: "The Board in its invitation for bids did not request invitations to conduct a development program for it. The Board requested invitations from manufacturers for the furnishing of a computer machine." Acceptance of defendant's argument would mean that though a purchaser makes his choice because of the attractiveness of a manufacturer's representation and will be bound by it, the manufacturer is free to express what are only aspirations and gamble on mere probabilities of fulfillment without any risk of liability. In fields of developing technology, the manufacturer would thus enjoy a wide degree of latitude with respect to performance while holding an option to compel the buyer to pay if the gamble should pan out. See Austin Co. v. United States, 314 F.2d 518, 521, 161 Ct.Cl. 76, cert. denied, 375 U.S. 830, 84 S. Ct. 75, 11 L. Ed. 2d 62 (1963). We do not think this the common understanding -- above all as to a contract where the manufacturer expressly agreed to liquidated damages for delay and authorized the purchaser to resort to other sources in the event of non-delivery. Contrast National Presto Industries, Inc. v. United States, 338 F.2d 99, 106-112, 167 Ct.Cl. 749 (1964), cert. denied, 380 U.S. 962, 14 L. Ed. 2d 153, 85 S. Ct. 1105 (1965). If a manufacturer wishes to be relieved of the risk that what looks good on paper may not prove so good in hardware, the appropriate exculpatory language is well known and often used.
Beyond this the evidence of true impracticability was far from compelling. The large sums predicted by defendant's witnesses must be appraised in relation not to the single computer ordered by the Federal Reserve Board, evidently for a bargain price, but to the entire ALWAC 800 program as originally contemplated. Although the record gives no idea what this was, even twenty-five machines would gross $10,000,000 if priced at the level of the comparable IBM equipment. While the unanticipated need for expending $1,000,000 or $1,500,000 on redesign might have made such a venture unattractive, as defendant's management evidently decided, the sums are thus not so clearly prohibitive as it would have them appear. What seemingly did become impossible was on-time performance; the issue whether if defendant had offered prompt rectification of the design, the Government could have refused to give it a chance and still recover not merely damages for delay but also the higher cost of replacement equipment, is not before us.

Affirmed.

Krell v. Henry

[1903] 2 K.B. 740

Appeal from a decision of Darling, J.

The plaintiff, Paul Krell, sued the defendant, C.S. Henry, for £50, the balance of a sum of £75, for which the defendant had agreed to hire a flat at 56A, Pall Mall on the days of June 26 and 27, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty. The defendant denied his liability, and counterclaimed for the return of the sum of £25, which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.

The facts, which were not disputed, were as follows. The plaintiff on leaving the country in March, 1902, left instructions with his solicitor to let his suite of chambers at 56A, Pall Mall on such terms and for such period (not exceeding six months) as he thought proper. On June 17, 1902, the defendant noticed an announcement in the windows of the plaintiff's flat to the effect that windows to view the coronation processions were to be let. The defendant interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the procession could be obtained from the premises, and he eventually agreed with the housekeeper to take the suite for the two days in question for a sum of £75.

On June 20 the defendant wrote the following letter to the plaintiff's solicitor:—

I am in receipt of yours of the 18th instant, inclosing form of agreement for the suite of chambers on the third floor at 56A, Pall Mall, which I have agreed to take for the two days, the 26th and 27th instant, for the sum of £75. For reasons given you I cannot enter into the agreement, but as arranged over the telephone I inclose herewith cheque for £25 as deposit, and will thank you to confirm to me that I shall have the entire use of these rooms during the days (not the nights) of the 26th and 27th instant. You may rely that every care will be taken of the premises and their contents. On the 24th inst. I will pay the balance, viz., £50, to complete the £75 agreed upon.

On the same day the defendant received the following reply from the plaintiff's solicitor:—

I am in receipt of your letter of today's date inclosing cheque for £25 deposit on your agreeing to take Mr. Krell's chambers on the third floor at 56A, Pall Mall for the two days, the 26th and 27th June, and I confirm the agreement that you are to have the entire use of these rooms during the days (but not the nights), the balance, £50, to be paid to me on Tuesday next the 24th instant.

The processions not having taken place on the days originally appointed, namely, June 26 and 27, the defendant declined to pay the balance of £50 alleged to be due from him under the contract in writing of June 20 constituted by the above two letters. Hence the present action.

Darling J., on August 11, 1902, held upon the authority of *Taylor v. Caldwell* and *The Moorcock* (1889, 14 P.D. 64), that there was an implied condition in the contract that the procession should take place, and gave judgment for the defendant on the claim and counterclaim.

The plaintiff appealed.

. . .

Vaughan Williams, L.J. read the following written judgment:— . . . It is said, on the one side [by Krell, the owner of the flat], that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfillment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract.

But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of . . . is limited to cases in which the event causing the impossibility of performance is the destruction or nonexistence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the nonexistence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited . . .

In my judgment [in this case] the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a license to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred.

It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say £10, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well.  Moreover, I think, that under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract.

Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract . . .

I think this appeal ought to be dismissed.

Griffith v. Brymer

King's Bench Div., 1903
19 T.L.R. 434

This was an action brought by Mr. Murray Griffith, of 8, Seamoreplace, Park-lane against Colonel W.E. Brymer, M.P., of 8, St. Jame's-street to recover the sum of 100 pounds paid on an agreement to hire a certain room at 8, St. Jame's-street for the purpose of viewing the Coronation Procession on June 26, 1902.

The facts, so far as the material, were as follows:--At 11 a.m. on June 24, 1902, the plaintiff entered into a verbal agreement with Messrs. Pope, Roach, and Co., the defendant's agents, to take the room for the purpose of viewing the procession on June 26, and handed over his cheque for 100 pounds. It was admitted that the decision to operate on the King, which rendered the procession impossible, had been reached at about 10 a.m. that morning. But neither party was aware of this fact when the agreement was entered into and the cheque given; and it was contended for the plaintiff that as both parties were under a misconception with regard to the existing state of facts about which they were contracting, the plaintiff was entitled to the return of his money. In the course of the argument Clark v. Lindsay, 19 T.L.R. 202, 88 L.T. 198, and Blakeley v. Muller, 19 T.L.R. 186, were cited.

Mr. Justice Wright held that . . . [t]he agreement was made on the supposition by both parties that nothing had happened which made the performance impossible. This was a missupposition on the state of the facts which went to the whole root of the matter. The contract was therefore void, and the plaintiff was entitled to recover his 100 pounds.

Sherwood v. Walker

33 N.W. 919 (Mich. 1887)

Morse, J.

. . .

The main controversy depends upon the construction of a contract for the sale of the cow. . .

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 21 of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

WALKERVILLE, May 15, 1886

T. C. SHERWOOD,
President, etc., --

Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue at five and a half cents per pound, less fifty pounds shrink. We enclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, if you prefer.

Yours truly,

HIRAM WALKER & SONS.

The order Graham enclosed in the letter read as follows:

ALKERVILLE, May 15, 1886

George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

Yours truly,
HIRAM WALKER & SONS.

On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted his suit.

After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

. . .

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

. . .

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

. . . it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual . . .

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580, 588.

. . .

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature.

Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much different between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known there would have been no contract. This mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was.

The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold when she is in fact a breeding cow, and a valuable one.

The court should have instructed the jury that if they found that the cow was sold, or contracted to be sole, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and new trial granted, with costs of this Court to defendants.

Sherwood, J. (dissenting). I do not concur in the opinion given by my brethren in this case. I think the judgments before the justice and at the circuit were right.

. . .

As has already been stated by my brethren, the record shows that the plaintiff is a banker, and farmer as well, carrying on a farm, and raising the best breeds of stock, and lived in Plymouth, in the county of Wayne, 23 miles from Detroit; that the defendants lived in Detroit, and were also dealers in stock of the higher grades; that they had a farm at Walkerville, in Canada, and also one in Greenfield, in said county of Wayne, and upon these farms the defendants kept their stock. The Greenfield farm was about 15 miles from the plaintiff's.

In the spring of 1886 the plaintiff, learning that the defendants had some "polled Angus cattle" for sale, was desirous of purchasing some of that breed, and, meeting the defendants, or some of them, at Walkerville, inquired about them, and was informed that they had none at Walkerville, "but had a few head left on their farm in Greenfield, and they asked the plaintiff to go and see them, stating that in all probability they were sterile and would not breed." In accordance with said request, the plaintiff, on the fifth day of May, went out and looked at the defendants' cattle at Greenfield, and found one called "Rose 2d," which he wished to purchase, and the terms were finally agreed upon at five and one-half cents per pound, live weight, 50 pounds to be deducted for shrinkage. The sale was in writing, and the defendants gave an order to the plaintiff directing the man in charge of the Greenfield farm to deliver the cow to plaintiff. This was done on the fifteenth of May. On the twenty-first of May plaintiff went to get his cow, and the defendants refused to let him have her; claiming at the time that the man in charge at the farm thought the cow was with calf, and, if such was the case, they would not sell her for the price agreed upon.

The record further shows that the defendants, when they sold the cow, believed the cow was not with calf, and barren; that from what the plaintiff had been told by defendants (for it does not appear he had any other knowledge or facts from which he could form an opinion) he believed the cow was farrow, but still thought she could be made to breed.

The foregoing shows the entire interview and treaty between the parties as to the sterility and qualities of the cow sold to the plaintiff. The cow had a calf in the month of October.

There is no question but that the defendants sold the cow representing her of the breed and quality they believed the cow to be, and that the purchaser so understood it. And the buyer purchased her believing her to be of the breed represented by the sellers, and possessing all the qualities stated, and even more. He believed she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. Under the foregoing facts, -- and these are all that are contained in the record material to the contract, -- it is held that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at the time by either party to exist, the contract may be annulled by the defendants at their pleasure. I know of no law, and have not been referred to any, which will justify any such holding, and I think the circuit judge was right in his construction of the contract between the parties.

It is claimed that a mutual mistake of a material fact was made by the parties when the contract of sale was made. There was no warranty in the case of the quality of the animal. When a mistaken fact is relied upon as ground for rescinding, such fact must not only exist at the time the contract is made, but must have been known to one or both of the parties. Where there is no warranty, there can be no mistake of fact when no such fact exists, or, if in existence, neither party knew of it, or could know of it; and that is precisely the case. If the owner of a Hambletonian horse has speeded him, and was only able to make him go a mile in three minutes, and should sell him to another, believing that was his greatest speed, for $300, when the purchaser believed he could go much faster, and made the purchase for that sum, and a few days thereafter, under more favorable circumstances, the horse was driven a mile in 2 min. 16 sec., and was found to be worth $20,000, I hardly think it would be held, either at law or in equity, by any one, that the seller in such case could rescind the contract. The same legal principles apply in each case.

In this case neither party knew the actual quality and condition of this cow at the time of the sale. The defendants say, or rather said, to the plaintiff, "they had a few head left on their farm in Greenfield, and asked plaintiff to go and see them, stating to plaintiff that in all probability they were sterile and would not breed." Plaintiff did go as requested, and found there three cows, including the one purchased, with a bull. The cow had been exposed, but neither knew she was with calf or whether she would breed. The defendants thought she would not, but the plaintiff says that he thought she could be made to breed, but believed she was not with calf. The defendants sold the cow for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the defendants. No conditions whatever were attached to the terms of sale by either party. It was in fact as absolute as it could well be made, and I know of no precedent as authority by which this Court can alter the contract thus made by these parties in writing, and interpolate in it a condition by which, if the defendants should be mistaken in their belief that the cow was barren, she should be returned to them, and their contract should be annulled.

It is not the duty of courts to destroy contracts when called upon to enforce them, after they have been legally made. There was no mistake of any such material fact by either of the parties in the case as would license the vendors to rescind. There was no difference between the parties, no misapprehension, as to the substance of the thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances. If this were not the law, there would be no safety in purchasing this kind of stock.

. . .

The judgment should be affirmed.

Wood v. Boynton

25 N.W. 42 (Wis. 1885)

Taylor, J.

This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court and, after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and, after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box, --the pin, -- a small earring; . . . this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and spent some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?" I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the 28th of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz and he says "Well, yes; what did I offer you for it?," and I says, "One dollar"; and he stepped to the change drawer and gave me the dollar, and I went out.

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg, -- worn pointed at one end; it was nearly straw color, -- a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no ideas this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. . . .

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, -- a mistake in fact as to the identify of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. . . . Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond.

. . .

When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold . . . .

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. . . .

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

By the Court -- The judgment of the circuit court is affirmed.

Raffles v. Wichelhaus

In the Court of Exchequer, 1864.
2 Hurl. & C. 906.

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's hollorah [a type of cotton], to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17l/4 d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.

Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendant to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end.

Pollock, C.B. It would be a question for the jury whether both parties meant the same ship called the Peerless.

That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name.

Pollock, C.B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.

In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other Peerless.

Martin, B. It is imposing on the defendant a contract different from that which he entered into.

Pollock, C.B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.

The defendant has no right to contradict by parol evidence, a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract.

Pollock, C.B. One vessel sailed in October and the other in December.

The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus ad idem [meeting of the minds], and therefore no binding contract.

He was then stopped by the Court.

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants.

Elsinore Union Elem. Sch. Dist. v. Kastorff

353 P.2d 713 (Cal. 1960)

Defendants, who are a building contractor and his surety, appeal from an adverse judgment in this action by plaintiff school district to recover damages allegedly resulting when defendant Kastorff, the contractor, refused to execute a building contract pursuant to his previously submitted bid to make certain additions to plaintiff's school buildings. We have concluded that because of an honest clerical error in the bid and defendant's subsequent prompt rescission he was not obliged to execute the contract, and that the judgment should therefore be reversed. Pursuant to plaintiff's call for bids, defendant Kastorff secured a copy of the plans and specifications of the proposed additions to plaintiff's school buildings and proceeded to prepare a bid to be submitted by the deadline hour of 8 p. m., August 12, 1952, at Elsinore, California. Kastorff testified that in preparing his bid he employed work sheets upon which he entered bids of various subcontractors for such portions of the work as they were to do, and that to reach the final total of his own bid for the work he carried into the right hand column of the work sheets the amounts of the respective sub bids which he intended to accept and then added those amounts to the cost of the work which he would do himself rather than through a subcontractor; that there is "a custom among subcontractors, in bidding on jobs such as this, to delay giving . . . their bids until the very last moment"; that the first sub bid for plumbing was in the amount of $9,285 and he had received it "the afternoon of the bid-opening," but later that afternoon when "the time was drawing close for me to get my bids together and get over to Elsinore (from his home in San Juan Capistrano) he received a $6,500 bid for the plumbing.

Erroneously thinking he had entered the $9,285 plumbing bid in his total column and had included that sum in his total bid and realizing that the second plumbing bid was nearly $3,000 less than the first, Kastorff then deducted $3,000 from the total amount of his bid and entered the resulting total of $89,994 on the bid form as his bid for the school construction. Thus the total included no allowance whatsoever for the plumbing work.

Kastorff then proceeded to Elsinore and deposited his bid with plaintiff. When the bids were opened shortly after 8 p. m. that evening, it was discovered that of the five bids submitted that of Kastorff was some $11,306 less than the next lowest bid. The school superintendent and the four school board members present thereupon asked Kastorff whether he was sure his figures were correct, Kastorff stepped out into the hall to check with the person who had assisted in doing the clerical work on the bid, and a few minutes later returned and stated that the figures were correct.

He testified that he did not have his work sheets or other papers with him to check against at the time. The board thereupon, on August 12, 1952, voted to award Kastorff the contract. The next morning Kastorff checked his work sheets and promptly discovered his error. He immediately drove to the Los Angeles office of the firm of architects which had prepared the plans and specifications for plaintiff, and there saw Mr. Rendon. Mr. Rendon testified that Kastorff "had his maps and estimate work-sheets of the project, and indicated to me that he had failed to carry across the amount of dollars for the plumbing work. It was on the sheet, but not in the total sheet. We examined that evidence, and in our opinion we felt that he had made a clerical error in compiling his bill. . . . In other words, he had put down a figure, but didn't carry it out to the 'total' column when he totaled his column to make up his bid. . . . He exhibited . . . at that time . . . his work-sheets from which he had made up his bid." That same morning (August 13) Rendon telephoned the school superintendent and informed him of the error and of its nature and that Kastorff asked to be released from his bid. On August 14 Kastorff wrote a letter to the school board explaining his error and again requesting that he be permitted to withdraw his bid. On August 15, after receiving Kastorff's letter, the board held a special meeting and voted not to grant his request. Thereafter, on August 28, written notification was given to Kastorff of award of the contract to him. Subsequently plaintiff submitted to Kastorff a contract to be signed in accordance with his bid, and on September 8, 1952, Kastorff returned the contract to plaintiff with a letter again explaining his error and asked the board to reconsider his request for withdrawal of his bid.

Plaintiff thereafter received additional bids to do the subject construction; let the contract to the lowest bidder, in the amount of $102,900; and brought this action seeking to recover from Kastorff the $12,906 difference between that amount and the amount Kastorff had bid. Recovery of $4,499.60 is also sought against Kastorff's surety under the terms of the bond posted with his bid.

Defendants in their answer to the complaint pleaded, among other things, that Kastorff had made an honest error in compiling his bid; that "he thought he was bidding, and intended to bid, $9500.00 more, making a total of $99,494.00 as his bid"; that upon discovering his error he had promptly notified plaintiff and rescinded the $89,994 bid. The trial court found that it was true that Kastorff made up a bid sheet, which was introduced in evidence; that the subcontractor's bids thereupon indicated were those received by Kastorff; that he "had 16 subcontracting bids to ascertain from 31 which were submitted"; and that Kastorff had neglected to carry over from the left hand column on the bid sheet to the right hand column on the sheet a portion of the plumbing (and heating) subcontractor's bid. Despite the uncontradicted evidence related hereinabove, including that of plaintiff's architect and of its school superintendent, both of whom testified as plaintiff's witnesses, the court further found, however, that "it is not true that the right hand column of figures was totaled for the purpose of arriving at the total bid to be submitted by E. J. Kastorff . . . It cannot be ascertained from the evidence for what purpose the total of the right hand column of figures on the bid sheet was used nor can it be ascertained from the evidence for what purpose the three bid sheets were used in arriving at the total bid." And although finding that "on or about August 15, 1952," plaintiff received Kastorff's letter of August 14 explaining that he "made an error of omitting from my bid the item of Plumbing," the court also found that "It is not true that plaintiff knew at any time that defendant Kastorff's bid was intended to be other than $89,994.00 . . . It is not true that the plaintiff knew at the time it requested the execution of the contract by defendant Kastorff that he had withdrawn his bid because of an honest error in the compilation thereof. It is not true that plaintiff had notice of an error in the compilation of the bid by defendant Kastorff and tried nevertheless to take advantage of defendant Kastorff by forcing him to enter a contract on the basis of a bid he had withdrawn. . . . It is not true that it would be either inequitable or unjust to require defendant Kastorff to perform the contract awarded to him for the sum of $89,994.00, and it is not true that he actually intended to bid for said work the sum of $99,494.00." Judgment was given for plaintiff in the amounts sought, and this appeal by defendants followed.

"Rescission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in statu quo. [Citations.] In addition, the party seeking relief must give prompt notice of his election to rescind and must restore or offer to restore to the other party everything of value which he has received under the contract. [Citations.]”

. . . [T]he trial court's view . . . that "Kastorff had ample time and opportunity after receiving his last subcontractor's bid" to complete and check his final bid, does not convict Kastorff of that "neglect of legal duty" which would preclude his being relieved from the inadvertent clerical error of omitting from his bid the cost of the plumbing. . . .

Neither should he be denied relief from an unfair, inequitable, and unintended bargain simply because, in response to inquiry from the board when his bid was discovered to be much the lowest submitted, he informed the board, after checking with his clerical assistant, that the bid was correct. He did not have his work sheets present to inspect at that time, he did thereafter inspect them at what would appear to have been the earliest practicable moment, and thereupon promptly notified plaintiff and rescinded his bid.

Further, . . . Kastorff's bid agreement, as provided by plaintiff's own bid form, was to execute a formal written contract only after receiving written notification of acceptance of his bid, and such notice was not given to him until some two weeks following his rescission.

If the situations of the parties were reversed and plaintiff and Kastorff had even executed a formal written contract (by contrast with the preliminary bid offer and acceptance) calling for a fixed sum payment to Kastorff large enough to include a reasonable charge for plumbing but inadvertently through the district's clerical error omitting a mutually intended provision requiring Kastorff to furnish and install plumbing, we have no doubt but that the district would demand and expect reformation or rescission. In the case before us the district expected Kastorff to furnish and install plumbing; surely it must also have understood that he intended to, and that his bid did, include a charge for such plumbing. The omission of any such charge was as unexpected by the board as it was unintended by Kastorff. Under the circumstances the "bargain" for which the board presses (which action we, of course, assume to be impelled by advice of counsel and a strict concept of official duty) appears too sharp for law and equity to sustain.

Plaintiff suggests that in any event the amount of the plumbing bid omitted from the total was immaterial. The bid as submitted was in the sum of $89,994, and whether the sum for the omitted plumbing was $6,500 or $9,285 (the two sub bids), the omission of such a sum is plainly material to the total. . . .

The judgment is reversed.

Post v. Jones

60 U.S. 150 (1856)

Mr. Justice Grier delivered the opinion of the court.

The libellants, owners of the ship Richmond and cargo, filed the libel in this case for an adjustment of salvage.

They allege, that the ship Richmond left the port of Cold Spring, Long Island, on a whaling voyage to the North and South Pacific Ocean, in July, 1846; that on the 2d of August, 1849, in successful prosecution of her voyage, and having nearly a full cargo, she was run upon some rocks on the coast of Behring's Straits, about a half mile from shore; that while so disabled, the whaling ships Elizabeth Frith and the Panama, being in the same neighborhood, and about to return home, but not having full cargoes, each took on board some seven or eight hundred barrels of oil and a large quantity of whalebone from the Richmond; that these vessels have arrived in the port of Sag Harbor, and their owners are proceeding to sell said oil, etc., without adjusting or demanding salvage, unjustly setting up a pretended sale of the Richmond and her cargo to them by her master.

The libellants pray to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to "salvage and freight."

The claimants, who are owners of the ships Frith and Panama, allege, in their answer, that the Richmond was wholly and irrevocably wrecked; that her officers and crew had abandoned her, and gone on a barren and uninhabited shore near by; that there were no inhabitants or persons on that part of the globe, from whom any relief could be obtained, or who would accept her cargo, or take charge thereof, for a salvage compensation; that the cargo of the Richmond, though valuable in a good market, was of little or no value where she lay; that the season during which it was practicable to remain was nigh its close; that the entire destruction of both vessel and cargo was inevitable, and the loss of the lives of the crew almost certain; that, under these circumstances, the master of the Richmond concluded to sell the vessel at auction, and so much of her cargo as was desired by the persons present, which was done on the following day, with the assent of the whole ship's company.

Respondents aver that this sale was a fair, honest, and valid sale of the property, made from necessity, in good faith, and for the best interests of all concerned, and that they are the rightful and bona fide owners of the portions of the cargo respectively purchased by them.

The District Court decreed in favor of claimants; on appeal to the Circuit Court, this decree was reversed; the sale was pronounced void, and the respondents treated as salvors only, and permitted to retain a moiety of the proceeds of the property as salvage.

The claimants have appealed to this court, and the questions proposed for our consideration are, 1st, whether, under the peculiar circumstances of this case, the sale should be treated as conferring a valid title; and, if not, 2d, whether the salvage allowed was sufficient.

1.  [Discussion of the first question.]

. . .

As many of the circumstances attending this case are peculiar and novel, it may not be improper to give a brief statement of them. The Richmond, after a ramble of three years on the Pacific, in pursuit of whales, had passed through the sea of Anadin, and was near Behring's Straits, in the Arctic ocean, on the 2d of August, 1849. She had nearly completed her cargo, and was about to return; but, during a thick fog, she was run upon rocks, within half a mile of the shore, and in a situation from which it was impossible to extricate her. The master and crew escaped in their boats to the shore, holding communication with the vessel, without much difficulty or danger. They could probably have transported the cargo to the beach, but this would have been unprofitable labor, as its condition would not have been improved. Though saved from the ocean, it would not have been safe. The coast was barren; the few inhabitants, savages and thieves. This ocean is navigable for only about two months in the year; during the remainder of the year it is sealed up with ice. The winter was expected to commence within fifteen or twenty days, at farthest. The nearest port of safety and general commercial intercourse was at the Sandwich Islands, five thousand miles distant. Their only hope of escape from this inhospitable region was by means of other whaling vessels, which were known to be cruising at no great distance, and who had been in company with the Richmond, and had pursued the same course.

On the 5th of August the fog cleared off, and the ship Elizabeth Frith was seen at a short distance. The officers of the Richmond immediately went on board, and the master informed the master of the Frith of the disaster which had befallen the Richmond. He requested him to take his crew on board, and said, "You need not whale any more; there is plenty of oil there, which you may take, and get away as soon as possible." On the following day they took on board the Frith about 300 barrels oil from the Richmond. On the 6th, the Panama and the Junior came near; they had not quite completed their cargoes; as there was more oil in the Richmond than they could all take, it was proposed that they also should complete their cargoes in the same way. Captain Tinkham, of the Junior, proposed to take part of the crew of the Richmond, and said he would take part of the oil, “provided it was put up and sold at auction.”

In pursuance of this suggestion, advertisements were posted on each of the three vessels, signed by or for the master of the Richmond. On the following day the forms of an auction sale were enacted; the master of the Frith bidding one dollar per barrel for as much as he needed, and the others seventy-five cents. The ship and tackle were sold for five dollars; no money was paid, and no account kept or bill of sale made out. Each vessel took enough to complete her cargo of oil and bone. The transfer was effected in a couple of days, with some trouble and labor, but little or no risk or danger, and the vessels immediately proceeded on their voyage, stopping as usual at the Sandwich Islands.

Now, it is evident, from this statement of the facts, that, although the Richmond was stranded near the shore upon which her crew and even her cargo might have been saved from the dangers of the sea, they were really in no better situation as to ultimate safety than if foundered or disabled in the midst of the Pacific ocean. The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.

It has been contended by the claimants that it would be a great hardship to treat this sale as a nullity, and thus compel them to assume the character of salvors, because they were not bound to save this property, especially at so great a distance from any port of safety, and in a place where they could have completed their cargo in a short time from their own catchings, and where salvage would be no compensation for the loss of this opportunity. The force of these arguments is fully appreciated, but we think they are not fully sustained by the facts of the case. Whales may have been plenty around their vessels on the 6th and 7th of August, but, judging of the future from the past, the anticipation of filling up their cargo in the few days of the season in which it would be safe to remain, was very uncertain, and barely probable. The whales were retreating towards the north pole, where they could not be pursued, and, though seen in numbers on one day, they would disappear on the next; and, even when seen in greatest numbers, their capture was uncertain. By this transaction, the vessels were enabled to proceed at once on their home voyage; and the certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance in saving their neighbor's property.

It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered, than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. . . . The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors.

2.  As to the amount of salvage.

[Having decided the sale was invalid, the court considers the principles by which the amount due as salvage should be determined.]

. . .

[I]t is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to have the amount due to each party adjusted, according to the principles stated in the opinion of this court, and that all the costs of said cause in this court, and in the Circuit and District Courts, be paid out of the fund in the said Circuit Court.

North Ocean Shipping Co. Ltd. v Hyundai Construction Co. Ltd

Queen's Bench Division

[1979] 3 W.L.R. 419

Contract—Validity—Duress—Contract to build ship—Devaluation of currency—Shipbuilders' refusal to honour contract unless payments increased to lessen effect of devaluation—Owners' agreement to demands under protest—Whether economic pressure amounting to duress—Whether consideration for increased payments

A shipbuilding company entered into a contract by which they agreed to build a tanker for ship owners for a fixed price in United States dollars, payment to be made in five instalments. The company agreed to open a letter of credit to provide security for repayment of instalments in the event of their default in the performance of the contract. After the owners had paid the first instalment, the United States dollar was devalued by 10 per cent. upon which the company put forward a claim to an increase of 10 per cent. in the remaining instalments. The owners, asserting that there was no legal ground on which the claim could be made, paid the second and third instalments without the additional 10 per cent., but the company returned both instalments. The owners suggested that the company should subject their claim to arbitration, but they declined to do so, and requested the owners to give them a final and decisive reply to their demand for an increase by a certain date, failing which they would terminate the contract. The owners, who at that time were negotiating a very lucrative contract for the charter of the tanker, replied that although they were under no obligation to make additional payments, they would do so "without prejudice" to their rights, and requested that the company arrange for corresponding increases in the letter of credit. The company agreed to do so in June 1973, and the owners remitted the remaining instalments, including the 10 per cent. increase, without protest. The tanker was delivered to the owners in November 1974 but it was not until July 1975 that the company knew that the owners were claiming the return of the extra 10 per cent. paid on the four instalments with interest and the matter wasreferred to arbitration. The arbitrators stated a special case for the opinion of the court on a question of law.

On the questions whether there was consideration for the agreement that the owners should pay an extra 10 per cent. and whether the owners had entered into the agreement under duress: -

giving judgment for the company, (1) that the company in agreeing to increase the letter of credit by 10 per cent. were not merely fulfilling a pre-existing contractual obligation but were undertaking something additional and, in the circumstances, the increase was consideration for the agreement by which the owners increased their payments under the original contract (post, p. 714B-D).Stilk v. Myrick (1809) 2 Camp. 317 considered.(2)That the company's threat to break the contract without any legal justification unless the owners increased their payments by 10 per cent. did amount to duress in the form of economic pressure and, accordingly, the agreement of June 1973 was a voidable contract which the owners could either affirm or avoid; that, since there was no likelihood that the company would resile from the contract to build the tanker at the time she was due for delivery, the owners, by making the final payments without protest and also by their delay from November 1974 until July 1975 before making a claim for the return of the extra payments, had so conducted themselves as to affirm the contract and, accordingly, their claim failed (post, pp. 719E - 720A, H - 721B).Skeate v. Beale (1840) 11 Ad. & El. 983 and dictum of Isaacs J. in Smith v. William Charlick Ltd. (1924) 34 C.L.R. 38, 56 applied.Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (The Siboen and The Sibotre) [1976] 1 Lloyd's Rep. 293 considered.

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SPECIAL CASE stated by arbitrators.

By a contract dated April 10, 1972, and made between the claimants, North Ocean Shipping Co. Ltd. of Monrovia, as prospective owners ("the owners"), and the first respondents, Hyundai Construction Co. Ltd. of Seoul, South Korea, as builders, the first respondents agreed to build for the owners a single steel screw turbine of 259,000 deadweight tons subsequently named the *Atlantic Baron.* The contract incorporated the terms and conditions of a memorandum of agreement dated February 2, 1972. On February 20, 1974, the first respondents assigned their interest in the contract to an associated company, the second respondents, Hyundai Shipbuilding & Heavy Industries Co. Ltd. of Ulsan, South Korea (both respondents are referred to as "the Yard").

A dispute having arisen between the parties, the following claims were referred to arbitration. (1) A claim by the owners for U.S. $3,010,250.00 in respect of alleged overpayments to the Yard. The owners contended that, during June 1973, they were compelled to submit to the Yard's illegitimate demand for an increase of 10 per cent. in the purchase price; that agreement was made under duress and voidable for that reason or, alternatively, was void for lack of consideration; the latter contention was made by way of an amended pleading after the conclusion of the hearing. The Yard denied liability in full, arguing that the agreement of June 1973 was valid and binding upon the owners. (2) A counterclaim by the Yard for U.S. $209,678.03. The owners admitted liability in that respect subject to a set off against the sum claimed by them.

 The arbitrators, Clifford Albert Lawrence Clark appointed by the owners and Donald Davies appointed by the Yard, stated a special case. The case having stated that article II of the memorandum of agreement provided that the purchase price of the vessel was to be U.S. $30,950,000 and that article III provided that the contract price "shall not be subject to adjustment," continued:

Article XI (as amended) provided for the price to be payable in five instalments, the four first instalments each being 5 per cent of the purchase price payable (i) on the signing of the shipbuilding contract; (ii) within six working days of advice that prefabrication had been commenced; (iii) within six working days of advice that the keel had been laid; (iv) within six working days of advice that the vessel had been floated. The fifth and final instalment was expressed to be payable on tender by the Yard and acceptance by the owners of delivery of the vessel. The arbitrators found the following facts:

 1. On April 28, 1972, the owners duly paid the first instalment of $1,547,000 pursuant to article XI of the memorandum.

2. On February 12, 1973, the United States dollar was devalued by 10 per cent. The Korean won followed suit. It was agreed between the parties that as a result of this devaluation, the amounts payable under certain sub-contracts relating to the vessel, where the money of account was neither U.S. dollars nor the South Korean won but where U.S. dollars were the money of payment, were more than they would otherwise have been. It was neither admitted nor proved that such increases were as much as 10 per cent.

 3. By a letter of April 23, 1973, the Yard requested the owners that each unpaid instalment should be increased by 10 per cent. on the ground of devaluation. On receipt of that request the owners took legal advice. They were advised and thereafter believed (taking legal advice at all stages) that there was no possible legal basis for that request. No legal basis for the request was ever advanced and at the hearing before the arbitrators, the Yard accepted that there was no possible legal ground for the request.

 4. The owners, by their telex of May 14, 1973, refused the Yard's request.

 5. On May 12, 1973, the owners telexed the Yard with reference to the second and third instalments and tendered them on May 16, 1973. The Yard refunded those instalments on May 19, 1973, but the owners did not become aware of that refund until June 8, 1973.

 6. By a telex of May 14, 1973, the Yard repeated their request for an increase of 10 per cent. in the price on the basis that the devaluation of the dollar constituted force majeure and that in equity it was fair that the owners should make an additional payment. By a telex of May 17 the Yard made another request for an increase in the price of the vessel and asked for an acceptance of their request soonest; further, the Yard stated that the remittance of any instalment without the acceptance of their condition would not be appreciated and would be returned immediately. The owners replied on May 17 by way of telex rejecting the Yard's proposal. By a telex of May 21, the Yard again asked that the owners accept their proposal. By that time it was reasonable to infer that the Yard did not intend to perform the contract unless the price was increased by 10 per cent.

7. On May 22, 1973, the owners fixed the vessel to Shell for a time charter for 3 years at rate of hire of Worldscale 80 (U.S.$3.16½) with a laydays/cancelling spread of July 15 to December 31, 1974. The owners' brokers began making inquiries for fixing the vessel in February 1973 and began negotiations with Shell in March. Shell offered Worldscale 78 while the owners wanted Worldscale 85, and compromise was eventually achieved at Worldscale 80 on May 22, 1973. The vessel was fixed at a very good rate and the owners were going to make, and did make, a substantial profit out of the fixture. Even if the owners paid the additional 10 per cent. they were still going to make and still did make a substantial profit out of the fixture.

 8. The time charter fixture was concluded at a time when the Yard's requests/demands for the additional 10 per cent. on the vessel's contract price were still unresolved. Yards do sometimes ask for an upward adjustment of the price of vessels which they are building and owners sometimes agree to such adjustments.

9. The Yard were unaware of the fixture of the vessel.

10. The owners had no reason to believe that the Yard were aware of the fixture of the vessel.

11. On May 23, 1973, the owners replied to the Yard's telex of May 21 saying that they were unable to comply with the Yard's request and the Yard replied to that on June 4 saying that the owners' acceptance of the Yard's request was the only solution to the matter in question. On June 6, 1973, the owners again said they could not agree to the Yard's request.

12. On June 8, 1973, the owners learned of the refund of the two instalments remitted on May 17 and accordingly telexed the Yard that they were holding the instalments pending the Yard's disposal instructions.

13. On June 21 the Yard said that it was unavoidable for them to take action unless a satisfactory solution was forthcoming. At that time the owners believed that any default of the time charter would be detrimental to their relationship with Shell as well as leaving them with a potential liability of about $8,000,000 to Shell. There was no practical possibility of placing a substitute order for a ship to be delivered in 1974 to meet the cancelling date of the Shell charter; if there had been a practical possibility, the cost of the substitute vessel would have been in the nature of $60,000,000. Further, because of the buoyant freight market it would not have been possible to substitute a vessel at Worldscale 80. Further again, the owners thought that Shell would not accept a substitute vessel in view of the contractual stipulation for a new vessel. However, the owners made no investigations with a view to finding a replacement vessel nor did they make any approach to Shell with a view to finding a solution to the problem posed by the Yard's proposals.

14. The owners expressly disclaimed any allegation that the Yard's proposals were made in bad faith.

15. The Yard were at no time prepared to accept anything other than an unqualified agreement by the owners to pay the additional 10 per cent. in accordance with the Yard's proposals.

 16. The owners realised that the Yard were not prepared to accept anything other than an unqualified agreement as in paragraph 15 above.

 17. The owners conceded that they had not been misled by the Yard with regard to any material fact.

 18. By their telex of June 22, 1973, the owners proposed that the Yard's demand should be submitted to arbitration in accordance with article XIII of the memorandum and offered to pay the additional 10 per cent. into a account in escrow pending the outcome of such arbitration.

 19. By their telex of June 26, 1973, the Yard rejected the owners' proposal for arbitration.

 20. It was not suggested by the owners that if an arbitration had been instituted by them against the Yard, the Yard would not have been able to honour or would not have honoured any award made against them (the Yard). However, it was likely that, from a practical viewpoint, ex parte proceedings would not have resulted in an award of arbitration proceedings.

 21. By their telex of June 28, 1973, the owners agreed to the Yard's demands and to pay the additional 10 per cent. "in order to maintain an amicable relationship and without prejudice to our rights."

 22. By their telex of June 29, 1973, the Yard stated that they were "pleased to acknowledge that the minor difference in opinion between" the owners and the Yard had "been settled, thanks to" the owners' "generous understanding of" the Yard's position.

 23. The Yard did not appreciate the significance of the reservation contained in the words "without prejudice to our rights" in the owners' telex of June 28, 1973.

 24. The owners realised from the Yard's telex of June 29, 1973, that the Yard had not appreciated the significance of such reservation.

 25. The Yard at all times from June 28, 1973, until July 1975 considered that the owners had agreed without qualification or reservation to their demands for the additional 10 per cent.

 26. The owners deliberately did not draw to the Yard's attention the significance of the reservation contained in their telex of June 28, 1973.

 27. In accordance with the agreement of June 1973 the owners paid to the Yard the additional 10 per cent. on each of the remaining instalments of the vessel's contract price, the total of such additional payments being $3,010,250. It was that sum of $3,010,250 which, together with interest, the owners sought to recover in this arbitration.

 28. The owners made no protest in respect of the additional 10 per cent. when paying any of the remaining instalments of the vessel's contract price together with the additional 10 per cent. thereon. However, the owners made separate payments in respect of the 10 per cent. increase and treated separately the sums so paid because they regarded them as recoverable.

 29. The owners deliberately made no protest as aforesaid in order to maintain an amicable relationship with the Yard and in order not to put the Yard on notice that the owners had reserved their position.

 30. The prefabrication, keel-laying and floating instalments of the vessel's contract price were paid to Hyundai Construction Co. Ltd.

 31. On February 20, 1974, the Yard (with the agreement of the owners) assigned their right, title and interest in and to the shipbuilding contract to an associated company, Hyundai Shipbuilding & Heavy Industries Co. Ltd. and the instalments due after that date were paid to that company. No formal objection was taken to the fact that the assignees were not a party to the arbitration and, by agreement of all concerned, the arbitrators permitted the owners to join Hyundai Shipbuilding & Heavy Industries Co. Ltd., as second respondents.

32. The owners made no protest in the assignment as to the additional 10 per cent.; they deliberately made no such protest for the reasons set out in paragraph 29.

 33. The pre-delivery instalments of the vessel's contract price were paid to Hyundai Shipbuilding & Heavy Industries Co. Ltd.

 34. The pre-delivery instalment (in the sum of U.S. $8,500,000) and the delivery instalment (in the sum of $19,700,000) did not specify the additional 10 per cent. on the vessel's contract price as a separate item.

 35. The final (delivery) instalment paid by the owners was expressed to be "in full and final settlement."

 36. The return letter of credit (see article XI of the memorandum and the shipbuilding contract) was increased to take up the additional 10 per cent. at the request of the owners.

37. The owners made no protest as to the additional 10 per cent. either in the undated document entitled "Ships' Price Status" which was signed by the owners' superintendent engineer with the approval of the owners or in the protocol of delivery and acceptance.

 38. The owners deliberately made no protest for the reasons set out in paragraph 29 above.

 39. By the time the vessel was due for delivery in November 1974 the tanker chartering market and the tanker sale and purchase market had gone down very substantially; there was no ground for inferring that at that time the Yard would have refused to deliver the vessel if the owners had protested as to the additional 10 per cent.

 40. The owners had no reason to believe and did not believe that if they made any protest in the protocol of delivery and acceptance as to the additional 10 per cent. the Yard would have refused to deliver the vessel.

 41. At about the same time as the Yard had agreed to build the vessel which subsequently became known as the *Atlantic Baron* the Yard also agreed to build a further vessel for an associated company of the owners, namely, South Ocean Shipping Co. Ltd. That vessel was known as Yard No. 7302 and later known as the *Atlantic Baroness.* The owners stated that, if they initiated arbitration proceedings for the recovery of the increased sum paid in respect of the *Atlantic Baron,* the Yard would or might have refused to deliver the *Atlantic Baroness.*

 42. There was no ground for inferring that the Yard would have refused to deliver the *Atlantic Baroness* if the owners had protested as to the additional 10 per cent. on the vessel's contract price.

 43. The owners had no reason to believe and did not believe that if they made any protest in the protocol of delivery and acceptance as to the additional 10 per cent. the Yard would have refused to deliver the *Atlantic Baroness.*

 44. The first time that the Yard knew that the owners intended to reclaim the additional 10 per cent. on the vessel's contract price was when they received the owners' telex of July 30, 1975, shortly after tender of the *Atlantic Baroness.*

 45. The owners never intended to affirm the agreement for the extra payments in respect of the vessel nor to waive any of their rights in relation thereto. The owners always thought that they were acting in such a manner as to protect themselves against any damage with legal rights of recovery being preserved.

 The question of law for the decision of the court was whether the owners were entitled to recover from the Yard sums paid by the owners to the Yard in excess of the price provided in the memorandum of agreement dated February 2, 1972, and the agreement dated April 10, 1972 (less sums admitted to be due from the owners to the Yard under the Yard's counterclaim).

 (1.) Subject to the decision of the court on the above question of law, the arbitrators held that the owners' claim failed completely and the Yard's counterclaim succeeded in full.

 (2.) The arbitrators awarded and adjudged that the owners should forthwith pay to the Yard the sum of U.S. $209,678.03 in full and final settlement of the matters in the reference.

(3.) The arbitrators further awarded and adjudged that the owners should bear and pay their own and the Yard's costs in the reference (the latter to be taxed if not agreed), also that the owners should pay the cost of the award provided that if the Yard should in the first place have paid the cost of the award they should be entitled to an immediate refund from the owners of the sum so paid. The arbitrators stated an alternative award to be effective if the court answered the question of law in the affirmative.

 *Andrew Longmore* and *Gavin Kealey* for the owners.

 *Adrian Hamilton Q.C.* and *David Hunt* for the builders.

 The main submissions of counsel are set out in the judgment (post, pp. 712E - 713F, 714D - 719C).

 *Cur. adv. vult.*

July 20. MOCATTA J.

read the following judgment and, having stated the facts, continued: In the original pleadings in the arbitration the owners based their claims solely upon the agreement made by the telex of June 28, 1973, and the reply thereto as having been made under duress. They pleaded that the owners had avoided the said agreement, since it had been made under duress and was therefore voidable, presumably by their claim in the arbitration of July 30, 1975, and that they were therefore entitled to recover the sum of $3,010,250 from the Yard. However towards the end of the arbitration they put forward an alternative claim that the agreement reached at the end of June 1973 was void for lack of consideration and that accordingly the same sum could be recovered as money had and received having been paid involuntarily in respect of a void contract. They were given leave to amend their pleading by adding this additional ground and the amendment was made after the close of the argument by counsel before the arbitrators. No objection was taken to the proposed amendment and it was not suggested that the owners were debarred from this line of argument by any equitable or promissory estoppel. Accordingly, Mr. Longmore argued that this particular point was not open to Mr. Hamilton to argue before me owing to the absence of certain necessary findings of fact. However no request was made by either side for the case to be remitted for further findings of fact to be found and, if necessary, I must accordingly do the best in relation to this matter as I can on the material before me.

Mr. Longmore's argument that the agreement to pay the extra 10 per cent. was void for lack of consideration was based upon the well-known principle that a promise by one party to fulfil his existing contractual duty towards his other contracting party is not good consideration; he relied upon the well-known case of Stilk v. Myrick (1809) 2 Camp. 317; 6 Esp. 129 for this submission. Accordingly there was no consideration for the owner's agreement to pay the further 10 per cent., since the Yard were already contractually bound to build the ship and it is common ground that the devaluation of the dollar had in no way lessened the Yard's legal obligation to do this. There has of course been some criticism in the books of the decision in Stilk v. Myrick, which is somewhat differently reported in the two sets of reports, but Cambell's Reports have the better reputation and what I have referred to as being the law on this point is referred to as "the present rule" in Chitty on Contracts, General Principles, 24th ed. (1977), p. 86: see, also, Cheshire and Fifoot, Law of Contract, 9th ed. (1976), p. 83. The law seems still to be the same in Australia: see T. A. Sundell & Sons Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd. (1955) 56 S.R.(N.S.W.) 323.

 Mr. Hamilton relied upon what Denning L.J. said in two cases dealing with very different subject matters. The earlier was Ward v. Byham [1956] 1 W.L.R. 496. There the father of an illegitimate child who had lived with her mother for some years turned the mother out of the house, retaining the child for a while for himself. Later he made an offer to let the mother have the child and pay an allowance of £1 a week, provided the child was well looked after and happy and was allowed to decide for herself where she wished to live. When the mother married, the father discontinued payment, but on being sued by the mother he was held liable. The mother was by statute bound to maintain her illegitimate child, but Denning L.J. said at p. 498 that he thought there was sufficient consideration in the promise to perform an existing duty or in its performance. Apart from the fact that the existing duty on the mother was imposed upon her by statute law, which I think differentiates the case, the other two members of the Court of Appeal thought that compliance with the special terms of the father's letter, about keeping the child happy and leaving her freedom of choice constituted ample consideration. Again in Williams v. Williams [1957] 1 W.L.R. 148, 151, while Denning L.J. said that "a promise to perform an existing duty is, I think, sufficient consideration to support a promise," nonetheless he went on to find two separate grounds for good consideration for the husband's promise. Similarly Hodson L.J. at p. 153 and Morris L.J. at p. 155 found good consideration for the husband's promise. I do not therefore think either of these cases successfully enables Mr. Hamilton to avoid the rule in Stilk v. Myrick, 2 Camp. 317.

 What I have, however, found more difficult is whether the Yard did not give some consideration for the extra 10 per cent. on the contract price, on which they insisted, in the form of their agreement to increase pro tanto what was for short called in argument "the return letter of credit." The reference here is to some somewhat confusingly drafted provisions in article XI (2) of the shipbuilding contract headed "terms of payment." This begins by dealing with the first payment of 5 per cent. of the contract price which was to be paid on the signing of the contract. It there provides that should the Yard fail within 31 days to provide the owners with all of the documents referred to below, the contract should at the owners' option become null and void and the first payment plus interest would be returned by the Yard. The third of the documents mentioned is described in a complicated way. It starts by referring to a letter of credit issued by the Korean Exchange Bank in the form and words set out in exhibit B attached, guaranteeing the payments and refunds by the Yard to the owners which might become refundable under the contract. It then says that exhibit B, which covers the initial payment of 5 per cent. is to be provided on signing of the contract and continues "and the builders will provide a letter from the Korean Exchange Bank covering the three subsequent payments by" February 10. This date was no doubt inserted because an original contract between the parties dated February 2 came to nothing and was replaced, though very much on the same terms, by the contract of April 10 on which the special case is founded. The three subsequent payments are there set out separately and in detail and deal with the instalments of a further 5 per cent. of the total price each, namely, U.S. $1,547,500, payable respectively on the commencement of prefabrication, the laying of the keel and the floating of the vessel. The "return letter of credit" was, therefore, to cover specific detailed sums. I have already mentioned that in their important telex of June 28, 1973, the final sentence read "No doubt you will arrange for corresponding increases in the letter of credit provided for in article XI (2) (iii)" and this was readily and quite naturally accepted and given effect to by the Yard. I remain unconvinced, however, that by merely securing an increase in the instalments to be paid of 10 per cent. the Yard automatically became obliged to increase the return letter of credit pro tanto and were therefore doing no more than undertaking in this respect to fulfil their existing contractual duty. I think that here they were undertaking an additional obligation or rendering themselves liable to an increased detriment. I therefore conclude, though not without some doubt, that there was consideration for the new agreement.

 In view of this conclusion it is unnecessary for me to deal with a number of the additional points which Mr. Hamilton advanced against the argument that there was no consideration. I shall have to deal with some of them on Mr. Longmore's alternative argument that the increased price agreement and the additional payments made in consequence thereof resulted from a form of duress. I think, however, that I should say something about two of them. One was that acceptance of the increased price enabled the contract to be performed on the basis of amicable relations, which was particularly important to the owners who wanted the vessel before the end of December 1974, which was the cancelling date for the Shell charterparty. I cannot think that this can amount to anything the law would regard as consideration moving from the Yard. Secondly he argued that the American case of Watkins & Son Inc. v. Carrig (1941) 21 A. 2d 591 required the present circumstances to be treated as if the original contract were rescinded by mutual agreement and the new one substituted. The case is cited by Professor Treitel in *The Law of Contract,* 4th ed. (1975), p. 67 not as being the law of England but as an example of unforeseen circumstances arising in the performance of a contract, which ought to disentitle the promisee from taking an unconscionable advantage of the promissor. Further the facts here are in my opinion far removed from a case of rescission.

 Having reached the conclusion that there was consideration for the agreement made on June 28 and 29, 1973, I must next consider whether even if that agreement, varying the terms of the original shipbuilding contract of April 10, 1972, was made under a threat to break that original contract and the various increased instalments were made consequently under the varied agreement, the increased sums can be recovered as money had and received. Mr. Longmore submitted that they could be, provided they were involuntary payments and not made, albeit perhaps with some grumbling, to close the transaction.

 Certainly this is the well-established position if payments are made,for example, to avoid the wrongful seizure of goods where there is no prior agreement to make such payments. The best known English case to this effect is probably Maskell v. Horner [1915] 3 K.B. 106, where the plaintiff had over many years paid illegal tolls on his goods offered for sale in the vicinity of Spitalfields Market. The plaintiff had paid under protest, though the process was so prolonged, that the protests became almost in the nature of jokes, though the plaintiff had in fact suffered seizures of his goods when he had not paid. Lord Reading C.J. did not say that express words of protest were always necessary, though they might be useful evidence to negative voluntary payments; the circumstances taken as a whole must indicate that the payments were involuntary. Buckley L.J. at p. 124, regarded the making of a protest before paying to avoid the wrongful seizure of one's goods as "a further factor," which went to show that the payment was not voluntary. Pickford L.J. at p. 126 likewise regarded the fact of protest as "some indication" that the payer intended to resist the claim.

 There are a number of well-known examples in the books of English cases where the payments made have been involuntary by reason of some wrongful threatened action or inaction in relation to goods and have subsequently been recovered, but where the issue has not been complicated by the payments having been made under a contract. Some of these cases have concerned threats to seize, seizure or wrongful detention of goods, Maskell v. Horner being the best known modern example of the former two categories and Astley v. Reynolds (1731) 2 Str. 915 a good example of the latter category, where a pawnbroker refused to release plate when the plaintiff tendered the money lent and, on demand, more than the legal rate of interest, since without this the pawnbroker would not release the plaintiff's plate. The plaintiff recovered the excess, as having paid it under compulsion and it was held no answer that an alternative remedy might lie in trover.

 Mr. Longmore referred me to other cases decided in this country bordering upon what he called economic duress as distinct from duress to goods. Thus in Parker v. Great Western Railway Co. (1844) 7 Man. & G. 253, approved in Great Western Railway Co. v. Sutton (1869) L.R. 4 H.L. 226, it was held that the railway was not entitled to differentiate adversely between charges on goods made against one carrier or packer using the railway and others. Excess charges payable by such persons were recovered. In advising the House of Lords in the latter case, Willes J. said, at p. 249:

"... I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by condictio indebiti, or action for money had and received. This is every day's practice as to excess freight." Another case, decided in 1844, on which Mr. Longmore relied was Close v. Phipps (1844) 7 Man. & G. 586, in which the attorney of a mortgagee threatened to sell the mortgaged property unless certain costs, to which he was not entitled, were paid in addition to the mortgage money. Theadditional costs were paid under protest and were subsequently recovered as money had and received. It was stressed in argument, rightly I think, that this was a case of money paid under duress, the duress being a threatened breach of contract, though in Goff and Jones, The Law of Restitution (1966), p. 149 the case is categorised as an example of duress of goods. Another very unusual case is Fernley v. Branson (1851) 20 L.J.Q.B. 178. There there was a submission to two arbitrators and an umpire the terms including:

"the costs and expenses of the submission and reference and award to be made should be in the discretion of the said arbitrators or their umpire, who might award and direct by and to whom the sam should be paid." When the award, made by the umpire alone, was ready, he informed the parties that this was ready to be taken up on payment of over £379, made up mainly of fees and expenses of the umpire and arbitrators. Eventually the award was taken up and the fees requested paid but these were by the consent of the umpire and one arbitrator taxed by a taxing master and reduced, the reductions being accepted by the two mentioned, but not by the other arbitrator, Mr. Branson. He was accordingly sued in the county court for the excess of some £49 and held liable to pay this. The decision was upheld on appeal on the basis that the payment was due as money had and received. Wightman J. thought it unnecessary to refer to the decisions respecting money paid under duress of goods, since these cases were not questioned by counsel. He relied upon the terms in the submission I have quoted but the court decided that these only gave the tribunal the power to decide who should pay the costs, but not to fix costs which were unreasonably high. It is difficult to know how to categorise this case, since there was no duress of goods. In Goff and Jones, The Law of Restitution it is attributed to the quasi-public position of the arbitral tribunal, but Mr. Longmore rightly pointed out that the role of the arbitrator is contractual and that he can sue for his fees.

 There has been considerable discussion in the books whether, if an agreement is made under duress of goods to pay a sum of money and there is some consideration for the agreement, the excess sum can be recovered. The authority for this suggested distinction is Skeate v. Beale (1841) 11 Ad. & El. 983. It was there said by Lord Denman C.J. that an agreement was not void because made under duress of goods, the distinction between that case and the cases of money paid to recover goods wrongfully seized being said to be obvious in that the agreement was not compulsorily but voluntarily entered into. In the slightly later case of Wakefield v. Newbon (1844) 6 Q.B. 276. Lord Denman C.J. referred to cases such as Skeate v. Beale as "that class where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what is found due." Kerr J. in Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (The Siboen and The Sibotre) [1976] 1 Lloyd's Rep. 293, 335, gave strong expression to the view that the suggested distinction based on Skeate v. Beale would not be observed today. He said, though obiter, that Skeate v. Beale would not justify a decision:

"For instance, if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of physical violence to anyone, I do not think that the law would uphold the agreement." I was referred to a number of cases decided overseas. Nixon v. Furphy (1925) 25 S.R.(N.S.W.) 151; Knutson v. Bourkes Syndicate [1941] 3 D.L.R. 593 and In re Hooper and Grass' Contract [1949] V.L.R. 269, all of which have a similarity to Close v. Phipps, 7 Man. & G. 586. Perhaps their greatest importance, however, is the quotation in the first mentioned from the judgment of Isaacs J. in Smith v. William Charlick Ltd. (1924) 34 C.L.R. 38, 56 where he said:

"It is conceded that the only ground on which the promise to repay could be implied is 'compulsion.' The payment is said by the respondent not to have been 'voluntary' but 'forced' from it within the contemplation of the law ... 'Compulsion' in relation to a payment of which refund is sought, and whether it is also variously called 'coercion,' 'extortion,' 'exaction' or 'force,' includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or any right of the person who pays. ... Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay."

 These cases do not, however, expressly deal with the position arising when the threat or compulsion result in a new or varied contract. This was, or something very like it, however, the position in Sundell's case, 56 S.R.(N.S.W.) 323. In that case the plaintiff had originally entered into a contract to buy from the defendant a quantity of galvanised iron at £100 15s. a ton and had established a letter of credit in favour of the defendant seller accordingly. The iron was to come from France and some months after the contract had been entered into the seller said that an increase in price of probably £27 was inevitable and requested that the letter of credit be increased, otherwise the plaintiff would not get his iron. Eventually the buyer on April 17 sent the seller a fresh order for the same quantity of iron at £140 per ton, but asking the seller to acknowledge that the buyer should have the right to contend that the original contract required the seller to supply the iron at £109 15s. a ton. The buyer amended and increased his letter of credit accordingly, but the seller in acknowledging the buyer's letter did not accept the terms laid down in it. Eventually the iron arrived before the argument had been resolved and full use was made of the increased letter of credit.

 The buyer thereafter sued to recover the excess he had paid through the increased letter of credit as having been paid under "practical compulsion." The first point taken in answer to this was that the original contract was varied or superseded by a new contract made on April 17 and that accordingly the buyer was obliged thereunder to pay. This argument failed since the court found there was no consideration for the provision of the increased letter of credit. The second point argued was that apayment could not be said to have been made under "practical compulsion" where a threat was made by the payee to withhold from the payer a contractual right as distinct from a right of possession of property, a statutory right or some proprietary right. This it was argued would be to break new ground and would be contrary to what was said by Lord Sumner in Sinclair v. Brougham [1914] A.C. 398, 453-454 against extending the action for money had and received. These arguments were rejected by the court who cited the passage from the judgment of Isaacs J. set out above emphasising by italics the words "or any right" of the person paying under compulsion. It would seem, therefore, that the Australian courts would be prepared to allow the recovery of excess money paid, even under a new contract, as the result of a threat to break an earlier contract, since the threat or compulsion would be applied to the original contractual right of the party subject to the compulsion or economic duress. This also seems to be the view in the United States, where this was one of the grounds of decision in King Construction Co. v. W. M. Smith Electric Co. (1961) 350 S.W. 2d 940. This view also accords with what was said in D. & C. Builders Ltd. v. Rees [1966] 2 Q.B. 617, 625, *per* Lord Denning M.R.: "No person can insist on a settlement procured by intimidation."

 Mr. Longmore also relied upon two English cases of the last century as showing that even when a contract has been entered into to pay an excess amount the remedy by way of a claim for money had and received is available. The first of these was Hills v. Street (1828) 5 Bing. 37. There a broker was in possession of goods distrained for rent. The party distrained upon was anxious to have time to pay the rent and that the goods should not be sold. A written request was demanded by the broker and an undertaking to pay expenses given. Yet despite what appears to have been an agreement, the party distrained upon was held entitled to recover expenses charged by the broker. There was no voluntary payment. The second was Tamvaco v. Simpson (1866) L.R. 1 C.P. 363, cited in Goff and Jones, The Law of Restitution, p. 151 as being inconsistent with the so-called rule based upon Skeate v. Beale, 11 Ad. & El. 983. The case is, however, a difficult one to follow and draw conclusions from since the courts were limited to answering two questions on a case stated. Mr. Longmore further relied upon the Chancery case of Ormes v. Beadel (1860) 2 Giff. 166, reversed on appeal on the ground of affirmation or acquiescence (1860) 2 De G. F. & J. 333, as showing that in equity a contract entered into under circumstances of acute economic pressure, increased by the refusal of an architect to pay a builder a sum which the court found was a fair and just demand for work done, would be set aside in equity.

 I may here usefully cite a further short passage from the valuable remarks of Kerr J. in The Siboen and The Sibotre [1976] 1 Lloyd's Rep. 293, 336, where, after referring to three of the Australian cases I have cited, he said:

"It is true that in that case, and in all the three Australian cases, it was held that there had been no consideration for the settlement which the courts reopened. But I do not think that it would have made any difference if the defendants in these cases had also insisted on somepurely nominal but legally sufficient consideration. If the contract is void the consideration would be recoverable in quasi-contract; if it is voidable equity could rescind the contract and order the return of the consideration." It is also interesting at this point to quote a few sentences from an article entitled "Duress As A Vitiating Factor in Contract" by Mr. Beatson, Fellow of Merton College, Oxford in (1974) 33 Cambridge Law Journal 97, 108:

"It is submitted that there is no reason for making a distinction between actual payments and agreements to pay. If that is so there is nothing to prevent a court from finding that duress of goods is a ground upon which the validity of a contract can be impeached ... The law was accurately stated by the courts of South Carolina as early as 1795, when it was said that '... whenever assumpsit will lie for money extorted by duress of goods, a party may defend himself against any claim upon him for money to be paid in consequence of any contract made under similar circumstances.'" Before proceeding further it may be useful to summarise the conclusions I have so far reached. First, I do not take the view that the recovery of money paid under duress other than to the person is necessarily limited to duress to goods falling within one of the categories hitherto established by the English eases. I would respectfully follow and adopt the broad statement of principle laid down by Isaacs J. cited earlier and frequently quoted and applied in the Australian cases. Secondly, from this it follows that the compulsion may take the form of "economic duress" if the necessary facts are proved. A threat to break a contract may amount to such "economic duress." Thirdly, if there has been such a form of duress leading to a contract for consideration, I think that contract is a voidable one which can be avoided and the excess money paid under it recovered.

 I think the facts found in this ease do establish that the agreement to increase the price by 10 per cent. reached at the end of June 1973 was caused by what may be called "economic duress." The Yard were adamant in insisting on the increased price without having any legal justification for so doing and the owners realised that the Yard would not accept anything other than an unqualified agreement to the increase. The owners might have claimed damages in arbitration against the Yard with all the inherent unavoidable uncertainties of litigation, but in view of the position of the Yard vis-à-vis their relations with Shell it would be unreasonable to hold that this is the course they should have taken: see Astley v. Reynolds (1731) 2 Str. 915. The owners made a very reasonable offer of arbitration coupled with security for any award in the Yard's favour th/at might be made, but this was refused. They then made their agreement, which can truly I think be said to have been made under compulsion, by the telex of June 28 without prejudice to their rights. I do not consider the Yard's ignorance of the Shell charter material. It may well be that had they known of it they would have been even more exigent.

 If I am right in the conclusion reached with some doubt earlier that there was consideration for the 10 per cent. increase agreement reached at the end of June 1973, and it be right to regard this as having been reached under a kind of duress in the form of economic pressure, then what is said in *Chitty on Contracts,* 24th ed. (1977), vol. 1, para. 442, p. 207, to which both counsel referred me, is relevant, namely, that a contract entered into under duress is voidable and not void:

"... consequently a person who has entered into a contract under duress, may either affirm or avoid such contract after the duress has ceased; and if he has so voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it." On appeal in Ormes v. Beadel, 2 De G.F. & J. 333 and in Kerr J.'s case [1976] 1 Lloyd's Rep. 293 there was on the facts action held to amount to affirmation or acquiescence in the form of taking part in an arbitration pursuant to the impugned agreement. There is nothing comparable to such action here.

 On the other hand, the findings of fact in the special case present difficulties whether one is proceeding on the basis of a voidable agreement reached at the end of June 1973, or whether such agreement was void for want of consideration, and it were necessary in consequence to establish that the payments were made involuntarily and not with the intention of closing the transaction.

 I have already stated that no protest of any kind was made by the owners after their telex of June 28, 1973, before their claim in this arbitration on July 30, 1975, shortly after in July of that year the *Atlantic Baroness,* a sister ship of the *Atlantic Baron,* had been tendered, though, as I understand it, she was not accepted and arbitration proceedings in regard to her are in consequence taking place. There was therefore a delay between November 27, 1974, when the *Atlantic Baron* was delivered and July 30, 1975, before the owners put forward their claim.

 The owners were, therefore, free from the duress on November 27, 1974, and took no action by way of protest or otherwise between their important telex of June 28, 1973, and their formal claim for the return of the excess 10 per cent. paid of July 30, 1975, when they nominated their arbitrator. One cannot dismiss this delay as of no significance, though I would not consider it conclusive by itself. I do not attach any special importance to the lack of protest made at the time of the assignment, since the documents made no reference to the increased 10 per cent. However, by the time the *Atlantic Baron* was due for delivery in November 1974, market conditions had changed radically, as is found in paragraph 39 of the special case and the owners must have been aware of this. The special case finds in paragraph 40, as stated earlier, that the owners did not believe that if they made any protest in the protocol of delivery and acceptance that the Yard would have refused to deliver the vessel or the *Atlantic Baroness* and had no reason so to believe. Mr. Longmore naturally stressed that in the rather carefully expressed findings in paragraphs 39 to 44 of the special case, there is no finding that if at the time of the final payments the owners had withheld payment of the additional 10 per cent. the Yard would not have delivered the vessel. However, after careful consideration, I have come to the conclusion that the important points here are that since there was no danger at this time in registering a protest, the final payments were made without any qualification and were followed by a delay until July 31, 1975, before the owners put forward their claim, the correct inference to draw, taking an objective view of the facts, is that the action and inaction of the owners can only be regarded as an affirmation of the variation in June 1973 of the terms of the original contract by the agreement to pay the additional 10 per cent. In reaching this conclusion I have not, of course, overlooked the findings in paragraph 45 of the special case, but I do not think that an intention on the part of the owners not to affirm the agreement for the extra payments not indicated to the Yard can avail them in the view of their overt acts. As was said in Deacon v. Transport Regulation Board [1958] V.R. 458, 460 in considering whether a payment was made voluntarily or not: "No secret mental reservation of the doer is material. The question is - what would his conduct indicate to a reasonable man as his mental state." I think this test is equally applicable to the decision this court has to make whether a voidable contract has been affirmed or not, and I have applied this test in reaching the conclusion I have just expressed.

 I think I should add very shortly that having considered the many authorities cited, even if I had come to a different conclusion on the issue about consideration, I would have come to the same decision adverse to the owners on the question whether the payments were made voluntarily in he sense of being made to close the transaction.

 I accordingly answer the question of law in the negative with the consequences set out in paragraphs (1), (2) and (3) of the award.Judgment for respondents with costs of argument before court. (R. D. )

Henningsen v. Bloomfield Motors, Inc.

161 A.2d 69 (N.J. 1960)

Plaintiff Claus H. Henningsen purchased a Plymouth automobile, manufactured by defendant Chrysler Corporation, from defendant Bloomfield Motors, Inc. His wife, plaintiff Helen Henningsen, was injured while driving it and instituted suit against both defendants to recover damages on account of her injuries. Her husband joined in the action seeking compensation for his consequential losses. The complaint was predicated upon breach of express and implied warranties and upon negligence. At the trial the negligence counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issues of implied warranty of merchantability. Verdicts were returned against both defendants and in favor of the plaintiffs. Defendants appealed and plaintiffs cross-appealed from the dismissal of their negligence claim. . . .

The facts are not complicated, but a general outline of them is necessary to an understanding of the case.

On May 7, 1955 Mr. and Mrs. Henningsen visited the place of business of Bloomfield Motors, Inc., an authorized De Soto and Plymouth dealer, to look at a Plymouth. They wanted to buy a car and were considering a Ford or a Chevrolet as well as a Plymouth. They were shown a Plymouth which appealed to them and the purchase followed. The record indicates that Mr. Henningsen intended the car as a Mother's Day gift to his wife. He said the intention was communicated to the dealer. When the purchase order or contract was prepared and presented, the husband executed it alone. His wife did not join as a party.

The purchase order was a printed form of one page. On the front it contained blanks to be filled in with a description of the automobile to be sold, the various accessories to be included, and the details of the financing. The particular car selected was described as a 1955 Plymouth, Plaza "6," Club Sedan. The type used in the printed parts of the form became smaller in size, different in style, and less readable toward the bottom where the line for the purchaser's signature was placed. The smallest type on the page appears in the two paragraphs, one of two and one-quarter lines and the second of one and one-half lines, on which great stress is laid by the defense in the case. These two paragraphs are the least legible and the most difficult to read in the instrument, but they are most important in the evaluation of the rights of the contesting parties. They do not attract attention and there is nothing about the format which would draw the reader's eye to them. In fact, a studied and concentrated effort would have to be made to read them. De-emphasis seems the motif rather than emphasis. More particularly, most of the printing in the body of the order appears to be 12 point block type, and easy to read. In the short paragraphs under discussion, however, the type appears to be six point script and the print is solid, that is, the lines are very close together.

The two paragraphs are:

The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized. . . .

I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. . . .

. . .The testimony of Claus Henningsen justifies the conclusion that he did not read the two fine print paragraphs referring to the back of the purchase contract. And it is uncontradicted that no one made any reference to them, or called them to his attention. With respect to the matter appearing on the back, it is likewise uncontradicted that he did not read it and that no one called it to his attention.

The reverse side of the contract contains 8 1/2 inches of fine print. It is not as small, however, as the two critical paragraphs described above. The page is headed "Conditions" and contains ten separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject, as in the case of the "Owner Service Certificate" to be referred to later. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth. It is as follows:

7. It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows:

The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

After the contract had been executed, plaintiffs were told the car had to be serviced and that it would be ready in two days . . .

The new Plymouth was turned over to the Henningsens on May 9, 1955. . . . It had no servicing and no mishaps of any kind before the event of May 19. That day, Mrs. Henningsen drove to Asbury Park. On the way down and in returning the car performed in normal fashion until the accident occurred. She was proceeding north on Route 36 in Highlands, New Jersey, at 20-22 miles per hour. The highway was paved and smooth, and contained two lanes for northbound travel. She was riding in the right-hand lane. Suddenly she heard a loud noise "from the bottom, by the hood." It "felt as if something cracked." The steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall. No other vehicle was in any way involved. A bus operator driving in the left-hand lane testified that he observed plaintiffs' car approaching in normal fashion in the opposite direction; "all of a sudden [it] veered at 90 degrees \* \* \* and right into this wall." As a result of the impact, the front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident. The condition was such that the collision insurance carrier, after inspection, declared the vehicle a total loss. It had 468 miles on the speedometer at the time.

The insurance carrier's inspector and appraiser of damaged cars, with 11 years of experience, advanced the opinion, based on the history and his examination, that something definitely went "wrong from the steering wheel down to the front wheels" and that the untoward happening must have been due to mechanical defect or failure; "something down there had to drop off or break loose to cause the car" to act in the manner described.

As has been indicated, the trial court felt that the proof was not sufficient to make out a prima facie case as to the negligence of either the manufacturer or the dealer. The case was given to the jury, therefore, solely on the warranty theory, with results favorable to the plaintiffs against both defendants.

I.

THE CLAIM OF IMPLIED WARRANTY AGAINST THE MANUFACTURER.

. . . The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose. . . . But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability. . . .

The manufacturer agrees to replace defective parts for 90 days after the sale or until the car has been driven 4,000 miles, whichever is first to occur, if the part is sent to the factory, transportation charges prepaid, and if examination discloses to its satisfaction that the part is defective. It is difficult to imagine a greater burden on the consumer, or less satisfactory remedy. Aside from imposing on the buyer the trouble of removing and shipping the part, the maker has sought to retain the uncontrolled discretion to decide the issue of defectiveness. . . .

. . . We hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

II.

THE EFFECT OF THE DISCLAIMER AND LIMITATION OF LIABILITY CLAUSES ON THE IMPLIED WARRANTY OF MERCHANTABILITY.

. . .

The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial -- simply to deliver it. The form warranty is not only standard with Chrysler but, as mentioned above, it is the uniform warranty of the Automobile Manufacturers Association. Members of the Association are: General Motors, Inc., Ford, Chrysler, Studebaker-Packard, American Motors (Rambler), Willys Motors, Checker Motors Corp., and International Harvester Company. . . . Of these companies, the "Big Three" (General Motors, Ford, and Chrysler) represented 93.5% of the passenger-car production for 1958 and the independents 6.5% . . .

The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract. Because there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer, there is no incentive on their part to stimulate good will in that field of public relations. Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way, the urge to be careful is not so pressing. . . .

Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. They have endeavored thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer to the attempted exculpation of the seller. . . . Accordingly to be found in the cases are statements that disclaimers and the consequent limitation of liability will not be given effect if "unfairly procured". . . ; if not brought to the buyer's attention and he was not made understandingly aware of it . . .

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. In the matter of warranties on the sale of their products, the Automotive Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security.

Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another . . . Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way. . . .

Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions. In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. . . . The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity. . . .

III.

THE DEALER'S IMPLIED WARRANTY.

The principles that have been expounded as to the obligation of the manufacturer apply with equal force to the separate express warranty of the dealer. This is so, irrespective of the absence of the relationship of principal and agent between these defendants, because the manufacturer and the Association establish the warranty policy for the industry. The bargaining position of the dealer is inextricably bound by practice to that of the maker and the purchaser must take or leave the automobile, accompanied and encumbered as it is by the uniform warranty.

. . .

VII.

. . . [T]he judgments in favor of the plaintiffs and against defendants are affirmed.

Williams v. Walker-Thomas Furniture Co.

198 A.2d 914 (D.C. 1964)

J. SKELLY WRIGHT, Circuit Judge:

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made." Emphasis added.) The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95. She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In its opinion in Williams v. Walker-Thomas Furniture Company, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention as follows:

Appellant's second argument presents a more serious question. The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.

We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act, Art. 83 @@ 128-153, or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall.) 443, 445, 20 L. Ed. 438 (1870), the Supreme Court stated: “If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to." Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C.CODE @ 2-302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of @ 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 1 CORBIN, op. cit. supra Note 2. We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DISSENT:

DANAHER, Circuit Judge (dissenting):

The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the Williams case, quoted in the majority text, concludes: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar." My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D.C.CODE @@ 26-601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.

I join the District of Columbia Court of Appeals in its disposition of the issues.

Toker v. Westerman

274 A.2d 78 (Union County Ct. 1970)

OPINION

On November 7, 1966 plaintiff's assignor, People's Foods of New Jersey, sold a refrigerator-freezer to defendant under a retail installment contract. The cash price for the unit was $ 899.98. With sales tax, group life insurance and time price differential the total amount was $ 1,229.76, to be paid in 36 monthly installments of $ 34.16 each.

Defendants made payments over a period of time, but resist payment of the balance in the sum of $ 573.89, claiming that the unit was so greatly over-priced as to make the contract unenforceable under N.J.S. 12A:2-302.

Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

At the trial defendant presented an appliance dealer who had inspected the refrigerator-freezer in question. He stated that the same had a capacity of approximately 18 cubic feet, was not frost-free, and, with no special features, was known in the trade as a stripped unit. He estimated the reasonable retail price at the time of sale as between $ 350 and $ 400. He testified that the most expensive refrigerator-freezer of comparable size, with such additional features as butter temperature control and frost-free operation, at that time sold for $ 500.

The questions presented are simply whether or not the contract price for the unit is unconscionable, and, if so, whether the provisions of the cited section of the Uniform Commercial Code apply.

The Code does not define the term "unconscionable." Elsewhere an unconscionable contract has been defined as:

\* \* one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state, except in abstract terms, which gives but little practical help. It has been said that there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. 43 Words and Phrases p. 143.

It is apparent that the court should not allow the statutory provision in question to be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavorable. Suffice it to say that in the instant case the court finds as shocking, and therefore unconscionable, the sale of goods for approximately 2 1/2 times their reasonable retail value. This is particularly so where, as here, the sale was made by a door-to-door salesman for a dealer who therefore would have less overhead expense than a dealer maintaining a store or showroom. In addition, it appeared that defendants during the course of the payments they made to plaintiff were obliged to seek welfare assistance.

A flagrantly excessive purchase price was held to be within the intendment of N.J.S. 12A:2-302 in the case of Toker v. Perl, 103 N.J. Super. 500 (Law Div. 1966). There the same dealer as in the present case sold a refrigerator-freezer to defendant for a purchase price of $ 799.95. The court found that the maximum value of the unit was $ 300 and held the excessive price to be unconscionable. The claim for the balance of the purchase price was therefore held to be unenforceable under the statute. On appeal, the Appellate Division affirmed. Toker v. Perl, 108 N.J. Super. 129, (1969). However, defendants there charged, and the trial court found, that the dealer had fraudulently procured defendant's signatures to the contract. The affirmance of the Appellate Division was on this ground alone, the court specifically expressing no opinion on the finding of the trial court that the excessive price of the unit also rendered the contract unenforceable.

There appear to be no other cases in New Jersey on this precise point and the reported cases in other states are sparse. However, it would also appear that those states which have considered this question have uniformly held that the purchase price alone may be found to be unconscionable, therefore bringing the statutory provision into play. See Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Sup. Ct. 1966), rev'd on other grounds, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (App. Div. 1967); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S. 2d 391, 392 (Sup. Ct. 1967); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A. 2d 886 (Sup. Ct. 1964). Compare Star Credit Corp. v. Molina, 59 Misc. 2d 290, 298 N.Y.S. 2d 570 (Civ. Ct. 1969) in which the court refused to hold the purchase price of the home freezer to be unconscionable where there was no evidence offered to show the true market price of the item.

In Frostifresh Corp. v. Reynoso, supra, the Appellate Court upheld the finding of unconscionability where a home freezer costing the plaintiff $ 348 was sold to a welfare recipient for a total price, including time-price-differential, of $ 1,145.88. However, it also reversed the lower court in permitting the seller to recover only the cost of the item, holding that the seller was entitled to the reasonable profit. These decisions are clearly in the mainstream of current judicial concepts in the area of consumer goods, as set forth by our Supreme Court:

\* \* Although courts continue to recognize that persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way. [Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528 (1967)]

In the instant case the court finds that in receiving a total of $ 655.85 plaintiff and his assignor have received a reasonable sum. The payment of the balance of the purchase price will therefore not be enforced. Judgment for defendants.

Gatton v. T-Mobile USA, Inc.

152 Cal. App. 4th 571 (Cal. App. 1 Dist. 2007)

Gemello, J.

In this consolidated appeal, T-Mobile USA, Inc. appeals from an order denying its motion to compel arbitration of actions challenging the early termination fee charged to cellular telephone service subscribers and challenging the practice of selling locked handsets that a subscriber cannot use when switching carriers. T-Mobile contends the court erred in concludingthat the arbitration clause in its service agreement is unconscionable.

. . . [W]e hold that the adhesive nature of the service agreement established a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives and that the high degree of substantive unconscionability arising from the class action waiver rendered the arbitration provision unenforceable.

 We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

*The* *Parties* *and* *the* *Service* *Agreements*

T-Mobile USA, Inc. (T-Mobile) is a cellular telephone provider in California. Plaintiffs are or were subscribers to T-Mobile. All plaintiffs executed service agreements drafted by T-Mobile. Each agreement incorporated terms and conditions drafted by T-Mobile. Directly above the signature line in the service agreement executed by plaintiffs is a short paragraph stating, “By signing below, you acknowledge you .... have received a copy of this Agreement.... You also acknowledge you have received and reviewed the T-Mobile Terms and Conditions, and agree to be bound by them.... All disputes are subject to mandatory arbitration in accordance with paragraph 3 of the Terms and Conditions.”

The introductory paragraph to the terms and conditions incorporated into the agreement states: “Welcome to T-Mobile. BY ACTIVATING OR USING OUR SERVICE YOU AGREE TO BE BOUND BY THE AGREEMENT. Please carefully read these Terms and Conditions (“T & C's” ) as they describe your Service and affect your legal rights. IF YOU DON'T AGREE WITH THESE T & C'S, DO NOT USE THIS SERVICE OR YOUR UNIT.” Similarly, the handset shipping box was sealed across the closing seam with a sticker that stated: “IMPORTANT[¶] Read the enclosed T-Mobile Terms & Conditions. By using T-Mobile service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee provisions.” The terms and conditions were also included in a “Welcome Guide” enclosed in the boxes containing the handsets.

Section 3 of the terms and conditions incorporated into the agreement is entitled “Mandatory Arbitration; Dispute Resolution.” It includes language waiving any right to seek classwide relief.[[1]](#footnote-1)1 The terms and conditions incorporated into each of the plaintiff's agreements included a mandatory arbitration clause including a class action waiver.

*Early* *Termination* *Fees* *Case* *(A112082)*

The action of plaintiffs Gatton, Hull, Nguyen, and Vaughan, brought on behalf of themselves individually and on behalf of all similarly situated California residents, challenges the fee imposed by T-Mobile for termination of the service agreement before its expiration date.

The complaint includes the following allegations. The service agreement between T-Mobile and its subscribers is typically one or two years in duration. Under the terms of the agreement, subscribers who terminate the service before the expiration of the agreement are subject to an early termination penalty of approximately $200 per telephone. The early termination penalties are also imposed if T-Mobile terminates the agreement for, among other reasons, nonpayment by the subscriber. The amount of the fee does not vary according to how long the contract has been in effect at the time of termination; it is the same whether the contract has been in effect for several weeks or several months. The flat-fee early termination penalty constitutes an unlawful penalty under Civil Code section 1671, subdivision (d),[[2]](#footnote-2)2 is unlawful under the unfair competition law (Bus. & Prof.Code, § 17200 et seq.), and is unconscionable under the Consumers Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.).

 Plaintiffs seek a permanent injunction prohibiting T-Mobile from collecting or enforcing the early termination penalty; a constructive trust on all monies collected as early termination penalties; and all other relief to which they are statutorily entitled, including restitution.

*Handset* *Locking* *Case* *(A112084)*

The action of plaintiffs Nguyen and Grant, brought on behalf of themselves individually and on behalf of all similarly situated California residents, challenges the practice of installing a locking device in T-Mobile handsets that prevents its subscribers from switching cell phone providers without purchasing a new handset.

The complaint includes the following allegations. The handsets T-Mobile sells its subscribers are manufactured by equipment vendors such as Nokia, Motorola, or Samsung. Each handset has a receptacle into which a machine readable SIM (subscriber information module) card can be inserted. The card is approximately the size of a postage stamp and contains the subscriber and the provider identifying information. The SIM card can be inserted and removed by hand; no special tools or equipment are required. T-Mobile employs a SIM lock to prevent its handsets from operating with a SIM card programmed for any other network. The SIM lock can be unlocked by entering an eight digit code number; once unlocked, the handset will operate with any compatible SIM card for any network. T-Mobile requires equipment vendors to alter the handsets they sell to T-Mobile by locking them with SIM locks and setting the SIM unlock code based on a secret algorithm provided by T-Mobile. The agreement between T-Mobile and its subscribers falsely states that T-Mobile handsets are not compatible with and will not work with other wireless networks. That misrepresentation constitutes unfair competition and violates the CLRA. The secret locking makes it impossible or impracticable for subscribers to switch cell phone service providers without purchasing a new handset.

Plaintiffs seek an order directing T-Mobile to disclose the existence and effect of the handset locks and to offer to unlock the handsets free of charge; an injunction prohibiting T-Mobile from secretly programming and selling handsets with SIM locks and from representing that the handsets are not compatible with services provided by other wireless carriers; and for restitution and/or disgorgement of all amounts wrongfully charged to plaintiffs and members of the class.

*Motion* *to* *Compel* *Arbitration*

T-Mobile moved to compel arbitration of the two actions in accord with the service agreement. Plaintiffs opposed the motion on the grounds that (1) their claims for injunctive relief under the Unfair Competition Law and the CLRA were not arbitrable, and (2) their remaining claims were not arbitrable because the arbitration clause was unconscionable.

The trial court denied the motion to compel. It concluded that the claims for injunctive relief were primarily for the benefit of the public and, consequently, were not subject to arbitration. As to the other claims, it concluded that the arbitration provision was unconscionable and therefore unenforceable. The trial court held that although the indications of procedural unconscionability were “not particularly strong,” under *Discover* *Bank* *v.* *Superior* *Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100(*Discover* *Bank* ), the arbitration clause was substantively unconscionable because its prohibitionon class arbitrations or participation in a class action was against public policy.

DISCUSSION

Appellant T-Mobile contends the trial court erred in denying its motion to compel because the class action waiver did not render the arbitration provision unconscionable and because principles of federal preemption require enforcement of the provision.

I. *Unconscionability*

An agreement to arbitrate is valid except when grounds exist for revocation of a contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).) Unconscionability is one ground on which a court may refuse to enforce a contract. (Civ.Code, § 1670.5.) The petitioner, T-Mobile here, bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense. (*Engalla* *v.* *Permanente* *Medical* *Group,* *Inc.* (1997) 15 Cal.4th 951, 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

Whether a provision is unconscionable is a question of law. (Civ.Code, § 1670.5, subd. (a); *Flores* *v.* *Transamerica* *HomeFirst,* *Inc.* (2001) 93 Cal.App.4th 846, 851, 113 Cal.Rptr.2d 376(*Flores* ).) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (*Stirlen* *v.* *Supercuts,* *Inc.* (1997) 51 Cal.App.4th 1519, 1527, 60 Cal.Rptr.2d 138(*Stirlen* ); *Flores,* at p. 851, 113 Cal.Rptr.2d 376.)

The analytic framework employed by the California Supreme Court in determining whether a contract provision is unconscionable has its origins in *A* *&* *M* *Produce* *Co.* *v.* *FMC* *Corp.* (1982) 135 Cal.App.3d 473, 186 Cal.Rptr. 114(*A* *&* *M* *Produce* ). (See *Armendariz* *v.* *Foundation* *Health* *Psychcare* *Services,* *Inc.* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669(*Armendariz* ).) Unconscionability has a procedural and a substantive element; the procedural element focuses on the existence of oppression or surprise and the substantive element focuses on overly harsh or one-sided results. (*Armendariz,* at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, quoting *A* *&* *M* *Produce,* at pp. 486-487, 186 Cal.Rptr. 114; see also *Discover* *Bank,* *supra,* 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree. (*Armendariz,* at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The analysis employs a sliding scale: “ the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Ibid.;* see also *Donovan* *v.* *RRL* *Corp.* (2001) 26 Cal.4th 261, 291, 109 Cal.Rptr.2d 807, 27 P.3d 702.)

A. *The* Discover Bank *Decision*

Our analysis of the challenged arbitration provision is governed by the California Supreme Court decision *Discover* *Bank.* There, the court considered an unconscionability challenge to an arbitration provision prohibiting classwide arbitration in an agreement between a credit card company and its cardholders. (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 152, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) The provision was added to the agreement by a notice sent to cardholders. (*Id.* at p. 153, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

The court emphasized the “important role of class action remedies in California law.” (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 157, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) “ ‘Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.’ ” (*Id.* at p. 156, 30 Cal.Rptr.3d 76, 113 P.3d 1100, quoting *Vasquez* *v.* *Superior* *Court* (1971) 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964.)

 In analyzing the unconscionability issue, *Discover* *Bank* first concluded that “when a consumer is given an amendment to its cardholder agreement in the form of a ‘bill stuffer’ that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present.” (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) Turning to the substantive element, the court stated “although adhesive contracts are generally enforced [citation], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. [Citation.] As stated in Civil Code section 1668: ‘All contracts *which* *have* *for* *their* *object,* *directly* *or* *indirectly,* *to* *exempt* *anyone* *from* *responsibility* *for* *his* *own* *fraud,* *or* *willful* *injury* to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.’ (Italics added.)” (*Discover* *Bank,* at p. 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) The court acknowledged that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, but because damages in consumer cases are often small and “because ‘ “ [a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit” ’ [citation], ‘ “ the class action is often the only effective way to halt and redress such exploitation.” ’ ” (*Ibid.*) Moreover, the court recognized that such class action and class arbitration waivers are “indisputably one-sided.” (*Ibid.*) “ ‘Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.’ ” (*Ibid.*)

 In light of those considerations, *Discover* *Bank* held that when a waiver of classwide relief “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (*Discover* *Bank,* *supra,* 36 Cal.4th at pp. 162-163, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

Against this legal backdrop, we consider the specific provision challenged here.

B. *Procedural* *Unconscionability*

The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. (*Kinney* *v.* *United* *HealthCare* *Services,* *Inc.* (1999) 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348, citing *A* *&* *M* *Produce,* *supra,* 135 Cal.App.3d at p. 486, 186 Cal.Rptr. 114.) The element focuses on oppression or surprise. (*Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669.) “ Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” (*Flores,* *supra,* 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376, citing *A* *&* *M* *Produce,* at p. 486, 186 Cal.Rptr. 114.) Surprise is defined as “ ‘the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.’ ” (*Stirlen,* *supra,* 51 Cal.App.4th at p. 1532, 60 Cal.Rptr.2d 138, quoting *A* *&* *M* *Produce,* at p. 486, 186 Cal.Rptr. 114.)

In their reply brief, plaintiffs did not dispute T-Mobile's assertion that the surprise aspect of procedural unconscionability is absent because the arbitration provision was fully disclosed to T-Mobile's customers. In response to our request for supplemental briefing, plaintiffs first urged that surprise is not necessary to find procedural unconscionability. Plaintiffs then asserted that we could find surprise because T-Mobile did not specifically bring to the attention of its customers that the arbitration provision included a class action waiver and because the print used in the agreement was small. We conclude that plaintiffs have not shown surprise. The arbitration provision was not disguised or hidden, and T-Mobile made affirmative efforts to bring the provision to the attention of its customers, including by referencing the provision on a sticker placed across the closing seam of the handset shipping box. (*Stirlen,* *supra,* 51 Cal.App.4th at p. 1532, 60 Cal.Rptr.2d 138.) A finding of procedural unconscionability in this case cannot be based on the existence of surprise.

The California Supreme Court has consistently reiterated that “ ‘ [t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion.’ ” (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100; see also *Armendariz,* *supra,* 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669 [“Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion” ]; *Little* *v.* *Auto* *Stiegler,* *Inc.* (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979.) Appellate courts considering unconscionability challenges in consumer cases have routinely found the procedural element satisfied where the agreement containing the challenged provision was a contract of adhesion. For example, in *Flores* we stated that “[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability” (*Flores,* *supra,* 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376), and in *Aral* *v.* *EarthLink,* *Inc.* (2005) 134 Cal.App.4th 544, 557, 36 Cal.Rptr.3d 229, the court described an adhesive contract as “quintessential procedural unconscionability.” (See also *Marin* *Storage* *&* *Trucking,* *Inc.* *v.* *Benco* *Contracting* *&* *Engineering,* *Inc.* (2001) 89 Cal.App.4th 1042, 1054, 107 Cal.Rptr.2d 645(*Marin* *Storage* ); *Cohen* *v.* *DirecTV,* *Inc.* (2006) 142 Cal.App.4th 1442, 1451, 48 Cal.Rptr.3d 813.)

 Whether the challenged provision is within a contract of adhesion pertains to the oppression aspect of procedural unconscionability. A contract of adhesion is “ ‘ “imposed and drafted by the party of superior bargaining strength” ’ ” and “ ‘ “relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” ’ ” (*Discover* *Bank,* *supra,* 36 Cal. 4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) This definition closely parallels the description of the oppression aspect of procedural unconscionability, which “arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” (*Flores,* *supra,* 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376, citing *A* *&* *M* *Produce,* *supra,* 135 Cal.App.3d at p. 486, 186 Cal.Rptr. 114; see also *Perdue* *v.* *Crocker* *National* *Bank* (1985) 38 Cal.3d 913, 925, fn. 9, 216 Cal.Rptr. 345, 702 P.2d 503 [noting that oppression arises from “unequal bargaining power”].) It is clear that the T-Mobile service agreement was a contract of adhesion: T-Mobile drafted the form agreement, its bargaining strength was far greater than that of individual customers, and customers were required to accept all terms and conditions of the agreement as presented or forgo T-Mobile's telephone service.

 Nevertheless, T-Mobile argues that there was no oppression in the formation of the agreements because plaintiffs had the option of obtaining mobile phone service from one of two other providers whose agreements did not contain class action waivers. Preliminarily, we note that the evidence of the availability of market alternatives is exceedingly slim. More fundamentally, we reject the contention that the existence of market choice altogether negates the oppression aspect of procedural unconscionability. “Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to ‘ take it or leave it’ without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.” (*Szetela* *v.* *Discover* *Bank* (2002) 97 Cal.App.4th 1094, 1100, 118 Cal.Rptr.2d 862(*Szetela*).) The existence of consumer choice decreases the extent of procedural unconscionability but does not negate the oppression and obligate courts to enforce the challenged provision regardless of the extent of substantive unfairness.The existence of consumer choice is relevant, but it is not determinative of the entire issue. (*Ibid.*)[[3]](#footnote-3)3

We considered market alternatives as a relevant factor in our decision in *Marin* *Storage,* *supra,* 89 Cal.App.4th 1042, 107 Cal.Rptr.2d 645. There, a general contractor challenged the enforceability of an indemnification provision in a form subcontract created by a crane rental company. (*Id.* at pp. 1046-1048, 107 Cal.Rptr.2d 645.) The procedural element was satisfied because the agreement at issue was “ a contract of adhesion and, hence, procedurally unconscionable.” (*Id.* at p. 1054, 107 Cal.Rptr.2d 645.) But the degree of procedural unconscionability was limited because the contractor was sophisticated and had choice in selecting crane providers; in fact the plaintiff had done business with ten other firms. (*Id.* at p. 1056, 107 Cal.Rptr.2d 645.) We also considered substantive unconscionability and concluded that, viewed in its commercial context, the indemnification provision was not overly one-sided or unreasonable. (*Id.* at pp. 1055-1056, 107 Cal.Rptr.2d 645.) Balancing the procedural and substantive elements, we concluded that “ [i]n light of the low level of procedural unfairness ... a greater degree of substantive unfairness than has been shown here was required before the contract could be found substantively unconscionable.” (*Id.* at p. 1056, 107 Cal.Rptr.2d 645; see also *Woodside* *Homes* *of* *Cal.,* *Inc.* *v.* *Superior* *Court* (2003) 107 Cal.App.4th 723, 730, 132 Cal.Rptr.2d 35 [because plaintiff home buyers were not unsophisticated or lacking in choice, they established only a “ low level” of procedural unconscionability and were obligated to establish “ a *high* level of substantive unconscionability” ].)

The *Marin* *Storage* approach is consistent with the instruction in *Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, that the elements of procedural and substantive unconscionability “ need not be present in the same degree.” The court explained: “ ‘Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.’ [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Ibid.*)

 In the three appellate decisions relied on by T-Mobile to support its approach to procedural unconscionability, the results would be the same under the *Marin* *Storage* reasoning. In two, the courts, like *Marin* *Storage,* actually rejected the unconscionability claims only after finding no clear substantive unfairness. (*Morris* *v.* *Redwood* *Empire* *Bancorp,* *supra,* 128 Cal.App.4th at p. 1322, 27 Cal.Rptr.3d 797 [“In sum, we are able to discern little or no procedural unconscionability from the allegations of the second amended complaint.... [¶] We now turn our analysis to substantive unconscionability”]; *Wayne* *v.* *Staples,* *Inc.,* *supra,* 135 Cal.App.4th at p. 483, 37 Cal.Rptr.3d 544.) Critically, any substantive unconscionability was relativelyminor: *Morris* involved only a $150 fee charged upon termination of a credit card merchant account; *Staples* involved allegedly excessive charges for “declared value coverage” but the charges were “comparable to the amount charged by other retailers of shipping services.” (*Morris,* at pp. 1323-1324, 27 Cal.Rptr.3d 797; *Staples,* at p. 483, 37 Cal.Rptr.3d 544.) In the third, *Dean* *Witter* *Reynolds,* *Inc.* *v.* *Superior* *Court* (1989) 211 Cal.App.3d 758, 772, 259 Cal.Rptr. 789(*Dean* *Witter*), while the court did not reach the issue of substantive unconscionability, the challenged provision was a relatively insignificant $50 fee for terminating an individual retirement account.

 The cases are distinguishable because in each there was not a high degree of substantive unconscionability that could justify a court “ ‘ disregard [ing] the regularity of the procedural process of the contract formation.’ ” (*Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669.) In other words, because any substantive unconscionability was low, the sliding scale analysis did not provide a basis to refuse to enforce the provisions in light of the minimal procedural unconscionability.

The rule T-Mobile asks us to adopt disregards the sliding scale balancing required by *Armendariz;* in the absence of evidence of surprise, the proposed rule would allow any evidence of consumer choice to trump all other considerations, mandating courts to enforce the challenged provisions without considering the degree of substantive unfairness and the potential harm to important public policies. Although contracts of adhesion are well accepted in the law and routinely enforced, the inherent inequality of bargaining power supports an approach to unconscionability that preserves the role of the courts in reviewing the substantive fairness of challenged provisions. (*Graham* *v.* *Scissor-Tail,* *Inc.,* *supra,* 28 Cal.3d at pp. 817-818, 171 Cal.Rptr. 604, 623 P.2d 165; *Marin* *Storage,* *supra,* 89 Cal.App.4th at p. 1052, 107 Cal.Rptr.2d 645.) Otherwise, the imbalance of power creates an opportunity for overreaching in drafting form agreements. (See *Graham* *v.* *Scissor-Tail,* at pp. 817-818, 171 Cal.Rptr. 604, 623 P.2d 165.) The possibility of overreaching is even greater in ordinary consumer transactions involving relatively inexpensive goods or services because consumers have little incentive to carefully scrutinize the contract terms or to research whether there are adequate alternatives with different terms, and companies have every business incentive to craft the terms carefully and to their advantage. The unconscionability doctrine ensures that companies are not permitted to exploit this dynamic by imposing overly one-sided and onerous terms. (*Ibid.*) In sum, there are provisions so unfair or contrary to public policy that the law will not allow them to be imposed in a contract of adhesion, even if theoretically the consumer had an opportunity to discover and use an alternate provider for the good or service involved.

We reject the rule proposed by T-Mobile. Instead we hold that absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. If the challenged provision does not have a high degree of substantive unconscionability, it should be enforced. But, under *Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, we conclude that courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market.

The Ninth Circuit, sitting en banc in *Nagrampa* *v.* *MailCoups,* *Inc.* (9th Cir.2006) 469 F.3d 1257, reached the same conclusion. There, a franchisee contended that an arbitration provision in a contract of adhesion was unconscionable. (*Id.* at p. 1281.) The court rejected the franchisor's argument that the availability of other franchising opportunities could alone defeat the plaintiff's claim of procedural unconscionability. (*Id.* at p. 1283.) Because the franchisor had overwhelming bargaining power, drafted the contract, and presented it on a take-it-or-leave-it basis, there was “minimal” evidence of procedural unconscionability. (*Id.* at p. 1284.) The court reasoned that the minimal showing was “sufficient to require us, under California law, to reach the second prong of the unconscionability analysis. We therefore next examine the extent of substantive unconscionability to determine, whether based on the California courts' sliding scale approach, the arbitration provision is unconscionable.” (*Ibid.*)

We conclude that plaintiffs showed a minimal degree of procedural unconscionability arising from the adhesive nature of the agreement. But this is “ ‘the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.’ ” (*Graham* *v.* *Scissor-Tail,* *Inc.,* *supra,* 28 Cal.3d at p. 819, 171 Cal.Rptr. 604, 623 P.2d 165.) Under the sliding scale approach, plaintiffs were obligated to make a strong showing of substantive unconscionability to render the arbitration provision unenforceable.

C. *Substantive* *Unconscionability*

The substantive element of the unconscionability analysis focuses on overly harsh or one-sided results. (*Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Flores,* *supra,* 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376.) In light of *Discover* *Bank,* we conclude that the challenged provision has a high degree of substantive unconscionability.

In considering whether class action waivers may be unconscionable, *Discover* *Bank* emphasized that class actions are often the only effective way to halt corporate wrongdoing and that class action waivers are “indisputably one-sided” because companies typically do not sue their customers in class action lawsuits. (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) The court did not conclude that all class action waivers are necessarily unconscionable, but the court did hold that “when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” then the waiver is exculpatory in effect and unconscionable under California law. (*Discover* *Bank,* *supra,* 36 Cal.4th at pp. 162-163, 30 Cal.Rptr.3d 76, 113 P.3d 1100; see also *Cohen* *v.* *DirecTV,* *Inc.,* *supra,* 142 Cal.App.4th at pp. 1451-1454, 48 Cal.Rptr.3d 813; *Klussman* *v.* *Cross* *Country* *Bank* (2005) 134 Cal.App.4th 1283, 1297-1298, 36 Cal.Rptr.3d 728; *Aral* *v.* *EarthLink,* *Inc.,* *supra,* 134 Cal.App.4th at pp. 555-557, 36 Cal.Rptr.3d 229; *Szetela,* *supra,* 97 Cal.App.4th at pp. 1100-1102, 118 Cal.Rptr.2d 862 [cited with approval in *Discover* *Bank* ].)

 T-Mobile contends that this case is distinguishable from *Discover* *Bank* on two grounds. First, the amount in controversy exceeds the $29 late payment fee involved in *Discover* *Bank.* The largest monetary damage claim is the $200 early termination fee. We agree with *Cohen* *v.* *DirecTV,* *Inc.,* *supra,* 142 Cal.App.4th at p. 1452, 48 Cal.Rptr.3d 813, which rejected the same argument T-Mobile makes. The court reasoned: “ While $1,000 is not an insignificant sum, many consumers of services such as those offered by DIRECTV may not view that amount as sufficient ‘ “ ‘ “to warrant individual litigation,” ’ ” and certainly it is not sufficient to obtain legal assistance in prosecuting the claim. [ *Discover* *Bank,* *supra,* 36 Cal.4th at p. 157, 30 Cal.Rptr.3d 76, 113 P.3d 1100.] In short, the class action device remains, in our view, the only practicable way for consumers of services such as DIRECTV's to deter and redress wrongdoing of the type Cohen alleges. Damages that may or may not exceed $1,000 do not take DIRECTV's class action waiver outside ‘ a setting in which disputes between the contracting parties predictably involve small amounts of damages....'” (*Cohen,* at p. 1452, 48 Cal.Rptr.3d 813.) The same is true in this case.

 Second, T-Mobile contends that the class action waiver would not exculpate the company from any wrongdoing because, unlike in *Discover* *Bank,* plaintiffs assert inarbitrable claims for public injunctive relief. However, under *Discover* *Bank's* reasoning, the class action waiver would at the very least effectively exculpate T-Mobile from the alleged fraud perpetrated on the class members, which is enough to bring this case within the scope of the *Discover* *Bank* holding. Moreover, *Discover* *Bank* rejected the argument that private lawsuits seeking injunctive relief and attorney fees awards are an adequate substitute for class actions. The court specifically stated that it was not persuaded that the problems posed by class action waivers are ameliorated by the availability of attorney fees awards in private litigation or the availability of public actions (brought by the Attorney General or other designated law enforcement officials) for injunctive relief and civil penalties. (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100; see also *id.* at p. 180, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (dis. opn. of Baxter, J.).)

 In the consumer context, class actions and arbitrations are “ often inextricably linked to the vindication of substantive rights.” (*Discover* *Bank,* *supra,* 36 al.4th at p. 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) There is nothing extraordinary about the circumstances of this case that distinguishes it from the typical consumer class actions described in *Discover* *Bank.* Because it is directly within the scope of the holding in that case, we conclude that the class action waiver has a high degree of substantive unconscionability. Applying the sliding scale test for unconscionability, even though the evidence of procedural unconscionability is limited, the evidence of substantive unconscionability is strong enough to tip the scale and render the arbitration provision unconscionable. The trial court properly denied the motion to compel arbitration.

. . .

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Costs are awarded to plaintiffs.

I concur: SIMONS, J.JONES, P.J., Concurring and Dissenting.

Under compulsion of *Discover* *Bank* *v.* *Superior* *Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100(*Discover* *Bank*), I concur in my colleagues' conclusion that the arbitration clauses before us are substantively unconscionable because of the prohibition in the mandatory arbitration provision against the pursuit of any remedy by a plaintiff as a representative of other potential claimants or class of claimants. But I cannot agree that the contracts are also procedurally unconscionable. In my view, plaintiffs do not show, on the record before us, either surprise or oppression to support their procedural unconscionability claim. In the absence of both procedural and substantive elements of unconscionability, this court should decline to exercise its discretion to refuse to enforce the disputed clause. (*Armendariz* *v.* *Foundation* *Health* *Psychcare* *Services,* *Inc.* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669(*Armendariz* ).) The trial court erred when it denied the motion to compel arbitration, and its order so holding should be reversed.

BACKGROUND

It is undisputed that the challenged terms of the cellular telephone service agreement were drafted by cellular telephone provider T-Mobile and executed by each plaintiff when he/she signed up for T-Mobile cellular telephone service. The contracts were presented on a “ take-it-or-leave-it” basis, were not subject to negotiation, and were therefore adhesive contracts. As recounted by the majority, a short paragraph directly above the signature line contained a statement that the customer's signature constituted the customer's acknowledgement of receipt, review of, and agreement to be bound by “ the T-Mobile Terms and Conditions,” and that “ All disputes are subject to mandatory arbitration in accordance with paragraph 3 of the Terms and Conditions.” A second notice appeared in the introductory paragraph, cautioning subscribers in capitalized letters that “ BY ACTIVATION OR USING OUR SERVICE YOU AGREE TO BE BOUND BY THE AGREEMENT ... IF YOU DON'T AGREE WITH THESE T & C'S, DON'T USE THIS SERVICE OR YOUR UNIT.”

 Customers were given a third notice on the closing seam of the shipping box containing the newly purchased handset. The box was sealed with a sticker that stated: “ **IMPORTANT** Read the enclosed T-Mobile Terms & Conditions. By using T-Mobile service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee provisions.”

Once the shipping box was opened, the subscriber found a “Welcome Guide.” Page three of the “Welcome Guide” was a table of contents, which listed “ Terms and Conditions” as one of the sections of the guide. At the bottom of the table of contents was the statement: “ Important Note: By using T-Mobile service, you acknowledge that you have read and agree to the terms and conditions of the Service Agreement.” The “ Terms and Conditions” included in the welcome guide was identical to the terms and conditions given to the customers before they signed their service agreements, including the same introductory paragraph admonishing the customer to read the terms and conditions carefully and not to use the service if they did not agree with all terms and conditions.

Section 5 of the terms and conditions, entitled “Cancellation and Return Policy,” describes a “ Return Period.” It states, “[t]here is a Return Period during which you can cancel a newly activated line of Service without paying a cancellation fee. The Return Period is 14 calendar days from the date of Service activation or 30 days from the Phone's purchase date if you have not activated service.... You may be required to pay a restocking fee....”

 The actions brought by plaintiffs Gatton, Hull, Nguyen and Vaughan, on behalf of themselves individually and on behalf of all similarly situated California residents, challenged the term in T-Mobile's service agreement which imposed a fee for termination of the service agreement before its expiration date. The action of plaintiffs Nguyen and Grant, brought on behalf of themselves individually and on behalf of all similarly situated California residents, concerns a locking device installed in T-Mobile handsets that prevents its subscribers from switching cell phone providers without purchasing a new handset.

DISCUSSION

It is well settled that an agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract (Code Civ. Proc., §§ 1281, 1281.2, subd. (b)), and it is equally settled that a court can refuse to enforce an unconscionable provision in a contract. (Civ.Code, § 1670.5; *Armendariz,* *supra,* 24 Cal.4th at pp. 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

1. *Unconscionability*

In *Discover* *Bank* our Supreme Court “ ‘briefly recapitulate[d] the principles of unconscionability’ ” in the context of a challenge to a mandatory arbitration clause forbidding classwide arbitration that was added to the plaintiff's bank credit card agreement 13 years after the plaintiff obtained the card. The bank informed the plaintiff that continued use of the card would be deemed acceptance of the new terms unless the cardholder notified the bank that he did not want to accept the new terms and ceased using his account. (*Discover* *Bank,* *supra,* 36 Cal.4th at pp. 154, 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) “ [T]he doctrine has ‘ “ both a “procedural” and a “substantive” element,’ the former focusing on ‘ “oppression” ’ or ‘ “surprise” ’ due to unequal bargaining power, the latter on ‘ “overly harsh” ’ “or” ‘ “one-sided” ’ results.” [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ‘ “which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contact or reject it.’ [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.' (*Little* *v.* *Auto* *Stiegler,* *Inc.* (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979(*Little* ).” (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.))[[4]](#footnote-4)1

*Discover* *Bank* continued: “We agree that at least some class action waivers in consumer contracts are unconscionable under California law. First, when a consumer is given an amendment to its cardholder agreement in the form of a ‘bill stuffer’ that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present. [quoting *Szetela* *v.* *Discover* *Bank* (2002) 97 Cal.App.4th 1094, 1100, 118 Cal.Rptr.2d 862(*Szetela* ).] Moreover, although adhesive contracts are generally enforced [quoting *Scissor-Tail* ], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.” (*Discover* *Bank,* *supra,* 36 Cal.4th at pp. 160-161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

For a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, *both* procedural and substantive unconscionability must be present, although not necessarily in the same degree. (*Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; see also *A* *&* *M* *Produce* *Co.* *v.* *FMC* *Corp.* (1982) 135 Cal.App.3d 473, 487, 493, 186 Cal.Rptr. 114(*A* *&* *M* *Produce* ).) T-Mobile contends the service agreement at issue here is not procedurally unconscionable because there was no showing of surprise or oppression. I agree.

2. *Procedural* *Unconscionability*

A. Surprise

T-Mobile argues that plaintiffs cannot claim surprise regarding the service agreement's arbitration provision because the provision was fully disclosed to potential purchasers. As the majority notes, plaintiffs conceded in their reply brief the absence of the surprise component of procedural unconscionability. Plaintiffs' efforts to resurrect this argument in supplemental briefing must fail. The record contains ample evidence of T-Mobile's disclosures and admonitions given to subscribers before and after the purchase. The quantity and prominence of the disclosures and the grace period of 14 days from service activation or 30 days from purchase if no activation, should a customer decide he or she did not want to accept the terms of the service agreement, demonstrate the absence of surprise to support procedural unconscionability. I turn then to the issue of oppression.

B. Oppression

T-Mobile argues the oppression element of procedural unconscionability is lacking because plaintiffs could obtain mobile phone service from other providers whose agreements did not contain a mandatory arbitration provision and because there are no other indicia of oppression. Plaintiffs counter that the service agreement “ provides a maximum degree of procedural unconscionability” because it is a standard form, preprinted, nonnegotiable contract of adhesion presented to them on a “ take it or leave it” basis.

The oppression component of procedural unconscionability has long been described as arising from an inequality of bargaining power of the parties to the contract which results in no real negotiation and an absence of meaningful choice on the part of the weaker party. (*A* *&* *M* *Produce,* *supra,* 135 Cal.App.3d at p. 486, 186 Cal.Rptr. 114; see also *Wayne* *v.* *Staples,* *Inc.* (2006) 135 Cal.App.4th 466, 480, 37 Cal.Rptr.3d 544; *Crippen* *v.* *Central* *Valley* *RV* *Outlet* (2004) 124 Cal.App.4th 1159, 1164, 22 Cal.Rptr.3d 189; *Kinney* *v.* *United* *HealthCare* *Services,* *Inc.* (1999) 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348.)

The majority ascribes to the California Supreme Court a consistent position that “ ‘[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion.’ ” . . . (*Discover* *Bank,* *supra,* 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100, quoting *Little,* *supra,* 29 Cal.4th at p. 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979; see also *Armendariz,* *supra,* 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.) While our Supreme Court has repeated the quoted statement, I cannot agree that our high court views procedural unconscionability as established based only on the presence of “unequal bargaining power” (see *Perdue* *v.* *Crocker* *National* *Bank* (1985) 38 Cal.3d 913, 925, fn. 9, 216 Cal.Rptr. 345, 702 P.2d 503) or “an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice” (*Flores* *v.* *Transamerica* *HomeFirst,* *Inc.* (2001) 93 Cal.App.4th 846, 853, 113 Cal.Rptr.2d 376(*Flores* ), quoting *A* *&* *M* *Produce,* *supra,* 135 Cal.App.3d at p. 486, 186 Cal.Rptr. 114). A review of the origin of these definitional statements leads me to conclude that more than the existence of an adhesive contract is required.

Critical to an unconscionability analysis is *Scissor-Tail,* *supra,* 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165, in which the plaintiff contended he should not be compelled to arbitrate a dispute because the underlying agreement, at least to the extent it required arbitration of disputes between the parties, was “an unenforceable contract of adhesion.” (*id.* at p. 817, 171 cal.rptr. 604, 623 P.2d 165.) *Scissor-tail* concluded the agreement was adhesive, i.e., a “ ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhereto the contract or reject it.’ ” (*Ibid.,* quoting *Neal,* *supra,* 188 Cal.App.2d at p. 694, 10 Cal.Rptr. 781.) But *Scissor-Tail* continued: “To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, ‘the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.’ [Citation.] Thus, a contract of adhesion is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules-legislative or judicial-operate to render it otherwise.” (*Scissor-Tail,* *supra,* at p. 819, 171 Cal.Rptr. 604, 623 P.2d 165, fns. omitted) No subsequent case has disapproved this language. Indeed, although *Discover* *Bank* recited the *A* *&* *M* *Produce* analytic framework, *Discover* *Bank* also observed that contracts of adhesion are generally enforced, specifically quoting *Scissor-Tail.* (*Discover* *Bank,* *supra,* 36 Cal.4th at pp. 160, 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

 Reading *Scissor-Tail* together with *A* *&* *M* *Produce,* and particularly the phrase in the latter decision-“an absence of meaningful choice on the part of the weaker party” -, I conclude there is no taint of unconscionability from the bare fact that a contract is adhesive. Other factors must be present to preclude enforceability on grounds of unconscionability.

. . .

 As I stated at the outset, the *Armendariz* analytic framework requires *both* procedural and substantive elements before a court can exercise its discretion to refuse to enforce a contract under the unconscionability doctrine. (*Armendariz,* *supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; see also *A* *&* *M* *Produce,* *supra,* 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114.) Because there is an absence on this record of both the surprise and oppression factors of procedural unconscionability, the service agreement is not unconscionable, and T-Mobile's motion to compel arbitration should be granted.

**Notes and Questions**

 1. The dissent argues that “there is no taint of unconscionability from the bare fact that a contract is adhesive. Other factors must be present to preclude enforceability on grounds of unconscionability.” But would the majority not agree with the last sentence? The majority does not infer *unenforceability* from the fact of a contract of adhesion, just *procedural* unconscionability. Unenforceability requires *substantive* unconscionability as well.

 2. In *Douglas v. U.S. Dist. Court for Cent. Dist. of California*, \_\_ F.3d \_\_ (9th Cir. 2007), Douglas obtained long distance telephone service under a contract with TalkAmerica. Sometime later, TalkAmerica altered the contract to impose additional service charges; a class action waiver; an arbitration clause; and a choice-of-law provision requiring the use of New York law. The contract was posted on the TalkAmerica website, but Douglas was never notified of the changes. The court held that the arbitration clause was procedurally and substantive unconscionable. On the issue of procedural unconscionability, the court noted that “In California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a “take-it-or-leave-it” contract to a customer-even if the customer has a meaningful choice as to service providers.” *Id*. at \*2.

 3. Many businesses maintain contracts on their web sites governing the sales and services they provide. These are typically take-or-leave-it contracts of adhesion. When they alter those contracts, do *Gatton* and *Douglas* mean that a the businesses must notify the affected customers if the businesses want the modification to be effective? Note that, in *Douglas*, the revised contract was available on the TalkAmerica website. Douglas did not visit the website, but the court notes that

Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so.

*Id*. at \*1.

Lewis v. Browning

130 Mass. 173 (1881)

Action for breach of the covenants of a written lease of a tenement in Boston. The defendant admitted that there had been a breach of the conditions of the lease, and agreed that judgment might be entered for the plaintiff in the sum of $2168.22, unless the facts herein stated constituted a defense to this action.

Gray, C. J.

In *M'Culloch v. Eagle Ins. Co.* 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of the decision is maintained, upon an able and elaborate discussion of reasons and authorities, in *Langdell on Contracts* (2d ed.) 989- 996. In England, New York and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. . . .

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. . . And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no', I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'"

Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a dispatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.

Lonergan v. Scolnick

276 P.2d 8 (Cal. Ct. App. 1954)

This is an action for specific performance or for damages in the event specific performance was impossible.

The complaint alleged that on April 15, 1952, the parties entered into a contract whereby the defendant agreed to sell, and plaintiff agreed to buy a 40-acre tract of land for $ 2,500; that this was a fair, just and reasonable value of the property; that on April 28, 1952, the defendant repudiated the contract and refused to deliver a deed; that on April 28, 1952, the property was worth $ 6,081; and that plaintiff has been damaged in the amount of $ 3,581. The answer denied that any contract had been entered into, or that anything was due to the plaintiff. By stipulation, the issue of whether or not a contract was entered into between the parties was first tried, reserving the other issues for a further trial if that became necessary. The issue as to the existence of a contract was submitted upon an agreed statement, including certain letters between the parties, without the introduction of other evidence.

The stipulated facts are as follows: During March, 1952, the defendant placed an ad in a Los Angeles paper reading, so far as material here, "Joshua Tree vic. 40 acres, . . . need cash, will sacrifice." In response to an inquiry resulting from this ad the defendant, who lived in New York, wrote a letter to the plaintiff dated March 26, briefly describing the property, giving directions as to how to get there, stating that his rock-bottom price was $ 2,500 cash, and further stating that "This is a form letter."

          On April 7, the plaintiff wrote a letter to the defendant saying that he was not sure he had found the property, asking for its legal description, asking whether the land was all level or whether it included certain jutting rock hills, and suggesting a certain bank as escrow agent "should I desire to purchase the land." On April 8, the defendant wrote to the plaintiff saying "From your description you have found the property"; that this bank "is O.K. for escrow agent"; that the land was fairly level; giving the legal description; and then saying, "If you are really interested, you will have to decide fast, as I expect to have a buyer in the next week or so."

On April 12, the defendant sold the property to a third party for $ 2,500. The plaintiff received defendant's letter of April 8 on April 14. On April 15 he wrote to the defendant thanking him for his letter "confirming that I was on the right land," stating that he would immediately proceed to have the escrow opened and would deposit $ 2,500 therein "in conformity with your offer," and asking the defendant to forward a deed with his instructions to the escrow agent. On April 17, 1952, the plaintiff started an escrow and placed in the hands of the escrow agent $ 100, agreeing to furnish an additional $ 2,400 at an unspecified time, with the provision that if the escrow was not closed by May 15, 1952, it should be completed as soon thereafter as possible unless a written demand for a return of the money or instruments was made by either party after that date. It was further stipulated that the plaintiff was ready and willing at all times to deposit the $ 2,400.

The matter was submitted on June 11, 1953. On July 10, 1953, the judge filed a memorandum opinion stating that it was his opinion that the letter of April 8, 1952, when considered with the previous correspondence, constituted an offer of sale which offer was, however, qualified and conditioned upon prompt acceptance by the plaintiff; that in spite of the condition thus imposed, the plaintiff delayed more than a week before notifying the defendant of his acceptance; and that since the plaintiff was aware of the necessity of promptly communicating his acceptance to the defendant his delay was not the prompt action required by the terms of the offer.

Findings of fact were filed on October 2, 1953, finding that each and all of the statements in the agreed statement are true, and that all allegations to the contrary in the complaint are untrue. As conclusions of law, it was found that the plaintiff and defendant did not enter into a contract as alleged in the complaint or otherwise, and that the defendant is entitled to judgment against the plaintiff. Judgment was entered accordingly, from which the plaintiff has appealed.

The appellant contends that the judgment is contrary to the evidence and to the law since the facts, as found, do not support the conclusions of law upon which the judgment is based. It is argued that there is no conflict in the evidence, and this court is not bound by the trial court's construction of the written instruments involved; that the evidence conclusively shows that an offer was made to the plaintiff by the defendant, which offer was accepted by the mailing of plaintiff's letter of April 15; that upon receipt of defendant's letter of April 8 the plaintiff had a reasonable time within which to accept the offer that had been made; that by his letter of April 15 and his starting of an escrow the plaintiff accepted said offer; and that the agreed statement of facts establishes that a valid contract was entered into between the parties. In his briefs the appellant assumes that an offer was made by the defendant, and confined his argument to contending that the evidence shows that he accepted that offer within a reasonable time.

. . .

The correspondence here indicates an intention on the part of the defendant to find out whether the plaintiff was interested, rather than an intention to make a definite offer to the plaintiff. The language used by the defendant in his letters of March 26 and April 8 rather clearly discloses that they were not intended as an expression of fixed purpose to make a definite offer, and was sufficient to advise the plaintiff that some further expression of assent on the part of the defendant was necessary.

          The advertisement in the paper was a mere request for an offer. The letter of March 26 contains no definite offer, and clearly states that it is a form letter.  It merely gives further particulars, in clarification of the advertisement, and tells the plaintiff how to locate the property if he was interested in looking into the matter. The letter of April 8 added nothing in the way of a definite offer. It merely answered some questions asked by the plaintiff, and stated that if the plaintiff was really interested he would have to act fast. The statement that he expected to have a buyer in the next week or so indicated that the defendant intended to sell to the first-comer, and was reserving the right to do so.

From this statement, alone, the plaintiff knew or should have known that he was not being given time in which to accept an offer that was being made, but that some further assent on the part of the defendant was required. Under the language used the plaintiff was not being given a right to act within a reasonable time after receiving the letter; he was plainly told that the defendant intended to sell to another, if possible, and warned that he would have to act fast if he was interested in buying the land.

Davis v. Jacoby

34 P.2d 1026 (Cal. 1934)

Plaintiffs appeal from a judgment refusing to grant specific performance of an alleged contract to make a will. The facts are not in dispute and are as follows:

The plaintiff Caro M. Davis was the niece of Blanche Whitehead who was married to Rupert Whitehead. Prior to her marriage in 1913 to her coplaintiff Frank M. Davis, Caro lived for a considerable time at the home of the Whiteheads, in Piedmont, California. The Whiteheads were childless and extremely fond of Caro. The record is replete with uncontradicted testimony of the close and loving relationship that existed between Caro and her aunt and uncle. During the period that Caro lived with the Whiteheads she was treated as and often referred to by the Whiteheads as their daughter. In 1913, when Caro was married to Frank Davis the marriage was arranged at the Whitehead home and a reception held there. After the marriage, Mr. and Mrs. Davis went to Mr. Davis' home in Canada, where they have resided ever since. During the period 1913 to 1931 Caro made many visits to the Whiteheads, several of them being of long duration. The Whiteheads visited Mr. and Mrs. Davis in Canada on several occasions. After the marriage and continuing down to 1931 the closest and most friendly relationship at all times existed between these two families. They corresponded frequently, the record being replete with letters showing the loving relationship.

By the year 1930 Mrs. Whitehead had become seriously ill. She had suffered several strokes and her mind was failing. Early in 1931 Mr. Whitehead had her removed to a private hospital. The doctors in attendance had informed him that she might die at any time or she might linger for many months. Mr. Whitehead had suffered severe financial reverses. He had had several sieges of sickness and was in poor health. The record shows that during the early part of 1931 he was desperately in need of assistance with his wife, and in his business affairs, and that he did not trust his friends in Piedmont. On March 18, 1931, he wrote to Mrs. Davis telling her of Mrs. Whitehead's condition and added that Mrs. Whitehead was very wistful. "Today I endeavored to find out what she wanted. I finally asked her if she wanted to see you. She burst out crying and we had great difficulty in getting her to stop. Evidently, that is what is on her mind. It is a very difficult matter to decide. If you come it will mean that you will have to leave again, and then things may be serious. I am going to see the doctor, and get his candid opinion and will then write you again. . . . Since writing the above, I have seen the doctor, and he thinks it will help considerably if you come." Shortly thereafter, Mr. Whitehead wrote to Caro Davis further explaining the physical condition of Mrs. Whitehead and himself. On March 24, 1931, Mr. Davis, at the request of his wife, telegraphed to Mr. Whitehead as follows: "Your letter received. Sorry to hear Blanche not so well. Hope you are feeling better yourself. If you wish Caro to go to you can arrange for her to leave in about two weeks. Please wire me if you think it advisable for her to go." On March 30, 1931, Mr. Whitehead wrote a long letter to Mr. Davis, in which he explained in detail the condition of Mrs. Whitehead's health and also referred to his own health. He pointed out that he had lost a considerable portion of his cash assets but still owned considerable realty, that he needed someone to help him with his wife and some friend he could trust to help him with his business affairs and suggested that perhaps Mr. Davis might come to California. He then pointed out that all his property was community property; that under his will all the property was to go to Mrs. Whitehead; that he believed that under Mrs. Whitehead's will practically everything was to go to Caro. Mr. Whitehead again wrote to Mr. Davis under date of April 9, 1931, pointing out how badly he needed someone he could trust to assist him, and giving it as his belief that if properly handled he could still save about $150,000. He then stated: "Having you [Mr. Davis] here to depend on and to help me regain my mind and courage would be a big thing." Three days later, on April 12, 1931, Mr. Whitehead again wrote, addressing his letter to "Dear Frank and Caro", and in this letter made the definite offer, which offer it is claimed was accepted and is the basis of this action. In this letter he first pointed out that Blanche, his wife, was in a private hospital and that "she cannot last much longer . . . my affairs are not as bad as I supposed at first. Cutting everything down I figure 150,000 can be saved from the wreck." He then enumerated the values placed upon his various properties and then continued

my trouble was caused by my friends taking advantage of my illness and my position to skin me. Now if Frank could come out here and be with me, and look after my affairs, we could easily save the balance I mentioned, provided I don’t get into another panic and do some more foolish things.”

The next attack will be my end, I am 65 and my health has been bad for years, so, the Drs. don't give me much longer to live. So if you can come, Caro will inherit everything and you will make our lives happier and see Blanche is provided for to the end.

My eyesight has gone back on me, I cant read only for a few lines at a time. I am at the house alone with Stanley [the chauffeur] who does everything for me and is a fine fellow. Now, what I want is someone who will take charge of my affairs and see I don’t lose any more. Frank can do it, if he will and cut out the booze.

Will you let me hear from you as soon as possible, I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end. If I had you here my mind would get better and my courage return, and we could work things out."

This letter was received by Mr. Davis at his office in Windsor, Canada, about 9:30 A. M. April 14, 1931. After reading the letter to Mrs. Davis over the telephone, and after getting her belief that they must go to California, Mr. Davis immediately wrote Mr. Whitehead a letter, which, after reading it to his wife, he sent by air mail. This letter was lost, but there is no doubt that it was sent by Davis and received by Whitehead, in fact the trial court expressly so found. Mr. Davis testified in substance as to the contents of this letter. After acknowledging receipt of the letter of April 12, 1931, Mr. Davis unequivocally stated that he and Mrs. Davis accepted the proposition of Mr. Whitehead and both would leave Windsor to go to him on April 25th. This letter of acceptance also contained the information that the reason they could not leave prior to April 25th was that Mr. Davis had to appear in court on April 22d as one of the executors of his mother's estate. The testimony is uncontradicted and ample to support the trial court's finding that this letter was sent by Davis and received by Whitehead. In fact under date of April 15, 1931, Mr. Whitehead again wrote to Mr. Davis and stated

Your letter by air mail received this a. m. Now, I am wondering if I have put you to unnecessary trouble and expense, if you are making any money don’t leave it, as things are bad here. . . . You know your business and I don’t and I am half crazy in the bargain, but I don’t want to hurt you or Caro. Then on the other hand if I could get someone to trust and keep me straight I can save a good deal, about what I told you in my former letter."

This letter was received by Mr. Davis on April 17, 1931, and the same day Mr. Davis telegraphed to Mr. Whitehead "Cheer up -- we will soon be there, we will wire you from the train."

Between April 14, 1931, the date the letter of acceptance was sent by Mr. Davis, and April 22d, Mr. Davis was engaged in closing out his business affairs, and Mrs. Davis in closing up their home and in making other arrangements to leave. On April 22, 1931, Mr. Whitehead committed suicide. Mr. and Mrs. Davis were immediately notified and they at once came to California. From almost the moment of her arrival Mrs. Davis devoted herself to the care and comfort of her aunt, and gave her aunt constant attention and care until Mrs. Whitehead's death on May 30, 1931. On this point the trial court found: "from the time of their arrival in Piedmont, Caro M. Davis administered in every way to the comforts of Blanche Whitehead and saw that she was cared for and provided for down to the time of the death of Blanche Whitehead on May 30, 1931; during said time Caro M. Davis nursed Blanche Whitehead, cared for her and administered to her wants as a natural daughter would have done toward and for her mother". This finding is supported by uncontradicted evidence and in fact is conceded by respondents to be correct. In fact the record shows that after their arrival in California Mr. and Mrs. Davis fully performed their side of the agreement.

After the death of Mrs. Whitehead, for the first time it was discovered that the information contained in Mr. Whitehead's letter of March 30, 1931, in reference to the contents of his and Mrs. Whitehead's wills was incorrect. By a duly witnessed will dated February 28, 1931, Mr. Whitehead, after making several specific bequests, had bequeathed all of the balance of his estate to his wife for life, and upon her death to respondents Geoff Doubble and Rupert Ross Whitehead, his nephews. Neither appellant was mentioned in his will. It was also discovered that Mrs. Whitehead by a will dated December 17, 1927, had devised all of her estate to her husband. The evidence is clear and uncontradicted that the relationship existing between Whitehead and his two nephews, respondents herein, was not nearly as close and confidential as that existing between Whitehead and appellants.

After the discovery of the manner in which the property had been devised was made, this action was commenced upon the theory that Rupert Whitehead had assumed a contractual obligation to make a will whereby "Caro Davis would inherit everything"; that he had failed to do so; that plaintiffs had fully performed their part of the contract; that damages being insufficient, quasi specific performance should be granted in order to remedy the alleged wrong, upon the equitable principle that equity regards that done which ought to have been done. The requested relief is that the beneficiaries under the will of Rupert Whitehead, respondents herein, be declared to be involuntary trustees for plaintiffs of Whitehead's estate.

It should also be added that the evidence shows that as a result of Frank Davis leaving his business in Canada he forfeited not only all insurance business he might have written if he had remained, but also forfeited all renewal commissions earned on past business. According to his testimony this loss was over $8,000.

The trial court found that the relationship between Mr. and Mrs. Davis and the Whiteheads was substantially as above recounted and that the other facts above stated were true; that prior to April 12, 1931, Rupert Whitehead had suffered business reverses and was depressed in mind and ill in body; that his wife was very ill; that because of his mental condition he "was unable to properly care for or look after his property or affairs"; that on April 12, 1931, Rupert Whitehead in writing made an offer to plaintiffs that, if within a reasonable time thereafter plaintiffs would leave and abandon their said home in Windsor, and if Frank M. Davis would abandon or dispose of his said business, and if both the plaintiffs would come to Piedmont in the said county of Alameda where Rupert Whitehead then resided and thereafter reside at said place and be with or near him, and, if Frank M. Davis would thereupon and thereafter look after the business and affairs of said Rupert Whitehead until his condition improved to such an extent as to permit him so to do, and if the plaintiffs would look after and administer to the comforts of Blanche Whitehead and see that she was properly cared for until the time of her death, that, in consideration thereof, Caro M. Davis would inherit everything that Rupert Whitehead possessed at the time of his death and that by last will and testament Rupert Whitehead would devise and bequeath to Caro M. Davis all property and estate owned by him at the time of his death, other than the property constituting the community interest of Blanche Whitehead; that shortly prior to April 12, 1931, Rupert Whitehead informed plaintiffs of the supposed terms of his will and the will of Mrs. Whitehead. The court then finds that the offer of April 12th was not accepted. As already stated, the court found that plaintiffs sent a letter to Rupert Whitehead on April 14th purporting to accept the offer of April 12th, and also found that this letter was received by the Whiteheads, but finds that in fact such letter was not a legal acceptance. The court also found that the offer of April 12th was "fair and just and reasonable, and the consideration therefor, namely, the performance by plaintiffs of the terms and conditions thereof, if the same had been performed, would have been an adequate consideration for said offer and for the agreement that would have resulted from such performance; said offer was not, and said agreement would not have been, either harsh or oppressive or unjust to the heirs at law, or devisees, or legatees, of Rupert Whitehead, or to each or any of them, or otherwise".

The court also found that plaintiffs did not know that the statements made by Whitehead in reference to the wills were not correct until after Mrs. Whitehead's death, that after plaintiffs arrived in Piedmont they cared for Mrs. Whitehead until her death and "Blanche Whitehead was greatly comforted by the presence, companionship and association of Caro M. Davis, and by her administering to her wants".

The theory of the trial court and of respondents on this appeal is that the letter of April 12th was an offer to contract, but that such offer could only be accepted by performance and could not be accepted by a promise to perform, and that said offer was revoked by the death of Mr. Whitehead before performance. In other words, it is contended that the offer was an offer to enter into a unilateral contract, and that the purported acceptance of April 14th was of no legal effect.

The distinction between unilateral and bilateral contracts is well settled in the law. It is well stated in section 12 of the American Institute's Restatement of the Law of Contracts as follows:

"A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee."

. . . . Although the legal distinction between unilateral and bilateral contracts is thus well settled, the difficulty in any particular case is to determine whether the particular offer is one to enter into a bilateral or unilateral contract. Some cases are quite clear cut. Thus an offer to sell which is accepted is clearly a bilateral contract, while an offer of a reward is a clear-cut offer of a unilateral contract which cannot be accepted by a promise to perform, but only by performance. . . . Between these two extremes is a vague field where the particular contract may be unilateral or bilateral depending upon the intent of the offeror and the facts and circumstances of each case. The offer to contract involved in this case falls within this category. . . .

. . . [W]e are of the opinion that the offer of April 12th was an offer to enter into a bilateral as distinguished from a unilateral contract. Respondents argue that Mr. Whitehead had the right as offerer to designate his offer as either unilateral or bilateral. That is undoubtedly the law. It is then argued that from all the facts and circumstances it must be implied that what Whitehead wanted was performance and not a mere promise to perform. We think this is a non sequitur, in fact the surrounding circumstances lead to just the opposite conclusion. These parties were not dealing at arm's length. Not only were they related, but a very close and intimate friendship existed between them. The record indisputably demonstrates that Mr. Whitehead had confidence in Mr. and Mrs. Davis, in fact that he had lost all confidence in everyone else. The record amply shows that by an accumulation of occurrences Mr. Whitehead had become desperate, and that what he wanted was the promise of appellants that he could look to them for assistance. He knew from his past relationship with appellants that if they gave their promise to perform he could rely upon them. The correspondence between them indicates how desperately he desired this assurance. Under these circumstances he wrote his offer of April 12th, above quoted, in which he stated, after disclosing his desperate mental and physical condition, and after setting forth the terms of his offer: "Will you let me hear from you as soon as possible -- I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end." By thus specifically requesting an immediate reply Whitehead expressly indicated the nature of the acceptance desired by him -- namely, appellants' promise that they would come to California and do the things requested by him. This promise was immediately sent by appellants upon receipt of the offer, and was received by Whitehead. It is elementary that when an offer has indicated the mode and means of acceptance, an acceptance in accordance with that mode or means is binding on the offeror.

Another factor which indicates that Whitehead must have contemplated a bilateral rather than a unilateral contract, is that the contract required Mr. and Mrs. Davis to perform services until the death of both Mr. and Mrs. Whitehead. It is obvious that if Mr. Whitehead died first some of these services were to be performed after his death, so that he would have to rely on the promise of appellants to perform these services. It is also of some evidentiary force that Whitehead received the letter of acceptance and acquiesced in that means of acceptance.

 . . .

For the foregoing reasons we are of the opinion that the offer of April 12, 1931, was an offer to enter into a bilateral contract which was accepted by the letter of April 14, 1931. Subsequently appellants fully performed their part of the contract. Under such circumstances it is well settled that damages are insufficient and specific performance will be granted. . . .

For the foregoing reasons the judgment appealed from is reversed.

Klockner v. Green

254 A.2d 782 (N.J. 1969)

Plaintiffs, Richard Klockner and Frances Klockner, the stepson and stepgranddaughter respectively of the late Edyth Klockner, brought suit to enforce an alleged oral contract between the deceased and the plaintiffs obligating the deceased to bequeath her estate to the plaintiffs in return for their services to her during her lifetime. Named as defendants were Harry Green, the executor of the estate, William Rhodes, Elizabeth Sylvania and Margaret Rhodes, the surviving next of kin of decedent, and Carolyn Wolf Field, a legatee under decedent's last executed will. (Carolyn Wolf Field did not answer nor appear in this case.)

At the conclusion of plaintiffs' case, the trial court granted defendants' motion to dismiss, holding that the proofs did not reveal the making of a contract because no offer and acceptance nor consideration had been established. The Appellate Division affirmed, holding that since there was no reliance by plaintiffs upon decedent's promise, the statute of frauds barred enforcement of that promise under N.J.S.A. 25:1-5. We granted certification. 53 N.J. 272 (1969).

Plaintiffs' uncontradicted proofs (as stated above, the motion to dismiss was granted before defendants introduced their case) established that Edyth Klockner, the deceased, and her husband, Richard Klockner's father, executed wills in favor of each other. Although her husband predeceased her, Edyth never revised her will. Accordingly, at her death, approximately three years later, her testamentary disposition had lapsed, and, but for this suit, the bulk of her estate would apparently pass by intestacy to her sole surviving relatives, defendants herein.

Richard Klockner's relationship with decedent, his stepmother, was like that of a natural child to his parent. He performed numerous services for her both before and after his father's death, doing as much and more than could be expected from even one's natural child. On an average, Richard attended to her needs once or twice a week from 1963 to her death in 1966.

Plaintiff, Frances Klockner (daughter of plaintiff, Richard Klockner), similarly spent much time with decedent, having a relationship more like that of mother and daughter than stepgrandmother and stepgranddaughter. Frances spent numerous nights with decedent when the latter felt fearful or alone, and also accompanied her on trips whenever she was needed.

In the early part of 1965 decedent approached Mr. Green, who had represented both her and her husband for many years, to discuss drawing a will. She indicated she wanted to leave her real property to Richard and her personal property to Frances. At Mr. Green's suggestion she prepared a draft of a will, modeled after her earlier will, leaving the bulk of her estate to Richard and Frances. This draft was revised pursuant to suggestions from Mr. Green. Neither was ever executed, however. Subsequently, in June 1965, decedent discussed with Richard the disposition of her estate. She informed him that she wanted to compensate him for being so helpful, and that if he would agree to continue to look after her and continue to let Frances visit her, she would leave the real property to him and the balance of the estate to Frances. Frances testified that the decedent discussed with her the understanding she had with Richard.

Decedent again contacted Mr. Green and informed him of the understanding she had with plaintiff regarding the disposition of her estate. Using decedent's second draft as a guide, Mr. Green redrafted her will and mailed it to decedent on November 24, 1965. Apparently because of decedent's belief that a will was a premonition of death, this draft remained unexecuted. Decedent became ill suddenly and died in February 1966, never having executed a will subsequent to the mutual will drawn with her husband in 1940.

Both the trial court and the Appellate Division held for defendants because, when questioned on cross-examination, both Richard and Frances testified that they would have continued to perform the services for decedent even if she had not made the promises to compensate them.

It is not disputed that a valid, enforceable contract can be made obligating a person to bequeath property in a specified manner. Accord Davison v. Davison, 13 N.J. Eq. 246 (Ch. 1861) (upholding a parol agreement to bequeath real estate in exchange for services); Johnson v. Hubbell, 10 N.J. Eq. 332 (Ch. 1855) (holding valid an oral agreement by a father to bequeath property in exchange for a son's conveyance of property to his sister). The question is: was such a contract entered into here?

Although we recognize that alleged agreements to make a particular disposition of one's estate must be subjected to close scrutiny, we have no doubt that decedent here intended to obligate herself to bequeath her property to plaintiffs so long as they continued to serve her as they had prior to her promise. Such a promise, when acted upon, becomes a binding obligation. Decedent bargained for plaintiffs' services and obligated herself to bequeath the property to them when they performed. See 1 Corbin, Contracts, § 63 (1963).

The performance by plaintiffs need not have been induced solely by the offer of compensation. In the Restatement of Contracts, § 55 (1932), it is indicated that if an act is requested by the offeror as consideration for a unilateral contract, the act need only be given with the intent of accepting the offer. The examples which illustrate that rule clearly encompass the instant case.

"A offers a reward for information leading to the conviction of a criminal \* \* \*. B, \* \* \* induced by motives of fear or public duty, would have given the information without hope of reward, but as there is an offer of reward he intends when he gives the information to accept the offer. There is a contract."

In the only New Jersey case discussing this rule, the Court of Errors and Appeals noted that once the contract has been legally concluded, in giving effect to that contract "the motive which induced the party to make the contract or perform it must always be immaterial." Mayor, etc. of Hoboken v. Bailey, 36 N.J.L. 490, 497 (E. & A. 1873). See also 1 Corbin, Contracts, § 58 (1963) (recognizing the complexity of motivating causes in human action); Restatement 2d, Contracts § 55 (Tent. Draft No. 1, April 13, 1964) and § 84 (Tent. Draft No. 2, April 30, 1965).

In reviewing the facts of the instant case for purposes of the motion for judgment of dismissal, we must accept as true all the evidence which supports the view of the party against whom the motion is made, and should give him the benefit of all legitimate inferences which may be drawn in his favor. DeRienzo v. Morristown Airport Corp., 28 N.J. 231 (1958); Cauco v. Galante, 6 N.J. 128 (1951).

We have no doubt that in the instant case a valid contract was entered into between plaintiffs and Edyth Klockner. Nothing in Richard's testimony indicated that he did not intend to accept the offer notwithstanding his statement that he would have served his stepmother anyway. The testimony of Frances similarly reveals no rejection of the offer despite a similar statement. These statements were merely the normal expressions of affection which naturally flow from the type of relationship which existed between plaintiffs and decedent.

The evidence also fully supports the existence of a bargain by decedent and her belief that she had contracted with plaintiff. Her attempt to execute a will (stymied only by her superstitions), and the testimony of her attorney, while not conclusive, present strong evidence of her intent to carry out her end of the bargain. See Laune v. Chandless, 99 N.J. Eq. 186 (Ch. 1926) (where the court interpreted the evidence of decedent's attempt to execute a will as indicative of decedent's belief that he had a moral and legal obligation to satisfy the contract); Vreeland v. Vreeland, 53 N.J. Eq. 387 (Ch. 1895) (where testimony and an undelivered deed were deemed sufficient corroboration of the alleged contract).

Regardless of the apparent existence of a contract, the Appellate Division nevertheless affirmed on the basis that the statute of frauds barred enforcement of the contract. We do not agree that the contract is unenforceable. The rule that a statute of frauds should not be used to work a fraud is well settled. Oral contracts which have been performed by one party are frequently enforced where to do otherwise would work an inequity on the party who has performed. Thus, the cases hold that such performance takes the contract out of the statute of frauds. E.g., Poloha v. Ruman, 137 N.J. Eq. 167 (Ch. 1945) (specifically enforcing parol agreement to leave plaintiff her home if plaintiff would continue to care for decedent and her husband), affirmed per curiam 140 N.J. Eq. 396 (E. & A. 1947); Davison v. Davison, supra 13 N.J. Eq. 246 (holding that plaintiff's part performance took the oral contract out of the statute of frauds).

Nevertheless, to obtain specific performance, as is requested here, more than just full performance by plaintiffs is necessary. As stated in Cooper v. Colson, 66 N.J. Eq. 328, 332 (E. & A. 1904), that performance must be in some respects of an exceptional character, and it must be obvious that not only did the parties not intend to measure the services by ordinary pecuniary standards, but that also the services are of such peculiar character that it is impossible to estimate their value by any standard. Accord Poloha v. Ruman, supra 137 N.J. Eq. 167, affirmed per curiam 140 N.J. Eq. 396; and see cases cited Annotation, "Oral Land Contract -- Part Performance," 101 A.L.R. 923, 1091 n. 89 (1936). We have no doubt that specific performance is an appropriate remedy in the instant case. Plaintiffs were not related to decedent and, therefore had no obligation, either morally or legally, to serve her as they did. Nonetheless, in addition to the numerous instances when plaintiffs rendered services to decedent, they also bestowed upon her the care, affection, society and companionship one would expect from a close blood relative.

Who can value the worth to a lonely person of having a loved one available at the slightest moment of anxiety, or at the most trivial moment of need? The law furnishes no standard whereby the value of such services can be measured. It is incumbent on equity, therefore, to accept the estimate of their value made by the party requesting the services by decreeing specific performance of the agreement. Accord 49 Am. Jur., Statute of Frauds, § 529 (1943).

We also find no reason on the present record for penalizing plaintiffs because of their professed willingness to serve the widow. Plaintiffs have fully performed, and decedent has received the full benefit of her bargain. Because the decedent has received the full benefit of her bargain, the policy reasons justifying the development of the part performance exception to the statute of frauds have been satisfied. Since at this stage of the proceedings there is no real doubt as to the existence of the contract, the courts should not allow defendants to use the statute of frauds as a device to work a fraud on both plaintiffs and the decedent who at no time gave any indication that her estate should go to someone other than the plaintiffs.

Our discussion of course assumes the truth of the testimony of the plaintiffs and the inferences most favorable to them. We do so, because, as stated at the outset, judgment was granted on motion at the close of plaintiffs' case. We of course do not intend by this opinion to suggest how the testimony should be viewed at the close of the entire case.

We reverse and remand for further proceedings not inconsistent with this opinion.

Akers v. J.B. Sedberry, Inc.

286 S.W.2d 617 (Tenn. Ct. App. 1955)

Felts, Judge.

These two consolidated causes are before us upon a writ of error sued out by J. B. Sedberry, Inc., and Mrs. M. B. Sedberry, defendants below, to review a decree of the Chancery Court, awarding a recovery against them in favor of each of the complainants, Charles William Akers and William Gambill Whitsitt, for damages for breach of a contract of employment.

. . .

J. B. Sedberry, Inc., was a Tennessee corporation with its principal place of business at Franklin, Tennessee. Mrs. M. B. Sedberry owned practically all of its stock and was its president and in active charge of its affairs. It was engaged in the business of distributing 'Jay Bee' hammer mills, which were manufactured for it under contract by Jay Bee Manufacturing Company, a Texas corporation, whose plant was in Tyler, Texas, and whose capital stock was owned principally by L. M. Glasgow and B. G. Byars.

On July 1, 1947, J. B. Sedberry, Inc., by written contract, employed complainant Akers as Chief Engineer for a term of five . . . His duties were to carry on research for his employer, and to see that the Jay Bee Manufacturing Company, Tyler, Texas, manufactured the mills and parts according to proper specifications. Mrs. M. B. Sedberry guaranteed the employer's performance of this contract.

On August 1, 1947, J. B. Sedberry, Inc., by written contract, employed complainant Whitsitt as Assistant Chief Engineer for a term of five years . . . His duties were to assist in the work done by the Chief Engineer. Mrs. M. B. Sedberry guaranteed the employer's performance of this contract.

Under Mrs. Sedberry's instructions, Akers and Whitsitt moved to Tyler, Texas, began performing their contract duties in the plant of the Jay Bee Manufacturing Company, continued working there, and were paid under the contracts until October 1, 1950, when they ceased work, under circumstances hereafter stated.

In 1947, when these employment contracts were made, Mrs. Sedberry owned no stock in the Jay Bee Manufacturing Company. In 1948 she purchased the shares of stock in this company which were owned by the Glasgow interests, and in 1949 she purchased the 750 shares owned by her brother, B. G. Byars, . . .

Glasgow had been general manager of the Jay Bee Manufacturing Company, but when he sold his stock, he was succeeded by A. M. Sorenson as manager. There soon developed considerable friction between Sorenson and complainants Akers and Whitsitt. The Jay Bee Manufacturing Company owed large sums to the Tyler State Bank & Trust Co.; and the bank's officers, fearing the company might fail under Sorenson's management, began talking to Akers and Whitsitt about the company's financial difficulties.

One of the bank's vice-presidents, J. Harold Stringer, made a trip to Franklin to see Mrs. Sedberry about the company's indebtedness to the bank. He told her that they could not get along with Sorenson and did not agree with the way he was managing the company's affairs. Mrs. Sedberry asked Stringer as soon as he got back to Tyler to see Akers and Whitsitt and discuss with them plans for the refinancing and the operation of the company; and thereafter the bank's officers had a number of conferences with Akers and Whitsitt about these matters.

While these matters were pending, Akers and Whitsitt flew to Nashville and went to Franklin to talk with Mrs. Sedberry about them. They had a conference with her at her office on Friday, September 29, 1950, lasting from 9:30 a. m. until 4:30 p. m. As they had come unannounced, and unknown to Sorenson, they felt Mrs. Sedberry might mistrust them; and at the outset, to show their good faith, they offered to resign, but she did not accept their offer. Instead, she proceeded with them in discussing the operation and refinancing of the business.

Testifying about this conference, Akers said that, at the very beginning, to show their good faith, he told Mrs. Sedberry that they would offer their resignations on a ninety-day notice, provided they were paid according to the contract for that period; that she pushed the offers aside -- 'would not accept them', but went into a full discussion of the business; that nothing was thereafter said about the offers to resign; and that they spent the whole day discussing the business, Akers making notes of things she instructed him to do when he got back to Texas.

Whitsitt testified that at the beginning of the meeting Akers stated the position for both of them, and told Mrs. Sedberry, as evidence of their good faith, 'we would resign with ninety-days notice if she paid us the monies that she owed us to that date, and on the other hand, if she did not accept that resignation, we would carry forth the rest of our business.' He said that she did not accept the offer, but proceeded with the business, and nothing further was said about resigning.

Mrs. Sedberry testified that Akers and Whitsitt came in and 'offered their resignations'; that they said they could not work with Sorenson and did not believe the bank would go along with him; and that 'they said if it would be of any help to the organization they would be glad to tender their resignation and pay them what was due them.' She further said that she 'did not accept the resignation', that she 'felt it necessary to contact Mr. Sorenson and give consideration to the resignation offer.' But she said nothing to complainants about taking the offer under consideration.

On cross-examination she said that in the offer to resign 'no mention was made of any ninety-day notice'. Asked what response she made to the offer she said, 'I treated it rather casually because I had to give it some thought and had to contact Mr. Sorenson.' She further said she excused herself from the conference with complainants, went to another room, tried to telephone Sorenson in Tyler, Texas, but was unable to locate him.

She then resumed the conference, nothing further was said about the offers to resign, nothing was said by her to indicate that she thought the offers were left open or held under consideration by her. But the discussion proceeded as if the offers had not been made. She discussed with complainants future plans for refinancing and operating the business, giving them instructions, and Akers making notes of them.

Following the conference, complainants, upon Mrs. Sedberry's request, flew back to Texas to proceed to carry out her instructions. . . .

On Monday, October 2, 1950, Mrs. Sedberry sent to complainants similar telegrams, signed by 'J. B. Sedberry, Inc., by M. B. Sedberry, President', stating that their resignations were accepted, effective immediately. We quote the telegram to Akers, omitting the formal parts:

'Account present unsettled conditions which you so fully are aware we accept your kind offer of resignation effective immediately. Please discontinue as of today with everyone employed in Sedberry, Inc., Engineering Department, discontinuing all expenses in this department writing.'

While this said she was 'writing', she did not write.

Akers wrote . . . that he was amazed to get her telegram, and called her attention to the fact that no offer to resign by him was open or outstanding when she sent the telegram; that while he had made a conditional offer to resign at their conference on September 29, she had immediately rejected the offer, and had discussed plans for the business and had instructed him and Whitsitt as to things she wanted them to do in the business on their return to Tyler.

This letter further stated that Akers was expecting to be paid according to the terms of his contract until he could find other employment that would pay him as much income as that provided in his contract, and that if he had to accept a position with less income, he would expect to be paid the difference, or whatever losses he suffered by her breach of the contract. Whitsitt's letter contained a similar statement of his position.

. . .

As it takes two to make a contract, it takes two to unmake it. It cannot be changed or ended by one alone, but only by mutual assent of both parties. A contract of employment for a fixed period may be terminated by the employee's offer to resign, provided such offer is duly accepted by the employer . . . An employee's tender of his resignation, being a mere offer is, of course, not binding until it has been accepted by the employer. Such offer must be accepted according to its terms and within the time fixed. The matter is governed by the same rules as govern the formation of contracts

. . .

An offer may be terminated in a number of ways, as, for example, where it is rejected by the offeree, or where it is not accepted by him within the time fixed, or, if no time is fixed, within a reasonable time. An offer terminated in either of these ways ceases to exist and cannot thereafter be accepted . . . The question what is a reasonable time, where no time is fixed, is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case. Ordinarily, an offer made by one to another in a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter. The rule is illustrated by Restatement of Contracts, section 40, Illustration 2, as follows:

2. While A and B are engaged in conversation, A makes B an offer to which B then makes no reply, but a few hours later meeting A again, B states that he accepts the offer. There is no contract unless the offer or the surrounding circumstances indicate that the offer is intended to continue beyond the immediate conversation.

. . .

[The court cites additional authorities for the same proposition.]

The only offer by Akers and Whitsitt to resign was the offer made by them in their conversation with Mrs. Sedberry. They made that offer at the outset, and on the evidence it seems clear that they expected an answer at once. Certainly, there is nothing in the evidence to show that they intended the offer to continue beyond that conversation; and on the above authorities, we think the offer did not continue beyond that meeting.

Indeed, it did not last that long, in our opinion, but was terminated by Mrs. Sedberry's rejection of it very early in that meeting. While she did not expressly reject it, and while she may have intended, as she says, to take the offer under consideration, she did not disclose such an intent to complainants; but, by her conduct, led them to believe she rejected the offer, brushed it aside, and proceeded with the discussion as if it had not been made.

An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer or to take it under further advisement

Rest. Contracts sec. 36. 1 Williston on Contracts, section 51.

So, we agree with the Trial Judge that when defendants sent the telegrams, undertaking to accept offers of complainants to resign, there was no such offer in existence; and that this attempt of defendants to terminate their contract was unlawful and constituted a breach for which they are liable to complainants.

Petterson v. Pattberg

161 N.E. 428 (N.Y. 1928)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 18, 1927, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

Kellogg, J.

The evidence given upon the trial sanctions the following statement of facts: John Petterson, of whose last will and testament the plaintiff is the executrix, was the owner of a parcel of real estate in Brooklyn, known as 5301 Sixth avenue. The defendant was the owner of a bond executed by Petterson, which was secured by a third mortgage upon the parcel. On April 4th, 1924, there remained unpaid upon the principal the sum of $5,450. This amount was payable in installments of $250 on April 25th, 1924, and upon a like monthly date every three months thereafter. Thus the bond and mortgage had more than five years to run before the entire sum became due. Under date of the 4th of April, 1924, the defendant wrote Petterson as follows: "I hereby agree to accept cash for the mortgage which I hold against premises 5301 6th Ave., Brooklyn, N.Y. It is understood and agreed as a consideration I will allow you $780 providing said mortgage is paid on or before May 31, 1924, and the regular quarterly payment due April 25, 1924, is paid when due." On April 25, 1924, Petterson paid the defendant the installment of principal due on that date. Subsequently, on a day in the latter part of May, 1924, Petterson presented himself at the defendant's home, and knocked at the door. The defendant demanded the name of his caller. Petterson replied: "It is Mr. Petterson. I have come to pay off the mortgage." The defendant answered that he had sold the mortgage. Petterson stated that he would like to talk with the defendant, so the defendant partly opened the door. Thereupon Petterson exhibited the cash and said he was ready to pay off the mortgage according to the agreement. The defendant refused to take the money. Prior to this conversation Petterson had made a contract to sell the land to a third person free and clear of the mortgage to the defendant. Meanwhile, also, the defendant had sold the bond and mortgage to a third party. It, therefore, became necessary for Petterson to pay to such person the full amount of the bond and mortgage. It is claimed that he thereby sustained a loss of $780, the sum which the defendant agreed to allow upon the bond and mortgage if payment in full of principal, less that sum, was made on or before May 31st, 1924. The plaintiff has had a recovery for the sum thus claimed, with interest.

Clearly the defendant's letter proposed to Petterson the making of a unilateral contract, . . . a promise in exchange for the performance of an act.

. . . .An interesting question arises when, as here, the offeree approaches the offeror with the intention of proffering performance and, before actual tender is made, the offer is withdrawn.

To tender performance is to offer or attempt to perform.  The court holds (perhaps implausibly) that when Patterson came to Pattberg’s door with the money in hand, he did *not* tender performance.  On the effect of tender, see Offer and Acceptance Tutorial 5.

Of such a case Williston says: "The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated." (Williston on Contracts, sec. 60-b.) In this instance Petterson, standing at the door of the defendant's house, stated to the defendant that he had come to pay off the mortgage. Before a tender of the necessary moneys had been made the defendant informed Petterson that he had sold the mortgage. That was a definite notice to Petterson that the defendant could not perform his offered promise and that a tender to the defendant, who was no longer the creditor, would be ineffective to satisfy the debt. "An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person." (Dickinson v. Dodds, 2 Ch. Div. 463, headnote.) . . .

The judgment of the Appellate Division and that of the Trial Term should be reversed and the complaint dismissed, with costs in all courts.

Lehman, J. (dissenting).

. . .

The defendant undoubtedly made his offer as an inducement to the plaintiff to "pay" the mortgage before it was due. Therefore, it is said, that "the act requested to be performed was the completed act of payment, a thing incapable of performance unless assented to by the person to be paid." In unmistakable terms the defendant agreed to accept payment, yet we are told that the defendant intended, and the plaintiff should have understood, that the act requested by the defendant, as consideration for his promise to accept payment, included performance by the defendant himself of the very promise for which the act was to be consideration. The defendant's promise was to become binding only when fully performed; and part of the consideration to be furnished by the plaintiff for the defendant's promise was to be the performance of that promise by the defendant. So construed, the defendant's promise or offer, though intended to induce action by the plaintiff, is but a snare and delusion. The plaintiff could not reasonably suppose that the defendant was asking him to procure the performance by the defendant of the very act which the defendant promised to do, yet we are told that even after the plaintiff had done all else which the defendant requested, the defendant's promise was still not binding because the defendant chose not to perform.

I cannot believe that a result so extraordinary could have been intended when the defendant wrote the letter. "The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity." (See opinion of CARDOZO, Ch. J., in Surace v. Danna, 248 N.Y. 18.) If the defendant intended to induce payment by the plaintiff and yet reserve the right to refuse payment when offered he should have used a phrase better calculated to express his meaning than the words: "I agree to accept." A promise to accept payment, by its very terms, must necessarily become binding, if at all, not later than when a present offer to pay is made.

. . .

The judgment should be affirmed.

CARDOZO, Ch. J., POUND, CRANE and O'BRIEN, JJ., concur with KELLOGG, J.; LEHMAN, J., dissents in opinion, in which ANDREWS, J., concurs.

LEHMAN, J. , dissents in opinion in which ANDREWS, J. concurs.

Judgments reversed, etc.

Drennan v. Star Paving Co.

333 P.2d 757 (Cal. 1958)

Defendant appeals from a judgment for plaintiff in an action to recover damages caused by defendant's refusal to perform certain paving work according to a bid it submitted to plaintiff.

On July 28, 1955, plaintiff, a licensed general contractor, was preparing a bid on the "Monte Vista School Job" in the Lancaster school district. Bids had to be submitted before 8 p. m. Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between 50 and 75 subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one per cent or more of the construction work, and he had also to provide a bidder's bond of 10 per cent of his total bid of $ 317,385 as a guarantee that he would enter the contract if awarded the work.

Late in the afternoon, Mrs. Johnson had a telephone conversation with Kenneth R. Hoon, an estimator for defendant. He gave his name and telephone number and stated that he was bidding for defendant for the paving work at the Monte Vista School according to plans and specifications and that his bid was $ 7,131.60. At Mrs. Johnson's request he repeated his bid. Plaintiff listened to the bid over an extension telephone in his office and posted it on the master sheet after receiving the bid form from Mrs. Johnson. Defendant's was the lowest bid for the paving. Plaintiff computed his own bid accordingly and submitted it with the name of defendant as the subcontractor for the paving. When the bids were opened on July 28th, plaintiff's proved to be the lowest, and he was awarded the contract.

On his way to Los Angeles the next morning plaintiff stopped at defendant's office. The first person he met was defendant's construction engineer, Mr. Oppenheimer. Plaintiff testified: "I introduced myself and he immediately told me that they had made a mistake in their bid to me the night before, they couldn't do it for the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same."

Defendant refused to do the paving work for less than $ 15,000. Plaintiff testified that he "got figures from other people" and after trying for several months to get as low a bid as possible engaged L & H Paving Company, a firm in Lancaster, to do the work for $ 10,948.60.

The trial court found on substantial evidence that defendant made a definite offer to do the paving on the Monte Vista job according to the plans and specifications for $7,131.60, and that plaintiff relied on defendant's bid in computing his own bid for the school job and naming defendant therein as the subcontractor for the paving work. Accordingly, it entered judgment for plaintiff in the amount of $3,817 (the difference between defendant's bid and the cost of the paving to plaintiff) plus costs.

Defendant contends that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated his acceptance to defendant.

There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff's use of defendant's bid as the acceptance thereof, binding plaintiff, on condition he received the main contract, to award the subcontract to defendant. In sum, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

Plaintiff contends, however, that he relied to his detriment on defendant's offer and that defendant must therefore answer in damages for its refusal to perform. Thus the question is squarely presented: Did plaintiff's reliance make defendant's offer irrevocable?

Section 90 of the Restatement of Contracts states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." This rule applies in this state. . . .

Defendant's offer constituted a promise to perform on such conditions as were stated expressly or by implication therein or annexed thereto by operation of law. . . . Defendant had reason to expect that if its bid proved the lowest it would be used by plaintiff. It induced "action . . . of a definite and substantial character on the part of the promisee."

Had defendant's bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was silent on revocation, however, and we must therefore determine whether there are conditions to the right of revocation imposed by law or reasonably inferable in fact. In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance.

Thus section 45 of the Restatement of Contracts provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." In explanation, comment b states that the "main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)."

Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

The absence of consideration is not fatal to the enforcement of such a promise. It is true that in the case of unilateral contracts the Restatement finds consideration for the implied subsidiary promise in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration "in the sense of something that is bargained for and given in exchange." (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. . . .

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer. (See R. J. Daum Const. Co. v. Child, 122 Utah 194 [247 P.2d 817, 823].) In the present case plaintiff promptly informed defendant that plaintiff was being awarded the job and that the subcontract was being awarded to defendant.

. . .

The judgment is affirmed.

Hoffman v. Red Owl Stores

133 N.W.2d 267 (Wis. 1965)

Action by Joseph Hoffman (hereinafter "Hoffman") and wife, plaintiffs, against defendants Red Owl Stores, Inc. (hereinafter "Red Owl") and Edward Lukowitz.

The complaint alleged that Lukowitz, as agent for Red Owl, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return for which plaintiffs were to put up and invest a total sum of $ 18,000; that in reliance upon the above-mentioned agreement and representations plaintiffs sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs' actions in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants' representations and agreements.

The action was tried to a court and jury. The facts hereinafter stated are taken from the evidence adduced at the trial. Where there was a conflict in the evidence the version favorable to plaintiffs has been accepted since the verdict rendered was in favor of plaintiffs.

Hoffman assisted by his wife operated a bakery at Wautoma from 1956 until sale of the building late in 1961. The building was owned in joint tenancy by him and his wife. Red Owl is a Minnesota corporation having its home office at Hopkins, Minnesota. It owns and operates a number of grocery supermarket stores and also extends franchises to agency stores which are owned by individuals, partnerships, and corporations. Lukowitz resides at Green Bay and since September, 1960, has been divisional manager for Red Owl in a territory comprising Upper Michigan and most of Wisconsin in charge of 84 stores. Prior to September, 1960, he was district manager having charge of approximately 20 stores.

In November, 1959, Hoffman was desirous of expanding his operations by establishing a grocery store and contacted a Red Owl representative by the name of Jansen, now deceased. Numerous conversations were had in 1960 with the idea of establishing a Red Owl franchise store in Wautoma. In September, 1960, Lukowitz succeeded Jansen as Red Owl's representative in the negotiations. Hoffman mentioned that $ 18,000 was all the capital he had available to invest and he was repeatedly assured that this would be sufficient to set him up in business as a Red Owl store. About Christmastime, 1960, Hoffman thought it would be a good idea if he bought a small grocery store in Wautoma and operated it in order that he gain experience in the grocery business prior to operating a Red Owl store in some larger community. On February 6, 1961, on the advice of Lukowitz and Sykes, who had succeeded Lukowitz as Red Owl's district manager, Hoffman bought the inventory and fixtures of a small grocery store in Wautoma and leased the building in which it was operated.

After three months of operating this Wautoma store, the Red Owl representatives came in and took inventory and checked the operations and found the store was operating at a profit. Lukowitz advised Hoffman to sell the store to his manager, and assured him that Red Owl would find a larger store for him elsewhere. Acting on this advice and assurance, Hoffman sold the fixtures and inventory to his manager on June 6, 1961. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Before selling, Hoffman told the Red Owl representatives that he had $ 18,000 for "getting set up in business" and they assured him that there would be no problems in establishing him in a bigger operation. The makeup of the $ 18,000 was not discussed; it was understood plaintiff's father-in-law would furnish part of it. By June, 1961, the towns for the new grocery store had been narrowed down to two, Kewaunee and Chilton. In Kewaunee, Red Owl had an option on a building site. In Chilton, Red Owl had nothing under option, but it did select a site to which plaintiff obtained an option at Red Owl's suggestion. The option stipulated a purchase price of $ 6,000 with $ 1,000 to be paid on election to purchase and the balance to be paid within thirty days. On Lukowitz's assurance that everything was all set plaintiff paid $ 1,000 down on the lot on September 15th.

On September 27, 1961, plaintiff met at Chilton with Lukowitz and Mr. Reymund and Mr. Carlson from the home office who prepared a projected financial statement. Part of the funds plaintiffs were to supply as their investment in the venture were to be obtained by sale of their Wautoma bakery building.

On the basis of this meeting Lukowitz assured Hoffman: ". . . [E]verything is ready to go. Get your money together and we are set." Shortly after this meeting Lukowitz told plaintiffs that they would have to sell their bakery business and bakery building, and that their retaining this property was the only "hitch" in the entire plan. On November 6, 1961, plaintiffs sold their bakery building for $ 10,000. Hoffman was to retain the bakery equipment as he contemplated using it to operate a bakery in connection with his Red Owl store. After sale of the bakery Hoffman obtained employment on the night shift at an Appleton bakery.

The record contains different exhibits which were prepared in September and October, some of which were projections of the fiscal operation of the business and others were proposed building and floor plans. Red Owl was to procure some third party to buy the Chilton lot from Hoffman, construct the building, and then lease it to Hoffman. No final plans were ever made, nor were bids let or a construction contract entered. Some time prior to November 20, 1961, certain of the terms of the lease under which the building was to be rented by Hoffman were understood between him and Lukowitz. The lease was to be for ten years with a rental approximating $ 550 a month calculated on the basis of 1 percent per month on the building cost, plus 6 percent of the land cost divided on a monthly basis. At the end of the ten-year term he was to have an option to renew the lease for an additional ten-year period or to buy the property at cost on an instalment basis. There was no discussion as to what the instalments would be or with respect to repairs and maintenance.

On November 22d or 23d, Lukowitz and plaintiffs met in Minneapolis with Red Owl's credit manager to confer on Hoffman's financial standing and on financing the agency. Another projected financial statement was there drawn up entitled, "Proposed Financing For An Agency Store." This showed Hoffman contributing $ 24,100 of cash capital of which only $ 4,600 was to be cash possessed by plaintiffs. Eight thousand was to be procured as a loan from a Chilton bank secured by a mortgage on the bakery fixtures, $ 7,500 was to be obtained on a 5 percent loan from the father-in-law, and $ 4,000 was to be obtained by sale of the lot to the lessor at a profit.

A week or two after the Minneapolis meeting Lukowitz showed Hoffman a telegram from the home office to the effect that if plaintiff could get another $ 2,000 for promotional purposes the deal could go through for $ 26,000. Hoffman stated he would have to find out if he could get another $ 2,000. He met with his father-in-law, who agreed to put $ 13,000 into the business provided he could come into the business as a partner. Lukowitz told Hoffman the partnership arrangement "sounds fine" and that Hoffman should not go into the partnership arrangement with the "front office." On January 16, 1962, the Red Owl credit manager teletyped Lukowitz that the father-in-law would have to sign an agreement that the $ 13,000 was either a gift or a loan subordinate to all general creditors and that he would prepare the agreement. On January 31, 1962, Lukowitz teletyped the home office that the father-in-law would sign one or other of the agreements. However, Hoffman testified that it was not until the final meeting some time between January 26 and February 2, 1962, that he was told that his father-in-law was expected to sign an agreement that the $ 13,000 he was advancing was to be an out-right gift. No mention was then made by the Red Owl representatives of the alternative of the father-in-law signing a subordination agreement. At this meeting the Red Owl agents presented Hoffman with the following projected financial statement:

"Capital required in operation:

"Cash $ 5,000.00

"Merchandise 20,000.00

"Bakery 18,000.00

"Fixtures 17,500.00

"Promotional Funds 1,500.00

"TOTAL: $ 62,000.00 "Source of funds:

"Red Owl 7-day terms $ 5,000.00

"Red Owl Fixture contract

(Term 5 years) 14,000.00

"Bank loans (Term 9 years)

Union State Bank of Chilton 8,000.00

"(Secured by Bakery Equipment)

"Other loans (Term No-pay)

"TOTAL: $ 70,500.00"

Hoffman interpreted the above statement to require of plaintiffs a total of $ 34,000 cash made up of $ 13,000 gift from his father-in-law, $ 2,000 on mortgage, $ 8,000 on Chilton bank loan, $ 5,000 in cash from plaintiff, and $ 6,000 on the resale of the Chilton lot. Red Owl claims $ 18,000 is the total of the unborrowed or unencumbered cash, that is, $ 13,000 from the father-in-law and $ 5,000 cash from Hoffman himself. Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his $ 13,000 advancement was an absolute gift. This terminated the negotiations between the parties.

The case was submitted to the jury on a special verdict with the first two questions answered by the court. This verdict, as returned by the jury, was as follows:

"Question No. 1: Did the Red Owl Stores, Inc., and Joseph Hoffmann on or about mid-May of 1961 initiate negotiations looking to the establishment of Joseph Hoffmann as a franchise operator of a Red Owl Store in Chilton? Answer: Yes. (Answered by the Court.)

"Question No. 2: Did the parties mutually agree on all of the details of the proposal so as to reach a final agreement thereon? Answer: No. (Answered by the Court.)

"Question No. 3: Did the Red Owl Stores, Inc., in the course of said negotiations, make representations to Joseph Hoffmann that if he fulfilled certain conditions that they would establish him as a franchise operator of a Red Owl Store in Chilton? Answer: Yes.

"Question No. 4: If you have answered Question No. 3 'Yes,' then answer this question: Did Joseph Hoffmann rely on said representations and was he induced to act thereon? Answer: Yes.

"Question No. 5: If you have answered Question No. 4 'Yes,' then answer this question: Ought Joseph Hoffmann, in the exercise of ordinary care, to have relied on said representations? Answer: Yes.

"Question No. 6: If you have answered Question No. 3 'Yes' then answer this question: Did Joseph Hoffmann fulfill all the conditions he was required to fulfill by the terms of the negotiations between the parties up to January 26, 1962? Answer: Yes.

"Question No. 7: What sum of money will reasonably compensate the plaintiffs for such damages as they sustained by reason of:

(a) The sale of the Wautoma store fixtures and inventory?

Answer: $ 16,735.

(b) The sale of the bakery building?

Answer: $ 2,000.

(c) Taking up the option on the Chilton lot?

Answer: $ 1,000.

(d) Expenses of moving his family to Neenah?

Answer: $ 140.

(e) House rental in Chilton?

Answer: $ 125."

Plaintiffs moved for judgment on the verdict while defendants moved to change the answers to Questions 3, 4, 5, and 6 from "Yes" to "No," and in the alternative for relief from the answers to the subdivisions of Question 7 or a new trial. On March 31, 1964, the circuit court entered the following order:

"It Is Ordered in accordance with said decision on motions after verdict hereby incorporated herein by reference:

"1. That the answer of the jury to Question No. 7 (a) be and the same is hereby vacated and set aside and that a new trial be had on the sole issue of the damages for loss, if any, on the sale of the Wautoma store, fixtures and inventory.

"2. That all other portions of the verdict of the jury be and hereby are approved and confirmed and all after-verdict motions of the parties inconsistent with this order are hereby denied."

Defendants have appealed from this order and plaintiffs have cross-appealed from paragraph 1, thereof.

CURRIE, CHIEF JUSTICE. The instant appeal and cross appeal present these questions:

(1) Whether this court should recognize causes of action grounded on promissory estoppel as exemplified by sec. 90 of Restatement, 1 Contracts?

(2) Do the facts in this case make out a cause of action for promissory estoppel?

(3) Are the jury's findings with respect to damages sustained by the evidence?

Applicability of Doctrine to Facts of this Case.

The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment.

Foremost were the promises that for the sum of $ 18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $ 1,000 on the Chilton lot, the $ 18,000 figure was changed to $ 24,100. Then in November, 1961, Hoffman was assured that if the $ 24,100 figure were increased by $ 2,000 the deal would go through. Hoffman was induced to sell his grocery store fixtures and inventory in June, 1961, on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Owl go through.

We determine that there was ample evidence to sustain the answers of the jury to the questions of the verdict with respect to the promissory representations made by Red Owl, Hoffman's reliance thereon in the exercise of ordinary care, and his fulfilment of the conditions required of him by the terms of the negotiations had with Red Owl.

There remains for consideration the question of law raised by defendants that agreement was never reached on essential factors necessary to establish a contract between Hoffman and Red Owl. Among these were the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options. This poses the question of whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be the equivalent of an offer that would result in a binding contract between the parties if the promisee were to accept the same.

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, Contracts (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 University of Pennsylvania Law Review (1950), 459, at page 497. While the first two of the above listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment.

Damages.

Defendants attack all the items of damages awarded by the jury.

The bakery building at Wautoma was sold at defendants' instigation in order that Hoffman might have the net proceeds available as part of the cash capital he was to invest in the Chilton store venture. The evidence clearly establishes that it was sold at a loss of $ 2,000. Defendants contend that half of this loss was sustained by Mrs. Hoffman because title stood in joint tenancy. They point out that no dealings took place between her and defendants as all negotiations were had with her husband. Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. 1A Corbin, Contracts, p. 220, sec. 200. Here not only did defendants foresee that it would be necessary for Mrs. Hoffman to sell her joint interest in the bakery building, but defendants actually requested that this be done. We approve the jury's award of $ 2,000 damages for the loss incurred by both plaintiffs in this sale.

Defendants attack on two grounds the $ 1,000 awarded because of Hoffman's payment of that amount on the purchase price of the Chilton lot. The first is that this $ 1,000 had already been lost at the time the final negotiations with Red Owl fell through in January, 1962, because the remaining $ 5,000 of purchase price had been due on October 15, 1961. The record does not disclose that the lot owner had foreclosed Hoffman's interest in the lot for failure to pay this $ 5,000. The $ 1,000 was not paid for the option, but had been paid as part of the purchase price at the time Hoffman elected to exercise the option. This gave him an equity in the lot which could not be legally foreclosed without affording Hoffman an opportunity to pay the balance. The second ground of attack is that the lot may have had a fair market value of $ 6,000, and Hoffman should have paid the remaining $ 5,000 of purchase price. We determine that it would be unreasonable to require Hoffman to have invested an additional $ 5,000 in order to protect the $ 1,000 he had paid. Therefore, we find no merit to defendants' attack upon this item of damages.

We also determine it was reasonable for Hoffman to have paid $ 125 for one month's rent of a home in Chilton after defendants assured him everything would be set when plaintiff sold the bakery building. This was a proper item of damage.

Plaintiffs never moved to Chilton because defendants suggested that Hoffman get some experience by working in a Red Owl store in the Fox River Valley. Plaintiffs, therefore, moved to Neenah instead of Chilton. After moving, Hoffman worked at night in an Appleton bakery but held himself available for work in a Red Owl store. The $ 140 moving expense would not have been incurred if plaintiffs had not sold their bakery building in Wautoma in reliance upon defendants' promises. We consider the $ 140 moving expense to be a proper item of damage.

We turn now to the damage item with respect to which the trial court granted a new trial, i.e., that arising from the sale of the Wautoma grocery-store fixtures and inventory for which the jury awarded $ 16,735. The trial court ruled that Hoffman could not recover for any loss of future profits for the summer months following the sale on June 6, 1961, but that damages would be limited to the difference between the sales price received and the fair market value of the assets sold, giving consideration to any goodwill attaching thereto by reason of the transfer of a going business. There was no direct evidence presented as to what this fair market value was on June 6, 1961. The evidence did disclose that Hoffman paid $ 9,000 for the inventory, added $ 1,500 to it and sold it for $ 10,000 or a loss of $ 500. His 1961 federal income-tax return showed that the grocery equipment had been purchased for $ 7,000 and sold for $ 7,955.96. Plaintiffs introduced evidence of the buyer that during the first eleven weeks of operation of the grocery store his gross sales were $ 44,000 and his profit was $ 6,000 or roughly 15 percent. On cross-examination he admitted that this was gross and not net profit. Plaintiffs contend that in a breach-of-contract action damages may include loss of profits. However, this is not a breach-of-contract action.

The only relevancy of evidence relating to profits would be with respect to proving the element of goodwill in establishing the fair market value of the grocery inventory and fixtures sold. Therefore, evidence of profits would be admissible to afford a foundation for expert opinion as to fair market value.

Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule-of-thumb approaches to the damage problem should be avoided . . .

At the time Hoffman bought the equipment and inventory of the small grocery store at Wautoma he did so in order to gain experience in the grocery-store business. At that time discussion had already been had with Red Owl representatives that Wautoma might be too small for a Red Owl operation and that a larger city might be more desirable. Thus Hoffman made this purchase more or less as a temporary experiment. Justice does not require that the damages awarded him, because of selling these assets at the behest of defendants, should exceed any actual loss sustained measured by the difference between the sales price and the fair market value.

Since the evidence does not sustain the large award of damages arising from the sale of the Wautoma grocery business, the trial court properly ordered a new trial on this issue.

Order affirmed. Because of the cross appeal, plaintiffs shall be limited to taxing but two thirds of their costs.

Ardente v. Horan

366 A.2d 162 (R.I. 1976)

Ernest P. Ardente, the plaintiff, brought this civil action in Superior Court to specifically enforce an agreement between himself and William A. and Katherine L. Horan, the defendants, to sell certain real property. The defendants filed an answer together with a motion for summary judgment pursuant to Super. R. Civ. P. 56. Following the submission of affidavits by both the plaintiff and the defendants and a hearing on the motion, judgment was entered by a Superior Court justice for the defendants. The plaintiff now appeals.

In August 1975, certain residential property in the city of Newport was offered for sale by defendants. The plaintiff made a bid of $250,000 for the property which was communicated to defendants by their attorney. After defendants' attorney advised plaintiff that the bid was acceptable to defendants, he prepared a purchase and sale agreement at the direction of defendants and forwarded it to plaintiff's attorney for plaintiff's signature. After investigating certain title conditions, plaintiff executed the agreement. Thereafter plaintiff's attorney returned the document to defendants along with a check in the amount of $20,000 and a letter dated September 8, 1975, which read in relevant part as follows:

My clients are concerned that the following items remain with the real estate: a) dining room set and tapestry wall covering in dining room; b) fireplace fixtures throughout; c) the sun parlor furniture. I would appreciate your confirming that these items are a part of the transaction, as they would be difficult to replace.

The defendants refused to agree to sell the enumerated items and did not sign the purchase and sale agreement. They directed their attorney to return the agreement and the deposit check to plaintiff and subsequently refused to sell the property to plaintiff. This action for specific performance followed.

In Superior Court, defendants moved for summary judgment on the ground that the facts were not in dispute and no contract had been formed as a matter of law.  The trial justice ruled that the letter quoted above constituted a conditional acceptance of defendants' offer to sell the property and consequently must be construed as a counteroffer. Since defendants never accepted the counteroffer, it followed that no contract was formed, and summary judgment was granted.

. . .

The plaintiff's . . . contention is that the trial justice incorrectly applied the principles of contract law in deciding that the facts did not disclose a valid acceptance of defendants' offer.  Again we cannot agree.

The trial justice proceeded on the theory that the delivery of the purchase and sale agreement to plaintiff constituted an offer by defendants to sell the property. Because we must view the evidence in the light most favorable to the party against whom summary judgment was entered, in this case plaintiff, we assume as the trial justice did that the delivery of the agreement was in fact an offer.

. . . . A review of the record shows that the only expression of acceptance which was communicated to defendants was the delivery of the executed purchase and sale agreement accompanied by the letter of September 8. Therefore it is solely on the basis of the language used in these two documents that we must determine whether there was a valid acceptance.  Whatever plaintiff's unexpressed intention may have been in sending the documents is irrelevant. We must be concerned only with the language actually used, not the language plaintiff thought he was using or intended to use.

There is no doubt that the execution and delivery of the purchase and sale agreement by plaintiff, without more, would have operated as an acceptance. The terms of the accompanying letter, however, apparently conditioned the acceptance upon the inclusion of various items of personalty. In assessing the effect of the terms of that letter we must keep in mind certain generally accepted rules. To be effective, an acceptance must be definite and unequivocal. “An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.” 1 Restatement Contracts § 58, comment a (1932). The acceptance may not impose additional conditions on the offer, nor may it add limitations. "An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist." John Hancock Mut. Life Ins. Co. v. Dietlin, 97 R.I. 515, 518, 199 A.2d 311, 313 (1964). . . .

However, an acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition. Many cases have so held. Williston states the rule as follows: “Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed." 1 Williston, Contracts § 79 at 261-62 (3d ed. 1957).  Corbin is in agreement with the above view. 1 Corbin, supra § 84 at 363-65. Thus our task is to decide whether plaintiff's letter is more reasonably interpreted as a qualified acceptance or as an absolute acceptance together with a mere inquiry concerning a collateral matter.

In making our decision we recognize that, as one text states, "The question whether a communication by an offeree is a conditional acceptance or counter-offer is not always easy to answer. It must be determined by the same common-sense process of interpretation that must be applied in so many other cases." 1 Corbin, supra § 82 at 353. In our opinion, the language used in plaintiff's letter of September 8 is not consistent with an absolute acceptance accompanied by a request for a gratuitous benefit. We interpret the letter to impose a condition on plaintiff's acceptance of defendants' offer. The letter does not unequivocally state that even without the enumerated items plaintiff is willing to complete the contract. In fact, the letter seeks "confirmation" that the listed items "are a part of the transaction". Thus, far from being an independent, collateral request, the sale of the items in question is explicitly referred to as a part of the real estate transaction. Moreover, the letter goes on to stress the difficulty of finding replacements for these items. This is a further indication that plaintiff did not view the inclusion of the listed items as merely collateral or incidental to the real estate transaction.

. . .

Accordingly, we hold that since the plaintiff's letter of acceptance dated September 8 was conditional, it operated as a rejection of the defendants' offer and no contractual obligation was created.

The plaintiff's appeal is denied and dismissed, the judgment appealed from is affirmed and the case is remanded to the Superior Court.

 Poel v. Brunswick-Balke-Collender Co. of New York

110 N.E. 619 (N.Y. 1915)

Seabury, J.

In this action the plaintiff sued to recover damages from this defendant for the breach of an executory contract. The plaintiffs are the general partners of the limited partnership of Poel & Arnold. The defendant is a corporation organized under the laws of the state of New York. The theory of the action is that the defendant agreed to accept and pay for certain rubber which the plaintiffs agreed to sell to it, and that the refusal of the defendant to accept and pay for said rubber caused a breach of that contract. In the transactions between the parties the defendant was represented by one C. R. Rogers, who carried on negotiations in behalf of the defendant and signed the letters purporting to come from the defendant, and which will be referred to below. In the court several questions were litigated, viz., whether Rogers had authority to represent the defendant, and whether there was a contract and a sufficient written memorandum of such contract to satisfy the requirements of the statute of frauds. In our discussion of this case we shall assume, without deciding, that Rogers was authorized to represent the defendant in the action which he took.

. . . The question of law, whether these writings constitute a contract, and, if so, whether they satisfy the provisions of the statute of frauds, survives the unanimous decision of the Appellate Division, and is subject to review by this court. If there was no contract between the parties it necessarily follows that the letters and writings relied upon by the plaintiffs as constituting the note or memorandum which evidenced the contract cannot be held to comply with the requirements of the statute of frauds. The plaintiffs contend that on April 2, 1910, the defendant made an oral offer to the plaintiffs which the plaintiffs accepted in writing on April 4th, and that the contract so made is evidenced by the letter of January 7, 1911, which was signed by the defendant and thus the requirements of the statute of frauds were satisfied. The initial difficulty in the way of accepting this contention is that it leaves out of consideration altogether the defendant's letter of April 6th, and would have us determine the rights of the parties upon the letters of April 2d and 4th and the defendant's letter of January 7th and close our eyes entirely to the intervening letter of the defendant on April 6th. Moreover, the courts below found that the transaction between the parties was set forth in the four letters referred to. Another difficulty in the way of accepting this contention is that the plaintiff's must stand or fall upon the writings. The plaintiffs cannot prevail upon the theory that the writings express a contract, different in its terms and conditions from the contract which the parties entered into. In order to satisfy the requirements of the statute of frauds the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it shall completely evidence the contract which the parties made. If instead of proving the existence of that contract, it establishes that there was in fact no contract or evidenced a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute. . . .

The application of this principle to the facts of the present case makes it necessary that we should disregard the alleged oral agreement which is said to have preceded the written communications that were exchanged between the parties and confine our attention to the writings. There are in this case four writings, and upon three of them this controversy must be determined. They set forth with accuracy and precision the transaction between the parties. The oral evidence that was presented is in no way inconsistent with the writings, and if it were, the spoken words could not be permitted to prevail over the written. The writings referred to are as follows:

Poel & Arnold, 277 Broadway, New York,

April 2, 1910

Brunswick-Balke-Collender Co. Long Island City, L. I. -- Gentlemen: As per telephonic conversation with your Mr. Rogers to-day, this is to confirm having your offer of $2.42 per pound for 12 tons Upriver Fine Para Rubber, for shipment either from Brazil or Liverpool, in equal monthly parts January to June, 1911, about which we will let you know upon receipt of our cable reply on Monday morning.

Thanking you for the offer we remain,

Very truly yours,

Poel & Arnold
Per W. J. Kelly

Poel & Arnold, 277 Broadway, New York

April 4, 1910

Brunswick-Balke-Collender Co., Long Island City, L. I. -- Gentlemen: Enclosed, we beg to hand you contract for 12 tons Upriver Fine Para Rubber, as sold you today, with our thanks for the order.

Very truly yours,

Poel & Arnold
Per W. J. Kelly

Enclosed with this letter was the following:

Apr. 4/10

Brunswick-Balke-Collender Co.,
Long Island City, L. I.

Sold to You:

For equal monthly shipments January to June, 1911, from Brazil and/or Liverpool, about twelve (12) tons Upriver Fine Para Rubber at two dollars and forty-two cents ($2.42) per pound; payable in U. S. gold or its equivalent, cash twenty (20) days from date of delivery here.

The court later interprets this letter as an offer, and the case turns on the question of whether the reply which follows is an acceptance.

On April 6th Rogers sent the following order to the plaintiffs. . . .

Purchase Dep't

Order No. 25409

This number must appear on Invoices and Cases

The Brunswick-Balke-Collender Co. of New York
Review Ave., Fox and Marsh Sts.

Long Island City, 4/6, 1910

M. Poel and Arnold, 277 Broadway, N. Y. C. Please deliver at once the following, and send invoice with goods:

About 12 tons Upriver Fine Para Rubber at 2.42 per lb. Equal monthly shipments January to June, 1911.

Conditions on Which Above Order is Given.

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.

Terms:  F. O. B.

Respectfully yours,

The Brunswick-Balke-Collender Co. of New York

Per C. R. Rogers

January 7, 1911

Messrs. Poel & Arnold, No. 277 Broadway, City -- Gentlemen: We beg herewith to advise you that within the past few weeks there has come to our attention through a statement made to us for the first time by Mr. Rogers, information as to certain transactions had by him with you in the past, and especially as to a transaction in April last relating to 12 tons of crude rubber. Mr. Rogers had no authority to effect any such transaction on our account, nor had we any notice or knowledge of his action until he made a voluntary statement disclosing the facts within the past few weeks.

In order that you may not be put to any unnecessary inconvenience, we feel bound to give you notice at the earliest opportunity after investigating the facts, that we shall not recognize these transactions or any others that may have been entered into with Mr. Rogers which were without our knowledge or authority.

Yours truly,
The Brunswick-Balke-Collender Co. of New York,
Per Chas. P. Miller, Vice-President

The first letter is of no legal significance, and only the other three need be considered. The fundamental question in this case is whether these writings constitute a contract between the parties. If they do not, no question as to whether these writings meet the requirements of the statute of frauds need be considered. An analysis of their provisions will show that they do not constitute a contract.

It is not contended, and in face of the provisions of the plaintiffs' letter of April 4th it cannot be claimed, that that letter is in itself a contract. It is a mere offer or proposal by the plaintiffs that the defendant should accept the proposed contract enclosed which is said to embody an oral order that the defendant had that day given the plaintiffs. The object of this letter was to have the terms of the oral agreement reduced to writing so that there could be no uncertainty as to the terms of the contract.

The letter of the defendant of April 6th did not accept this offer. If the intention of the defendant had been to accept the offer made in the plaintiffs' letter of April 4th, it would have been a simple matter for the defendant to have endorsed its acceptance upon the proposed contract which the plaintiffs' letter of April 4th had enclosed. Instead of adopting this simple and obvious method of indicating an intent to accept the contract proposed by the plaintiffs, the defendant submitted its own proposal and specified the terms and conditions upon which it should be accepted. The defendant's letter of April 6th was not an acceptance of this offer made by the plaintiffs in their letter of April 4th. It was a counter offer or proposition for a contract. Its provisions make it perfectly clear that the defendant: (1) Asked the plaintiffs to deliver rubber of a certain quality and quantity at the price specified in designated shipments; (2*) it specified that the order therein given was conditioned upon the receipt of its orders being promptly acknowledged; and* (3) upon the further condition that the plaintiffs would guarantee delivery within the time specified.

It may be urged that the condition specified in the defendant's order that the plaintiffs would guarantee the delivery of the goods within the time specified added nothing of substance to the agreement, because if the offer was accepted the acceptance itself would involve this obligation on the part of the plaintiffs.

The other condition specified by the defendant cannot be disposed of in the same manner. The provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition that the defendant had the right to annex to its offer. The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth. When this assent was given and the acknowledgment made, this contract was then to come into existence and would be completely expressed in writing. The plaintiffs did not acknowledge the receipt of this order and the proposal remained unaccepted. As the party making this offer deemed this provision material, and as the offer was made subject to compliance with it by the plaintiffs, it is not for the court to say that it is immaterial.

When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract, or it could reject the offer. There was no middle course. If it did not accept the offer proposed it necessarily rejected it. A proposal to accept the offer it modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs. . . .

The letter of January 7th by the defendant, in which it declares that Rogers acted without authority, refers to the "transaction in April last relating to 12 tons of crude rubber." This statement obviously refers to the matters set forth in the letters of April 4th and 6th, and if these letters do not, when read together, constitute a contract, it is evident that, when read in connection with the defendant's letter of January 7th, they fail to express a contract. There was no contract because, as has been shown, the plaintiffs did not accept the counter offer of the defendant expressed in its letter of April 6th. That being so, this letter from the defendant some months later, disavowing the authority of the salesman who sent the order, cannot supply the omission of the plaintiffs to accept the offer which the defendant's salesman made. If we limit our consideration to the writings, it is plain that there was no contract because the offer of the defendant was not accepted. If we should indulge the assumption, which we think we are not warranted in doing, that the writings do not correctly set forth the alleged previous parol agreement, then the writings cannot constitute a sufficient note of memorandum of that parol agreement to satisfy the requirements of the statute of frauds. Upon either proposition the plaintiffs have failed to establish a cause of action.

Having reached the conclusion that there was no contract between the parties, it is unnecessary to discuss the other questions urged upon our attention by appellant.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

WILLARD BARTLETT, C. J., and HISCOCK, COLLIN, HOGAN, and CARDOZO, JJ., concur. POUND, J., dissents.

Dorton v. Collins & Aikman Corp.

453 F.2d 1161 (6th Cir. 1972)

Celebrezze, Circuit Judge.

This is an appeal from the District Court's denial of Defendant-Appellant's motion for a stay pending arbitration . . . The suit arose after a series of over 55 transactions during 1968, 1969, and 1970 in which Plaintiffs-Appellees [hereinafter The Carpet Mart], carpet retailers in Kingsport, Tennessee, purchased carpets from Defendant-Appellant [hereinafter Collins & Aikman], incorporated under the laws of the State of Delaware, with its principal place of business in New York, New York, and owner of a carpet manufacturing plant [formerly the Painter Carpet Mills, Inc.] located in Dalton, Georgia. The Carpet Mart originally brought this action in a Tennessee state trial court, seeking compensatory and punitive damages in the amount of $450,000 from Collins & Aikman for the latter's alleged fraud, deceit, and misrepresentation in the sale of what were supposedly carpets manufactured from 100% Kodel polyester fiber. The Carpet Mart maintains that in May, 1970, in response to a customer complaint, it learned that not all of the carpets were manufactured from 100% Kodel polyester fiber but rather some were composed of a cheaper and inferior carpet fiber. After the cause was removed to the District Court on the basis of diversity of citizenship, Collins & Aikman moved for a stay pending arbitration, asserting that The Carpet Mart was bound to an arbitration agreement which appeared on the reverse side of Collins & Aikman's printed sales acknowledgment forms. Holding that there existed no binding arbitration agreement between the parties, the District Court denied the stay. For the reasons set forth below, we remand the case to the District Court for further findings.

. . .

We . . . find that there is no conflicts of law problem in the present case, the Uniform Commercial Code having been enacted in both Georgia and Tennessee at the time of the disputed transactions.
. . .

The primary question before us on appeal is whether the District Court, in denying Collins & Aikman's motion for a stay pending arbitration, erred in holding that The Carpet Mart was not bound by the arbitration agreement appearing on the back of Collins & Aikman's acknowledgment forms. In reviewing the District Court's determination, we must look closely at the procedures which were followed in the sales transactions which gave rise to the present dispute over the arbitration agreement.

In each of the more than 55 transactions, one of the partners in The Carpet Mart, or, on some occasions, Collins & Aikman's visiting salesman, telephoned Collins & Aikman's order department in Dalton, Georgia, and ordered certain quantities of carpets listed in Collins & Aikman's catalogue. There is some dispute as to what, if any, agreements were reached through the telephone calls and through the visits by Collins & Aikman's salesman. After each oral order was placed, the price, if any, quoted by the buyer was checked against Collins & Aikman's price list, and the credit department was consulted to determine if The Carpet Mart had paid for all previous shipments. After it was found that everything was in order, Collins & Aikman's order department typed the information concerning the particular order on one of its printed acknowledgment forms. Each acknowledgment form bore one of three legends: "Acknowledgment," "Customer Acknowledgment," or "Sales Contract." The following provision was printed on the face of the forms bearing the "Acknowledgment" legend:

"The acceptance of your order is subject to all of the terms and conditions on the face and reverse side hereof, including arbitration, all of which are accepted by buyer; it supersedes buyer's order form, if any. It shall become a contract either (a) when signed and delivered by buyer to seller and accepted in writing by seller, or (b) at Seller's option, when buyer shall have given to seller specification of assortments, delivery dates, shipping instructions, or instructions to bill and hold as to all or any part of the merchandise herein described, or when buyer has received delivery of the whole or any part thereof, or when buyer has otherwise assented to the terms and conditions hereof."

Similarly, on the face of the forms bearing the "Customer Acknowledgment" or "Sales Contract" legends the following provision appeared:

This order is given subject to all of the terms and conditions on the face and reverse side hereof, including the provisions for arbitration and the exclusion of warranties, all of which are accepted by Buyer, supersede Buyer's order form, if any, and constitute the entire contract between Buyer and Seller. This order shall become a contract as to the entire quantity specified either (a) when signed and delivered by Buyer to Seller and accepted in writing by Seller or (b) when Buyer has received and retained this order for ten days without objection, or (c) when Buyer has accepted delivery of any part of the merchandise specified herein or has furnished to Seller specifications or assortments, delivery dates, shipping instructions, or instructions to bill and hold, or when Buyer has otherwise indicated acceptance of the terms hereof.

The small print on the reverse side of the forms provided, among other things, that all claims arising out of the contract would be submitted to arbitration in New York City. Each acknowledgment form was signed by an employee of Collins & Aikman's order department and mailed to The Carpet Mart on the day the telephone order was received or, at the latest, on the following day.[(1)](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Lawuntitled00000387.htm) The carpets were thereafter shipped to The Carpet Mart, with the interval between the mailing of the acknowledgment form and shipment of the carpets varying from a brief interval to a period of several weeks or months. Absent a delay in the mails, however, The Carpet Mart always received the acknowledgment forms prior to receiving the carpets. In all cases The Carpet Mart took delivery of and paid for the carpets without objecting to any terms contained in the acknowledgment form.

In holding that no binding arbitration agreement was created between the parties through the transactions above, the District Court relied on T.C.A. § 47-2-207 [UCC § 2-207], which provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of chapters 1 through 9 of this title.

The District Court found that Subsection 2-207(3) controlled the instant case, quoting the following passage from 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 1.090303, at 19-20 (1964):

If the seller . . . ships the goods and the buyer accepts them, a contract is formed under subsection (3). The terms of this contract are those on which the purchase order and acknowledgment agree, and the additional terms needed for a contract are to be found throughout the U.C.C. . . . The U.C.C. does not impose an arbitration term on the parties where their contract is silent on the matter. Hence, a conflict between an arbitration and an no-arbitration clause would result in the no arbitration clause becoming effective.

Under this authority alone the District Court concluded that the arbitration clause on the back of Collins & Aikman's sales acknowledgment had not become a binding term in the 50-odd transactions with The Carpet Mart.

In reviewing this determination by the District Court, we are aware of the problems which courts have had in interpreting Section 2-207. This section of the UCC has been described as a "murky bit of prose," Southwest Engineering Co. v. Martin Tractor Co., 205 Kan. 684, 694, 473 P.2d 18, 25 (1970), as "not too happily drafted," Roto-Lith Ltd. v. F. P. Bartlett & Co., 297 F.2d 497, 500 (1st Cir. 1962), and as "one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory." Duesenberg & King, Sales and Bulk Transfers under the Uniform Commercial Code, (Vol. 3, Bender's Uniform Commercial Code Service) § 3.03, at 3-12 (1969). Despite the lack of clarity in its language, Section 2-207 manifests definite objectives which are significant in the present case.

. . . [I]t is clear that Section 2-207, and specifically Subsection 2-207(1), was intended to alter the "ribbon matching" or "mirror" rule of common law, under which the terms of an acceptance or confirmation were required to be identical to the terms of the offer or oral agreement, respectively. 1 W. Hawkland, supra, at 16; R. Nordstrom, Handbook of the Law of Sales, Sec. 37, at 99-100 (1970). Under the common law, an acceptance or a confirmation which contained terms additional to or different from those of the offer or oral agreement constituted a rejection of the offer or agreement and thus became a counter-offer. The terms of the counter-offer were said to have been accepted by the original offeror when he proceeded to perform under the contract without objecting to the counter-offer. Thus, a buyer was deemed to have accepted the seller's counter-offer if he took receipt of the goods and paid for them without objection.

Under Section [2-207](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) the result is different. This section of the Code recognizes that in current commercial transactions, the terms of the offer and those of the acceptance will seldom be identical. Rather, under the current "battle of the forms," each party typically has a printed form drafted by his attorney and containing as many terms as could be envisioned to favor that party in his sales transactions. Whereas under common law the disparity between the fineprint terms in the parties' forms would have prevented the consummation of a contract when these forms are exchanged, Section [2-207](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) recognizes that in many, but not all, cases the parties do not impart such significance to the terms on the printed forms. See 1 W. Hawkland, supra; § 1.0903, at 14, § 1.090301, at 16. Subsection [2-207(1)](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) therefore provides that "[a] definite and seasonable expression of acceptance or a written confirmation . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Thus, under Subsection (1), a contract is recognized notwithstanding the fact that an acceptance or confirmation contains terms additional to or different from those of the offer or prior agreement, provided that the offeree's intent to accept the offer is definitely expressed, see Sections 2-204 and 2-206, and provided that the offeree's acceptance is not expressly conditioned on the offeror's assent to the additional or different terms. . . .

With the above analysis and purposes of Section 2-207 in mind, we turn to their application in the present case. We initially observe that the affidavits and the acknowledgment forms themselves raise the question of whether Collins & Aikman's forms constituted acceptances or confirmations under Section [2-207](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm). The language of some of the acknowledgment forms ("The acceptance of your order is subject to . . .") and the affidavit of Mr. William T. Hester, Collins & Aikman's marketing operations manager, suggest that the forms were the only acceptances issued in response to The Carpet Mart's oral offers. However, in his affidavit Mr. J. A. Castle, a partner in The Carpet Mart, asserted that when he personally called Collins & Aikman to order carpets, someone from the latter's order department would agree to sell the requested carpets, or, alternatively, when Collins & Aikman's visiting salesman took the order, he would agree to the sale, on some occasions after he had used The Carpet Mart's telephone to call Collins & Aikman's order department. Absent the District Court's determination of whether Collins & Aikman's acknowledgment forms were acceptances or, alternatively, confirmations of prior oral agreements, we will consider the application of section 2-207 to both situations for the guidance of the District Court on remand.

Viewing Collins & Aikman's acknowledgment forms as acceptances under Subsection 2-207(1), we are initially faced with the question of whether the arbitration provision in Collins & Aikman's acknowledgment forms were in fact "additional to or different from" the terms of The Carpet Mart's oral offers. In the typical case under Section 2-207, there exist both a written purchase order and a written acknowledgment, and this determination can be readily made by comparing the two forms. In the present case, where the only written forms were Collins & Aikman's sales acknowledgments, we believe that such a comparison must be made between the oral offers and the written acceptances. Although the District Court apparently assumed that The Carpet Mart's oral orders did not include in their terms the arbitration provision which appeared in Collins & Aikman's acknowledgment forms, we believe that a specific finding on this point will be required on remand.

Assuming, for purposes of analysis, that the arbitration provision was an addition to the terms of The Carpet Mart's oral offers, we must next determine whether or not Collins & Aikman's acceptances were "expressly made conditional on assent to the additional . . . terms" therein, within the proviso of Subsection 2-207(1). As set forth in full above, the provision appearing on the face of Collins & Aikman's acknowledgment forms stated that the acceptances (or orders) were "subject to all of the terms and conditions on the face and reverse side hereof, including arbitration, all of which are accepted by buyer." The provision on the "Acknowledgment" forms further stated that Collins & Aikman's terms would become the basis of the contract between the parties

either (a) when signed and delivered by buyer to seller and accepted in writing by seller, or (b) at Seller's option, when buyer shall have given to seller specification of assortments, delivery dates, shipping instructions, or instructions to bill and hold as to all or any part of the merchandise herein described, or when buyer has received delivery of the whole or any part thereof, or when buyer has otherwise assented to the terms and conditions hereof.

Similarly, the provision on the "Customer Acknowledgment" and "Sales Contract" forms stated that the terms therein would become the basis of the contract

either (a) when signed and delivered by Buyer to Seller and accepted in writing by Seller or (b) when Buyer has received and retained this order for ten days without objection, or (c) when Buyer has accepted delivery of any part of the merchandise specified herein or has furnished to Seller specifications or assortments, delivery dates, shipping instructions to bill and hold, or when Buyer has otherwise indicated acceptance of the terms hereof.

Although Collins & Aikman's use of the words "subject to" suggests that the acceptances were conditional to some extent, we do not believe the acceptances were "expressly made conditional on [the buyer's] assent to the additional or different terms," as specifically required under the Subsection 2-207(1) proviso. In order to fall within this proviso, it is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be expressly conditional on the offeror's assent to those terms. Viewing the Subsection (1) proviso within the context of the rest of that Subsection and within the policies of Section 2-207 itself, we believe that it was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein. See 1 W. Hawkland, supra, § 1.090303, at 21. That the acceptance is predicated on the offeror's assent must be "directly and distinctly stated or expressed rather than implied or left to inference." Webster's Third International Dictionary (defining "express").

Although the UCC does not provide a definition of "assent," it is significant that Collins & Aikman's printed acknowledgment forms specified at least seven types of action or inaction on the part of the buyer which -- sometimes at Collins & Aikman's option -- would be deemed to bind the buyer to the terms therein. These ranged from the buyer's signing and delivering the acknowledgment to the seller -- which indeed could have been recognized as the buyer's assent to Collins & Aikman's terms -- to the buyer's retention of the acknowledgment for ten days without objection -- which could never have been recognized as the buyer's assent to the additional or different terms where acceptance is expressly conditional on that assent.

To recognize Collins & Aikman's acceptances as "expressly conditional on [the buyer's] assent to the additional . . . terms" therein, within the proviso of Subsection 2-207(1), would thus require us to ignore the specific language of that provision. Such an interpretation is not justified in view of the fact that Subsection [2-207(1)](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) is clearly designed to give legal recognition to many contracts where the variance between the offer and acceptance would have precluded such recognition at common law.
Because Collins & Aikman's acceptances were not expressly conditional on the buyer's assent to the additional terms within the proviso of Subsection 2-207(1), a contract is recognized under Subsection (1), and the additional terms are treated as "proposals" for addition to the contract under Subsection 2-207(2). Since both Collins & Aikman and The Carpet Mart are clearly "merchants" as that term is defined in Subsection 2-104(1), the arbitration provision will be deemed to have been accepted by The Carpet Mart under Subsection 2-207(2) unless it materially altered the terms of The Carpet Mart's oral offers. T.C.A. § 47-2-207(2) (b) [UCC § 2-207(2) (b)]. We believe that the question of whether the arbitration provision materially altered the oral offer under Subsection 2-207(2) (b) is one which can be resolved only by the District Court on further findings of fact in the present case. If the arbitration provision did in fact materially alter The Carpet Mart's offer, it could not become a part of the contract "unless expressly agreed to" by The Carpet Mart. T.C.A. § 47-2-207 [UCC § 2-207], Official Comment No. 3.

We therefore conclude that if on remand the District Court finds that Collins & Aikman's acknowledgments were in fact acceptances and that the arbitration provision was additional to the terms of The Carpet Mart's oral orders, contracts will be recognized under Subsection 2-207(1). The arbitration clause will then be viewed as a "proposal" under Subsection [2-207](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm)(2) which will be deemed to have been accepted by The Carpet Mart unless it materially altered the oral offers.

If the District Court finds that Collins & Aikman's acknowledgment forms were not acceptances but rather were confirmations of prior oral agreements between the parties, an application of Section [2-207](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) similar to that above will be required. Subsection [2-207(1)](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContracts%5CContract_Law2207__Additional_Terms_in_Accept.htm) will require an initial determination of whether the arbitration provision in the confirmations was "additional to or different from" the terms orally agreed upon. Assuming that the District Court finds that the arbitration provision was not a term of the oral agreements between the parties, the arbitration clause will be treated as a "proposal" for addition to the contract under Subsection 2-207(2), as was the case when Collins & Aikman's acknowledgments were viewed as acceptances above. The provision for arbitration will be deemed to have been accepted by The Carpet Mart unless the District Court finds that it materially altered the prior oral agreements, in which case The Carpet Mart could not become bound thereby absent an express agreement to that effect.

As a result of the above application of Section 2-207 to the limited facts before us in the present case, we find it necessary to remand the case to the District Court for the following findings: (1) whether oral agreements were reached between the parties prior to the sending of Collins & Aikman's acknowledgment forms; if there were no such oral agreements, (2) whether the arbitration provision appearing in Collins & Aikman's "acceptances" was additional to the terms of The Carpet Mart's oral offers; and, if so, (3) whether the arbitration provision materially altered the terms of The Carpet Mart's oral offers. Alternatively, if the District Court does find that oral agreements were reached between the parties before Collins & Aikman's acknowledgment forms were sent in each instance, it will be necessary for the District Court to make the following findings: (1) whether the prior oral agreements embodied the arbitration provision appearing in Collins & Aikman's "confirmations"; and, if not, (2) whether the arbitration provision materially altered the prior oral agreements. Regardless of whether the District Court finds Collins & Aikman's acknowledgment forms to have been acceptances or confirmations, if the arbitration provision was additional to, and a material alteration of, the offers or prior oral agreements, The Carpet Mart will not be bound to that provision absent a finding that it expressly agreed to be bound thereby.

. . .

For the reasons set forth above, the case is remanded to the District Court for further findings consistent with this opinion.

Cole-McIntyre-Norfleet Co. v. Holloway

214 S.W. 817 (Tenn. 1919)

Lansden, C. J.

This case presents a question of law, which, so far as we are advised, has not been decided by this court in its exact phases. March 26, 1917, a traveling salesman of plaintiff in error solicited and received from defendant in error, at his country store in Shelby county, Tenn., an order for certain goods, which he was authorized to sell. Among these goods were 50 barrels of meal. The meal was to be ordered out by defendant by the 3lst day of July, and afterwards 5 cents per barrel per month was to be charged him for storage.

After the order was given, the defendant heard nothing from it until the 26th of May, 1917, when he was in the place of business of plaintiff in error, and told it to begin shipment of the meal on his contract. He was informed by plaintiff in error that he did not accept the order of March 26th, and for that reason the defendant had no contract for meal.

The defendant in error never received confirmation or rejection from plaintiff in error, or other refusal to fill the order. The same traveling salesman of plaintiff in error called on defendant as often as once each week, and this order was not mentioned to defendant, either by him or by his principals, in any way. Between the day of its alleged rejection, prices on all of the articles in the contract greatly advanced. All of the goods advanced about 50 percent in value.

Some jobbers at Memphis received orders from their drummers, and filled the orders or notified the purchaser that the orders were rejected; but this method was not followed by plaintiff in error.

The contract provided that it was not binding until accepted by the seller at its office in Memphis, and that the salesman had no authority to sign the contract for either the seller or buyer. It was further stipulated that the order should not be subject to countermand.

It will be observed that plaintiff in error was silent upon both the acceptance and rejection of the contract. It sent forth its salesman to solicit this and other orders. The defendant in error did not have the right to countermand orders and the contract was closed, if and when it was accepted by plaintiff in error. The proof that some jobbers in Memphis uniformly filled such order unless the purchaser was notified to the contrary is of no value because it does not amount to a custom.

The case, therefore, must be decided upon its facts. The circuit court and the court of civil appeals were both of opinion that the contract was completed because of the lapse of time before plaintiff in error rejected it. The time intervening between the giving of the order by defendant and its alleged repudiation by plaintiff in error was about 60 days. Weekly opportunities were afforded the salesman of plaintiff in error to notify the defendant in error of the rejection of the contract, and, of course, daily occasions were afforded plaintiff in error to notify him by mail or wire. The defendant believed the contract was in force on the 26th of May, because he directed plaintiff in error to begin shipment of the meal on that day. Such shipments were to have been completed by July 31st, or defendant to pay storage charges. From this evidence the Circuit Court found as an inference of fact that plaintiff in error had not acted within a reasonable time, and therefore its silence would be construed as an acceptance of the contract. The question of whether the delay of plaintiff in error was reasonable or unreasonable was one of fact, and the circuit court was justified from the evidence in finding that the delay was unreasonable. Hence the case, as it comes to us, is whether delay upon the part of plaintiff in error for an unreasonable time in notifying the defendant in error of its action upon the contract is an acceptance of its terms.

We think such delay was unreasonable, and effected an acceptance of the contract. It should not be forgotten that this is not the case of an agent exceeding his authority, or acting without authority. Even in such cases the principal must accept or reject the benefits of the contract promptly and within a reasonable time. Williams v. Storm, 6 Cold. 207.

Plaintiff's agent in this case was authorized to do precisely that which he could do, both as to time and substance. The only thing which was left open by the contract was the acceptance or rejection of its terms by plaintiff in error. It will not do to say that a seller of goods like these could wait indefinitely to decide whether or not he will accept the offer of the proposed buyer. This was all done in the usual course of business, and the articles embraced within the contract were consumable in the use, and some of them would become unfitted for the market within a short time.

It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other party. The acceptance, however, of such an offer, may be communicated by the other party either by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself.

When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketable by delay, delay in notifying the other party of his decision will amount to an acceptance by the offeror. Otherwise, the offeror could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves time to himself to see if the contract will be profitable.

Writ denied.

ProCD v. Zeidenberg

86 F.3d 1447 (1996)

 EASTERBROOK, *Circuit Judge.* Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. *908 F. Supp. 640 (W.D. Wis. 1996).* The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter--and we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

**I**

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991).* See Paul J. Heald, *The Vices of Originality,* *1991 Sup. Ct. Rev. 143, 160-68.* ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means "compact disc--read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and zip codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as a electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $ 150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone (trademark) database is available via the America Online service for the price America Online charges to its clients (approximately $ 3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get a consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

 To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to--and cannot be bound by--terms that were secret at the time of purchase. *908 F. Supp. at 654.*

**II**

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. See *Microsoft Corp. v. Harmony Computers & Electronics, Inc., 846 F. Supp. 208 (E.D. N.Y. 1994).* . . . Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods.

 *Peeters v. State, 154 Wis. 111, 142 N.W. 181 (1913).* In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good--but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract--except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991);* see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995)* (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer pay place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2-201, and other citations are easy to derive.) One of the court's reasons--that by proposing as part of the draft Article 2B a new UCC § 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see *908 F. Supp. at 655-66*--depends on a faulty inference. To propose a change in a law's *text* is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction--although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See *Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991);* *Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir. 1988);* *Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993).* As their titles suggest, these are not consumer transactions. *Step-Saver* is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. See *Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994)* (Illinois law); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment* of §2-207, *68 Va. L. Rev. 1217, 1227-31 (1982).* Our case has only one form; UCC §2-207 is irrelevant. . . .

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.

A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $ 10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines "acceptance of goods", reinforces this understanding. A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see *Gillen v. Atalanta Systems, Inc., 997 F.2d 280, 284 n.1 (7th Cir. 1993);* but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC § 2-316(2), incorporating UCC § 1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC § § 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines.* Zeidenberg has not located any Wisconsin case--for that matter, any case in any state--holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $ 100 rather than $ 150--although any of these changes would be welcomed by the customer, if all other things were held constant--so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996).* ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off. . .

REVERSED AND REMANDED

Specht v. Netscape Communications Corp.

***MEMORANDUM AND ORDER DENYING MOTION TO COMPEL ARBITRATION AND STAY*** ***PROCEEDINGS***

 Hellerstein, District Judge.

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even willful inaction, as long as it is unequivocally referable to the promise, may create a contract.

The three related cases before me all involve this timeless issue of assent, but in the context of free software offered on the Internet. If an offeree downloads free software, and the offeror seeks a contractual understanding limiting its uses and applications, under what circumstances does the act of downloading create a contract? On the facts presented here, is there the requisite assent and consideration? My decision focuses on these issues.

In these putative class actions, Plaintiffs allege that usage of the software transmits to Defendants private information about the user's file transfer activity on the Internet, thereby effecting an electronic surveillance of the user's activity in violation of two federal statutes, the Electronic Communications Privacy Act, [18 U.S.C. § 2510](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=1000546&DocName=18USCAS2510&FindType=L) *et seq.,* and the Computer Fraud and Abuse Act, [18 U.S.C. § 1030](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=1000546&DocName=18USCAS1030&FindType=L). Defendants move to compel arbitration and stay the proceedings, arguing that the disputes reflected in the Complaint, like all others relating to use of the software, are subject to a binding arbitration clause in the End User License Agreement ("License Agreement"), the contract allegedly made by the offeror of the software and the party effecting the download. Thus, I am asked to decide if an offer of a license agreement, made independently of freely offered software and not expressly accepted by a user of that software, nevertheless binds the user to an arbitration clause contained in the license.

 **I. Factual and Procedural Background**

Defendant Netscape, a provider of computer software programs that enable and facilitate the use of the Internet, offers its "SmartDownload" software free of charge on its web site to all those who visit the site and indicate, by clicking their mouse in a designated box, that they wish to obtain it. SmartDownload is a program that makes it easier for its users to download files from the Internet without losing their interim progress when they pause to engage in some other task, or if their Internet connection is severed. Four of the six named Plaintiffs--John Gibson, Mark Gruber, Sean Kelly and Sherry Weindorf--selected and clicked in the box indicating a decision to obtain the software, and proceeded to download the software on to the hard drives of their computers. The fifth named Plaintiff, Michael Fagan, allegedly downloaded the software from a "shareware" web site operated by a third party. The sixth named Plaintiff, Christopher Specht, never obtained or used SmartDownload, but merely maintained a web site from which other individuals could download files.

Visitors wishing to obtain SmartDownload from Netscape's web site arrive at a page pertaining to the download of the software. On this page, there appears a tinted box, or button, labeled "Download." By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. If a visitor does so, he or she sees the following invitation to review the License Agreement:

Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.

Visitors are not required affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software. But if a visitor chooses to click on the underlined text in the invitation, a hypertext link takes the visitor to a web page entitled "License & Support Agreements." The first paragraph on this page reads in pertinent part:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below the paragraph appears a list of license agreements, the first of which is "*License Agreement for Netscape Navigator and Netscape Communicator Product Family* (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the visitor then clicks on that text, he or she is brought to another web page, this one containing the full text of the License Agreement.

The License Agreement, which has been unchanged throughout the period that Netscape has made SmartDownload available to the public, grants the user a license to use and reproduce SmartDownload, and otherwise contains few restrictions on the use of the software. The first paragraph of the License Agreement describes, in upper case print, the purported manner in which a user accepts or rejects its terms.

BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

The License Agreement also contains a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California.

Unless otherwise agreed in writing, all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute, with the losing party paying all costs of arbitration.

All users of SmartDownload must use it in connection with Netscape's Internet browser, which may be obtained either as an independent product, Netscape Navigator, or as part of a suite of software, Netscape Communicator. Navigator and Communicator are governed by a single license agreement, which is identical to the License Agreement for SmartDownload. By its terms, the Navigator / Communicator license is limited to disputes "relating to this Agreement."

 **II. Applicable Law**

. . . First, I must determine whether the parties entered into a binding contract. Only if I conclude that a contract exists do I proceed to a second stage of analysis: interpretation of the arbitration clause and its applicability to the present case. The first stage of the analysis--whether a contract was formed--is a question of state law. If, under the law, a contract is formed, the interpretation of the scope of an arbitration clause in the contract is a question of federal law. . . .

[The court determines that California law applies to the question of whether a contract was formed.]

 **III. Did Plaintiffs Consent to Arbitration?**

Unless the Plaintiffs agreed to the License Agreement, they cannot be bound by the arbitration clause contained therein. My inquiry, therefore, focuses on whether the Plaintiffs, through their acts or failures to act, manifested their assent to the terms of the License Agreement proposed by Defendant Netscape. More specifically, I must consider whether the web site gave Plaintiffs sufficient notice of the existence and terms of the License Agreement, and whether the act of downloading the software sufficiently manifested Plaintiffs' assent to be bound by the License Agreement. I will address separately the factually distinct circumstances of Plaintiffs Michael Fagan and Christopher Specht.

In order for a contract to become binding, both parties must assent to be bound. "[C]ourts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective." E. Allan Farnsworth, *Farnsworth on Contracts* § 3.1 (2d ed.2000). "To form a contract, a manifestation of mutual assent is necessary. Mutual assent may be manifested by written or spoken words, or by conduct." [*Binder v. Aetna Life Ins. Co.,* 75 Cal.App.4th 832, 850, 89 Cal.Rptr.2d 540, 551 (Cal.Ct.App.1999)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=1999231211&ReferencePosition=551) (citations omitted). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." [Cal. Com.Code § 2204](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=1000298&DocName=CACLS2204&FindType=L).

These principles enjoy continuing vitality in the realm of software licensing. The sale of software, in stores, by mail, and over the Internet, has resulted in several specialized forms of license agreements. For example, software commonly is packaged in a container or wrapper that advises the purchaser that the use of the software is subject to the terms of a license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he or she must return the product for a refund, and that failure to return it within a certain period will constitute assent to the license terms. These so-called "shrink-wrap licenses" have been the subject of considerable litigation.

In [*ProCD, Inc. v. Zeidenberg,*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807) for example, the Seventh Circuit Court of Appeals considered a software license agreement "encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs." [86 F.3d 1447, 1450 (7th Cir.1996)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996139807&ReferencePosition=1450). The absence of contract terms on the outside of the box containing the software was not material, since "[e]very box containing [the software] declares that the software comes with restrictions stated in an enclosed license." [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807) The court accepted that placing all of the contract terms on the outside of the box would have been impractical, and held that the transaction, even though one "in which the exchange of money precedes the communication of detailed terms," was valid, in part because the software could not be used unless and until the offeree was shown the license and manifested his assent. [*Id.* at 1451-52.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807)

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and *would not let him proceed without indicating acceptance.*

[*Id.* at 1452](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807) (emphasis added). The court concluded that "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)." [*Id.* at 1449.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807)

The Seventh Circuit expanded this holding in [*Hill v. Gateway 2000, Inc.,* 105 F.3d 1147 (7th Cir.1997)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=506&FindType=Y&SerialNum=1997025630), *cert. denied,* [522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1997109529). In [*Hill,*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1997025630) a customer ordered a computer by telephone; the computer arrived in a box also containing license terms, including an arbitration clause, "to govern unless the customer return[ed] the computer within 30 days." [*Id.* at 1148.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1997025630) The customer was not required to view or expressly assent to these terms before using the computer. More than 30 days later, the customer brought suit based in part on Gateway's warranty in the license agreement, and Gateway petitioned to compel arbitration. The court held that the manufacturer, Gateway, "may invite acceptance by conduct," and that "[b]y keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause." [*Id.* at 1149, 1150.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1997025630) Although not mentioned in the decision, the customer, by seeking to take advantage of the warranty provisions contained in the license agreement, thus could be fairly charged with the arbitration clause as well. It bears noting that unlike the plaintiffs in [*Hill*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1997025630) and [*Brower,*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1998172918) who grounded their claims on express warranties contained in the contracts, the Plaintiffs in this case base their claims on alleged privacy rights independent of the License Agreement for SmartDownload.

Not all courts to confront the issue have enforced shrink-wrap license agreements. In [*Klocek v. Gateway, Inc.,*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2000438798) the court considered a standard shrink-wrap license agreement that was included in the box containing the computer ordered by the plaintiff. [104 F.Supp.2d 1332 (D.Kan.2000)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=4637&FindType=Y&SerialNum=2000438798). The court held that Kansas and Missouri courts probably would not follow [*Hill*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1997025630) or [*ProCD, supra.*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807) The court held that the computer purchaser was the offeror, and that the vendor accepted the purchaser's offer by shipping the computer in response to the offer. Under [Section 2-207 of the Uniform Commercial Code](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=1000300&DocName=NYUCS2-207&FindType=L), the court held, the vendor's enclosure of the license agreement in the computer box constituted "[a] definite and seasonable expression of acceptance ... operat[ing] as an acceptance even though it state [d] terms additional to or different from those offered or agreed upon, unless acceptance [was] expressly made conditional on assent to the additional or different terms." *Id.* (quoting [K.S.A. § 84-2-207](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=1001553&DocName=KSSTS84-2-207&FindType=L)). The court found that the vendor had not made acceptance of the license agreement a condition of the purchaser's acceptance of the computer, and that "the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the [license terms.]" [*Id.* at 1340.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2000438798) Therefore, the court held, the plaintiff did not agree to the license terms and could not be compelled to arbitrate. [*Id.* at 1341.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2000438798)

For most of the products it makes available over the Internet (but not SmartDownload), Netscape uses another common type of software license, one usually identified as "click-wrap" licensing. A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon.[[5]](#footnote-5)12 The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labeled "Back" and used to return to an earlier step of the download preparation; one labeled "No," which if clicked, terminates the download; and one labeled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the software. The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable. *See, e.g.,* [*In re RealNetworks, Inc. Privacy Litigation,* No. 00C1366, 2000 WL 631341 (N.D.Ill. May 8, 2000)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=999&FindType=Y&SerialNum=2000355825); [*Hotmail Corp. v. Van$ Money Pie, Inc.,* No. C 98-20064, 1998](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=999&FindType=Y&SerialNum=1998144779) [WL 388389 (N.D.Cal. April 16, 1998)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=999&FindType=Y&SerialNum=1998144779).

A third type of software license, "browse-wrap," was considered by a California federal court in [*Pollstar v. Gigmania Ltd.,* No. CIV-F-00-5671, 2000 WL 33266437 (E.D.Cal. Oct. 17, 2000)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=999&FindType=Y&SerialNum=2001305319). In [*Pollstar,*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2001305319) the plaintiff's web page offered allegedly proprietary information. Notice of a license agreement appears on the plaintiff's web site. Clicking on the notice links the user to a separate web page containing the full text of the license agreement, which allegedly binds any user of the information on the site. However, the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site. The court referred to this arrangement as a "browse-wrap" license. The defendant allegedly copied proprietary information from the site. The plaintiff sued for breach of the license agreement, and the defendant moved to dismiss for lack of mutual assent sufficient to form a contract. The court, although denying the defendant's motion to dismiss, expressed concern about the enforceability of the browse-wrap license:

Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is provided by small gray text on a gray background.... No reported cases have ruled on the enforceability of a browse wrap license.... While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license agreement, this does not dispose of [the plaintiff's] breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.

[*Id.* at \*5-6.](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2001305319)

The SmartDownload License Agreement in the case before me differs fundamentally from both click-wrap and shrink-wrap licensing, and resembles more the browse-wrap license of [*Pollstar.*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=2001305319) Where click-wrap license agreements and the shrink-wrap agreement at issue in [*ProCD*](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&FindType=Y&SerialNum=1996139807) require users to perform an affirmative action unambiguously expressing assent *before* they may use the software, that affirmative action is equivalent to an express declaration stating, "I assent to the terms and conditions of the license agreement" or something similar. For example, Netscape's Navigator will not function without a prior clicking of a box constituting assent. Netscape's SmartDownload, in contrast, allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.

California courts carefully limit the circumstances under which a party may be bound to a contract. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.... This principle of knowing consent applies with particular force to provisions for arbitration." [*Windsor Mills, Inc. v. Collins & Aikman Corp.,* 25 Cal.App.3d 987, 993, 101 Cal.Rptr. 347 (Cal.Ct.App.1972)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1972102970). *Accord* [*Lawrence v. Walzer & Gabrielson,* 207 Cal.App.3d 1501, 1507, 256 Cal.Rptr. 6 (Cal.Ct.App.1989)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1989030937); [*Cory v. Golden State Bank,* 95 Cal.App.3d 360, 366, 157 Cal.Rptr. 538 (Cal.Ct.App.1979)](http://www.westlaw.com/Find/Default.wl?rs=++++1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1979111592).

In standard form contracts used to sell consumer goods, courts routinely enforce a wide range of provisions of which typical consumers are unaware. Disclaimers of consequential damages are one example (typical consumers do not even know what consequential damages are. So if the above statement is true, there must be two conditions for the offerree’s not being bound: (1) “inconspicuous contractual provisions of which he was unaware”; (2) “contained in a document whose contractual nature is not obvious.”

Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.

Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the individual obtaining SmartDownload is not made aware that he is entering into a contract. SmartDownload is available from Netscape's web site free of charge. Before downloading the software, the user need not view any license agreement terms or even any reference to a license agreement, and need not do anything to manifest assent to such a license agreement other than actually taking possession of the product. From the user's vantage point, SmartDownload could be analogized to a free neighborhood newspaper, readily obtained from a sidewalk box or supermarket counter without any exchange with a seller or vender. It is there for the taking.

The only hint that a contract is being formed is one small box of text referring to the license agreement, text that appears below the screen used for downloading and that a user need not even see before obtaining the product:

Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.

Couched in the mild request, "Please review," this language reads as a mere invitation, not as a condition. The language does not indicate that a user *must* agree to the license terms before downloading and using the software. While clearer language appears in the License Agreement itself, the language of the invitation does not require the reading of those terms[[6]](#footnote-6)14 or provide adequate notice either that a contract is being created or that the terms of the License Agreement will bind the user.

The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position, if accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against the Defendants.

Defendants further contend that even if the arbitration clause in the SmartDownload License Agreement is not binding, the license agreement applicable to Netscape Communicator and Navigator applies to this dispute. As discussed earlier, the Communicator and Navigator agreement is a conventional click-wrap contract; it prevents any use of the software unless and until the user clicks an icon stating his or her assent to the terms of the license. The agreement contains a clause requiring arbitration of "all disputes relating to this Agreement." Assuming *arguendo* that it is enforceable, the Communicator / Navigator license agreement is a separate contract governing a separate transaction; it makes no mention of SmartDownload. Plaintiffs' allegations involve an aspect of SmartDownload that allegedly transmits private information about Plaintiffs' online activities to Defendants. These claims do not implicate Communicator or Navigator any more than they implicate the use of other software on Plaintiffs' computers. Resolution of this dispute does not require interpretation of the parties' rights or obligations under the license agreement for Netscape Communicator and Navigator. Defendants were free to craft broader language for the Communicator / Navigator license, explicitly making later applications such as SmartDownload subject to that click-wrap agreement. They did not do so. Therefore, I reject Defendants' argument that the arbitration clauses in the Communicator and Navigator license agreements mandate arbitration of this dispute.

Mitchill v. Lath

160 N.E. 646 (N.Y. 1928)

Andrews, J.

In the fall of 1923 the Laths owned a farm. This they wished to sell. Across the road, on land belonging to Lieutenant-Governor Lunn, they had an ice house which they might remove. Mrs. Mitchill looked over the land with a view to its purchase. She found the ice house objectionable. Thereupon "the defendants orally promised and agreed, for and in consideration of the purchase of their farm by the plaintiff, to remove the said ice house in the spring of 1924." Relying upon this promise, she made a written contract to buy the property for $8,400, for cash and a mortgage and containing various provisions usual in such papers. Later receiving a deed, she entered into possession and has spent considerable sums in improving the property for use as a summer residence.

Note:  the consideration for the oral agreement to remove the ice-house was the same as the consideration for the sale of the property:  namely, the payment of the $8,400 cash and mortgage.

The defendants have not fulfilled their promise as to the ice house and do not intend to do so. We are not dealing, however, with their moral delinquencies. The question before us is whether their oral agreement may be enforced in a court of equity.

This requires a discussion of the parol evidence rule -- a rule of law which defines the limits of the contract to be construed. (Glackin v. Bennett, 226 Mass. 316.) It is more than a rule of evidence and oral testimony even if admitted will not control the written contract (O'Malley v. Grady, 222 Mass. 202), unless admitted without objection. (Brady v. Nally, 151 N.Y. 258.) It applies, however, to attempts to modify such a contract by parol. It does not affect a parol collateral contract distinct from and independent of the written agreement.

It is, at times, troublesome to draw the line. Williston, in his work on Contracts (sec. 637) points out the difficulty. "Two entirely distinct contracts," he says, "each for a separate consideration may be made at the same time and will be distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. \* \* \* Then if one of the agreements is oral and the other is written, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement."  That is the situation here. It is claimed that the defendants are called upon to do more than is required by their written contract in connection with the sale as to which it deals.

The principle may be clear, but it can be given effect by no mechanical rule. As so often happens, it is a matter of degree, for as Professor Williston also says where a contract contains several promises on each side it is not difficult to put any one of them in the form of a collateral agreement. If this were enough written contracts might always be modified by parol. Not form, but substance is the test.

In applying this test the policy of our courts is to be considered. We have believed that the purpose behind the rule was a wise one not easily to be abandoned. Notwithstanding injustice here and there, on the whole it works for good. Old precedents and principles are not to be lightly cast aside unless it is certain that they are an obstruction under present conditions. Under our decisions before such an oral agreement as the present is received to vary the written contract at least three conditions must exist, (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing; or put in another way, an inspection of the written contract, read in the light of surrounding circumstances must not indicate that the writing appears "to contain the engagements of the parties, and to define the object and measure the extent of such engagement." Or again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.

        The respondent does not satisfy the third of these requirements. It may be, not the second. We have a written contract for the purchase and sale of land. The buyer is to pay $8,400 in the way described. She is also to pay her portion of any rents, interest on mortgages, insurance premiums and water meter charges. She may have a survey made of the premises. On their part the sellers are to give a full covenant deed of the premises as described, or as they may be described by the surveyor if the survey is had, executed and acknowledged at their own expense; they sell the personal property on the farm and represent they own it; they agree that all amounts paid them on the contract and the expense of examining the title shall be a lien on the property; they assume the risk of loss or damage by fire until the deed is delivered; and they agree to pay the broker his commissions. Are they to do more? Or is such a claim inconsistent with these precise provisions? It could not be shown that the plaintiff was to pay $500 additional. Is it also implied that the defendants are not to do anything unexpressed in the writing?

        That we need not decide. At least, however, an inspection of this contract shows a full and complete agreement, setting forth in detail the obligations of each party. On reading it one would conclude that the reciprocal obligations of the parties were fully detailed.

Nor would his opinion alter if he knew the surrounding circumstances. The presence of the ice house, even the knowledge that Mrs. Mitchill thought it objectionable would not lead to the belief that a separate agreement existed with regard to it. Were such an agreement made it would seem most natural that the inquirer should find it in the contract.  Collateral in form it is found to be, but it is closely related to the subject dealt with in the written agreement -- so closely that we hold it may not be proved.

. . .

We do not ignore the fact that authorities may be found that would seem to support the contention of the appellant. Such are Erskine v. Adeane (L.R. 8 Ch. App. 756) and Morgan v. Griffith (L.R. 6 Exch. 70), where although there was a written lease a collateral agreement of the landlord to reduce the game was admitted. In this State Wilson v. Deen might lead to the contrary result. Neither are they approved in New Jersey (Naumberg v. Young, 15 Vroom, 331). Nor in view of later cases in this court can Batterman v. Pierce (3 Hill, 171) be considered an authority. A line of cases in Massachusetts, of which Durkin v. Cobleigh (156 Mass. 108) is an example, have to do with collateral contracts made before a deed is given. But the fixed form of a deed makes it inappropriate to insert collateral agreements, however closely connected with the sale. This may be cause for an exception. Here we deal with the contract on the basis of which the deed to Mrs. Mitchill was given subsequently, and we confine ourselves to the question whether its terms may be modified.

. . .

It is argued that what we have said is not applicable to the case as presented. The collateral agreement was made with the plaintiff. The contract of sale was with her husband and no assignment of it from him appears. Yet the deed was given to her. It is evident that here was a transaction in which she was the principal from beginning to end. We must treat the contract as if in form, as it was in fact, made by her.

Our conclusion is that the judgment of the Appellate Division and that of the Special Term should be reversed and the complaint dismissed, with costs in all courts.

Cardozo, Ch. J., Pound, Kellogg and O'brien, JJ., concur With Andrews, J.;

Lehman, J., Dissents in opinion in which Crane, J., Concurs.

Judgment Accordingly.

Lehman, J. (dissenting)

I accept the general rule as formulated by Judge Andrews. I differ with him only as to its application to the facts shown in the record. The plaintiff contracted to purchase land from the defendants for an agreed price. A formal written agreement was made between the sellers and the plaintiff's husband. It is on its face a complete contract for the conveyance of the land. It describes the property to be conveyed. It sets forth the purchase price to be paid. All the conditions and terms of the conveyance to be made are clearly stated. I concede at the outset that parol evidence to show additional conditions and terms of the conveyance would be inadmissible. There is a conclusive presumption that the parties intended to integrate in that written contract every agreement relating to the nature or extent of the property to be conveyed, the contents of the deed to be delivered, the consideration to be paid as a condition precedent to the delivery of the deeds, and indeed all the rights of the parties in connection with the land. The conveyance of that land was the subjectmatter of the written contract and the contract completely covers that subject.

The parol agreement which the court below found the parties had made was collateral to, yet connected with, the agreement of purchase and sale. It has been found that the defendants induced the plaintiff to agree to purchase the land by a promise to remove an ice house from land not covered by the agreement of purchase and sale. No independent consideration passed to the defendants for the parol promise. To that extent the written contract and the alleged oral contract are bound together. The same bond usually exists wherever attempt is made to prove a parol agreement which is collateral to a written agreement. Hence "the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." [See Judge Andrews' citation from Williston on Contracts, §637](file:///C%3A%5CUsers%5Cricha%5CDocuments%5CCourses%5CContract_LawMitchill_v_Lath.htm#519efabb).

Judge Andrews has formulated a standard to measure the closeness of the bond. Three conditions, at least, must exist before an oral agreement may be proven to increase the obligation imposed by the written agreement. I think we agree that the first condition that the agreement "must in form be a collateral one" is met by the evidence. I concede that this condition is met in most cases where the courts have nevertheless excluded evidence of the collateral oral agreement. The difficulty here, as in most cases, arises in connection with the two other conditions.

The second condition is that the "parol agreement must not contradict express or implied provisions of the written contract." Judge Andrews voices doubt whether this condition is satisfied. The written contract has been carried out. The purchase price has been paid; conveyance has been made, title has passed in accordance with the terms of the written contract. The mutual obligations expressed in the written contract are left unchanged by the alleged oral contract. When performance was required of the written contract, the obligations of the parties were measured solely by its terms. By the oral agreement the plaintiff seeks to hold the defendants to other obligations to be performed by them thereafter upon land which was not conveyed to the plaintiff. The assertion of such further obligation is not inconsistent with the written contract unless the written contract contains a provision, express or implied, that the defendants are not to do anything not expressed in the writing. Concededly there is no such express provision in the contract, and such a provision may be implied, if at all, only if the asserted additional obligation is "so clearly connected with the principal transaction as to be part and parcel of it," and is not "one that the parties would not ordinarily be expected to embody in the writing." The hypothesis so formulated for a conclusion that the asserted additional obligation is inconsistent with an implied term of the contract is that the alleged oral agreement does not comply with the third condition as formulated by Judge Andrews. In this case, therefore, the problem reduces itself to the one question whether or not the oral agreement meets the third condition.

I have conceded that upon inspection the contract is complete." It appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement;" it constitutes the contract between them and is presumed to contain the whole of that contract. (Eighmie v. Taylor, 98 N.Y. 288.) That engagement was on the one side to convey land; on the other to pay the price. The plaintiff asserts further agreement based on the same consideration to be performed by the defendants after the conveyance was complete, and directly affecting only other land. It is true, as Judge Andrews points out, that "the presence of the ice house, even the knowledge that Mrs. Mitchill thought it objectionable, would not lead to the belief that a separate agreement existed with regard to it;" but the question we must decide is whether or not, assuming an agreement was made for the removal of an unsightly ice house from one parcel of land as an inducement for the purchase of another parcel, the parties would ordinarily or naturally be expected to embody the agreement for the removal of the ice house from one parcel in the written agreement to convey the other parcel. Exclusion of proof of the oral agreement on the ground that it varies the contract embodied in the writing may be based only upon a finding or presumption that the written contract was intended to cover the oral negotiations for the removal of the ice house which lead up to the contract of purchase and sale. To determine what the writing was intended to cover "the document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered." (Wigmore on Evidence [2d ed.], §2430.)

The subject-matter of the written contract was the conveyance of land. The contract was so complete on its face that the conclusion is inevitable that the parties intended to embody in the writing all the negotiations covering at least the conveyance. The promise by the defendants to remove the ice house from other land was not connected with their obligation to convey, except that one agreement would not have been made unless the other was also made. The plaintiff's assertion of a parol agreement by the defendants to remove the ice house was completely established by the great weight of evidence. It must prevail unless that agreement was part of the agreement to convey and the entire agreement was embodied in the writing.

The fact that in this case the parol agreement is established by the overwhelming weight of evidence is, of course, not a factor which may be considered in determining the competency or legal effect of the evidence. Hardship in the particular case would not justify the court in disregarding or emasculating the general rule. It merely accentuates the outlines of our problem. The assumption that the parol agreement was made is no longer obscured by any doubts. The problem then is clearly whether the parties are presumed to have intended to render that parol agreement legally ineffective and non-existent by failure to embody it in the writing. Though we are driven to say that nothing in the written contract which fixed the terms and conditions of the stipulated conveyance suggests the existence of any further parol agreement, an inspection of the contract, though it is complete on its face in regard to the subject of the conveyance, does not, I think, show that it was intended to embody negotiations or agreements, if any, in regard to a matter so loosely bound to the conveyance as the removal of an ice house from land not conveyed.

The rule of integration undoubtedly frequently prevents the assertion of fraudulent claims. Parties who take the precaution of embodying their oral agreements in a writing should be protected against the assertion that other terms of the same agreement were not integrated in the writing. The limits of the integration are determined by the writing, read in the light of the surrounding circumstances. A written contract, however complete, yet covers only a limited field. I do not think that in the written contract for the conveyance of land here under consideration we can find an intention to cover a field so broad as to include prior agreements, if any such were made, to do other acts on other property after the stipulated conveyance was made.

In each case where such a problem is presented, varying factors enter into its solution. Citation of authority in this or other jurisdictions is useless, at least without minute analysis of the facts. The analysis I have made of the decisions in this State leads me to the view that the decision of the courts below is in accordance with our own authorities and should be affirmed.

Lee v. Seagram and Sons, Inc.

552 F.2d 447 (2nd Cir. 1977)

Gurfein, Circuit Judge

This is an appeal by defendant Joseph E. Seagram & Sons, Inc. ("Seagram") from a judgment entered by the District Court, Hon. Charles H. Tenney, upon the verdict of a jury in the amount of $407,850 in favor of the plaintiffs on a claim asserting common law breach of an oral contract. The plaintiffs are Harold S. Lee (now deceased) and his two sons, Lester and Eric ("the Lees") We affirm.

. . .

[The Lees had a 50% interest in a liquor distributorship. They sold the interest to Seagram under a written contract. The Lees claimed they had also reached a prior oral agreement with Seagram to relocate Harold Lee’s sons, Lester and Eric, in a new distributorship.]

The plaintiffs claimed a breach of the oral agreement to relocate Harold Lee's sons, alleging that Seagram had had opportunities to procure another distributorship for the Lees but had refused to do so. The Lees brought this action on January 18, 1972, fifteen months after the sale of the Capitol City distributorship to Seagram. They contended that they had performed their obligation by agreeing to the sale by Capitol City of its assets to Seagram, but that Seagram had failed to perform its obligation under the separate oral contract between the Lees and Seagram. The agreement which the trial court permitted the jury to find was "an oral agreement with defendant which provided that if they agreed to sell their interest in Capitol City, defendant in return, within a reasonable time, would provide the plaintiffs a Seagram distributorship whose price would require roughly an amount equal to the capital obtained by the plaintiffs for the sale of their interest in Capitol City, and which distributorship would be in a location acceptable to plaintiffs." No specific exception was taken to this portion of the charge. By its verdict for the plaintiffs, we must assume - as Seagram notes in its brief - that this is the agreement which the jury found was made before the sale of Capitol City was agreed upon.

I

Appellants urge that, as a matter of law, plaintiffs' proof of the alleged oral agreement is barred by the parol evidence rule.

Judge Tenny . . . decided that the rule did not bar proof of the oral agreement. We agree.

The District Court, in its denial of the defendant's motion for summary judgment, treated the issue as whether the written agreement for the sale of assets was an "integrated" agreement not only of all the mutual agreements concerning the sale of Capitol City assets, but also of all the mutual agreements of the parties. Finding the language of the sales agreement "somewhat ambiguous," the court decided that the determination of whether the parol evidence rule applies must await the taking of evidence on the issue of whether the sales agreement was intended to be a complete and accurate integration of all of the mutual promises of the parties.

Seagram did not avail itself of this invitation. It failed to call as witnesses any of the three persons who negotiated the sales agreement on behalf of Seagram regarding the intention of the parties to integrate all mutual promises or regarding the failure of the written agreement to contain an integration clause.

Appellants contend that, as a matter of law, the oral agreement was "part and parcel" of the subject-matter of the sales contract and that failure to include it in the written contract barred proof of its existence. Mitchill v. Lath, 247 N.Y. 377, 380, 160 N.E. 646 (1928).

The position of appellants, fairly stated, is that the oral agreement was either an inducing cause for the sale or was a part of the consideration for the sale, and in either case, should have been contained in the written contract. In either case, they argue that the parol evidence rule bars its admission.

Appellees maintain, on the other hand, that the oral agreement was a collateral agreement and that, since it is not contradictory of any of the terms of the sale agreement, proof of it is not barred by the parol evidence rule.

Because the case comes to us after a jury verdict we must assume that there actually was an oral contract, such as the court instructed the jury it could find. The question is whether the strong policy for avoiding fraudulent claims through application of the parol evidence rule nevertheless mandates reversal on the ground that the jury should not have been permitted to hear the evidence. See Fogelson v. Rackfay Constr. Co., 300 N.Y. 334 at 337-38, 90 N.E.2d 881 (1950).

The District Court stated the cardinal issue to be whether the parties "intended" the written agreement for the sale of assets to be the complete and accurate integration of all the mutual promises of the parties. If the written contract was not a complete integration, the court held, then the parol evidence rule has no application.

We assume that the District Court determined intention by objective standards. See 3 Corbin on Contracts §§573-574. The parol evidence rule is a rule of substantive law. Fogelson v. Rackfay Constr. Co., supra . . .

The law of New York is not rigid or categorical, but is in harmony with this approach. As Judge Fuld said in *Fogelson*: "Decision in each case must, of course, turn upon the type of transaction involved, the scope of the written contract and the content of the oral agreement asserted." 300 N.Y. at 338. And the Court of Appeals wrote in Ball v. Grady, 267 N.Y. 470, 472, 196 N.E. 402 (1935): "In the end, the court must find the limits of the integration as best it may be reading the writing in light of the surrounding circumstances." Accord, Fogelson, supra, 300 N.Y. at 338.  Thus, certain oral collateral agreements, even though made contemporaneously, are not within the prohibition of the parol evidence rule "because [if] they are separate, independent and complete contracts, although relating to the same subject.... are allowed to be proved by parol because they were made by parol, and no part thereof committed to writing." Thomas v. Scutt, 127 N.Y. 133, 140-41, 27 N.E. 961 (1891).

Although there is New York authority which in general terms supports defendant's thesis that an oral contract inducing a written one or varying the consideration may be barred, see, e.g., Fogelson v. Rackfay Constr. Co., supra, 300 N.Y. at 340, the overarching question is whether, in the context of the particular setting, the oral agreement was one which the parties would ordinarily be expected to embody in the writing . . . Fogelson v. Rackfay Constr. Co., supra, 300 N.Y. at 338. See Restatement on Contracts §240.

For example, integration is most easily inferred in the case of real estate contracts for the sale of land, e.g., Mitchill v. Lath, supra, 247 N.Y. 377, or leases, Fogelson, supra . . .. In more complex situations, in which customary business practice may be more varied, an oral agreement can be treated as separate and independent of the written agreement even though the written contract contains a strong integration clause. . . .

Thus, as we see it, the issue is whether the oral promise to the plaintiffs, as individuals, would be an expectable term of the contract for the sale of assets by a corporation in which plaintiffs have only a 50% interest, considering as well the history of their relationship to Seagram.

    Here, there are several reasons why it would not be expected that the oral agreement to give Harold Lee's sons another distributorship would be integrated into the sales contract. In the usual case, there is an identity of parties in both the claimed integrated instrument and in the oral agreement asserted. Here, although it would have been physically possible to insert a provision dealing with only the shareholders of a 50% interest, the transaction itself was a corporate sale of assets. Collateral agreements which survive the closing of a corporate deal, such as employment agreements for particular shareholders of the seller or consulting agreements, are often set forth in separate agreements. See Gem Corrugated Box Corp. v. National Kraft Container Corp., supra, 427 F.2d at 503 ("it is... plain that the parties ordinarily would not embody the stock purchase agreement in a writing concerned only with box materials purchase terms"). It was expectable that such an agreement as one to obtain a new distributorship for certain persons, some of whom were not even parties to the contract, would not necessarily be integrated into an instrument for the sale of corporate assets. As with an oral condition precedent to the legal effectiveness of an otherwise integrated written contract, which is not barred by the parol evidence rule if it is not directly contradictory of its terms, Hicks v. Bush, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962); cf. 3 Corbin on Contracts §589, "it is certainly not improbable that parties contracting in these circumstances would make the asserted oral agreement...." 10 N.Y.2d at 493.

Similarly, it is significant that there was a close relationship of confidence and friendship over many years between two old men, Harold Lee and Yogman, whose authority to bind Seagram has not been questioned. It would not be surprising that a handshake for the benefit of Harold's sons would have been thought sufficient. In point, as well, is the circumstance that the negotiations concerning the provisions of the sales agreement were not conducted by Yogman but by three other Seagram representatives, headed by John Barth. The two transactions may not have been integrated in their minds when the contract was drafted.

Finally, the written agreement does not contain the customary integration clause, even though a good part of it (relating to warranties and negative covenants) is boilerplate. The omission may, of course, have been caused by mutual trust and confidence, but in any event, there is no such strong presumption of exclusion because of the existence of a detailed integration clause, as was relied upon by the Court of Appeals in Fogelson, supra, 300 N.Y. at 340.

Nor do we see any contradiction of the terms of the sales agreement. Mitchill v. Lath, supra, 247 N.Y. at 381; 3 Corbin on Contracts §573, at 357. The written agreement dealt with the sale of corporate assets, an oral agreement with the relocation of the Lees. Thus, the oral agreement does not vary or contradict the money consideration recited in the contract as flowing to the selling corporation. That is the only consideration recited, and it is still the only consideration to the corporation.

We affirm.

Dannan Realty Corp. v. Harris

157 N.E.2d 597 (N.Y. 1959)

Burke, J.

        The plaintiff in its complaint alleges, insofar as its first cause of action is concerned, that it was induced to enter into a contract of sale of a lease of a building held by defendants because of oral representations, falsely made by the defendants, as to the operating expenses of the building and as to the profits to be derived from the investment. Plaintiff, affirming the contract, seeks damages for fraud.

        At Special Term, the Supreme Court sustained a motion to dismiss the complaint. On appeal, the Appellate Division unanimously reversed the order granting the dismissal of the complaint. Thereafter the Appellate Division granted leave to appeal, certifying the following question: "Does the first cause of action in the complaint state facts sufficient to constitute a cause of action?"

The basic problem presented is whether the plaintiff can possibly establish from the facts alleged in the complaint (together with the contract which was annexed to the complaint) reliance upon the misrepresentations (Cohen v. Cohen, 1 A D 2d 586, affd. 3 N Y 2d 813).

        We must, of course, accept as true plaintiff's statements that during the course of negotiations defendants misrepresented the operating expenses and profits. Such misrepresentations are undoubtedly material. However, the provisions of the written contract which directly contradict the allegations of oral representations are of equal importance in our task of reaching a decisive answer to the question posed in these cases.

        The contract, annexed to and made a part of the complaint, contains the following language pertaining to the particular facts of representations: "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is' \* \* \* It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition."

        Were we dealing solely with a general and vague merger clause, our task would be simple. A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue (Sabo v. Delman, 3 N Y 2d 155). To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made. (Bridger v. Goldsmith, 143 N. Y. 424; Angerosa v. White Co., 248 App. Div. 425, affd. 275 N. Y. 524; Jackson v. State of New York, 210 App. Div. 115, affd. 241 N. Y. 563; 3 Williston, Contracts [Rev. ed.], §811A.)

        Here, however, plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations (Cohen v. Cohen, supra). The Sabo case (supra) dealt with the usual merger clause. The present case, as the Cohen case, additionally, includes a disclaimer as to specific representations.

        This specific disclaimer is one of the material distinctions between this case and Bridger v. Goldsmith (supra) and Crowell-Collier Pub. Co. v. Josefowitz (5 N Y 2d 998). In the Bridger case, the court considered the effect of a general disclaimer as to representations in a contract of sale, concluding that the insertion of such a clause at the insistence of the seller cannot be used as a shield to protect him from his fraud. Another material distinction is that nowhere in the contract in the Bridger case is there a denial of reliance on representations, as there is here. Similarly, in Crowell-Collier Pub. Co. v. Josefowitz (supra), decided herewith, only a general merger clause was incorporated into the contract of sale. Moreover, the complaint there additionally alleged that further misrepresentations were made after the agreement had been signed, but while the contract was held in escrow and before it had been finally approved.

        Consequently, this clause, which declares that the parties to the agreement do not rely on specific representations not embodied in the contract, excludes this case from the scope of the Jackson, Angerosa, Bridger and Crowell-Collier cases (supra). (See Foundation Co. v. State of New York, 233 N. Y. 177.)

        The complaint here contains no allegations that the contract was not read by the purchaser. We can fairly conclude that plaintiff's officers read and understood the contract, and that they were aware of the provision by which they aver that plaintiff did not rely on such extra-contractual representations. It is not alleged that this provision was not understood, or that the provision itself was procured by fraud. It would be unrealistic to ascribe to plaintiff's officers such incompetence that they did not understand what they read and signed. (Cf. Ernst Iron Works v. Duralith Corp., 270 N. Y. 165, 171.) Although this court in the Ernst case discounted the merger clause as ineffective to preclude proof of fraud, it gave effect to the specific disclaimer of representation clause, holding that such a clause limited the authority of the agent, and hence, plaintiff had notice of his lack of authority. But the larger implication of the Ernst case is that, where a person has read and understood the disclaimer of representation clause, he is bound by it. The court rejected, as a matter of law, the allegation of plaintiffs "that they relied upon an oral statement made to them in direct contradiction of this provision of the contract." The presence of such a disclaimer clause "is inconsistent with the contention that plaintiff relied upon the misrepresentation and was led thereby to make the contract." (Kreshover v. Berger, 135 App. Div. 27, 28.)

        It is not necessary to distinguish seriatim the cases in other jurisdictions as they are not, in the main, in point or, in a few instances, clash with the rule followed in the State of New York. The marshaling of phrases plucked from various opinions and references to generalizations, with which no one disagrees, cannot subvert the fundamental precept that the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud. We must keep in mind that "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts" (Freeman v. Hewit, 329 U.S. 249, 252). When the citations are read in the light of this caveat, we find that they are generally concerned with factual situations wherein the facts represented were matters peculiarly within the defendant's knowledge, as in the cases of Sabo v. Delman (supra) and Jackson v. State of New York (supra).

        The general rule was enunciated by this court over a half a century ago in Schumaker v. Mather (133 N. Y. 590, 596) that "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. (Baily v. Merrell, Bulstrode's Rep. Part III, p. 94; Slaughter v. Gerson, 13 Wall. 383; Chrysler v. Canaday, 90 N. Y. 272.)"

Very recently this rule was approved as settled law by this court in the case of Sylvester v. Bernstein (283 App. Div. 333, affd. 307 N. Y. 778). In this case, of course, the plaintiff made a representation in the contract that it was not relying on specific representations not embodied in the contract, while, it now asserts, it was in fact relying on such oral representations. Plaintiff admits then that it is guilty of deliberately misrepresenting to the seller its true intention. To condone this fraud would place the purchaser in a favored position. (Cf. Riggs v. Palmer, 115 N. Y. 506, 511, 512.) This is particularly so, where, as here, the purchaser confirms the contract, but seeks damages. If the plaintiff has made a bad bargain he cannot avoid it in this manner.
If the language here used is not sufficient to estop a party from claiming that he entered the contract because of fraudulent representations, then no language can accomplish that purpose. To hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.

        Accordingly, the order of the Appellate Division should be reversed and that of Special Term reinstated, without costs. The question certified should be answered in the negative.

Fuld, J. (dissenting)

        If a party has actually induced another to enter into a contract by means of fraud -- and so the complaint before us alleges -- I conceive that language may not be devised to shield him from the consequences of such fraud. The law does not temporize with trickery or duplicity, and this court, after having weighed the advantages of certainty in contractual relations against the harm and injustice which result from fraud, long ago unequivocally declared that "a party who has perpetrated a fraud upon his neighbor may \* \* \* contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule but the exception." (Bridger v. Goldsmith, 143 N. Y. 424, 428.) It was a concern for similar considerations of policy which persuaded Massachusetts to repudiate the contrary rule which it had initially espoused. "The same public policy that in general sanctions the avoidance of a promise obtained by deceit", wrote that state's Supreme Judicial Court in Bates v. Southgate (308 Mass. 170, 182), "strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept \* \* \* and act upon agreements containing \* \* \* exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law."

. . .

        It was held that even this explicit disavowal of reliance did not bar the plaintiff from recovery. In answering the argument that the provision prevented proof either of misrepresentation by the defendant or reliance on the part of the plaintiff, the Appellate Division, in an opinion approved by this court, wrote: "A party to a contract cannot, by misrepresentation of a material fact, induce the other party to the contract to enter into it to his damage and then protect himself from the legal effect of such misrepresentation by inserting in the contract a clause to the effect that he is not to be held liable for the misrepresentation which induced the other party to enter into the contract. The effect of misrepresentation and fraud cannot be thus easily avoided" (pp. 119-120).

        Although the clause in the contract before us may be differently worded from those in the agreements involved in the other cases decided by this court, it undoubtedly reflects the same thought and meaning, and the reasoning and the principles which the court deemed controlling in those cases are likewise controlling in this one. Their application, it seems plain to me, compels the conclusion that the complaint herein should be sustained and the plaintiff accorded a trial of its allegations.

        It is said, however, that the provision in this contract differs from those heretofore considered in that it embodies a specific and deliberate exclusion of a particular subject. The quick answer is that the clause now before us is not of such a sort. On the contrary, instead of being limited, it is all-embracing, encompassing every representation that a seller could possibly make about the property being sold and, instead of representing a special term of a bargain, is essentially "boiler plate." plaintiff, alleging that the defendant fraudulently misrepresented the value of the property, sought damages. Again, despite the explicit statement that such a representation had not been made and the specific disavowal of reliance thereon, the court upheld the plaintiff's right to bring the action (p. 376).

. . .

        The rule heretofore applied by this court presents no obstacle to honest business dealings, and dishonest transactions ought not to receive judicial protection. The clause in the contract before us may lend support to the defense and render the plaintiff's task of establishing its claim more difficult, but it should not be held to bar institution of an action for fraud. Whether the defendants made the statements attributed to them and, if they did, whether the plaintiff relied upon them, whether, in other words, the defendants were guilty of fraud, are questions of fact not capable of determination on the pleadings alone. The plaintiff is entitled to its day in court.

Johnson v. United Investors Life Ins. Co.

263 N.W.2d 770 (Iowa 1978)

        This is an appeal from a decree reforming a life insurance contract to eliminate an exclusion of double indemnity coverage for death while piloting a private aircraft. Defendant United Investors Life Insurance Company contends the trial court erred in holding it was bound by the knowledge and representations of its soliciting agent when it acted on the policy application and in finding the evidence sufficient to establish a basis for reformation. We affirm the trial court.

        Plaintiff's husband Merlin Swan Johnson applied through defendant's soliciting agent Eller Lutes for a $100,000 annual renewable term life insurance policy which was to include double indemnity protection for accidental death. Lutes took the application in the Johnson farm home on January 4, 1973. After receiving the application, defendant issued a policy with an effective date of February 8, 1973. It provided primary coverage of $100,000 and included a double indemnity supplement. Plaintiff was the policy beneficiary.

        Merlin Johnson was killed while piloting a private aircraft on January 15, 1974. Shortly thereafter Lutes notified plaintiff she would receive $200,000 under the policy's double indemnity coverage. However, defendant instead subsequently issued a benefit check for $100,000 because of a provision in the double indemnity rider excluding double indemnity coverage of death resulting from piloting private aircraft.

        This litigation resulted from plaintiff's contention her husband desired double indemnity protection while piloting private aircraft, communicated this wish to Lutes when making application for the policy, and was assured by Lutes the double indemnity provision would cover that activity. She sought reformation of the policy to eliminate the exclusion on the ground of mutual mistake and asked judgment for $100,000. After trial, the trial court granted the relief requested. This appeal followed.

. . .

        We hold defendant was bound by Lutes' knowledge and representations when it acted upon Johnson's application for insurance.

        . . . Plaintiff sought reformation based on mutual mistake. It was her burden to prove by a preponderance of clear, satisfactory and convincing evidence that through mistake the policy failed to express the mutual intent of the parties. Schuknecht v. Western Mutual Insurance Company, 203 N.W.2d 605, 609 (Iowa 1973). In reformation cases involving insurance policies, less proof is required than in contract cases generally. Baldwin v. Equitable Life Assurance Society of the United States, 252 Iowa 639, 108 N.W.2d 66 (1961).

        A mistake within the meaning of reformation doctrine "is a belief that is not in accord with existing facts." Restatement (2d) of Contracts § 293 (Tent. Draft No. 10).

        Plaintiff's theory was that her husband and Lutes mutually intended the policy to provide double indemnity coverage for accidental death while piloting private aircraft. They were mutually mistaken, in plaintiff's view, in believing defendant would issue such a policy. Therefore, because Lutes' mistake is deemed the mistake of defendant, she contends she established the requisite basis for reformation.

        Our review is de novo. We accord weight to trial court findings of fact but are not bound by them. We are particularly mindful, when credibility issues are involved, that the trial court had the advantage of seeing and hearing the witnesses.
Lutes met with plaintiff and her husband in the kitchen of their home at about noon on January 4, 1973. Johnson was a farmer and had been a licensed pilot since 1972.

        Plaintiff testified as follows regarding the discussion concerning double indemnity coverage:

Q. Now, do you recall Mrs. Johnson any conversation about double indemnity or accidental death benefits between your husband and Mr. Lutes?
A. Yes.

Q. Did Mr. Lutes explain what double indemnity meant?
A. Yes.

Q. What did he say that it meant?
A. In case of an accident the life insurance policy for $100,000.00 would pay for $200,000.00, but the $100,000.00 benefits, life insurance policy would pay $200,000.00.

Q. Now, was there any conversation about your husband's flying an airplane in connection with this insurance coverage?
A. Yes, sir.

Q. What was that conversation?
A. I sir, asked Mr. Lutes specifically if my husband had enough flying hours in and about his rating as a pilot, whereupon, Mr. Lutes proceeded to get up from the kitchen table, go over to the couch; where his attache case was laying and from the case he took a small little black book. I did not see what was in this book before he turned to my husband and well, first he ran down the pages himself, then he turned to my husband and he said you have nothing to worry about.

Q. Did you as Mr. Lutes specifically about the double indemnity benefit?
A. Oh, yes, I did.

Q. What did you ask him about that?
A. In case, God forbid, that there would be an accident, did the $100,000.00 policy with the double indemnity benefits would it pay the $200,000.00 and he was very reassuring that, yes, it would.

Q. Did you ask him anything about if the accident occurred while Merlin was piloting an airplane?
A. Yes, sir. Many times over.

Q. And what did he say?
A. He was very reassuring with his little booklet that my husband was thoroughly covered.

She said Lutes filled out the application and showed her husband where to sign it. She testified he signed it without reading it. She also testified her husband did not read the policy after it was issued.
After Johnson's death Lutes visited plaintiff. They agree he told her she would receive $200,000 under the double indemnity provision of the policy. He testified as follows:

Q. What did you tell her that she would be receiving under this policy at that time?
A. I indicated to her she would be getting the accidental benefit.

Q. And how much was that?
A. Would have been two hundred thousand.

It was only after defendant issued its benefit check in the lesser amount of $100,000 that Lutes informed plaintiff of the exclusion.
A friend of Johnson, John Christiansen, testified he had discussed Johnson's coverage with him several months before his death while the two were hunting. He testified as follows:

Q. Can you tell the Court the substance of this conversation?
A. Well, Merlin and I went - were out hunting one day, we were just talking and just shooting the breeze and got talking about we just mentioned insurance and he said yeah, you know how you talk when you don't expect any death or anything. Yeah, I'm worth more dead than alive and he told me what the - he said not too long ago he bought this $100,000.00 policy and had accidental death benefit in it. I told him, I said, "well, it won't pay if you're killed in the airplane though." He says, "No, the insurance agent says that didn't make any difference, I'm still covered by accidental death." I told him, "Well, years ago", I said, "I sold insurance for a company here in Clinton" and I says, "Maybe its different now than it was then" and he said, "Yeah," - no, he say, "I'm covered if I fly the airplane." That was all the more we ever said about it. I thought, well, maybe they changed, but he was certainly under the opinion that he was covered for while he was flying his airplane.

Johnson's father testified regarding a similar conversation:

Q. And did you at that time have occasion to discuss what coverage he would have under the policy he would have if he was killed while flying the airplane?
A. Well, I asked him, I said, "You know flying planes is dangerous" and he said, I know it and he said but I've got insurance to cover if anything should happen to me because he was farming my farm and I was interested in everything was going to be all right so I says, "How much insurance do you carry?" He said, "I carry $100,000.00. In case of accidental death that will pay me twice that much" he told me.

Q. Aid did he mention whether or not that accidental death included flying an airplane, in his opinion?
A. He did, I said, "Does it cover you if your flying an airplane" and he said, "Yes, it does." He told me.

        Lutes denied having discussed the exclusion with Johnson. He acknowledged Johnson requested double indemnity coverage. He also acknowledged he knew Johnson was a pilot, and he therefore obtained information from him to fill out an aviation questionnaire. On the questionnaire Johnson signified his willingness to pay a higher premium if necessary because of aviation to obtain the coverage he requested.

        Lutes was asked if he personally was then aware of the exclusion. He said, "I would say yes." However, he also said this was the first policy he ever sold with an "aviation rider." He admitted he thought the double indemnity provision was applicable when he first visited plaintiff after her husband's death, and he did not change his mind until he received the $100,000 benefit check, called the Kansas City office of defendant, and was told of the exclusion. Under the whole record we believe it is more likely he was unaware of the exclusion when he solicited the application. We also believe plaintiff's version of the discussion which took place then is more credible.

        Like the trial court, we find plaintiff proved her case for reformation.

        This is true despite a fine-print disclaimer in the application of the agent's authority to bind defendant regarding policy benefits. Lutes admitted he did not call this language to Johnson's attention, and the evidence is persuasive that Johnson did not read it. As is usual, the agent filled out the application and the applicant merely signed it where directed. Johnson was not negligent nor is reformation barred because of his failure to read the application. Quinn v. Mutual Benefit Health and Accident Association, supra, 244 Iowa at 14, 55 N.W.2d at 550. See Restatement (2d) of Contracts § 299 (Tent. Draft No. 10()"A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation \* \* \*, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.").

        It is plain that Johnson wanted double indemnity protection while piloting aircraft. Lutes knew this and took the application on that basis. Therefore in passing upon the application defendant knew Johnson sought a policy which would include such coverage. Defendant thus had a duty either to issue a policy providing the desired coverage or to notify Johnson the coverage was unavailable. Frohna v. Continental Insurance Companies, 62 Wis.2d 650, 652, 215 N.W.2d 1, 2 (1974) ("mutual mistake is established when the party applying for insurance proves he made certain statements to the agent concerning the coverage desired, but the policy as issued did not provide the coverage"); 13A Appleman, Insurance Law and Practice, § 7609, 1977 pocket part p. 26. The case for reformation is even stronger when Lutes' representations are considered.

        We agree with the trial court that plaintiff is entitled to reformation.

AFFIRMED.

        All Justices concur except REES and LeGRAND, JJ. who dissent.

1. 1 Section 3 of the arbitration agreement provides:

“YOU WILL FIRST NEGOTIATE WITH [T-MOBILE] IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND U.S. IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES OR UNITS (“ CLAIM” ). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT. [ ] IF YOU DO NOT REACH AGREEMENT WITH U.S. WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION (“AAA” ) UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT [listed telephone number] OR VISITING ITS WEB SITE AT [listed].... You will pay your share of the arbitrator's fees except (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including....

“Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.” [↑](#footnote-ref-1)
2. 2 Civil Code section 1671, subdivision (d) provides: “ [A] provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the state of the case, it would be impracticable or extremely difficult to fix the actual damage.” [↑](#footnote-ref-2)
3. 3 Notably, we believe the issue before us is properly framed as whether the existence of market choice negates the existence of oppression, not whether choice renders a contract nonadhesive. (*Morris* *v.* *Redwood* *Empire* *Bancorp* (2005) 128 Cal.App.4th 1305, 1319-1320 & fn. 6, 27 Cal.Rptr.3d 797; see also *Marin* *Storage,* *supra,* 89 Cal.App.4th at pp. 1054-1056, 107 Cal.Rptr.2d 645; *Wayne* *v.* *Staples,* *Inc.* (2006) 135 Cal.App.4th 466, 483, 37 Cal.Rptr.3d 544; but see *Szetela,* *supra,* 97 Cal.App.4th at p. 1100, 118 Cal.Rptr.2d 862.) [↑](#footnote-ref-3)
4. 1 The definition of “ contract of adhesion” that appears in the quote from *Little*-“ imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it” -is taken from *Neal* *v.* *State* *Farm* *Ins.* *Co.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781(*Neal* ). *Graham* *v.* *Scissor-Tail,* *Inc.* (1981) 28 Cal.3d 807, 817, 171 Cal.Rptr. 604, 623 P.2d 165(*Scissor-Tail* ), characterized it as the “ serviceable general definition [that has] well stood the test of time and will bear little improvement.” [↑](#footnote-ref-4)
5. 12 In this respect, click-wrap licensing is similar to the shrink-wrap license at issue in ProCD, supra, which appeared on the user's computer screen when the software was used and could not be bypassed until the user indicated acceptance of its terms. See ProCD, 86 F.3d at 1452. [↑](#footnote-ref-5)
6. 14 Defendants argue that this case resembles the situation where a party has failed to read a contract and is nevertheless bound by that contract. See, e.g., Powers v. Dickson, Carlson & Campillo, 54 Cal.App.4th 1102, 1109, 63 Cal.Rptr.2d 261 (Cal.Ct.App.1997); Rowland v. PaineWebber Inc., 4 Cal.App.4th 279, 287, 6 Cal.Rptr.2d 20 (Cal.Ct.App.1992). This argument misses the point. The question before me is whether the parties have first bound themselves to the contract. If they have unequivocally agreed to be bound, the contract is enforceable whether or not they have read its terms. [↑](#footnote-ref-6)