CHAPTER

# 7

# CONDITIONS AND PROMISES: PERFORMANCE AND BREACH

## I. BASIC CONCEPTS

The bulk of the provisions of an agreement are designed to state positive obligations of the parties and when, if at all, they must be performed. Making these determinations, and the effect on the other party's performance if one party breaches, involves an analysis of the law surrounding conditions and promises. The analysis required in this area may be complex in part because of the new vocabulary involved. Before we get into that though, take a look at the next few problems and determine how you think these should come out applying only your "gut" feeling. After you finish this chapter come back to them and use the law to address them.

### *Problem 136*

Your insurance policy provides that you must give notice of an insured-against event within ten days of its occurrence or the company is not liable. Suppose that you fail to do so. Must the insurance company pay your claim? If not, why not? Can the insurance company sue you for failure to give the contracted-for notice? If not, why not?

### *Problem 137*

Nebuchadnezzar hired the Hanging Gardens Construction Company to build a terrace for $20,000, agreeing to pay for it in stages upon the completion of various parts of the building, less a percentage retained until the end of the project. One month, by accident, Nebuchadnezzar's check was $50 short of the correct amount. Hanging Gardens' president calls you, its attorney. Can it sue Nebuchadnezzar if the money is not

immediately paid? For this reason alone could it refuse to perform further on the construction job? Why or why not?

### *Problem 138*

Deciding that she needed a new, distinctive briefcase, Portia Moot, well-known appellate lawyer, hired a leather craftsman who promised to make her one for court appearances. She agreed to pay him $400 on completion. On the date the briefcase was to be delivered, she went to his shop. He had moved to Arizona. She had the same briefcase made elsewhere for $600. May she sue him for the damages his breach has caused her? Must she pay him first? Why or why not?

In this chapter, we are not concerned with whether the parties have a contract; we assume a contract is formed. This chapter explores when, if ever, the performances that each party promised are due — the law of promises and conditions. A *promise* (sometimes called a *covenant*) is simply a contractual undertaking, breach of which leads to liability for damages or equitable relief. A *condition* is a fact, the occurrence or nonoccurrence of which determines when and if a party must perform.

The parties may have agreed that promised performances are (a) due on a specified date or (b) due upon the occurrence or nonoccurrence of some event other than the passage of time (for example, when the price for gold is $700 per ounce). If the parties have expressed an intent that performance is dependent upon the occurrence or nonoccurrence of an event not certain to occur, the performance obligation is said to be subject to an *express condition.* (The mere passage of time — "I will pay you in ten days" — is not a "condition.") What happens if the event that must occur does not arise? At first thought, the answer to this query seems simple: The party whose obligation is dependent upon the event no longer has any obligation. But is this fair if the other contracting party has already performed and stands to lose a great amount solely because of the nonoccurrence of the event? What if the nonoccurrence of the event appears to have been a minor issue to the parties at the time of the agreement?

The parties may have exchanged a number of promises and said nothing about the order of performances. The court may still infer the parties' intent concerning the order of performances from their conduct, the surrounding circumstances, and the sense of the contract — a condition implied in fact. Instead, where the intent is unclear, a court may use a *constructive condition* — conditions implied in law — to fill in the blanks concerning the timing of performances. For example, if X has promised to build a bridge for Y, the court may find that the completion of the bridge is a constructive condition of exchange to Y's promise to pay for the construction.

# II. EXPRESS CONDITIONS AND IMPLIED-IN-FACT CONDITIONS

## A. *The Policy Concerns*

### HOWARD v. FEDERAL CROP INSURANCE CORP.
**United States Court of Appeals, Fourth Circuit, 1976**
**540 F.2d 695**

WIDENER, Circuit Judge. Plaintiff-appellants sued to recover for losses to their 1973 tobacco crop due to alleged rain damage. The crops were insured by defendant-appellee, Federal Crop Insurance Corporation (FCIC). Suits were brought in a state court in North Carolina and removed to the United States District Court. The three suits are not distinguishable factually so far as we are concerned here and involve identical questions of law. They were combined for disposition in the district court and for appeal. The district court granted summary judgment for the defendant and dismissed all three actions. We remand for further proceedings. Since we find for the plaintiffs as to the construction of the policy, we express no opinion on the procedural questions.

Federal Crop Insurance Corporation, an agency of the United States, in 1973, issued three policies to the Howards, insuring their tobacco crops, to be grown on six farms, against weather damage and other hazards.

The Howards (plaintiffs) established production of tobacco on their acreage, and have alleged that their 1973 crop was extensively damaged by heavy rains, resulting in a gross loss to the three plaintiffs in excess of $35,000. The plaintiffs harvested and sold the depleted crop and timely filed notice and proof of loss with FCIC, but, prior to inspection by the adjuster for FCIC, the Howards had either plowed or disked under the tobacco fields in question to prepare the same for sowing a cover crop of rye to preserve the soil. When the FCIC adjuster later inspected the fields, he found the stalks had been largely obscured or obliterated by plowing or disking and denied the claims, apparently on the ground that the plaintiffs had violated a portion of the policy which provides that the stalks on any acreage with respect to which a loss is claimed shall not be destroyed until the corporation makes an inspection.

The holding of the district court is best capsuled in its own words:

> The inquiry here is whether compliance by the insureds with this provision of the policy was a condition precedent to the recovery. The court concludes that it was and that the failure of the insureds to comply worked a forfeiture of benefits for the alleged loss.[1]

1. The district court also relied upon language in subparagraph 5(b), infra, which required as a condition precedent to payment that the insured, in addition to establishing his production and loss from an insured case, "furnish any other information regarding the manner and extent of loss as may be required by the Corporation." The court construed the preservation of the stalks as such "information." We see no language in the policy or connection in the record to indicate this is the case.

There is no question but that apparently after notice of loss was given to defendant, but before inspection by the adjuster, plaintiffs plowed under the tobacco stalks and sowed some of the land with a cover crop, rye. The question is whether, under paragraph 5(f) of the tobacco endorsement to the policy of insurance, the act of plowing under the tobacco stalks forfeits the coverage of the policy. Paragraph 5 of the tobacco endorsement is entitled *Claims.* Pertinent to this case are subparagraphs 5(b) and 5(f), which are as follows:

> 5(b) *It shall be a condition precedent* to the payment of any loss that the insured establish the production of the insured crop on a unit and that such loss has been directly caused by one or more of the hazards insured against during the insurance period for the crop year for which the loss is claimed, and furnish any other information regarding the manner and extent of loss as may be required by the Corporation. (Emphasis added.)
>
> 5(f) The tobacco stalks on any acreage of tobacco of types 11a, 11b, 12, 13, or 14 with respect to which a loss is claimed *shall not be destroyed until the Corporation makes an inspection.* (Emphasis added.)

The arguments of both parties are predicated upon the same two assumptions. First, if subparagraph 5(f) creates a condition precedent, its violation caused a forfeiture of plaintiffs' coverage. Second, if subparagraph 5(f) creates an obligation (variously called a promise or covenant) upon plaintiffs not to plow under the tobacco stalks, defendant may recover from plaintiffs (either in an original action, or, in this case, by a counterclaim, or as a matter of defense) for whatever damage is sustained because of the elimination of the stalks. However, a violation of subparagraph 5(f) would not, under the second premise, standing alone, cause a forfeiture of the policy.

Generally accepted law provides us with guidelines here. There is a general legal policy opposed to forfeitures. United States v. One Ford Coach, 307 U.S. 219, 226 (1939); Baca v. Commissioner of Internal Revenue, 326 F.2d 189, 191 (5th Cir. 1963). Insurance policies are generally construed most strongly against the insurer. Henderson v. Hartford Accident & Indemnity Co., 268 N.C. 129, 150 S.E.2d 17, 19 (1966). When it is doubtful whether words create a promise or a condition precedent, they will be construed as creating a promise. Harris and Harris Const. Co. v. Crain and Denbo, Inc., 256 N.C. 110, 123 S.E.2d 590, 595 (1962). The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. *Harris* 123 S.E.2d at 596. And *Harris*, at 123 S.E.2d 590, 595, cites Jones v. Palace Realty Co., 226 N.C. 303, 37 S.E.2d 906 (1946), and Restatement of the Law, Contracts, §261.

Plaintiffs rely most strongly upon the fact that the term "condition precedent" is concluded in subparagraph 5(b) but not in subparagraph 5(f). It is true that whether a contract provision is construed as a condition or an obligation does not depend entirely upon whether the word "condition" is expressly used. Appleman, Insurance Law and Practice (1972), vol. 6A, §4144. However, the persuasive force of plaintiffs' argument in this case is found in the use of the term "condition precedent" in subparagraph 5(b) but not in subparagraph 5(f). Thus, it is argued that the ancient

maxim to be applied is that the expression of one thing is the exclusion of another.

The defendant places principal reliance upon the decision of this court in Fidelity-Phenix Fire Insurance Company v. Pilot Freight Carriers, 193 F.2d 812, 31 A.L.R.2d 839 (4th Cir. 1952). Suit there was predicated upon a loss resulting from theft out of a truck covered by defendant's policy protecting plaintiff from such a loss. The insurance company defended upon the grounds that the plaintiff had left the truck unattended without the alarm system being on. The policy contained six paragraphs limiting coverage. Two of those imposed what was called a "condition precedent." They largely related to the installation of specified safety equipment. Several others, including paragraph 5, pertinent in that case, started with the phrase, "It is further warranted." In paragraph 5, the insured warranted that the alarm system would be on whenever the vehicle was left unattended. Paragraph 6 starts with the language: "The assured agrees, by acceptance of this policy, that the foregoing conditions precedent relate to matters material to the acceptance of the risk by the insurer." Plaintiff recovered in the district court, but judgment on its behalf was reversed because of a breach of warranty of paragraph 5, the truck had been left unattended with the alarm off. In that case, plaintiff relied upon the fact that the words "condition precedent" were used in some of the paragraphs but the word "warranted" was used in the paragraph in issue. In rejecting that contention, this court said that "warranty" and "condition precedent" are often used interchangeably to create a condition of the insured's promise, and "[m]anifestly the terms 'condition precedent' and 'warranty' were intended to have the same meaning and effect." 193 F.2d at 816.

*Fidelity-Phenix* thus does not support defendant's contention here. Although there is some resemblance between the two cases, analysis shows that the issues are actually entirely different. Unlike the case at bar, each paragraph in *Fidelity-Phenix* contained either the term "condition precedent" or the term "warranted." We held that, in that situation, the two terms had the same effect in that they both involved forfeiture. That is well established law. See Appleman, Insurance Law and Practice (1972), vol. 6A, §4144. In the case at bar, the term "warranty" or "warranted" is in no way involved, either in terms or by way of like language, as it was in *Fidelity-Phenix*. The issue upon which this case turns, then, was not involved in *Fidelity-Phenix*.

The Restatement of the Law of Contracts states:

> **§261. Interpretation of Doubtful Words as Promise or Condition**
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> Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise; but the same words may sometimes mean that one party promises a performance and that the other party's promise is conditional on that performance.

Two illustrations (one involving a promise, the other a condition) are used in the Restatement:

2. A, an insurance company, issues to B a policy of insurance containing promises by A that are in terms conditional on the happening of certain events. The policy contains this clause: "provided, in case differences shall arise touching any loss, *the matter shall be submitted to impartial arbitrators,* whose award shall be binding on the parties." This is a promise to arbitrate and does not make an award a condition precedent of the insurer's duty to pay.
3. A, an insurance company, issues to B an insurance policy in usual form containing this clause: "In the event of disagreement as to the amount of loss it shall be ascertained by two appraisers and an umpire. The loss shall *not be payable until 60 days after the award of the appraisers when such an appraisal is required.*" This provision is not merely a promise to arbitrate differences but makes an award a condition of the insurer's duty to pay in case of disagreement. (Emphasis added.)

We believe that subparagraph 5(f) in the policy here under consideration fits illustration 2 rather than illustration 3. Illustration 2 specifies something to be done, whereas subparagraph 5(f) specifies something not to be done. Unlike illustration 3, subparagraph 5(f) does not state any conditions under which the insurance shall "not be payable," or use any words of like import. We hold that the district court erroneously held, on the motion for summary judgment, that subparagraph 5(f) established a condition precedent to plaintiffs' recovery which forfeited the coverage.

From our holding that defendant's motion for summary judgment was improperly allowed, it does not follow the plaintiffs' motion for summary judgment should have been granted, for if subparagraph 5(f) be not construed as a condition precedent, there are other questions of fact to be determined. At this point, we merely hold that the district court erred in holding, on the motion for summary judgment, that subparagraph 5(f) constituted a condition precedent with resulting forfeiture.

The explanation defendant makes for including subparagraph 5(f) in the tobacco endorsement is that it is necessary that the stalks remain standing in order for the Corporation to evaluate the extent of loss and to determine whether loss resulted from some cause not covered by the policy. However, was subparagraph 5(f) inserted because without it the Corporation's opportunities for proof would be more difficult, or because they would be impossible? Plaintiffs point out that the Tobacco Endorsement, with subparagraph 5(f), was adopted in 1970, and crop insurance goes back long before that date. Nothing is shown as to the Corporation's prior 1970 practice of evaluating losses. Such a showing might have a bearing upon establishing defendant's intention in including 5(f). Plaintiffs state, and defendant does not deny, that another division of the Department of Agriculture, or the North Carolina Department, urged that tobacco stalks be cut as soon as possible after harvesting as a means of pest control. Such an explanation might refute the idea that plaintiffs plowed under the stalks for any fraudulent purpose. Could these conflicting directives affect the reasonableness of plaintiffs' interpretation of defendant's prohibition upon plowing under the stalks prior to adjustment?

We express no opinion on these questions because they were not before the district court and are mentioned to us largely by way of argument rather than from the record. No question of ambiguity was raised in the court below or here and no question of the applicability of paragraph 5(c) to this case was alluded to other than in the defendant's pleadings, so we also do not reach those questions. Nothing we say here should preclude FCIC from asserting as a defense that the plowing or disking under of the stalks caused damage to FCIC if, for example, the amount of the loss was thereby made more difficult or impossible to ascertain whether the plowing or disking under was done with bad purpose or innocently. To repeat, our narrow holding is that merely plowing or disking under the stalks does not of itself operate to forfeit coverage under the policy.

The case is remanded for further proceedings not inconsistent with this opinion.

QUESTIONS

1. What is the effect of the court finding an express condition? A promise? What is the effect of language that creates both a promise and a condition?

2. How do we know if a clause in a contract is a condition, a promise, or both? Is it a question of fact? Of law?

## JONES ASSOCIATES v. EASTSIDE PROPERTIES
**Court of Appeals of Washington, 1985**
**41 Wash. App. 462, 704 P.2d 681**

SWANSON, Judge. Jones Associates, Inc. (Jones Associates) appeals the superior court judgment (1) dismissing its action against Eastside Properties, Inc., et al., (Eastside) for money due under a professional services contract of $15,030 plus interest and (2) awarding Eastside Properties $7,500 for costs, expenses, and attorney fees. We reverse and remand for trial.

In early 1977 Jones Associates, an engineering, consulting, and surveying firm, and Eastside Properties, a real estate development corporation, entered into a professional services agreement. The contract signed by the parties was a preprinted form commonly used by Jones Associates which was modified by an Eastside representative.

Under the contract for a $17,480 fixed fee, including short plat application fees, Jones Associates was to provide a feasibility study, master plan, nine record surveys, and nine short plats for Eastside's 180-acre land parcel. In May, 1978 Jones Associates submitted Eastside's short plat application to the King County Building and Land Development Division, which in July, 1978, gave its preliminary approval with numerous conditions attached. Eastside unsuccessfully appealed the conditions imposed.

To enable Eastside to comply with the imposed conditions, the parties entered into a June 19, 1979 amendment to the original contract, which amendment expressly incorporated all of the original contract's terms. For a $12,550 fixed fee, under the change order Jones Associates was to provide an updated feasibility study, a roadway plan and profile, a design for a water system if not provided by the water district, storm drainage plans submitted for approval, and revised short plats filed for recordation.

Jones Associates claims that it performed all required services under the original contract and the change order. According to Eastside Properties, however, the following two conditions precedent to payment were not met: the original and the updated feasibility studies were not proven to be satisfactory to Eastside, and King County final plat approval was not obtained.

Eastside paid $15,000 to Jones Associates in April, 1980. In March, 1981 Jones Associates brought a money due action against Eastside. At the time of trial Eastside's short plat application still had not been approved, and the extension period to obtain final county approval had expired.

At the end of the plaintiff's evidence the trial court granted Eastside's motion to dismiss the complaint and awarded Eastside $7,500 attorney fees pursuant to the parties' contract. The court's oral decision stated that the dismissal was based upon its interpretation of the unambiguous contract language that obtaining county approval was a condition precedent to contractual payment, which condition had not been met. Jones Associates' reconsideration motion was denied, and this appeal followed.

The issue is whether the trial court erred in dismissing Jones Associates' action against Eastside Properties. Eastside Properties claims that the following contract provision creates a condition precedent to payment: "Engineer shall be responsible for obtaining King County approval for all platting as set forth above." Jones Associates, however, contends that the provision is not a condition precedent but rather merely states that it was to perform all necessary engineering, consulting, and surveying services related to Eastside's short plat application. We conclude that the provision is a promise rather than a condition precedent; thus dismissing the action was error. . . .

A condition precedent is an event occurring after the making of a valid contract which must occur before a right to immediate performance arises. Koller v. Flerchinger, 73 Wash. 2d 857, 860, 441 P.2d 126 (1968); Silverdale Hotel v. Lomas & Nettleton Co., 36 Wash. App. 762, 770, 677 P.2d 773 (1984). In contrast to the breach of a promise, which subjects the promisor to liability for damages but does not necessarily discharge the other party's duty of performance, the nonoccurrence of a condition prevents the promisee from acquiring a right or deprives him of one but subjects him to no liability. Ross v. Harding, 64 Wash. 2d 231, 236, 391 P.2d 526 (1964); 5 S. Williston, Contracts §665, at 132 (3d ed. 1961).

> Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances. 5 Williston, Contracts (3d ed.) §663, p.127.

Eastside wants the provision to be interpreted as a condition precedent bec/ they want to be relieved from performance
Jones wants it to be a promise

*Ross,* supra at 236, 391 P.2d 526; accord, *Koller,* supra, 73 Wash. 2d at 860, 441 P.2d 126. Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise. *Ross,* supra.

> An intent to create a condition is often revealed by such phrases and words as "provided that," "on condition," "when," "so that," "while," "as soon as," and "after."

Vogt v. Hovander, 27 Wash. App. 168, 178, 616 P.2d 660 (1979). Here no such words were used, and it is unclear whether the parties intended obtaining King County approval to be a condition precedent to payment under the contract.

Where the parties' contractual language is ambiguous, the principal goal of construction is to search out the parties' intent. Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wash. 2d 911, 918, 468 P.2d 666 (1970).

> Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Stender v. Twin City Foods, Inc., 82 Wash. 2d 250, 254, 510 P.2d 221 (1973), quoted in Leija v. Materne Bros., Inc., 34 Wash. App. 825, 829, 664 P.2d 527 (1983). Here an examination of the entire contract, circumstances surrounding the contract's formation, the parties' subsequent conduct, and the reasonableness of the parties' respective interpretations indicates that the parties intended Jones Associates' assumption of responsibility for obtaining King County approval to be a duty under the contract but not a condition precedent to payment.

First, the relevant provision's language in the second typewritten paragraph under "Scope of Services" does not expressly indicate that if King County approval was not obtained, Eastside would not be responsible for any costs whatsoever, as does the preceding typewritten paragraph[4] containing an express condition precedent regarding a satisfactory economic feasibility study. Since the two typewritten paragraphs were inserted into the contract by Eastside, the first typewritten paragraph provides evidence of Eastside's ability clearly and unambiguously to express a condition precedent to payment. Moreover, ambiguous contract language is strictly construed against the drafter. *Jacoby,* supra; Taylor-Edwards Warehouse v. Burlington Northern, 715 F.2d 1330, 1334 (9th Cir.1983).

Further, other portions of the original contract support Jones Associates' contention that it contemplated its contractual duty to be to perform necessary services related to the short plat application rather than

4. The first typewritten paragraph states:

> Engineer shall promptly complete feasibility study and if said study establishes to Client's satisfaction that the development project is economic, the Engineer shall be required to fulfill the entire scope of services as set forth in this agreement. In the event said feasibility study is not satisfactory to Client, this entire agreement shall be considered terminated and Client shall not be responsible for any costs or charges whatsoever.

that obtaining King County final plat approval was to be a condition precedent to payment. The "Description of Final Product" lists, besides a development feasibility report and master plan, nine record surveys and nine short plats "in King County format," not "approved by King County." Similarly, the contract states under "Completion of Assignment" that the short plats were to be ready for submission by a certain date, not that they were to have King County approval by a certain date. In addition, while the change order is in accord with Jones Associates' assuming responsibility for obtaining King County final plat approval, the language implies a duty rather than an express condition precedent: One of Jones Associates' services to be performed under the change order was to revise and "file for recordation," not obtain county approval of, the short plats.

Moreover, the respondent's conduct subsequent to the making of the contract supports the interpretation that the parties did not intend the relevant provision to be a condition precedent. First, rather than refusing to pay the fixed fee because of the nonoccurrence of a condition precedent, Eastside did tender in April, 1980, $15,000 of the $30,030 that was due under the original contract and its amendment. In addition, Eastside did, though not without argument, enter into a contractual amendment for $12,550 for Jones Associates to perform additional services so that it could comply with King County's imposed conditions rather than insisting that the condition precedent of obtaining King County approval contemplated that the original contract encompassed any necessary additional services to secure such approval.

> Further, it is well-established that forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial.

Kaufman Bros. Constr. v. Olney, 29 Wash. App. 296, 300, 628 P.2d 838 (1981) (quoting Dill v. Zielke, 26 Wash. 2d 246, 252, 173 P.2d 977 (1946)).[5] The Restatement (Second) of Contracts §227(1) (1981) states:

> In resolving doubts as to whether an event is made a condition of an obligor's duty, . . . an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risks.

The Restatement §227 comment b continues:

> If the event is within [the obligee's] control, he will often assume this risk [of forfeiture]. If it is not within his control, it is sufficiently unusual for him to assume the risk that, in case of doubt, an interpretation is preferred under which the event is not a condition.

Here since obtaining King County final plat approval was not within Jones Associates' control, it was sufficiently unusual for it to assume the

5. The Restatement (Second) of Contracts §227 comment b (1981) defines "forfeiture" as the resulting denial of compensation where the nonoccurrence of a condition of an obligor's duty causes the obligee to lose his right to the agreed exchange after he has relied substantially on the expectation of that exchange, as by preparation or performance.

risk of forfeiture so that where doubt exists, as in this case, the preferred interpretation is that the event was not a condition. No circumstances have been shown to indicate that it assumed the risk of forfeiture; rather, Harry P. Jones, Jones Associates' president, testified to the contrary. Moreover, conditions precedent are not favored by the courts. Thomas v. French, 30 Wash. App. 811, 819, 638 P.2d 613 (1981). An examination of the entire contract, the circumstances of its formation, the parties' conduct and the reasonableness of their interpretations supports the conclusion that obtaining King County final plat approval was intended to be Jones Associates' duty under the contract but not a condition precedent to payment. . . .

However, since it is undisputed that King County approval was not secured, Jones Associates may be liable for breach of its promise to obtain King County final plat approval.

> One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk.

Fischler v. Nicklin, 51 Wash. 2d 518, 523, 319 P.2d 1098 (1958). By signing the original contract, which included the typewritten paragraph regarding responsibility for obtaining King County approval, and its amendment, which incorporated the original contract's terms, Jones Associates assumed the risk that King County might not approve Eastside's short plat application so that if such approval was not obtained, it would be liable for breach of the parties' contract.

Jones Associates contends that it cannot be liable for not obtaining King County final plat approval because such approval was dependent upon certain factors, some of which were in the respondent's discretion or ability to perform. There being no findings of fact, the record is not clear as to why final county plat approval was not obtained. However, all contracts embody an implied condition that the parties will not interfere with each other's performance, but will cooperate in good faith. Lonsdale v. Chesterfield, 99 Wash. 2d 353, 357, 662 P.2d 385 (1983); Long v. T-H Trucking Co., Inc., 4 Wash. App. 922, 926, 486 P.2d 300 (1971). Proof of a party's interference with the performance of the other party's obligation under the contract will work to discharge the other party's duty. *Long,* supra; Cavell v. Hughes, 29 Wash. App. 536, 539, 629 P.2d 927 (1981). Upon remand both parties will have the opportunity to show any conduct of the other party that prevented it from obtaining the full benefit of performance.

The judgment is reversed and the cause is remanded for trial and the determination of damages, if any, to be offset against any money due Jones Associates under the contract as well as an attorney fee award to the prevailing party pursuant to the parties' contract.

QUESTION

What will the parties argue on retrial?

## BRIGHT v. GANAS
### Court of Appeals of Maryland, 1937
### 171 Md. 493, 189 A. 427

SLOAN, J. The plaintiff, Paul Ganas, sued the defendant, Robert S. Bright, executor of James G. Darden, deceased, on an alleged testamentary contract for the sum of $20,000. The judgment being for the plaintiff for $8,990, the defendant appeals. . . .

Paul Ganas, the plaintiff, a native of Greece, at the age of thirteen, came to this country about twenty-seven years ago, whither he had been preceded by his father, then engaged in the restaurant business at Roanoke, Va. He worked at various places, principally as a waiter, finally going to Washington, where he became acquainted with Col. James G. Darden, a picturesque and mysterious character, who lived luxuriously and seemed to be supplied with plenty of money, though we are not informed as to the nature or size of his estate. Col. Darden settled in Cambridge in 1929, where he bought a house, and in May of that year engaged Ganas as a servant or man of all work, more or less personal in its nature, and there Ganas continued until Darden's death in November, 1933 at about the age of sixty-eight. . . . [T]here is nothing contained in the record which proves or tends to prove anything except a specific agreement for the payment of $20,000 out of Col. James G. Darden's estate, at his death, to Paul Ganas, if he served the colonel faithfully and continuously to that time.

Col. Darden was ill for several months continuously to the day of his death. So far as he knew, during that time, the plaintiff was serving him faithfully, and assisted in nursing him. On or about the last day of August, 1933, Mrs. Darden had left her husband's room late at night (the plaintiff was downstairs at the time), and had gone to her room, where she there found on her bed an envelope containing a letter addressed to her by the plaintiff. It would serve no worthy purpose to quote it or to even summarize its contents, except to say that this plaintiff had designs on his employer's wife, which he was intent on revealing to her. She testified that the next morning she took the letter to her mother, who lived in Cambridge, asked her to read it, and asked her advice. She told Dr. Wolfe, her husband's physician (since deceased), about it, and he advised her against telling her husband. She said, "I wanted to that night, but I knew he could not stand it." Asked on cross-examination, "You spoke of locking your door after the burial. There was never any effort on Paul's part to follow this up was there?" She answered, "He did not have a chance. I had someone near me all the time." About two hours after Col. Darden's funeral she showed Mr. Bright, the executor, the letter and told him the plaintiff must get out of the house. He being told by Mr. Bright that he must leave, he rebelled, and the next day he was told by his attorney he had to go, and then did.

The plaintiff must have had some conception of the gravity and consequences of his offense, for on the envelope containing the letter he wrote: "If I lose my job by this note — at least I would gain my peace of mind —." When asked at the trial what led him to write the letter he gave a long,

incoherent, unresponsive answer, which showed no reason or excuse for writing it, and that it was inspired by moral depravity or a disordered, disorderly mind, with no conception of the proprieties, especially when his employer, who seemed to be fond of him, and whose confidence was thus betrayed, was so ill that his physician forbade any communication with him on the subject. This record discloses no excuse or justification for the plaintiff's behavior. He is the one who offended against all the rules of propriety and decency, and he ought to pay the penalty instead of reaping a reward. There was nothing in the wife's conduct inviting such an outburst from the plaintiff. If this act of the plaintiff was such as to justify his immediate and summary discharge, if his employer had known of the incident, then, in our opinion, it is as available to the executor as a defense, as it would have been to the decedent in his lifetime. . . . [T]his from Labatt's Master and Servant (2d ed.) §299, p.930: "Every servant impliedly stipulates that both his words and his behavior in regard to his master and his master's family shall be respected and free from insolence. A breach of this stipulation is unquestionably a valid reason for dismissing the servant, especially when it is accompanied by other conduct which would of itself justify a rescission of the contract."

Punishing him for amoral conduct Why?

As we have indicated, this is one entire contract, and the plaintiff was entitled to the full consideration of his contract or none of it. Schneider v. Hagerstown Brewing Co., 136 Md. 151, 154, 110 A. 218; 39 C.J. 145, 149. On the theory of an entire contract, if the act of unfaithfulness and disloyalty here charged against the plaintiff was sufficient to warrant his immediate discharge by his employer, had it been known to him, then his right to compensation has been forfeited (20 A.&E. Ency. Law (2d ed.) 20), for it cannot be assumed that the employer would not have done the thing that common decency and loyalty to his wife would have required him to do. The question for us then is, whether it is one of law for the court or of fact for the jury, the legal sufficiency of the evidence to support a verdict for the plaintiff having been submitted by the fourth prayer of the defendant for a directed verdict which was refused and exception taken. If held to be for the jury, then the defendant's sixth and ninth prayers, which instructed the jury to find for the defendant if they found the plaintiff to have been unfaithful to his employer, should have been granted.

The rule with respect to the province of the court and jury as stated in 26 C.J. 1016, and quoted in Dorrance v. Hoopes, supra, is: "What constitutes good and sufficient cause for the discharge of a servant is a question of law, and where the facts are undisputed, it is for the court to say whether the discharge was justified. But where the facts are disputed, it is for the jury to say upon all the evidence whether there were sufficient grounds to warrant the discharge," and in that case, 122 Md. 344, at page 352, 90 A. 92, 95, Ann. Cas. 1916A, 1012, this court said: "There are cases . . . so flagrant and so manifestly contrary to the implied conditions arising from . . . master and servant which should exist between them that they can be decided by the court as matters of law." 39 C.J. 212.

discharge is a question of law

In this case the violation of the agreement by the plaintiff was so flagrant, unjustified, and inexcusable as to justify his discharge, and, if by it he earned his discharge, then he cannot recover. It was not contradicted,

denied, nor even explained, so that, in accordance with the rule herein stated, in our opinion the plaintiff was not entitled to recover, and the defendant's fourth prayer should have been granted. 13 C.J. 790, §1011. . . .

Judgment reversed without a new trial with costs to the appellant.

NOTES AND QUESTIONS

1. The court refuses to reprint the plaintiff's letter, but (as reported in L. Fuller and R. Braucher, Basic Contract Law at 659 (1964)) it appeared in the court record in this fashion:

> My dear Margaret:
>
> We seem to talk to each other in a secret language. You often communicate to me that you desire my friendship; you treat me not like a servant. This is what torments me! God knows, at times I would like to kiss you and all most eat you — for love is physical — otherwise what is beauty for?
>
> Yes a man needs a woman to draw power into his being. And what is a woman that no one loves? Or a woman that does not love anyone? A mere piece of physical mechanism and that is all.
>
> You too, often seem to me to be frigid, incapable of loving; and I don't believe you ever loved me. I, on the other hand have loved you deeply from my heart — and have suffered mental and physical agony. Yes such is love!
>
> I would have gone to hell for you once, for I thought you loved me. But now I know better — and that's why I try hard to forget you.
>
> Now you ought to try to forget me — for one thing you do not have to depend on me for your lively-hood.
>
> I always wanted to see you taken care of financially — your income in the future will be 3 times larger than mine —
>
> Besides I am not ready for marriage. I want to study and be something first — But sometimes I feel that without love I am simply a lost atom in the universe — and cannot accomplish much.
>
> I often feel that you just want to dominate me — to put me under your heels — that's all.
>
> Yes you are a puzzle to me — If I only knew your secret goal!
>
> Without love,
>
> Paul

2. Do you agree with the court's characterization of this letter? With the court's result? In answering this, consider that written on the envelope containing the letter were the following words: "If I lose my job with this note — at least I would gain my peace of mind —."

3. What pedagogical point is being made by the inclusion of this case at this point in the chapter?

## *B. Conditions Precedent vs. Conditions Subsequent*

When we classify conditions as *express, implied-in-fact,* or *constructive,* the classification has to do with how the condition arose (by explicit agreement of the parties, as implied by their conduct, or implied in law).

In *Howard* the court was trying to determine whether the contested clause was a condition *precedent* (pronounced pre-SEE-dent, *not* PRESS-i-dent). When we speak of *conditions precedent* and *conditions subsequent,* the classification has to do with the time when the conditioning event is to happen in relation to the promisor's duty to perform. A condition is precedent if an event must occur *before* the performance is due. A condition is subsequent if the performance obligation is due but will cease to exist upon the occurrence of the specified event.

## GRAY v. GARDNER
**Supreme Judicial Court of Massachusetts, 1821**
**17 Mass. 188**

ASSUMPSIT on a written promise to pay the plaintiff 5,198 dollars, 87 cents, with the following condition annexed, viz., "on the condition that if a greater quantity of sperm oil should arrive in whaling vessels at *Nantucket* and *New Bedford,* on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14, 1819.

The consideration of the promise was a quantity of oil, sold by the plaintiff to the defendants. On the same day another note unconditional had been given by the defendants, for the value of the oil, estimated at sixty cents per gallon; and the note in suit was given to secure the residue of the price, estimated at eighty-five cents, to depend on the contingency mentioned in the said condition.

At the trial before the chief justice, the case depended upon the question whether a certain vessel, called the *Lady Adams,* with a cargo of oil, arrived at *Nantucket* on the first day of October, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants; and further that, although the vessel might have, within the time, gotten within the space which might be called *Nantucket Roads,* yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October, in order to have *arrived,* within the meaning of the contract.

The opinion of the chief justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had; otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman, for the defendants. As the evidence at the trial was contradictory, the question on whom the burden of proof rested, became important. We hold that it was on the plaintiff. This was a condition precedent. Until it should happen, the promise did not take effect. On the occurrence of a certain contingent event, the promise was to be binding, and not otherwise. To entitle himself to enforce the promise, the plaintiff must show that the contingent event has actually occurred.

On the other point saved at the trial, the defendants insist that it was not required by the terms of this contract that the vessel should be

moored. It is not denied that such would be the construction of a policy of insurance containing the same expression. But every contract is to be taken according to the intention of the parties to it, if such intention be legal, and capable of execution. The contemplation of parties to a policy of insurance is, that the vessel shall be safe before she shall be said to have arrived. So it is in some other maritime contracts. But in that now in question, nothing was in the minds of the parties, but that the fact of the arrival of so much oil should be known within the time limited. The subject matter in one case is safety, in the other it is information only. In this case the vessel would be said to have arrived, in common understanding, and according to the meaning of the parties.

PARKER, C.J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event, viz., the arrival of a certain quantity of oil, at the specified places, in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants, in this case, promise to pay a certain sum of money, on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them; and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before twelve o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor, or is moored. She may sink, or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance; and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned, before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

## NOTES AND QUESTIONS

1. Why would the parties have made such a contract?

2. Why did it matter whether the condition here was precedent or subsequent?

3. Was the court correct in calling this a condition subsequent? See Farnsworth at 524 n.24 for a criticism of the court's conclusion.

4. Reread Problem 136 in this chapter and compare it with the clause below from an insurance policy. If we assume that the relevant language creates express conditions, which one illustrates a condition precedent and which a condition subsequent?

> If the company does not pay the insured's claim, whether valid or not, within one year of the occurrence of the insured-against event, the company

shall not have any further liability unless the insured shall file suit within the one year period.

5. The Restatement (Second) of Contracts has dropped the precedent/subsequent distinction, and only conditions precedent are called "conditions" under the new lexicon. Conditions subsequent have been downgraded to simply "events that terminate a duty." See Restatement (Second) of Contracts §230. This is because of the difficulty in distinguishing between the two and the relative unimportance of the issue in most contract cases. However, there is some practical significance in distinguishing between the two as suggested by the following Federal Rules of Civil Procedure:

**Rule 9. Pleading Special Matters. . .**

(c) *Conditions Precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

**Rule 8. General Rules of Pleading. . .**

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

6. A court always has the power to alter the usual burdens of pleading and proof in situations where one party has superior ability to present the relevant evidence, or where, for one reason or another, justice requires a different allocation. For example, it is easier to prove a positive ("John Doe was in Tampa on February 25th") than a negative ("John Doe was not in Houston on February 25th"), so the court may decide to place the burden of proof on the person with best access to the evidence of the positive happening. In Buick Motor Co. v. Thompson, 138 Ga. 282, 75 S.E. 354 (1912), the contract was to supply cars "conditions permitting," and the court placed the burden of proving the issue on the defendant, even though traditional analysis would probably deem this a condition precedent to the plaintiff's case.

7. The historical setting of this famous case and a discussion of the law it created are found in Curtis Nyquist, A Contract Tale From the Crypt, 30 Houston L. Rev. 1205 (1993).

# III. SOME TYPES OF EXPRESS CONDITIONS, INCLUDING CONDITIONS OF SATISFACTION

## CHODOS v. WEST PUBLISHING CO.
**United States Court of Appeals, Ninth Circuit, 2002**
**292 F.3d 992**

REINHARDT, Circuit Judge.

This case presents the question whether a publisher retains the right to reject an author's manuscript written pursuant to a standard industry agreement, even though the manuscript is of the quality contemplated by both parties. In this case, attorney Rafael Chodos entered into a standard Author Agreement with the Bancroft-Whitney Publishing Company under which he agreed to write a treatise on the intriguing subject of the law of fiduciary duty. The agreement is widely used in the publishing industry for traditional literary works as well as for specialized volumes. Bancroft-Whitney thought that the treatise would be successful commercially and that it would result in substantial profits for both the author and the publisher. After Chodos had spent a number of years fulfilling his part of the bargain and had submitted a completed manuscript, Bancroft-Whitney's successor, the West Publishing Company, came to a contrary conclusion. It declined to publish the treatise, citing solely sales and marketing reasons. Like a good lawyer, Chodos responded by suing for damages, first for breach of contract, and then, after amending his complaint to drop that claim, in quantum meruit. The district court held that under the terms of the contract West's decision not to publish was within its discretion, and granted summary judgment in West's favor. Chodos appeals, and we reverse.

### I. BACKGROUND

Rafael Chodos is a California attorney whose specialty is the law of fiduciary duty. His practice consists primarily of matters involving fiduciary issues such as partnership disputes, corporate dissolutions, and joint ventures. Prior to being admitted to the bar in 1977, Chodos worked as a software engineer. Beginning in approximately 1989, Chodos began developing the idea of writing a treatise on the law of fiduciary duty that included a traditional print component as well as an electronic component that incorporated search engines, linking capabilities, and electronic indexing. Chodos sought to draw on both his legal and technological expertise, and was motivated in part by the fact that there was, and continues to be, no systematic scholarly treatment of the law of fiduciary duty.

In early 1995, Chodos sent a detailed proposal, which included a tentative table of contents, to the Bancroft-Whitney Corporation. Bancroft was at the time a leading publisher of legal texts. William Farber, an Associate Publisher, promptly responded to Chodos's proposal, and

informed him that the Bancroft editorial staff was enthusiastic about both the subject matter and the technological features of the proposed project. In July, 1995, Bancroft and Chodos entered into an Author Agreement, which both parties agree is a standard form contract used to govern the composition of a literary work for hire.

The Author Agreement provided for no payments to Chodos prior to publication, and a 15% share of the gross revenues from sales of the work. Farber informed Chodos that a typical successful title published by Bancroft grossed $1 million over a five-year period, although Chodos's work, of course, might be more or less successful than the average. Chodos sought publication of the work not only for the direct financial rewards, but also for the enhanced professional reputation he might receive from the publication of a treatise, which in turn might result in additional referrals to his practice and increased fees for him.

From July, 1995 through June, 1998, Chodos's principal professional activity was the writing of the treatise. He significantly limited the time spent on his law practice, and devoted several hours each morning as well as most weekends to the book project. Chodos estimates that he spent at least 3600 hours over the course of three years on writing the treatise and developing the accompanying electronic materials. He did so with the guidance of Bancroft staff. For example, in late 1995 or early 1996, Farber instructed Chodos that because Bancroft viewed the book as a practice aid and not as an academic work, he should delete an introductory chapter that was primarily historical and disperse the historical material throughout the text, in footnote form. As Chodos completed each of the chapters, he submitted them to Bancroft on a CD-ROM; the seventh and final chapter was sent to the publisher in February, 1998. When finished, the book consisted of 1247 pages.

In mid-1996, Bancroft-Whitney was purchased by the West Publishing Group, and the two entities merged at the end of the year. The Bancroft editors, now employed by West, continued to work with Chodos in preparing the work for publication, although West did establish a management position that ultimately had a direct bearing on Chodos's career as a treatise-writer, that of Director of Product Development and Management for the Western Market Center. Between February and June, 1998, after the entire treatise had been submitted, Chodos reviewed the manuscript to ensure that the formatting was consistent and that no substantive gaps existed. In the summer of 1998 the West editors provided him with detailed notes and suggestions, to which he diligently responded. In November, 1998, West again sent Chodos a lengthy letter including substantive editorial suggestions related to the organization of the book. In early December, 1998, West sent Chodos yet another letter, this time apologizing for delays in publication, and assuring him that publication would take place in the first quarter of 1999. Burt Levy, who replaced Farber as Chodos's editor, informed Chodos that copy editors were preparing the manuscript for release in the early part of that year.

After receiving no communication from Levy in January, 1999, Chodos contacted West to check on the status of his treatise. On February 4, 1999, Chodos received a response from Nell Petri, a member of the marketing

department. Petri informed Chodos that West had decided not to publish the book because it did not "fit within [West's] current product mix" and because of concerns about its "market potential." West admits, however, that the manuscript was of "high quality" and that its decision was not due to any literary shortcomings in Chodos's work.

The decision not to publish the treatise on fiduciary duty was made by Carole Gamble, who joined West as Director of Product Development and Management for the Western Market Center at about the same time that Chodos completed the manuscript. In late 1998, West developed new internal criteria to guide publication decisions. Applying these criteria, Gamble decided not to go forward with the publication of the treatise. She did not in fact read what Chodos had written, but instead reviewed a detailed outline of the treatise and the original proposal for it. Gamble did not prepare a business analysis prior to making her decision. After Chodos informed West that in his view the publisher had breached its contract, West did prepare an economic projection that concluded that the publication of Chodos's work would be an unprofitable venture. Thus, this legal action was born.

### PROCEEDINGS BELOW

Chodos filed an action against West for breach of contract in Los Angeles Superior Court in March, 1999, shortly after the publisher's decision not to publish his work, and West removed the case to federal court on the basis of diversity jurisdiction. Chodos immediately moved for summary judgment, which was denied. Shortly thereafter, he amended his complaint to seek restitution on a quantum meruit basis and dropped the breach of contract claim. West moved to dismiss the amended complaint for failure to state a claim, and the motion was denied. At the conclusion of discovery, West moved for summary judgment, and Chodos sought to amend the complaint again, in order to add a claim for fraud. The district court granted West's motion and entered judgment in its favor; it simultaneously denied Chodos leave to amend his complaint.

## II. Discussion

Chodos makes two alternative arguments: first, that the standard Author Agreement is an illusory contract, and second, that if a valid contract does exist, West breached it. Under either theory of liability, Chodos contends that he is entitled to recover in quantum meruit.

### A. THE AUTHOR AGREEMENT IS NOT ILLUSORY

In support of his first argument, Chodos correctly notes that in order for a contract to be enforceable under California law, it must impose binding obligations on each party. Bleecher v. Conte 29 Cal. 3d 345, 350,

213 Cal. Rptr. 852, 698 P.2d 1154 (1981). The California Supreme Court has held that "if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration." Mattei v. Hopper, 51 Cal.2d 119, 122, 330 P.2d 625 (1958). Chodos contends that because the contract required him to produce a work of publishable quality, but allowed West, in its discretion, to decide unilaterally whether or not to publish his work, the contract violates the doctrine of mutuality of obligation and is therefore illusory.

California law, like the law in most states, provides that a covenant of good faith and fair dealing is an implied term in every contract. Carma Developers (Cal.) v. Marathon Dev. Cal., 2 Cal. 4th 342, 372-73, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992); see Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 231 A.2d 800, 805 (1967) (noting that a "majority of the courts" read a good-faith obligation into contracts providing one party with discretion); Boston Road Shopping Center v. Teachers Ins. and Annuity Ass'n of America, 13 A.D.2d 106, 213 N.Y.S.2d 522, aff'd. 11 N.Y.2d 831, 227 N.Y.S.2d 444, 182 N.E.2d 116 (1962). Thus, a court will not find a contract to be illusory if the implied covenant of good faith and fair dealing can be read to impose an obligation on each party. See, e.g., Third Story Music v. Waits, 41 Cal. App. 4th 798, 805-06, 48 Cal. Rptr. 2d 747 (1995) ("[T]he implied covenant of good faith is also applied to contradict an express contractual grant of discretion when necessary to protect an agreement which otherwise would be rendered illusory and unenforceable."). The covenant of good faith "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Carma,* 2 Cal. 4th at 372, 6 Cal. Rptr. 2d 467, 826 P.2d 710.

It is correct that the agreement at issue imposes numerous obligations on the author but gives the publisher "the right in its discretion to terminate" the publishing relationship after receiving the manuscript and determining that it is unacceptable. However, we conclude that the contract is not illusory because West's duty to exercise its discretion is limited by its duty of good faith and fair dealing. See, e.g., Asmus v. Pacific Bell, 23 Cal. 4th 1, 15-16, 96 Cal. Rptr. 2d 179, 999 P.2d 71 (2000); *Third Story Music Inc.,* 41 Cal. App. 4th at 803-04, 48 Cal. Rptr. 2d 747; see also Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917) ("We are not to suppose that one party was to be placed at the mercy of the other."). More specifically, because the standard Author Agreement obligates the publisher to make a judgment as to the quality or literary merit of the author's work — to determine whether the work is "acceptable" or "unacceptable" — it must make that judgment in good faith, and cannot reject a manuscript for other, unrelated reasons. See *Third Story Music,* 41 Cal. App. 4th at 804, 48 Cal. Rptr. 2d 747. Thus, Chodos's first argument fails.

### B. WEST BREACHED THE AGREEMENT

Chodos's alternative argument — that a contract exists and it was breached — is more persuasive. West contends that the Author Agreement

allowed it to decline to publish the manuscript after Chodos completed writing it for *any* good-faith reason, regardless of whether the reason was related to the quality or literary merit of Chodos's manuscript. However, West's right to terminate the agreement is a limited one defined in two related provisions of the agreement. The first, the "acceptance clause," establishes that West may decline to publish Chodos's manuscript if it finds the work to be "unacceptable" in form and content. The acceptance clause, paragraph eight of the agreement, provides that:

> After timely receipt of the Work or any portion of the Work prepared by Author, Publisher shall review it as to both form and content, and notify Author whether it is acceptable or unacceptable in form and content under the terms of this Agreement. In the event that Publisher determines that the Work or any portion of the Work is unacceptable, Publisher shall notify Author of Publisher's determination and Publisher may exercise its rights under paragraph 4.

The second relevant provision (referred to in the acceptance clause as West's "rights under paragraph 4") allows West to terminate the publishing agreement if the author does not cure a failure in performance after being given an opportunity to do so. This provision, numbered paragraph four of the contract and entitled "Author's Failure to Perform," states:

> [I]f Publisher determines that the Work or any portion of it is not acceptable to publisher as provided in paragraph 8 [the acceptance clause] . . . [a]fter thirty (30) days following written notice to author if Author has not cured such failure in performance Publisher has the right in its discretion to terminate this Agreement.

The district court agreed with West that in determining whether a manuscript is satisfactory in form and content under the acceptance clause of the standard Author Agreement, the publisher may in good faith consider solely the likelihood of a book's commercial success and other similar economic factors. We unequivocally reject the view that the relevant provisions of the Author Agreement may be so construed in the absence of additional language or conditions.

The expansive reading of the acceptance clause suggested by West is inconsistent with the language of the two contract clauses. Under the agreement, the publisher may deem a manuscript unacceptable only if it is deficient in "form and content." Thus, had Chodos submitted a badly written, poorly researched, disorganized or substantially incomplete work to West, the publisher would have been well within its rights to find that submission unacceptable under the acceptance clause — as it would were it to reject any work that it believed in good faith lacked literary merit. A publisher bargains for a product of a certain quality and is entitled to reject a work that in its good faith judgment falls short of the bargained-for standard. Nothing in the contract, however, suggests that the ordinary meaning of the words "form and content" was not intended, and nowhere in the contract does it state that the publisher may terminate the agreement if it changes its management structure or its marketing strategy, or if

it revises its business or economic forecasts, all matters unrelated to "form and content."

To the contrary, the fact that the contract required West to afford Chodos an opportunity to cure any deficient performance supports our straightforward reading of the acceptance clause as a provision that relates solely to the quality or literary merit of a submitted work.[1] As noted above, if West determined that Chodos's submission was unacceptable, he was to be given a period of time to cure his failure in performance. The inclusion of this provision indicates that a deficiency in "form and content" is one that the author has some power to cure. Chodos has no power to "cure" West's view that the marketplace for books on fiduciary duty had changed; nor could he "cure" a change in West's overall marketing strategy and product mix; nor, indeed, could he be expected to do much about a general downturn in economic conditions. The text and structure of the contract thus demonstrate that West's stated reasons for terminating the agreement were not among those contemplated by the parties.

The uncontroverted evidence in this case is that Chodos worked diligently in cooperation with West — indeed, with West's encouragement — to produce a work that met the highest professional standard, and that he was successful in that venture. His performance was induced by an agreement that permitted rejection of the completed manuscript only for deficiencies in "form and content." Chodos thus labored to complete a work of high quality with the expectation that, if he did so, it would be published. He devoted thousands of hours of labor to the venture, and passed up substantial professional opportunities, only for West to decide that due to the vagaries of its internal reorganizations and changes in its business strategies or in the national economy or the market for legal treatises, his work, albeit admittedly of high quality, was for naught. It would be inequitable, if not unconscionable, for an author to be forced to bear this considerable burden solely because of his publisher's change in management, its poor planning, or its inadequate financial analyses at the time it entered into the contract, or even because of an unexpected change in the market-place. Moreover, to allow a publisher to escape its contractual obligations for these reasons would be directly contrary to both the language and the spirit of the standard Author Agreement.

West urges us to affirm the district court's ruling because, in its view, it is well-accepted that, regardless of the contract's failure to mention economic circumstances or market demands, publishers have broad discretion under the acceptance clause of the standard Author Agreement to reject manuscripts for any good faith commercial reason. For this proposition, the district court cited two cases from the Second Circuit involving that same clause. Although at least one of the cases contains dicta that would support the district court's decision, both are distinguishable factually and legally. Moreover, to the extent that either case suggests that

1. In the case of technical, scientific or legal work, the term "quality" may be more descriptive of the permissible subject of the publisher's exercise of its discretion, while in the case of a less specialized publication, such as a novel, a book of poetry of essays, or a biography or other historical work, the term "literary merit" may be more fitting.

a publisher bound by the standard Author Agreement may terminate the contract for *any* reason so long as it acts in good faith, we respectfully reject that view.

In Doubleday & Co. v. Curtis, 763 F.2d 495, 496 (2d Cir.1985), a publisher rejected a manuscript by the well-known actor but neophyte author, Tony Curtis, on the basis of its poor literary quality. There, as here, the publishing agreement allowed the publisher to reject a submission if it was not satisfactory as to "form and content." Id. However, in *Doubleday,* in direct contrast to the circumstances here, it was agreed that the manuscript was *unsatisfactory* in form and content. Id. at 500. In Doubleday, Curtis's claim was that the publisher had a good-faith obligation under the contract to re-write his admittedly unsatisfactory manuscript and to transform it into one of publishable quality. Id. The Second Circuit held that a publisher's good faith obligation does not stretch that far; thus, the Second Circuit's essential holding in *Doubleday* has no bearing on the present case.

It is true that the Second Circuit appears to have stated its holding in *Doubleday* more broadly than the case before the court warranted. The court said:

> [W]e hold that a publisher may, in its discretion, terminate a standard publishing contract, provided that the termination is made in good faith, and that the failure of an author to submit a satisfactory manuscript was not caused by the publisher's bad faith.

Id. at 501. Still, read in context, the holding does not make it clear whether the court meant that a publisher may reject a manuscript for reasons wholly unrelated to its literary worth or that it may do so only if it determines in good faith that the submitted work is unsatisfactory on its literary merits. If the former is the Second Circuit's view of the law, we respectfully disagree.

The district court also relied on Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979). That case is more apposite than *Doubleday* in that the district court there held that a publisher may consider economic circumstances when evaluating a manuscript's "form and content" under the standard publishing agreement. Id. at 1308-09. Although we disagree with that holding for the reasons set forth above, and are certainly not bound by it, we note that even in *Random House* the court did not go so far as to state that economic considerations may be the *sole* reason for a publisher to decline to publish a manuscript that is in every other respect acceptable. In *Random House*, as in *Doubleday,* the submitted manuscript was not of publishable quality. In contrast to Chodos's work, the editor at Random House considered the manuscript at issue to be "shallow and badly designed." Id. at 1308.

In sum, we reject the district court's determination that West acted within the discretion afforded it by the Author Agreement when it decided not to publish Chodos's manuscript. Because West concedes that the manuscript was of high quality and that it declined to publish it solely for commercial reasons rather than because of any defect in its form and content, we hold as a matter of law that West breached its agreement with Chodos.

### C. CHODOS MAY PURSUE A QUANTUM MERUIT CLAIM

The district court ruled that if West breached the contract, Chodos could proceed in quantum meruit, but only if the damages were not determinable under the contract. It also stated that a question of material fact existed as to whether contract damages were determinable. It then granted West summary judgment on the quantum meruit claim because it held that there was no breach of contract. As we have already determined above, the district court erred in finding that no breach occurred. Accordingly, we must consider the remaining issues relevant to Chodos's quantum meruit claim.

Under California law, a party who has been injured by a breach of contract may generally elect what remedy to seek. In a leading case on election of remedies, the California Supreme Court stated:

> It is well settled in this state that one who has been injured by a breach of contract has an election to pursue any of three remedies, to wit: He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed, or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing.

Alder v. Drudis, 30 Cal. 2d 372, 381-82, 182 P.2d 195 (1947) (internal quotation marks omitted).

In employment contracts and contracts for personal services, like the one before us, the first option, an action in quantum meruit, is generally limited to cases in which the breach occurs after partial performance and the party seeking a recovery does not thereafter complete performance. "Where [a party's] performance is not prevented, the injured party may elect instead to affirm the contract and complete performance. If such is his election, his exclusive remedy is an action for damages." B.C. Richter Contracting Co. v. Continental Casualty Co., 230 Cal. App. 2d 491, 500, 41 Cal. Rptr. 98 (1964) (citing House v. Piercy, 181 Cal. 247, 251, 183 P. 807 (1919)). Thus, if a plaintiff has fully performed a contract, damages for breach is often the only available remedy. Oliver v. Campbell, 43 Cal. 2d 298, 306, 273 P.2d 15 (1954).

The California Supreme Court has, however, recognized an exception to the general rule. In *Oliver,* the court stated:

> The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; *but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt.*

Id. at 306, 273 P.2d 15 (adopting Restatement of Contracts §350) (emphasis added).

Assuming that Chodos fully performed his end of the bargain by delivering a completed manuscript to West, then whether Chodos can recover

on a quantum meruit claim turns on whether the 15% of the gross revenues provided for in the agreement constitutes a "liquidated debt." According to Black's Law Dictionary, "[a] debt is liquidated when it is certain what is due and how much is due. That which has been made certain as to amount due by agreement of parties or by operation of law." Black's Law Dictionary 931 (6th ed. 1990). The term "liquidated debt" is similar to the term "liquidated damages," which the California courts have defined as "an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement. . . ." Kelly v. McDonald, 98 Cal. App. 121, 125, 276 P. 404 (1929) (citation omitted), overruled in part on other grounds, McCarthy v. Tally, 46 Cal. 2d 577, 297 P.2d 981 (1956).

Chodos's entitlement to 15% of the revenues from his book on fiduciary duty is not a liquidated debt under California law, as it was not a certain or readily ascertainable figure. The mere existence of a fixed percentage royalty in a contract does not render that royalty a "liquidated debt," if the revenues to which that percentage figure is to be applied cannot be calculated with reasonable certainty. Here, it is impossible to determine even now what those revenues would have been had West not frustrated the completion of the contract. Had West honored its contractual obligations and published the treatise, the revenues would have depended on any number of circumstances, including how West chose to market the book, and how it was received by readers and critics.[2] Accordingly, under *Oliver*, Chodos is entitled to sue for restitution for the time and effort he reasonably invested in writing the manuscript. See also O'Hare v. Peacock Dairies, 26 Cal. App. 2d 345, 79 P.2d 433, 442-43 (1938) (holding future profits to be unascertainable where plaintiffs are owed a future revenue stream from a dairy that had ceased operation). We express no opinion as to how restitution should be calculated in this case, nor do we intimate any suggestion as to the appropriate amount of such recovery. . . .

## III. Conclusion

Because West breached its contract with Chodos by rejecting his manuscript for a reason not permitted by the contract between the parties and because Chodos is entitled to recover for the breach in quantum meruit, we REVERSE the district court's grant of summary judgment in West's favor, and REMAND the case to the district court with instructions to enter summary judgment as to liability in Chodos's favor, and for further proceedings consistent with this opinion. . . .

2. It might also be reasonably argued that West's publishing to of Codos's treatise was an additional element of consideration to which Chodos was entitled, since substantial benefits other than the royalties he would have received mithg have acured to him as a result of publication, including enhanced reputation and additional client referrals. Because restitution is available if "*any* part of the consideration due from the defendant in return is something other than a liquidated debt," *Oliver*, 43 Cal. 2d at 306, 273 P.2d 1 (emphasis added), restitution might be available under this theory regardless of whether the potential royalties are considered a "liquidated debt".

due tho. consideration of publication

### *Problem 139*

(a) Oscar Wilde went to James Whistler and asked to have his portrait painted, agreeing to pay Whistler £40 if he was satisfied with the painting. Whistler produced what all agree to be a masterpiece, but Wilde pooh-poohed it, proclaiming it "crude and mean." Whistler sued. Must Wilde pay? Is this an illusory contract? Who has the burden of proof here?

(b) When Scarlett decided to sell her ancestral home, Tara, she engaged the services of Mitchell Realty, agreeing to pay a 10 percent commission if the company could produce a "satisfactory" buyer. Mitchell Realty scouted around and found a millionaire named John Doe, who agreed to pay cash. Investigation showed him to be a shy, quiet recluse. She turned him down as unsatisfactory, and Mitchell sued her for its fee. How should this come out? Would it influence your answer if the seller were a corporation?

(c) Four Star Construction Company built a $4 million building for Octopus National Bank, with payments to be made as the project progressed. Fifteen percent of each progress payment was to be withheld in a retainage account to be paid at the end of the project after Four Star had obtained a certificate of approval from the architect hired by the bank to supervise the project. The building was built according to specifications, and Four Star was so proud of its work that it called in industry magazines to write up the job. Nonetheless, the architect inspected the project and pronounced the work unsatisfactory, refusing to elaborate beyond saying that the "workmanship is ugly." Four Star sued. Is it entitled to the retainage? Does it matter what the motivation of the architect is?

## GULF CONSTRUCTION CO. v. SELF
**Court of Appeals of Texas, 1984**
**676 S.W.2d 624**

UTTER, J. This is an appeal of two separate lawsuits which were tried jointly by agreement of all parties before the Honorable Rachel Littlejohn sitting as judge of the 156th and 36th District Courts of San Patricio County. Each case involved a suit by a subcontractor against a general contractor and its bonding company to recover payment for labor and materials furnished by the subcontractors to the general contractor. The parties waived a jury trial, and the case was tried to the court. Separate judgments were rendered against appellants in favor of each appellee-subcontractor. From such separate judgments, appellants appeal. We affirm the judgments of the trial court.

Appellant Gulf Construction Company, Inc., as general contractor, entered into two contracts with Good Hope Chemical Corporation, as owner, for the construction of various buildings to be located at Good Hope Chemical's plant site near Ingleside in San Patricio County. A performance and payment bond was executed by appellant Mid Continent Casualty as surety for Gulf Construction.

Appellant Gulf Construction then entered into three separate subcontracts with each of the appellees, Shaw Plumbing Company and Calvin Self, individually and d/b/a Industrial Electric Company. During the construction of the project, the owner, Good Hope Chemical, encountered financial problems and directed that all work at the plant site cease. After they were ordered to stop their work, the subcontractors each demanded that Gulf Construction pay the balance owed for the work performed. After they each made their demands, the subcontractors filed mechanic's and materialman's liens after giving the appropriate notice. Also, the subcontractors perfected their claims on the performance and payment bond furnished by appellant Gulf Construction and executed by appellant Mid Continent Casualty Company as surety. When the general contractor, Gulf Construction, refused and failed to pay the balance owed to each of the subcontractors, the subcontractors, Shaw Plumbing and Self, filed suit. Appellants defended against the subcontractors' claims on the basis of the ninth paragraph of the subcontracts which reads as follows:

> Ninth. When the owner or his representative advances or pays the general contractor, the general contractor shall be liable for and obligated to pay the sub-contractor up to the amount or percentage recognized and approved for payment by the owner's representative less the retainage required under the terms of the prime contract. Under no circumstances shall the general contractor be obligated or required to advance or make payments to the sub-contractor until the funds have been advanced or paid by the owner or his representative to the general contractor.

It was the position of appellants that, since the owner, Good Hope Chemical, had filed for bankruptcy and was unable to pay appellant, appellant Gulf Construction was under no obligation, pursuant to the ninth paragraph of the subcontracts, to pay the balance owed to each of the subcontractors.

Resolution of the issues presented in appellant's first through sixth points of error on appeal depends on the construction of the language of the ninth paragraph of the subcontracts in question as either (1) a condition precedent to Gulf Construction's obligation to pay the balance owed to each subcontractor or (2) merely a covenant dealing with the "terms of payment" or "manner of payment."

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of contracts or liability under them. Hohenberg Brothers Company v. George E. Gibbons & Co., 537 S.W.2d 1 (Tex. 1976). Conditions precedent to an obligation to perform are those acts or events which occur subsequently to the making of the contract that must occur before there is a right to immediate performance and before there is a breach of contractual duty. Ibid. While no particular words are necessary for the existence of a condition, such terms as "if," "provided that," "on condition that," or some other phrase that conditions performance usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered

from the contract as a whole and from the intent of the parties. Ibid. The Texas Supreme Court in Citizens National Bank in Abilene v. Texas and Pacific Railway Company, 136 Tex. 333, 150 S.W.2d 1003 (1941) stated:

> It is the duty of the Court, in determining the meaning and intent of a contract, to look to the entire instrument; that is, the contract must be examined from its four corners. Stated in another way, the contract must be considered and construed as an entire instrument, and all of its provisions must be considered and construed together. It is not usually proper to consider a single paragraph, clause, or provision by itself, to ascertain its meaning. To the contrary, each and every part of the contract must be construed and considered with every other part, so that the effect or meaning on any other part may be determined.

However, where the intent of the parties is doubtful or where a condition would impose an absurd or impossible result, then the agreement should be interpreted as creating a covenant rather than a condition. Also, it is a rule of construction that a forfeiture, by finding a condition precedent, is to be avoided when possible under another reasonable reading of the contract. Schwarz-Jordan, Inc. of Houston v. Delisle Construction Company, 569 S.W.2d 878 (Tex. 1978). "Because of their harshness and operation, conditions are not favorites of the law." Sirtex Oil Industries, Inc. v. Erigan, 403 S.W.2d 784 (Tex. 1966). The rule, as announced in Henshaw v. Texas National Resources Foundation, 216 S.W.2d 566 (Tex. 1949), is that:

> Since forfeitures are not favored, courts are inclined to construe the provisions in a contract as covenants rather than as conditions. If the terms of the contract are fairly susceptible of an interpretation which will prevent a forfeiture, they will be so construed.

Generally, a writing is construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intention of the parties. Republic National Bank of Dallas v. Northwest National Bank of Fort Worth, 578 S.W.2d 109 (Tex. 1978).

The first sentence of the ninth paragraph of the subcontract in question, by itself, does not set forth a condition precedent to appellant's obligation to make payment but only utilizes language similar to that in contractual provisions construed in Thos. J. Dyer Company v. Bishop International Engineering, Inc., 303 F.2d 655 (6th Cir. 1962); Prickett v. Kendell Builders, Inc., 572 S.W.2d 57 (Tex. Civ. App. — Eastland 1978, no writ); Wisznia v. Wilcox, 438 S.W.2d 874 (Tex. Civ. App. — Corpus Christi 1909, writ ref'd. n.r.e.); and Mignot v. Parkhill, 237 Or. 450, 391 P.2d 755 (1964), wherein the courts held that such language set forth only a covenant regarding "terms of payment" or "manner of payment" and not a condition precedent. However, the additional question presented is: Does the second sentence of the ninth paragraph which provides that "Under no circumstances shall the general contractor be obligated or required to advance or make payments to the sub-contractor until the funds have been advanced or paid by the owner or his representative to the general

contractor," when read in context within the entire contract, create a condition precedent or does it modify or explain the preceding sentence as to "terms of payment" or "manner of payment?"

In Thos. J. Dyer Company v. Bishop International Engineering Company, supra, the United States Sixth Court of Appeals was called upon to construe a provision in a subcontract which provided that no payment was due the subcontractor until five days after the owner of the construction project made payment to the general contractor. The general contractor had not been paid by the owner and contended that, since it had not been paid, the condition precedent to his obligation to make payment had not yet been met; and, hence, it should not be subject to any liability. In rejecting the general contractor's claim, the United States Sixth Court of Appeals stated:

> It is, of course, basic in the construction business for the general contractor on a construction project of any magnitude to expect to be paid in full by the owner for the labor and material he puts into the project. He would not remain long in business unless such was his intention and such intention was accomplished. That is a fundamental concept of doing business with another. The solvency of the owner is a credit risk necessarily incurred by the general contractor, but various legal and contractual provisions, such as mechanics liens, and installment payments, are used to reduce these to a minimum. These evidence the intention of the parties that the contractor be paid even though the owner may ultimately become insolvent. This expectation and intention of being paid is even more pronounced in the case of a subcontractor whose contract is with the general contractor, not with the owner. In addition to his mechanic's lien, he is primarily interested in the solvency of the general contractor with whom he has contracted. Normally and legally, the insolvency of the owner will not defeat the claim of the subcontractor against the general contractor. Accordingly, in order to transfer this normal credit risk incurred by the general contractor from the general contractor to the subcontractor, the contract between the general contractor and the subcontractor should contain an express condition clearly showing that to be the intention of the parties.

The Court of Appeals for the Sixth Circuit held that, in accordance with "the normal construction of the relationship of the parties," said provision did not shift the normal credit risk from the general contractor to the subcontractor and that the provision was a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which time the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. Furthermore, the United States Court of Appeals held that to construe the provision as requiring the subcontractor to wait to be paid for an indefinite time until the general contractor has been paid by the owner, which may never occur, is to give it an unreasonable construction which the parties did not intend at the time the subcontract was entered into.

In Mignot v. Parkhill, the Oregon Supreme Court construed the following subcontract provision which is similar to the second sentence of the ninth paragraph in question:

> It is fully understood by and between the parties hereto that the contractor [defendant] shall not be obligated to pay subcontractor [plaintiff]

for any of the work until such time as contractor has himself received the money from Bate Lumber Company.

As in the instant case, the above-quoted provision in *Mignot* was followed by an unconditional agreement to pay a certain amount to the subcontractor as consideration for the subcontractor's performance under the contract. The Oregon Supreme Court construed the contractual provision in the following manner:

> We take the contract at its four corners. The defendant's engagement to pay the stipulated consideration is expressed in unconditional terms and the provision in question, in our opinion, does no more than affect the time of payment. In unambiguous language, the defendant agreed to pay designated sums, not upon receiving the money from Bate Lumber Co., but upon completion of various portions of the work on specified days, subject only to approval by the forest service representative. The contract does not state that the defendant shall not be obligated if the money is not received from Bate Lumber Company nor that payment shall be made to plaintiff "out of" funds received by defendant from Bate Lumber Company (as in so many cases holding the provision a condition precedent) but that defendant shall not be obligated *"until such time as"* the money is received by him. The clause is in the nature of a modification of the time provisions which immediately precede it and is followed by an unconditional agreement of the defendant to pay plaintiff $123,700 in consideration of latter's prompt and faithful performance of the work.

As in *Mignot,* we hold that the contract in question does not state that Gulf Construction shall not be obligated *if* the money is not received from the owner, Good Hope Chemical, nor that the payment shall be made to the subcontractors "out of" funds received by Gulf Construction but that Gulf Construction shall not be obligated or required to make payments *until* the money has been received by the owner. The second sentence of the ninth paragraph is in the nature of a modification of the time provision which immediately precedes it in the first sentence of the ninth paragraph.

Furthermore, we note that the following of the trial court's findings of law filed in support of its judgment are consistent with a reasonable interpretation of the above-quoted language of *Thos. J. Dyer Company,* as applied to the instant case:

> (1) The court finds as a matter of law that the risk of non-payment by an owner on a construction contract rests on the contractor who contracts with such owner rather than on a subcontractor who has no privity of contract with the owner.
>
> (2) The court finds as a matter of law that the risk of non-payment by the owner on a construction contract is not shifted from the contractor to the subcontractor unless there is a clear, unequivocal and expressed agreement between the parties to do so.
>
> (3) The court finds as a matter of law that there was no intent on the part of the parties to the subcontract of the risk of non-payment by the owner (Good Hope Chemical Corp.) should be shifted from the contractor (Gulf Construction Company, Inc.) to the subcontractors (Calvin Self, Individually and d/b/a Industrial Electric Company, and Shaw Plumbing Company).

(4) The court finds as a matter of law that the ninth paragraph of the subcontracts between the parties does not clearly, unequivocally and expressly shift the risk of non-payment by the owner from the contractor (Gulf Construction Company) to the subcontractors (Calvin Self, Individually and d/b/a Industrial Electric Company and Shaw Plumbing Company).

We hold that the ninth paragraph of the subcontracts merely provides a covenant dealing with "terms of payment" or "manner of payment" rather than a condition precedent. Appellants' first through sixth points of error are overruled. . . .

The judgment of the trial court in favor of appellee Shaw is modified to reflect the correct total judgment against Gulf Construction Company in the amount of $40,726.84, and, as modified, both judgments against Gulf Construction Company, Inc., and Mid-Continent Casualty Company are affirmed.

QUESTION AND NOTE

1. What facts relevant to conditions might lead you to a different conclusion?

2. It has been held in California that even an express condition precedent in the form of a "pay if paid" clause is unenforceable as a matter of public policy because it serves to deny the subcontractor its rights to a mechanic's lien under the California Constitution. Wm. R. Clarke Co. v. Safeco Insur., 64 Cal. Rptr. 2d 578, 938 P.2d 372 (1997).

## *Problem 140*

Every time his rich Aunt Augusta came to town, she gave Algernon a gift of $1,000. Her next visit was scheduled for the first of April, but Algernon ran short of funds before that date. He went to his friend John Worthing and asked to borrow $200, signing a promissory note in which he agreed to repay the money "when Aunt Augusta next arrives in town." Unfortunately, Aunt Augusta died suddenly, leaving all of her fortune to her daughter Gwendoline. Must Algernon pay when John Worthing presents the promissory note? See Mularz v. Greater Park City Co., 623 F.2d 139 (10th Cir. 1980).

## *Problem 141*

Scarlett contracted to sell her ancestral home, Tara, to Rhett Butler "provided he is able to obtain satisfactory financing by June 4, 2010." June 4 was the date set for the closing. Does this agreement oblige him to try to obtain financing? That is, has he made a *promise* to do so? If he does not do so, could she procure it for him? Would he have to take it?

# IV. PERFORMANCE AND CONSTRUCTIVE CONDITIONS

## A. *Need for Constructive Conditions of Exchange*

### KINGSTON v. PRESTON
**Court of King's Bench, 1773**
**2 Doug. 689, 99 Eng. Rep. 437**

It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated; — That, by articles made the 24th of March, 1770, the plaintiff, for the considerations therein-after mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercer, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house. — Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, etc., and execute such deeds of partnership, and, further, that the plaintiff should, and would, at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly, to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to £4,000. — Then the plaintiff averred, that he had performed, and been ready to perform, his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and a quarter. — The defendant pleaded, 1. That the plaintiff did not offer sufficient security; and, 2. That he did not give sufficient security for the payment of the £250, etc. — And the plaintiff demurred generally to both pleas. — On the part of the plaintiff, the case was argued by Mr. Buller, who contended, that the covenants were mutual and independent, and, therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff, in a separate action. On the other side, Mr. Grose insisted, that the covenants were dependent in their nature, and, therefore, performance must be alleged: the security to be given for the money, was manifestly the chief object of the transaction, and it would be highly

unreasonable to construe the agreement, so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security, (who might, and, indeed, was admitted to be worth nothing,) for the performance of his part. — In delivering the judgment of the Court, Lord Mansfield expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independant, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependant, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. — His Lordship then proceeded to say, that the dependance, or independance, of covenants, was to be collected from the evident sense and meaning of the parties, and, that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the Court, it would be the greatest injustice if the plaintiff should prevail: the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent. — Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent.

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**SHAW v. MOBIL OIL CORP.**
**Oregon Supreme Court, 1975**
**272 Or. 109, 535 P.2d 756**

DENECKE, J. The question is, what is the obligation of the plaintiff, a service station lessee and operator, to pay rent to the defendant, Mobil Oil Corporation, the lessor and gasoline supplier of plaintiff?

In 1972 the parties entered into a service station lease and a retail dealer contract. The contract required the dealer to purchase not less than 200,000 gallons of gasoline per year and Mobil to sell to the dealer the amount of gasoline ordered by the dealer, but not more than 500,000 gallons per year.

The lease required the dealer to pay as rent, 1.4 cents per gallon of gasoline delivered, but "no less than the minimum amount . . . specified in said schedule for a calendar month." The schedule specified a minimum rental of $470 per month. The lease further provided: "If at the end of a month, the gallonage payments are less than the minimum rental, Tenant shall pay the deficiency promptly. . . ."

In order for the rent per gallon to equal the minimum rental per month, Mobil was required to deliver 33,572 gallons per month. In July 1973 the dealer ordered 34,000 gallons, but Mobil delivered only 25,678 gallons. The reason for Mobil's delivery of less than the gallonage ordered was that it was complying with a request by the Federal Energy office that it allocate its existing gasoline supply among its dealers. Mobil demanded that the plaintiff dealer pay the minimum rental for July as specified in the lease. Plaintiff brought this declaratory judgment proceeding to have determined its obligation to pay the minimum rental under the circumstances stated. The trial court decided the dealer had to pay the minimum rental.

The retail dealer contract provided: "[T]he amounts so sold and purchased within such limits [minimum of 200,000 and maximum of 500,000 gallons per year] to be those ordered by Buyer [lessee]."

Mobil's District Sales Manager and the trial court both interpreted this clause to mean what it appears to state; that is, that Mobil had a duty to deliver to the dealer as much as the dealer ordered. This duty is at least partially subject to an excuse clause which will be discussed later.

The trial court found that the service station lease and the retail dealer contract "were executed contemporaneously, constituted an integrated contract and are to be construed together." We agree.

The dealer contended in the trial court and contends here that his promise to pay the minumum rental is a dependent promise; that is, it is conditioned upon Mobil's performing its obligation to deliver the quantities of gasoline ordered by the dealer.

The law in Oregon on dependent promises, which is similar to the law in other jurisdictions, is stated in First Nat. Bank v. Morgan, 132 Or. 515, 528-529, 284 P. 582, 286 P. 558 (1930):

> Whether covenants are dependent or independent is a question of the intention of the parties as deduced from the terms of the contract. If the parties intend that performance by each of them is in no way conditioned upon performance by the other, the covenants are independent, but if they intend performance by one to be conditioned upon performance by the other, the covenants are mutually dependent: 5 Page on Contracts, §§2941-2951, et seq.; Williston on Contracts, §824; Burkhart v. Hart, 36 Or. 586, 60 P. 205.
>
> . . . While there is no fixed definite rule of law by which the intention in all cases can be determined, yet we must remember, as stated by Professor Williston, that, since concurrent conditions protect both parties, courts endeavor so far as is not inconsistent with the expressed intention to construe performances as concurrent conditions. 2 Williston on Contracts, §835. See also 5 Page on Contracts, §2948. The necessity of construing these covenants as concurrent in order to avoid gross injustice in the instant case is apparent for without a delivery of the stock the whole consideration for which the note was given must of necessity fail. Accord, R.C.A. Photophone v. Sinnott, 146 Or. 456, 459, 30 P.2d 761 (1934).

Corbin prefers to label the promise "conditional," rather than dependent." 3A Corbin, Contracts, 46, §637 (1960).

In Associated Oil Co. v. Myers, 217 Cal. 297, 18 P.2d 668, 670 (1933), he defendants leased their property to the plaintiff, Associated Oil Co.

The lease provided for a rent of 4 cents per gallon of gasoline sold to defendants for resale with a minimum rental of $10 per month. The parties simultaneously entered into a licensing agreement whereby defendants agreed to sell the oil company's products exclusively. The oil company brought this suit to enjoin the defendants from selling other brands of petroleum products from the station. The court held the promises of the parties were dependent and one party's obligation to perform was conditional upon the other party's performance.

In Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N.Y. 313, 123 N.E. 766 (1919), the court held a promise to pay a minimum royalty was conditioned upon the performance of another promise by the other contracting party. Seligstein held a patent on a type of box and assigned the exclusive right to manufacture this type of box to the defendant. The agreement provided the manufacturer would pay Seligstein a royalty of $1 per thousand boxes manufactured. The royalty agreement further provided, " '. . . it is expressly understood that the payment by the said . . . [manufacturer] to said Seligstein for the right to manufacture and sell boxes under said letters patent shall not be less than the sum of five hundred dollars ($500.00) for each and every year during the life of this contract.' " 123 N.E. at 767.

The manufacturer paid Seligstein $1 per thousand boxes manufactured; however, this was not sufficient to equal the minimum rental. Seligstein's assignee brought this action for the difference between the amount paid per thousand boxes sold and the minimum rental. The manufacturer contended it had no obligation to pay the minimum rental because that obligation was conditioned upon Seligstein performing other promises which Seligstein failed to perform.

The court stated the issue:

> We take up first the question whether or not the agreement of the defendant to pay the minimum royalty and the agreements of Seligstein to protect the letters patent from substantial infringement, and to refrain from selling, within the designated territory, any box manufactured under the patent, or any rights for any clothing, millinery, or suit box to any one for the territory were dependent or independent of each other. 123 N.E. at 767-768.

The court held the promises were "dependent." It reasoned that the parties must have intended that the manufacturer undertook an obligation to pay a minimum royalty for the exclusive right to manufacture in reliance on Seligstein's promise to maintain the exclusiveness of manufacturer's right by not licensing any one else to manufacture and by not selling such boxes.

In the present case we believe it equally apparent that the dealer undertook his obligation to pay a minimum rental in reliance on Mobil's fulfillment of its obligation to deliver the quantity of gasoline ordered by the dealer.

We conclude that the dealer's promise to pay the minimum rental was conditioned or dependent upon Mobil's delivery of the amount of gasoline ordered by the dealer.

The primary contention of Mobil and seemingly the chief reason for the trial court's decision was that under a provision of the contract Mobil

was excused from delivering the quantity of gasoline ordered by the dealer because of a request to Mobil by the Federal Energy office to allocate its gasoline supply among its dealers.

Assuming that the contract does excuse Mobil from performance under these circumstances, nevertheless, the dealer is not obligated to pay the minimum rental.

The clause Mobil relies upon states:

> Seller shall not be liable for loss, damage or demurrage due to any delay or failure in performance (a) because of compliance with any order, request or control of any governmental authority or person purporting to act therefor.

Interpreting this clause most favorably to Mobil, its meaning can be no more than that Mobil cannot be held responsible for breach of contract if it does not perform its promises because of a government request.

A party has no obligation to perform a promise that is conditioned upon the other party's performance when the other party failed to perform even though the other party's failure to perform is excused and is not a breach of contract.

An example of this situation is when the other party fails to perform its promise upon which the promisor's performance is conditioned because of the impossibility of performance. Eggen v. Wetterborg, 193 Or. 145, 237 P.2d 970 (1951), is such a case. Plaintiffs leased the premises from the defendants for use as a gasoline station and tavern. The buildings were destroyed by fire. This court held that the lessees' obligations, including their obligation to pay rent, and the lessors' obligations were dependent upon the existence of the buildings. The court stated:

> When parties enter into a contract on the assumption that some particular thing necessary to its performance will continue to exist and be available for the purpose, and neither party agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to the implied condition that, if before the time for performance, and without the default of either party, the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it. 193 Or. at 152-153, 237 P.2d at 974.

Corbin states the rule:

> [I]f one of these promises becomes impossible of performance, the party who made it may be excused from legal duty. His failure to perform is not a breach of contract. But the fact that the law excuses him from performance does not justify him in demanding performance by the other party. 6 Corbin, Contracts 510-511, §1363 (1962).

Williston is to the same effect. 6 Williston, Contracts 131, 139, §838 (3d ed. 1962).

The dealer is not obligated to pay the minimum rental although Mobil night be excused from delivering the quantity of gasoline ordered by the lealer.

Reversed.

## B. *Ordering Performances through Constructive Conditions*

### RESTATEMENT (SECOND) OF CONTRACTS

#### §234. ORDER OF PERFORMANCES

(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate to the contrary.

### *Problem 142*

Travis decided to sell a houseboat to his good friend Meyer for the sum of $35,000. They agreed that Meyer would pay by check and that the sale would be made at noon on the first day of August on board the boat. On that date neither showed up at the appointed time. Meyer was at a conference, and Travis was at home reading an adventure story. When Meyer returned from the conference, he sued Travis for breach of contract. As judge, would you let his suit succeed without more? On these facts would Travis succeed in a similar suit against Meyer? See UCC §2-309, Official Comment 5, and consider the UCC sections that follow.

**Uniform Commercial Code §2-507(1)**

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

**Uniform Commercial Code §2-511(1)**

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

### *Problem 143*

Travis agreed to sell a houseboat to his good friend Meyer, to be delivered on the first of August. It was to be paid for by a check for $1,000 on the first of each month thereafter, starting in September until a total of $35,000 had been paid. Travis failed to deliver the boat on the date agreed, and Meyer sued on August 10. Must he tender payment in order to prevail in his suit? How does he avoid the language of UCC §2-511(1)?

To call conditions *concurrent* means that they must occur at the same time. Where it is not clear whose performance is to come first (as in Problem 142), tender is the concurrent condition imposed on each party. Until one party tenders, neither is in breach and cannot be sued. The UCC sections quoted above reflect this idea.

### *Problem 144*

When Mausolus was building a crematorium, he ordered 12,000 fancy bricks from Caria Brick Works, agreeing to pay $6,000 for them. Caria promised to deliver the bricks by the first of June. On the fifth of May, Caria delivered 6,000 of the bricks, informing Mausolus that the rest would be delivered shortly and presenting an invoice for $3,000. Mausolus refused to pay until all the bricks were delivered. Caria announced that unless Mausolus paid the bill, no further bricks would be delivered. Who is right? See UCC §2-307 and its Official Comment.

### *Problem 145*

Bill Gilbert agreed to write the lyrics for a musical show to be produced the following year. After writing one-half of the lyrics, Bill approached the producer and demanded that the producer pay him one-half of the promised price. The producer refused, and Bill quit writing and said he would write no more. The producer hired another lyricist, and Bill sued. What result? Consider the following section of the Restatement (Second) of Contracts and the comment. How would you draft the contract for Bill to reach the result he desires?

**§234. Order of Performance . . .**

(2) Except to the extent stated in Subsection (1) [quoted above before Problem 142] where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary. . . .

Comment e

Where the performance of one party requires a period of time and the performance of the other party does not, their performance cannot be simultaneous. Since one of the parties must perform first, he must forego the security that a requirement of simultaneous performance affords against disappointment of his expectation of an exchange of performances, and he must bear the burden of financing the other party before the latter has performed. . . . Of course the parties can by express provision mitigate the harshness of a rule that requires that one completely perform before the other perform at all. They often do this, for example, in construction contracts by stating a formula under which payment is to be made at stated

intervals as work progresses. But it is not feasible for courts to devise such formulas for the wide variety of such cases that come before them in which the parties have made no provision. Centuries ago, the principle became settled that where work is to be done by one party and payment is to be made by the other, the performance of the work must precede payment, in the absence of a showing of a contrary intention. It is sometimes supposed that this principle grew out of employment contracts, and reflects a conviction that employers as a class are more likely to be responsible than are workmen paid in advance. Whether or not the explanation is correct, most parties today contract with reference to the principle, and unless they have evidenced a contrary intention it is at least as fair as the opposite rule would be.

## C. *Substantial Performance of Conditions; the Effects of Material Breach on Performance*

### JACOB & YOUNGS, INC. v. KENT
**Court of Appeals of New York, 1921**
**230 N.Y. 239, 129 N.E. 889**

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of $77,000, and now sues to recover a balance of $3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that —

> All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as "standard pipe" of Reading manufacture.

The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract — that they were, indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict

directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. Spence v. Ham, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238; Woodward v. Fuller, 80 N.Y. 312; Glacius v. Black, 67 N.Y. 563, 566; Bowen v. Kimbell, 203 Mass. 364, 370, 89 N.E. 542, 133 Am. St. Rep. 302. The distinction is akin to that between dependent and independent promises, or between promises and conditions. Anson on Contracts (Corbin's ed.) §367; 2 Williston on Contracts, §842. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Rosenthal Paper Co. v. Nat. Folding Box & Paper Co., 226 N.Y. 313, 123 N.E. 766; Bogardus v. N.Y. Life Ins. Co., 101 N.Y. 328, 4 N.E. 522. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. 2 Williston on Contracts, §§841, 842; Eastern Forge Co. v. Corbin, 182 Mass. 590, 592, 66 N.E. 419; Robinson v. Mollett, L.R., 7 Eng. & Ir. App. 802, 814; Miller v. Benjamin, 142 N.Y. 613, 37 N.E. 631. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a "skyscraper." There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. Dakin & Co. v. Lee, 1916, 1 K.B. 566, 579. Where the line is to

be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case precise boundaries are impossible." 2 Williston on Contracts, §841. The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. Crouch v. Gutmann, 134 N.Y. 45, 51, 31 N.E. 271, 30 Am. St. Rep. 608. There is no general license to install whatever, in the builder's judgment, may be regarded as "just as good." Easthampton L.&C. Co., Ltd., v. Worthington, 186 N.Y. 407, 412, 79 N.E. 323. The question is one of degree, to be answered, if there is doubt, by the triers of the facts (Crouch v. Gutmann; Woodward v. Fuller, supra), and, if the inferences are certain, by the judges of the law (Easthampton L.&C. Co., Ltd., v. Worthington, supra). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. Schultze v. Goodstein, 180 N.Y. 248, 251, 73 N.E. 21; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N.Y. 486, 490, 56 N.E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong. Spence v. Ham, supra.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. Spence v. Ham, supra. 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. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be

omissions of that which could not afterwards be supplied exactly called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable." Handy v. Bliss, 204 Mass. 513, 519, 90 N.E. 864, 134 Am. St. Rep. 673. Cf. Foeller v. Heintz, 137 Wis. 169, 178, 118 N.W. 543, 24 L.R.A. (N.S.) 321; Oberlies v. Bullinger, 132 N.Y. 598, 601, 30 N.E. 999; 2 Williston on Contracts, §805, p.1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.

McLaughlin, J. I dissent. The plaintiff did not perform its contract. Its failure to do so was either intentional or due to gross neglect which, under the uncontradicted facts, amounted to the same thing, nor did it make any proof of the cost of compliance, where compliance was possible.

Under its contract it obligated itself to use in the plumbing only pipe (between 2,000 and 2,500 feet) made by the Reading Manufacturing Company. The first pipe delivered was about 1,000 feet and the plaintiff's superintendent then called the attention of the foreman of the subcontractor, who was doing the plumbing, to the fact that the specifications annexed to the contract required all pipe used in the plumbing to be of the Reading Manufacturing Company. They then examined it for the purpose of ascertaining whether this delivery was of that manufacture and found it was. Thereafter, as pipe was required in the progress of the work, the foreman of the subcontractor would leave word at its shop that he wanted a specified number of feet of pipe, without in any way indicating of what manufacture. Pipe would thereafter be delivered and installed in the building, without any examination whatever. Indeed, no examination, so far as appears, was made by the plaintiff, the subcontractor, defendant's architect, or any one else, of any of the pipe except the first delivery, until after the building had been completed. Plaintiff's architect then refused to give the certificate of completion, upon which the final payment depended, because all of the pipe used in the plumbing was not of the kind called for by the contract. After such refusal, the subcontractor removed the covering or insulation from about 900 feet of pipe which was exposed in the basement, cellar, and attic, and all but 70 feet was found to have been manufactured, not by the Reading Company, but by other manufacturers, some by the Cohoes Rolling Mill Company, some by the National Steel Works, some by the South Chester Tubing Company, and some which bore no manufacturer's mark at all. The balance of the pipe had been so installed in the building that an inspection of it could not be had without demolishing, in part at least, the building itself.

I am of the opinion the trial court was right in directing a verdict for the defendant. The plaintiff agreed that all the pipe used should be of the Reading Manufacturing Company. Only about two-fifths of it, so far as appears, was of that kind. If more were used, then the burden of proving

that fact was upon the plaintiff, which it could easily have done, since it knew where the pipe was obtained. The question of substantial performance of a contract of the character of the one under consideration depends in no small degree upon the good faith of the contractor. If the plaintiff had intended to, and had, complied with the terms of the contract except as to minor omissions, due to inadvertence, then he might be allowed to recover the contract price, less the amount necessary to fully compensate the defendant for damages caused by such omissions. Woodward v. Fuller, 80 N.Y. 312; Nolan v. Whitney, 88 N.Y. 648. But that is not this case. It installed between 2,000 and 2,500 feet of pipe, of which only 1,000 feet at most complied with the contract. No explanation was given why pipe called for by the contract was not used, nor that any effort made to show what it would cost to remove the pipe of other manufacturers and install that of the Reading Manufacturing Company. The defendant had a right to contract for what he wanted. He had a right before making payment to get what the contract called for. It is no answer to this suggestion to say that the pipe put in was just as good as that made by the Reading Manufacturing Company, or that the difference in value between such pipe and the pipe made by the Reading Manufacturing Company would be either "nominal or nothing." Defendant contracted for pipe made by the Reading Manufacturing Company. What his reason was for requiring this kind of pipe is of no importance. He wanted that and was entitled to it. It may have been a mere whim on his part, but even so, he had a right to this kind of pipe, regardless of whether some other kind, according to the opinion of the contractor or experts, would have been "just as good, better, or done just as well." He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless that condition be performed. Schultze v. Goodstein, 180 N.Y. 248, 73 N.E. 21; Spence v. Ham, supra; Steel S.&E.C. Co. v. Stock, 225 N.Y. 173, 121 N.E. 786; Van Clief v. Van Vechten, 130 N.Y. 571, 29 N.E. 1017; Glacius v. Black, 50 N.Y. 145, 10 Am. Rep. 449; Smith v. Brady, 17 N.Y. 173, and authorities cited on page 185, 72 Am. Dec. 442. The rule, therefore, of substantial performance, with damages for unsubstantial omissions, has no application. Crouch v. Gutmann, 134 N.Y. 45, 31 N.E. 271, 30 Am. St. Rep. 608; Spence v. Ham, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238.

What was said by this court in Smith v. Brady, supra, is quite applicable here:

> I suppose it will be conceded that every one has a right to build his house, his cottage or his store after such a model and in such style as shall best accord with his notions of utility or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner prefers a plain and simple Doric column, and has so provided in the agreement, the contractor has no right to put in its place the more costly and elegant Corinthian. If the owner, having regard to strength and durability, has contracted for walls of specified materials to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the

other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions on which payment is due have not been performed, then the right to demand it does not exist. To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements, which the just policy of the law does not permit. (17 N.Y. 186, 72 Am. Dec. 442).

I am of the opinion the trial court did not err in ruling on the admission of evidence or in directing a verdict for the defendant.

For the foregoing reasons I think the judgment of the Appellate Division should be reversed and the judgment of the Trial Term affirmed. . . .

Order affirmed, etc.

NOTES AND QUESTIONS

1. Is Cardozo holding that the Reading pipe clause was a mere promise and not a condition?

2. Traditionally, it is said that conditions "fail" and promises are "breached." This distinction is not religiously observed; note that Cardozo speaks of "breach of condition."

3. Corbin believes that it is wrong to state that substantial performance "satisfies the condition"; in his view substantial performance *is* the condition. Corbin §701.

4. The doctrine of substantial performance does not apply to *express* conditions; there must be strict compliance with express conditions. Oppenheimer v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 636 N.Y.S.2d 734, 660 N.E.2d 415 (1995). Considering that the following clause was in the contract (as reported in J. Dawson and W. Harvey, Cases on Contracts and Contract Remedies 744 (2d ed. 1969)), did Cardozo adhere to this doctrine?

> Any work furnished by the Contractor, the material or workmanship of which is defective or which is not fully in accordance with the drawings and specifications, in every respect, will be rejected and is to be immediately torn down, removed and remade or replaced in accordance with the drawings and specifications, whenever discovered.

5. If the owner of the house had some particular reason for desiring Reading pipe above all others, how should the clause be worded to make certain that no other pipe would do as well?

## *Problem 146*

When ordering supplies for the construction of the Dickens Orphanage, Mr. Bumble, president of the Bumble Construction Company,

saw that the specifications called for the installation of Reading pipe throughout the building. He told his clerk, Oliver, to order Cohoes pipe instead because it was cheaper and more or less the same thing as Reading pipe. When the directors of the orphanage learned of the substitution, they refused to make the final progress payment. Bumble sued. Who should prevail? See VRT, Inc. v. Dutton-Lainson Co., 530 N.W.2d 619 (Neb. 1995).

## FARNSWORTH §8.15

It is in society's interest to accord each party to a contract reasonable security for the protection of that party's justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for avoiding its contractual obligations. If the other party relied on the agreement, by performance or otherwise, "keeping the deal together" avoids the risk of forfeiture. Courts encourage this course as long as it will not seriously disappoint justified expectations. They do this by allowing the injured party to suspend performance only if the breach is *material,* that is, sufficiently serious to warrant this response. They curb abuse of this power to suspend by denying the injured party the power to exercise it if the breach is immaterial, so that minor breaches will not disrupt performance. Courts also encourage the parties to keep the deal together by allowing the injured party to terminate the contract only after an appropriate length of time has passed. They restrain abuse of this power to terminate by denying the injured party the power to exercise it hastily, so that not all delays will bring the contract to an end, and the party in breach will be afforded some time to cure its breach. An injured party that chooses to exercise a right of self-help either by suspending or by electing to terminate takes the risk taht a court may later regard the exercise as precipitous. According to the Supreme Court of Michigan, that party's decision "is fraught with peril, for should such determination, as viewed by a later court in the calm 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." [From Walker & Co. v. Harrison, 347 Mich. 630, 635, 81 N.W.2d 352, 355 (1957).]

[Farnsworth, in this same section, goes on to explain that if there has been a material breach, the injured party has the choice of accepting the breach as *total,* and terminating any remaining duty of performance, or as treating the breach merely as *partial,* and continuing to perform while reserving the right to sue for damages caused by the breach.]

## *Problem 147*

When Howard Mortus signed up for a $1 million life insurance policy from the Norisk Insurance Company he was able to make only a small down payment. For the bulk of the initial premium, he gave the insurance

company a promissory note payable on July 1, 2010, six months from the date the insurance became effective. He became ill early in 2010 and failed to make the payment in July as he had promised. He died on September 25 of that year. The company had not contacted him in any way between the first of July and his death. Must Norisk pay his estate the $1 million or is his failure to make the July payment an excusing event?

### *Problem 148*

Tracthouses, Inc., contracted with NewTown of New Jersey to build ten identical houses for $25,000 each on lots owned by NewTown.

(a) Tracthouses built the first three houses, but NewTown, financially embarrassed, was unable to make the payments. Advise Tracthouses what to do. Should it stop building and sue? Should it keep building and sue? If it does sue, should it sue for breach on the first three houses only or for all ten? See Pakas v. Hollingshead, 184 N.Y. 211, 77 N.E. 40 (1906).

(b) Tracthouses built nine of the houses perfectly, but had huge labor problems and could not complete the tenth, which it left in a half-finished condition. NewTown had agreed to pay when all ten houses were finished. Must it pay anything now that Tracthouses has defaulted? If Tracthouses is in material breach is it entitled to sue for anything?

## RESTATEMENT (SECOND) OF CONTRACTS

### §240. Part Performances as Agreed Equivalents

If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

## O. W. GRUN ROOFING & CONSTRUCTION CO. v. COPE
**Texas Court of Civil Appeals, 1975**
**529 S.W.2d 258**

Cadena, J. Plaintiff, Mrs. Fred M. Cope, sued defendant, O. W. Grun Roofing & Construction Co., to set aside a mechanic's lien filed by defendant and for damages in the sum of $1,500.00 suffered by plaintiff as a result of the alleged failure of defendant to perform a contract calling for the installation of a new roof on plaintiff's home. Defendant, in addition to a general denial, filed a cross-claim for $648.00, the amount which plaintiff agreed to pay defendant for installing the roof, and for foreclosure of the mechanic's lien on plaintiff's home.

Following trial to a jury, the court below entered judgment awarding plaintiff $122.60 as damages for defendant's failure to perform the contract; setting aside the mechanic's lien; and denying defendant recovery on its cross-claim. It is from this judgment that defendant appeals.

The jury found (1) defendant failed to perform his contract in a good and workmanlike manner; (2) defendant did not substantially perform the contract; (3) plaintiff received no benefits from the labor performed and the materials furnished by defendant; the reasonable cost of performing the contract in a good and workmanlike manner would be $777.60. Although the verdict shows the cost of proper performance to be $777.60, the judgment describes this finding as being in the amount of $770.60, and the award of $122.60 to plaintiff is based on the difference between $770.60 and the contract price of $648.00. . . .

The written contract required defendant to install a new roof on plaintiff's home for $648.00. The contract describes the color of the shingles to be used as "russet glow," which defendant defined as a "brown varied color." Defendant acknowledges that it was his obligation to install a roof of uniform color.

After defendant had installed the new roof, plaintiff noticed that it had streaks which she described as yellow, due to a difference in color or shade of some of the shingles. Defendant agreed to remedy the situation and he removed the nonconforming shingles. However, the replacement shingles do not match the remainder, and photographs introduced in evidence clearly show that the roof is not of a uniform color. Plaintiff testified that her roof has the appearance of having been patched, rather than having been completely replaced. According to plaintiff's testimony, the yellow streaks appeared on the northern, eastern and southern sides of the roof, and defendant only replaced the non-matching shingles on the northern and eastern sides, leaving the southern side with the yellow streaks still apparent. The result is that only the western portion of the roof is of uniform color.

When defendant originally installed the complete new roof, it used 24 "squares" of shingles. In an effort to achieve a roof of uniform color, five squares were ripped off and replaced. There is no testimony as to the number of squares which would have to be replaced on the southern, or rear, side of the house in order to eliminate the original yellow streaks. Although there is expert testimony to the effect that the disparity in color would not be noticeable after the shingles have been on the roof for about a year, there is testimony to the effect that, although some nine or ten months have elapsed since defendant attempted to achieve a uniform coloration, the roof is still "streaky" on three sides. One of defendant's experts testified that if the shingles are properly applied the result will be a "blended" roof rather than a streaked roof.

In view of the fact that the disparity in color has not disappeared in nine or ten months, and in view of the fact that there is testimony to the effect that it would be impossible to secure matching shingles to replace the nonconforming ones, it can reasonably be inferred that a roof of uniform coloration can be achieved only by installing a completely new roof.

The evidence is undisputed that the roof is a substantial roof and will give plaintiff protection against the elements.

The principle which allows recovery for part performance in cases involving dependent promises may be expressed by saying that a material breach or a breach which goes to the root of the matter or essence of the contract defeats the promisor's claim despite his part performance, or it may be expressed by saying that a promisor who has substantially performed is entitled to recover, although he has failed in some particular to comply with his agreement. The latter mode of expressing the rule is generally referred to as the doctrine of substantial performance and is especially common in cases involving building contracts, although its application is not restricted to such contracts.

It is difficult to formulate definitive rules for determining whether the contractor's performance, less than complete, amounts to "substantial performance," since the question is one of fact and of degree, and the answer depends on the particular facts of each case. But, although the decisions furnish no rule of thumb, they are helpful in suggesting guidelines. One of the most obvious factors to be considered is the extent of the nonperformance. The deficiency will not be tolerated if it is so pervasive as to frustrate the purpose of the contract in any real or substantial sense. The doctrine does not bestow on a contractor a license to install whatever is, in his judgment, "just as good." The answer is arrived at by weighing the purpose to be served, the desire to be gratified, the excuse for deviating from the letter of the contract and the cruelty of enforcing strict adherence or of compelling the promisee to receive something less than for which he bargained. Also influential in many cases is the ratio of money value of the tendered performance and of the promised performance. In most cases the contract itself at least is an indication of the value of the promised performance, and courts should have little difficulty in determining the cost of curing the deficiency. But the rule cannot be expressed in terms of a fraction, since complete reliance on a mathematical formula would result in ignoring other important factors, such as the purpose which the promised performance was intended to serve and the extent to which the nonperformance would defeat such purpose, or would defeat it if not corrected. See, generally, 3A Corbin, Contracts Secs. 700-707 (1960).

Issue

Rule

Factors to look at

Although definitions of "substantial performance" are not always couched in the same terminology and, because of the facts involved in a particular case, sometimes vary in the recital of the factors to be considered, the following definition by the Commission of Appeals in Atkinson v. Jackson Bros., 270 S.W. 848, 851 (Tex. Comm. App. 1925), is a typical recital of the constituent elements of the doctrine:

> To constitute substantial compliance the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them. Such performance permits only such omissions or deviations from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair

Question/Issue: whether the D's performance amounts to substantial considering that it's less-than-complete

Extent of the non-performance

the structure as a whole, and are remediable without doing material damage to other parts of the building in tearing down and reconstructing.

What was the general plan contemplated for the work in this case? What was the object and purpose of the parties? It is clear that, despite the frequency with which the courts speak of defects that are not "pervasive," which do not constitute a "deviation from the general plan," and which are "not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them," when an attempt is made to apply the general principles to a particular case difficulties are encountered at the outset. Was the general plan to install a substantial roof which would serve the purpose which roofs are designed to serve? Or, rather, was the general plan to install a substantial roof of uniform color? Was the object and purpose of the contract merely to furnish such a roof, or was it to furnish such a roof which would be of a uniform color? It should not come as a shock to anyone to adopt a rule to the effect that a person has, particularly with respect to his home, to choose for himself and to contract for something which exactly satisfies that choice, and not to be compelled to accept something else. In the matter of homes and their decoration, as much as, if not more than, in many other fields, mere taste or preference, almost approaching whimsy, may be controlling with the homeowner, so that variations which might, under other circumstances, be considered trifling, may be inconsistent with that "substantial performance" on which liability to pay must be predicated. Of mere incompleteness or deviations which may be easily supplied or remedied after the contractor has finished his work, and the cost of which to the owner is not excessive and readily ascertainable, present less cause for hesitation in concluding that the performance tendered constitutes substantial performance, since in such cases the owner can obtain complete satisfaction by merely spending some money and deducting the amount of such expenditure from the contract price.

In the case before us there is evidence to support the conclusion that plaintiff can secure a roof of uniform coloring only by installing a completely new roof. We cannot say, as a matter of law, that the evidence establishes that in this case that a roof which so lacks uniformity in color as to give the appearance of a patch job serves essentially the same purpose as a roof of uniform color which has the appearance of being a new roof. We are not prepared to hold that a contractor who tenders a performance so deficient that it can be remedied only by completely redoing the work for which the contract called has established, as a matter of law, that he has substantially performed his contractual obligation.

Point two asserts that the trial court erred in awarding plaintiff damages in the amount of $122.60 because such judgment is based on the answer to issue no. 5, and such special issue incorrectly referred to cost at the time of trial as opposed to the time of loss and, in any event, is not supported by any evidence. . . .

A witness testified that, at the time he installed the roof, a new roof of uniform color could have been installed for a cost of $648.00. He then testified that the cost of installing such a roof had increased by about 20