percent since that time. The figure at which the jury arrived in answer to issue 5 is equal exactly to $648.00 plus 20 percent, although the trial court, as already pointed out, lowered this amount by $7.00 for reasons not apparent from the record.

In its brief, defendant argues that it should be obvious that, in order to install another roof, it would not be necessary to replace the metal valleys, the metal trim and the Boston type ridges. This theory was not developed at the trial, a fact which defendant admits, at least tacitly, by its statement in the brief to the effect that the only testimony relating to the cost of replacing the roof was the testimony referred to in the preceding paragraph.

Point two is overruled.

Finally, defendant argues that it was entitled to judgment at least on the theory of quantum meruit on its cross claim because the evidence establishes as a matter of law that defendant installed a good weatherproof roof which was guaranteed for 15 years, and that such roof was installed properly in accordance with factory specifications and was of use and benefit to plaintiff.

The evidence does not conclusively establish that the shingles were properly installed. There is evidence to the effect that if shingles of this type are properly installed the result will be a roof which "blends," rather than a roof with clearly discordant streaks. In any event, the evidence does not conclusively establish that plaintiff has received any benefit from defendant's defective performance. As already pointed out, there is evidence that plaintiff will have to install a completely new roof. Because of defendant's deficient performance, plaintiff is now in a position which requires that she pay for a new roof.

Nor does the evidence conclusively establish that plaintiff accepted the claimed benefit. She complained immediately and has expressed dissatisfaction at all times. We cannot infer an acceptance from the fact that plaintiff continued to live in the house. She was living in the house before defendant installed the new roof, and we know of no rule which would require that, in order to avoid a finding of implied acceptance, plaintiff was obligated to move out of her home.

The judgment of the trial court is affirmed.

NOTE ON SUBSTANTIAL PERFORMANCE vs. MATERIAL BREACH

The doctrine of substantial performance was developed in order to deal with the potentially harsh effect of constructive conditions. Even the breaching party can still recover under the contract if that party's performance is substantial, with any remaining defects in performance recompensed by a setoff for the damages caused. If substantial performance has not occurred, the breaching party is stripped of the ability to sue on the contract and is limited to a remedy in quasi-contract, with damages measured by the excess of benefit conferred over and above harm caused, the contract price being the upper limit. See the discussion of quasi-contract in Chapter 3, pages 326-333.

Instead of determining whether there was substantial performance the court may determine whether the failure to perform is a material breach. The one being the opposite of the other, Tweedle Dum and Tweedle Dee. If X has materially breached, he has not substantially performed. If X has substantially performed, he has not materially breached.

When is there a failure of substantial performance; when is there a material breach? "The considerations in determining whether performance is substantial are those listed in §241 for determining whether a failure is material." Comment d to §237, Restatement (Second) of Contracts. According to the Restatement, those considerations are as follows:

§241. Circumstances Significant in Determining Whether a Failure Is Material

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

For a discussion of these Restatement (Second) criteria see Milner Hotels, Inc. v. Norfolk & Western Ry. Co., 822 F. Supp. 341 (S.D.W.V. 1993).

Article 25 of the United Nations Convention on Contracts for the International Sale of Goods borrows from civil law the concept of "fundamental breach." Fundamental breach is similar to material breach in the Restatement.

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result.

On a finding of fundamental breach, the aggrieved party is given a broader range of remedies (including contract termination) than for nonfundamental breaches. See, e.g., Articles 49, 51(2), 64, 72, 73.

Returning to the common law, what effect is to be given to a "willful" breach or, in the language of the Restatement, a breach that does not comport with good faith and fair dealing? Compare *Jacob* with §241 of the Restatement. What does bad faith mean in this context? If a contractor has

promised to use number 30 nails and instead uses number 20 nails, is that a bad faith breach? Always? Sometimes?

CARTER v. SHERBURNE CORP.
Vermont Supreme Court, 1974
132 Vt. 88, 315 A.2d 870

SHANGRAW, C.J. This is an appeal by the defendant from a judgment of the Rutland County Court. The subject matter of the litigation is work done and materials furnished by the plaintiff in connection with a development of the defendant's near Sherburne Mountain. The plaintiff claimed that he was not fully paid for labor and materials furnished under written contracts, and that he was entitled to further amounts on a quantum meruit basis for labor and materials furnished without express agreement as to price. The defendant claimed defective performance and payment for everything due, and asserted a counterclaim for expense necessitated by plaintiff's alleged failure to fulfill contractual commitments. The Court found that plaintiff was in substantial compliance under his contracts, that the defendant had no right to terminate the contracts, and that the defendant's counterclaim was without foundation. The Court also found that the plaintiff performed other work for the defendant without compensation under a promise for additional work which was not fulfilled by the defendant. Plaintiff was awarded various sums for unpaid invoices, payment for other work done for the defendant, and interest. The defendant corporation has appealed.

The facts as found by the Court are, in substance, as follows:

There were four written contracts between the parties covering (a) the furnishing and placing of gravel on one road, (b) the drilling and blasting of rock on various residential roads, (c) road construction, and (d) the cutting and grubbing of a gondola lift-line. The contracts called for weekly progress payments based upon work completed with a provision for retaining 10 percent until ten days after final acceptance. The billings from the plaintiff to the defendant amounted to $52,571.25, of which $41,368.05 was paid by the defendant. The difference between the $52,571.25 billed, and $41,368.05 paid, comprised $4,596.45 retained by the defendant under its holdback provision, and adjustments claimed by the defendant of $6,606.75. The Court found that adjustments in the amount of $4,747.25 was improperly taken by the defendant and that amount was decreed to the plaintiff. In addition the Court found that the plaintiff was entitled to all the retainage held by the defendant.

As to the defendant's contention that the plaintiff's performance was unsatisfactory and, in particular, that the plaintiff failed to abide by the completion schedules in the contracts, the Court found that on the whole, the plaintiff rendered substantial performance under the contracts without major complaints from the defendant up to the time it terminated the contracts. The Court found further, that time was not of the essence of the contracts, that many of the delays were due to the directions of the defendant in constantly shifting the plaintiff's activities from one contract to another, and that other delays were financial in origin, in that plaintiff had

difficulty meeting his outstanding obligations because of payments withheld by the defendant without justification.

The Court also found that the defendant's representatives promised the plaintiff extensive additional work contracts, that in return for this promise the plaintiff agreed to do certain work without compensation, that the plaintiff did in fact do some of this work, and that the additional work promised by the defendant was not awarded to the plaintiff. The Court held that the plaintiff was justified in his reliance on defendant's promise, and that he could recover his expenses and the value of his services from the defendant on a quantum meruit basis.

Defendant claims the Court erred in its ruling that the plaintiff was in substantial compliance under his contracts and in its finding that the plaintiff was entitled to recover certain sums under the gondola lift-line contract. In addition, defendant claims that the Court was in error in allowing the plaintiff recovery on a quantum meruit basis as parole evidence was improperly admitted, and the recovery granted was not in accordance with the terms of the contract. . . .

The defendant's primary contention is that the Court's ruling that the plaintiff was in substantial compliance under his contracts is error. The contention is that this ruling was based on the erroneous conclusion that time was not of the essence of the contracts, and that as time was of the essence and plaintiff failed to perform within the time specified, plaintiff was not in substantial compliance and defendant is entitled to the amounts withheld as retainage.

Where time is of the essence, performance on time is a constructive condition of the other party's duty, usually the duty to pay for the performance rendered. Jones v. United States, 96 U.S. 24 (1877). Time may be made of the essence of a contract by a stipulation to that effect, Cheney v. Libby, 134 U.S. 68 (1890), or by any language that expressly provides that the contract will be void if performance is not within a specified time. Sowles v. Hall, 62 Vt. 247, 20 A. 810 (1890). Where the parties have not expressly declared their intention, the determination as to whether time is of the essence depends on the intention of the parties, the circumstances surrounding the transaction, and the subject matter of the contract. Kennedy v. Rutter, 110 Vt. 332, 6 A.2d 17 (1939).

As a general rule, time is not of the essence in a building or construction contract in the absence of an express provision making it such. 13 Am. Jur. 2d Building and Construction Contracts §47.

> Construction contracts are subject to many delays for innumerable reasons, the blame for which may be difficult to assess. The structure . . . becomes part of the land and adds to the wealth of its owner. Delays are generally foreseen as probable; and the risks thereof are discounted. . . . The complexities of the work, the difficulties commonly encountered, the custom of men in such cases, all these lead to the result that performance at the agreed time by the contractor is not of the essence. 3A A. Corbin, Contracts §720, at 377 (1960).

We conclude, then, that time was not of the essence of any of the contracts considered here. None of the four contracts included express

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language making time of the essence, and we can find nothing in the circumstances surrounding these contracts that would lift them out of the operation of the general rule. Two of the contracts called for completion dates and forfeitures for non-completion on schedule, but the inclusion of dates in construction contracts does not make time of the essence. De Sombre v. Bickel, 18 Wis. 2d 390, 118 N.W.2d 868 (1963). Moreover, the inclusion of penalty or forfeiture provisions for non-completion on schedule is strong evidence that time is not of the essence and that performance on time is not a condition of the other party's duty to accept and pay for the performance rendered. 3A A. Corbin, Contracts §720 (1960).

Ordinarily, in contracts where time is not of the essence, a failure to complete the work within the specified time will not terminate the contract, but it will subject the contractor to damages for the delay. See 13 Am. Jur. 2d Building and Construction Contracts §47. However, in this case, most of the delays were due to the actions of the defendant corporation in constantly shifting the plaintiff's activities from one contract to another, cf. 17A C.J.S. Contracts §502(4), and in improperly withholding the plaintiff's payments. Cf. Orange, Alexandria and Manassas R. R. Co. v. Placide, 35 Md. 315 (1871). Delay in the performance of a contract will, as a rule be excused where it is caused by the act or default of the opposite party, Schneider v. Saul, 224 Md. 454, 168 A.2d 375 (1961); District of Columbia v. Camden Iron Works, 181 U.S. 453 (1901); 17 Am. Jur. 2d Contracts §389; 13 Am. Jur. 2d Building and Construction Contracts §48, or by the act or default of persons for whose conduct the opposite party is responsible. See Annot. 152 A.L.R. 1390 (1944). Where this is the case, the contractor will not be held liable, under a provision for liquidated damages or otherwise, for his non-compliance with the terms of the contract; See Wallis v. Wenham, 204 Mass. 83, 90 N.E. 396 (1910); Boylston Housing Corp. v. O'Toole, 321 Mass. 538, 74 N.E.2d 288, 172 A.L.R. 1251 (1947); Annot. 152 A.L.R. 350 (1944); and his non-compliance will not be considered a breach. See District of Columbia v. Camden Iron Works, supra. An obligation of good faith and fair dealing is an implied term in every contract, H. P. Hood and Sons v. Heins, 124 Vt. 331, 205 A.2d 561 (1964); Shaw v. E. I. DuPont De Nemours & Co., 126 Vt. 206, 226 A.2d 903 (1967), and a party may not obstruct, hinder, or delay a contractor's work and then seek damages for the delay thus occasioned.

Defendant also disputes the Court's conclusions with respect to the gondola lift-line contract. Defendant informed the plaintiff in April, 1968, that no more progress payments would be made on the gondola contract. At that time, plaintiff had completed a substantial portion of the contracted work, but had not yet invoiced it. After defendant's notice, plaintiff continued to work on the lift-line, but was forced to stop for financial reasons. Defendant claims that the plaintiff is not entitled to recover for work done or invoiced after the notice concerning termination of payments.

Defendant's April notice concerned only the progress payments due the plaintiff. It was not a notice of contract termination. In the absence of a total disavowal of the contract, failure of payment does not require an immediate cessation of performance. Williams v. Carter, 129 Vt. 619, 285 A.2d 735 (1971). The contracts between the plaintiff and the defendant

were not terminated until June of 1968. The termination was without legal justification, and the plaintiff is entitled to recover the contract price for all work done before the termination date. . . .

With respect to the recovery granted the plaintiff, failure to perform the agreed exchange gives rise to several remedies, one of which is recovery on a quantum meruit basis. An action in quantum meruit is distinct from one for damages. Its purpose is to require the wrongdoer to restore what he has received from the plaintiff's performance of the contract, Gilman v. Hall, 11 Vt. 510 (1839), and the measure of recovery is the reasonable value of the performance rendered, uncontrolled by the contract price or by any other terms of the express contract. Derby v. Johnson, 21 Vt. 17 (1848); 5 A. Corbin, Contracts §§1112, 1113 (1964). The Court's finding and conclusions are therefore correct.

Judgment affirmed.

Problem 149

Scarlett agreed to sell her ancestral home, Tara, to Rhett if he brought the entire payment in cash to Tara between the hours of noon and one o'clock tomorrow. The next day he arrived with the proper amount at 1:23 P.M. and tendered the money. By this time she had changed her mind and refused to go through with the deal. If he sued in equity, asking for specific performance after paying the money into court, would you, as judge, grant him relief? See Farnsworth §8.7

Problem 150

The Lincoln Railway Company ordered 12 shipments of split rails from the Douglas Timber Corporation, contracting for the delivery of one shipment per month of 500 rails each. The shipments were to be delivered by the end of the first week of each month for a one-year period. The first shipment arrived on time, but contained only 497 rails. May Lincoln Railway refuse to accept? Cancel the contract? See UCC §2-612. The next month Douglas Timber shipped 500 rails, but they arrived on the ninth day of the month. May Lincoln Railway reject? If Lincoln Railway refused to pay for the second shipment until Douglas Timber provided evidence of its ability to make future shipments in the proper quantity and on time, and Douglas Timber refused to make further shipments until Lincoln Railway paid for the second, who is in breach here? See UCC §2-609. What should have been done, and by whom? See UCC §1-207 [§1-308 in the revised version of Article 1]. The leading classic case on delivery problems in installment contracts is Norrington v. Wright, 115 U.S. 188 (1885).

The substantial performance rule has never (at least in theory) applied to single-delivery contracts between merchants. Learned Hand

once stated that "There is no room in commercial contracts for the doctrine of substantial performance." Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185, 186 (2d Cir. 1926). Instead the common law, and now §2-601 of the Uniform Commercial Code require that seller make a "perfect tender" of the goods, and if this doesn't happen, the buyer is given the option to accept the defective tender or reject it. Read UCC §§2-601, 2-602, 2-606, and 2-607.

PRINTING CENTER OF TEXAS, INC. v. SUPERMIND PUBLISHING CO.

Texas Court of Appeals, 1984
669 S.W.2d 779

CANNON, J. Appellee sued appellant for refund of a deposit made under a written contract to print 5,000 books entitled "Supermind Supermemory." Appellee alleged that it rightfully rejected the books upon delivery under Tex. Bus. & Com. Code Ann. §2.601 (Tex. UCC) (Vernon 1968) and that it has a right to cancel the contract and recover the part of the purchase price paid under Tex. Bus. & Com. Code Ann. §2.711 (Tex. UCC) (Vernon 1968). The trial court awarded appellee refund of its $2,900 deposit and $3,000 as reasonable attorney's fees on the verdict of the jury.

This appeal raises issues concerning: 1) whether appellee laid the proper predicate for admission of an attorney's billing statement as proof of reasonable attorney's fees under Tex. Rev. Civ. Stat. Ann. art. 3737e (Vernon Supp. 1982-1983); 2) whether the evidence was legally and factually sufficient to support the jury's finding that the books failed to conform to the contract; and 3) whether the judgment of the trial court is void because it did not have jurisdiction to award a judgment in excess of its maximum jurisdictional limit. We affirm the judgment of the trial court.

We note that appellee may have tried this suit on the wrong legal theory and if so, the judgment of trial court is not supported by the jury findings. The parties tried this suit on the assumption that the provisions of the Texas Uniform Commercial Code governed their contract for the printing of books. Chapter 2 of the Business and Commerce Code is limited to transactions involving the sale of goods. Tex. Bus. & Com. Code Ann. §2.102 (Vernon 1968). A contract to print books involves the sale of both goods and services. The printer sells goods which consist of paper and ink and services consisting of binding, typesetting, proofing, etc. "In such hybrid transactions, the question becomes whether the dominant factor or essence of the transaction is the sale of materials or of services." G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982).

It appears to us that the services are the essence or the dominant factor of a printing contract; therefore, Chapter 2 of the Business and Commerce Code would not apply. Special issue number one inquired of the jury whether the books delivered to appellee failed in any respect to conform to the contract. The affirmative answer to this issue does not give the purchaser a right to reject and to recover a refund of the purchase price under the common law of contracts as it would under Chapter 2 of the Code.

Appellant has not assigned a point of error as to whether the trial court's judgment is supported by the verdict of the jury. Therefore any error concerning this point is waived. Tex. R. Civ. P. 418; State Farm Mutual Automobile Ins. Co. v. Cowley, 468 S.W.2d 353 (Tex. 1971). We indulge in the doubtful assumption that Chapter 2 of the Business and Commerce Code governs the contract between parties to enable us to adequately consider appellant's points of error. . . .

Appellant contends in its second point of error that jury finding that the books failed to conform to the contract is so against the great weight and preponderance of the evidence as to be manifestly unjust. In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952). This finding is related to whether appellee had a right to reject the books under Tex. Bus. & Com. Code Ann. §2.601 (Vernon 1968) which states in part:" . . . if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may (1) reject the whole. . . ."

This provision has been called the perfect tender rule because it supposedly allows a buyer to reject whenever the goods are less than perfect. This statement is not quite accurate; under §2-601 the tender must be perfect only in the sense that the proffered goods must conform to the contract in every respect. Conformity does not mean substantial performance; it means complete performance. The longstanding doctrine of sales law that "there is no room in commercial contracts for the doctrine of substantial performance" is carried forward into §2.601 of the Code. Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185, 186 (2d Cir. 1926); see also 50 Tex. Jur. 2d Sales §210 and §211 (1970). We reject the holding of the court in Del Monte Corp. v. Martin, 574 S.W.2d 597 (Tex. Civ. App. — San Antonio, no writ), that a special issue which inquired whether plaintiff substantially complied with the terms of the contract was a correct form of submission to determine whether defendant had a right to reject the goods tendered under the sales contract. Substantial compliance is not the legal equivalent of conformity with the contract under §2.601.

In analyzing whether tendered goods are conforming, the contract of the parties must first be determined. "Conform" is defined in Tex. Bus. & Com. Code Ann. §2.106(b) (Vernon 1968), as "in accordance with the obligations under the contract." The contract of the parties includes more than the words used by the parties. It encompasses "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in the Code." Bus. & Com. Code Ann. §1.201(11) and §1.201(3). Thus, the terms of a contract may be explained and supplemented through trade usage, but it may not be used to contradict an express term. Bus. & Com. Code Ann. §2.202. The existence and scope of trade usage must be proved as facts. Bus. & Com. Code Ann. §1.205(b). A buyer has a right to reject goods under §2.601 if the goods fail to conform to either the express or implied terms of the contract.

Once the contract of the parties has been determined, the evidence must be reviewed to see if the right goods were tendered at the right time and place. If the evidence does establish nonconformity in some respect, the buyer is entitled to reject if he rejects in good faith. Bus. & Com. Code

Ann. §1.203 provides that, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Since the rejection of goods is a matter of performance, the buyer is obligated to act in good faith when he rejects the goods. Where the buyer is a merchant, his standard of good faith rejection requires honesty in fact and observance of reasonable commercial standards of fair dealing in the trade. Tex. Bus. & Com. Code Ann. §2.103(2). If the seller alleges that the buyer rejected in bad faith, the seller has the burden of proof on this issue. Evidence of circumstances which indicate that the buyer's motivation in rejecting the goods was to escape the bargain, rather than to avoid acceptance of a tender which in some respect impairs the value of the bargain to him, would support a finding of rejection in bad faith. Neumiller Farms Inc. v. Cornett, 368 So. 2d 272 (Ala. 1979). Thus, evidence of rejection of the goods on account of a minor defect in a falling market would in some instances be sufficient to support a finding that the buyer acted in bad faith when he rejected the goods.

The written contract between the parties which is expressed in a bid proposal dated July 31, 1981 covers only essential terms such as quantity, trim size, and type of paper and cover. The type of paper specified in the contract was thirty pound white newsprint. Appellee's witness testified that he was shown a sample of the newsprint to be used and that the tendered books were not the same color as the sample. The witness stated the pages of the books were gray while the sample was white. This testimony is evidence of nonconformity because any sample which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample. Tex. Bus. & Com. Code Ann. §2.313(a)(3) (Tex. UCC) (Vernon 1968).

Other nonconformities which appellee alleges and offers proof of are off center cover art, crooked pages, wrinkled pages and inadequate perforation on a pull out page. The contract does not expressly address any of these matters. Although evidence of trade usage may have indicated that these conditions are contrary to the standards of commercial practice within the publishing industry, appellant failed to offer evidence of trade usage to supplement the contract. However, appellant knew that appellee wanted the books printed for sale to the public. In these circumstances, it is implied in the contract that the books be commercially acceptable and appealing to the public. Section 2.314 Tex. Bus. & Com. Code Ann. (Tex. UCC) (Vernon 1968) states that a warranty that the goods shall be merchantable is implied in a contract for their sale and that for goods to be merchantable, they must pass without objection in the trade and be fit for the ordinary purposes for which such goods are used. A jury could reasonably conclude that books with crooked and wrinkled pages, off center cover art, and inadequate perforation are not fit for sale to the public. We find sufficient evidence to support the jury's finding that the books did not conform to the contract.

Appellant contends that if nonconformities exist, they are minor and that appellee rejected the books in bad faith. Appellant has failed to carry its burden to prove that appellee rejected the books in bad faith. First, we do not agree with appellant's contention that the alleged nonconformities

should be classified as minor. Second, there is no evidence which indicates that appellee's primary motivation in rejection of the books was to escape a bad bargain. We also note that appellant has waived its defense of rejection in bad faith by its failure to request an issue on this defense, because it has not conclusively established it under the evidence. Tex. R. Civ. P. 279.

Appellant's second point of error is overruled.

. . . Points of error three and four are overruled.

The judgment of the trial court is affirmed.

CAPITOL DODGE SALES v. NORTHERN CONCRETE PIPE, INC.

Michigan Court of Appeals, 1983
131 Mich. App. 149, 346 N.W.2d 535

PETERSON, J. Defendant appeals by leave granted from a district court judgment, affirmed on appeal to the circuit court, awarding plaintiff damages for breach of contract for sale of a new 1979 Dodge pickup truck.

Defendant claims that the trial court erred in finding that it had accepted the truck and in concluding that it had thereafter wrongfully attempted a revocation of the sale. We agree, finding that the evidence shows no acceptance within the meaning of the Uniform Commercial Code, MCL 440.2606; MSA 19.2606, and that defendant had an absolute right to reject the truck, MCL 440.2601; MSA 19.2601.

The evidence shows that on November 8 or 9, 1978, an officer of defendant, William Washabaugh, called at plaintiff's place of business to discuss the possible purchase of a pickup truck with a snowplow attachment. The truck in question was of the type desired and plaintiff's salesman, John Fuller, took Mr. Washabaugh for a test drive in the vehicle. Washabaugh liked the truck. However, before the test drive was completed, the engine overheated. There was a conflict in the testimony of Fuller and Washabaugh which was not addressed by the opinion of the trial judge: Washabaugh testified that the temperature gauge was "all the way over" and that there was steam coming from under the hood; Fuller testified that the truck was just running warm, that there was no overheating, and that he saw no steam coming from the engine compartment.

Whichever version is correct, the significant fact is that the topic of engine overheating was specifically addressed by Fuller and Washabaugh. Washabaugh expressed concern about the matter, and indicated past experience with other vehicles suffering engine damage from overheating. Fuller said that overheating resulted from incorrect positioning of the snowplow blade in front of the radiator. Washabaugh was willing to buy the truck if Fuller's statement was correct. Fuller assured him that that was in fact the case, documents of purchase were executed, and Washabaugh gave Fuller a check for the full payment of the purchase price. They agreed that employees of defendant would pick up the truck the following day and that they would be instructed on the proper positioning of the plow blade.

On the following day, Stanley Reid and Leon LaFave came to plaintiff's place of business to pick up the truck for defendant. Fuller personally

showed them how to properly position the blade, and it was so positioned in Fuller's presence before Reid and LaFave left for defendant's place of business near Potterville. When they arrived there, the engine was overheating and steaming. A mechanic employed by defendant could find no apparent defects from a visual inspection, so a telephone call was made to plaintiff's office. An employee in plaintiff's service department advised rechecking the blade position, refilling the radiator, and taking the truck out for another drive. This was done. Reid and LaFave drove to Potterville, about two miles from defendant's place of business, and back. The engine again overheated, the temperature gauge rose to the maximum, and there was an eruption of water and steam.

LaFave again called plaintiff's office and was told to bring the truck into plaintiff's service department. He did so, and when he arrived the engine was again overheating and steaming. He was told that the problem might be with a thermostat but that the truck would be ready and could be picked up the following afternoon.

On the next afternoon (the third day, be it November 10 or 11), LaFave went to Lansing and picked up the truck. He was told that a radiator cap had been replaced. By the time he got back to defendant's place of business, the engine was again overheating. On Washabaugh's orders, LaFave immediately notified plaintiff by telephone that defendant was not taking the truck, that payment was being stopped on the check, and that plaintiff should come get the truck. Plaintiff sent a wrecker and crew that evening and towed the truck back to its lot.

In the following days, plaintiff did nothing to the truck by way of inspection or repair. It was left sitting on plaintiff's lot. On November 15 or 16, the purchase and registration documents were taken by plaintiff to a branch office of the Secretary of State. On November 15 or 16, plaintiff received notice from its bank that defendant had stopped payment on the check.

Title to the truck was issued in defendant's name by the Secretary of State on December 1, 1978. Both parties retained counsel, and defendant made an effort to tender title to plaintiff so the truck could be resold. Plaintiff rejected the tender, taking the position that the transaction was complete and that it could not resell the truck because defendant held title, and commenced this suit.

. . . [T]he opinion of the trial judge contains no findings of fact, discussion, or conclusion as to an acceptance of the truck by defendant within the meaning of the Uniform Commercial Code, although the conclusion that acceptance had occurred can be implied from the opinion's statement of the issues as being: (1) whether the defendant had sustained the burden of proving the truck defective so as to justify a revocation after acceptance; (2) if the truck was defective, whether plaintiff was given an opportunity to seasonably cure the defect; and (3) whether plaintiff had a duty to resell the truck.

We find the trial judge's decision on such issues inapposite, holding that on these facts the implied finding that there had been an acceptance of the truck by defendant is erroneous.

The Uniform Commercial Code, §2-606 (MCL 440.2606; MSA 19.2606), provides:

> (1) Acceptance of goods occurs when the buyer
>
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
> (b) fails to make an effective rejection (subsection (1) of section 2602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
> (c) does any act inconsistent with the seller's ownership; but if such an act is wrongful as against the seller it is an acceptance only if ratified by him.
>
> (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

This language, in defining what constitutes an acceptance, clearly contemplates an act of the buyer beyond taking delivery or possession of the goods. Possession during the time necessary for the "reasonable opportunity" to inspect is contemplated prior to acceptance. Similarly, §2-602 of the code allows a rejection of goods for nonconformance "within a reasonable time *after their delivery.*" Thus, while transfer of possession or title may be acts bearing on the question of acceptance, they are not in themselves determinative thereof. White & Summers, Handbook of the Law under the Uniform Commercial Code (2d ed.), §8-2, p. 296. . . .

Zabriskie [Zabiske Chevrolet v. Smith, 228 A.2d 848 (D.C. 1967)] is pertinent for two reasons. In the first place, when dealing with acceptance under the UCC, it speaks to the relationship between the manufacturer and seller of complex machines or devices on the one hand and the dependent buyer on the other hand. The buyer may be expert in the use of the machine or device but he generally has no expertise as to the mechanical, electronic, chemical, and engineering components that combine to produce the intended performance. *Zabriskie* recognized this buyer dependency on the seller's expertise in holding that something more than a mere visual inspection is appropriate before the buyer can be held to have accepted the machine. We agree. A "reasonable time to inspect" under the UCC must allow an opportunity to put the product to its intended use, or for testing to verify its capability to perform as intended.

Zabriskie is also important for its holding that the adoption of the Uniform Commercial Code, §2-601, which provides that the buyer may reject goods which "fail in any respect to conform to the contract," creates a "perfect tender" rule replacing pre-code cases defining performance of a sales contract in terms of substantial compliance. We agree with that construction of the code. . . .

In the instant case, there was no acceptance. Nothing that defendant did can be construed under §2-606(1)(a), as signifying, after a reasonable

opportunity to inspect, that the truck conformed or that defendant would retain the truck in spite of its nonconformity. Defendant had the absolute right to reject the truck for nonconformity within a reasonable time, and to seasonably notify the plaintiff thereof. MCL 440.2602; MSA 19.2602. It did so.

Reversed and remanded for entry of judgment in favor of defendant. Costs to defendant.

NOTES AND QUESTIONS

1. What exactly is the difference between the substantial performance limitation and the good faith limitation on rejection that the court finds in *Printing Center?*

2. Do you feel the court in *Capitol Dodge* would have necessarily arrived at a different decision under the facts of *Printing Center?*

If the buyer of goods has clearly made an "acceptance" of them as that term is defined in §2-606, the buyer may no longer reject the goods under §2-602. But if the buyer subsequently discovers a major defect with the goods, may the buyer avoid the contract? The common law would give relief under the idea of rescission, but the Uniform Commercial Code avoids using that term and instead calls the avoidance mechanism "revocation of acceptance." Read §2-608.

COLONIAL DODGE, INC. v. MILLER
Michigan Supreme Court, 1984
420 Mich. 452, 362 N.W.2d 704

KAVANAGH, J. This case requires the court to decide whether the failure to include a spare tire with a new automobile can constitute a substantial impairment in the value of that automobile entitling the buyer to revoke his acceptance of the vehicle under MCL 440.2608; MSA 19.2608.

We hold it may and reverse.

On April 19, 1976, defendant Clarence Miller ordered a 1976 Dodge Royal Monaco station wagon from plaintiff Colonial Dodge which included a heavy-duty trailer package with extra wide tires.

On May 28, 1976, defendant picked up the wagon, drove it a short distance where he met his wife, and exchanged it for her car. Defendant drove that car to work while his wife returned home with the new station wagon. Shortly after arriving home, Mrs. Miller noticed that their new wagon did not have a spare tire. The following morning defendant notified plaintiff that he insisted on having the tire he ordered immediately, but when told there was no spare tire then available, he informed the salesman for plaintiff that he would stop payment on the two checks that were tendered as the purchase price, and that the vehicle could be picked

up from in front of his home. Defendant parked the car in front of his home where it remained until the temporary ten-day registration sticker had expired, whereupon the car was towed by the St. Clair police to a St. Clair dealership. Plaintiff had applied for license plates, registration, and title in defendant's name. Defendant refused the license plates when they were delivered to him.

According to plaintiff's witness, the spare tire was not included in the delivery of the vehicle due to a nation-wide shortage caused by a labor strike. Some months later, defendant was notified his tire was available.

Plaintiff sued defendant for the purchase price of the car. On January 13, 1981, the trial court entered a judgment for plaintiff finding that defendant wrongfully revoked acceptance of the vehicle. The Court of Appeals decided that defendant never accepted the vehicle under MCL 440.2606; MSA 19.2606 of the Uniform Commercial Code and reversed. 116 Mich. App. 78, 85; 322 N.W.2d 549 (1982). On rehearing, the Court of Appeals, noting the trial court found the parties had agreed that there was a valid acceptance, affirmed the trial court's holding there was not a substantial impairment in the value sufficient to authorize defendant to revoke acceptance of the automobile.

D's argument never accepted

P's arg.

Defendant argues that he never accepted the vehicle under MCL 440.2606; MSA 19.2606, claiming mere possession of the vehicle is not sufficient according to the UCC. Plaintiff contends defendant did accept the vehicle by executing an application for Michigan title and driving the vehicle away from the dealership. The trial court stated "[t]he parties agree that defendant Miller made a valid acceptance of the station wagon under §2.606 of the Uniform Commercial Code. . . ."

We are not persuaded that, had the matter been contested in the trial court, a finding of acceptance would be warranted on this record. However, since defendant did not submit the question to the trial judge, but in effect stipulated to acceptance, we will treat the matter as though there was acceptance.

* We are satisfied defendant made a proper revocation under MCL 440.2608(1)(b); MSA 19.2608(1)(b). This section reads:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Plaintiff argues the missing spare tire did not constitute a substantial impairment in the value of the automobile, within the meaning of MCL 440.2608(1); MSA 19.2608(1). Plaintiff claims a missing spare tire is a trivial defect, and a proper construction of this section of the UCC would not permit defendant to revoke under these circumstances. It maintains that since the spare tire is easy to replace and the cost of curing the nonconformity very small compared to the total contract price, there is no substantial impairment in value.

However, MCL 440.2608(1); MSA 19.2608(1) says "[t]he buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value *to him*. . . ." (Emphasis added.) Number two of the Official Comment to MCL 440.2608; MSA 19.2608 attempts to clarify this area. It says that

> [r]evocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

We cannot accept plaintiff's interpretation of MCL 440.2608(1); MSA 19.2608(1). In order to give effect to the statute, a buyer must show the nonconformity has a special devaluing effect on him and that the buyer's assessment of it is factually correct. In this case, the defendant's concern with safety is evidenced by the fact that he ordered the special package which included special tires. The defendant's occupation demanded that he travel extensively, sometimes in excess of 150 miles per day on Detroit freeways, and often in the early morning hours. Mr. Miller testified that he was afraid of a tire going flat on a Detroit freeway at 3 A.M. Without a spare, he testified, he would be helpless until morning business hours. The dangers attendant upon a stranded motorist are common knowledge, and Mr. Miller's fears are not unreasonable.

spare tire is a substantial impairment for the D even if the $ value of it is only trivial-

We hold that under the circumstances the failure to include the spare tire as ordered constituted a substantial impairment in value to Mr. Miller, and that he could properly revoke his acceptance under the UCC.

That defendant did not discover this nonconformity before he accepted the vehicle does not preclude his revocation. There was testimony that the space for the spare tire was under a fastened panel, concealed from view. This out-of-sight location satisfies the requirement of MCL 440.2608(1)(b); MSA 19.2608(1)(b) that the nonconformity be difficult to discover.

MCL 440.2608(2); MSA 19.2608(2) requires that the seller be notified of the revocation of acceptance and that it occur within a reasonable time of the discovery of the nonconformity. Defendant notified plaintiff of his revocation the morning after the car was delivered to him. Notice was given within a reasonable time.

Plaintiff argues that defendant failed to effectively revoke acceptance because he neglected to sign over title to the car to plaintiff.

Defendant, however, had no duty to sign over title absent a request from plaintiff that he do so. Under MCL 440.2608(3); MSA 19.2608(3), "[a]

buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." And a buyer who has rejected goods in his possession "is under a duty . . . to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but the buyer has no further obligations with regard to the goods. . ." MCL 440.2602(1)(b) and (c); MSA 19.2602(1)(b) and (c). Defendant's notice to plaintiff and holding of the car pending seller's disposition was sufficient under the statute, at least in the absence of evidence that defendant refused a request by the plaintiff to sign over title.

Plaintiff contends defendant abandoned the vehicle, denying it any opportunity to cure the nonconforming tender as prescribed in MCL 440.2508; MSA 19.2508. We find that defendant's behavior did not prevent plaintiff from curing the nonconformity. Defendant held the vehicle and gave notice to the plaintiff in a proper fashion; he had no further duties.

Reversed.

RYAN, J. (dissenting). I dissent.

While I agree that MCL 440.2608(1)(b); MSA 19.2608(1)(b) establishes what is essentially a subjective test to measure the buyer's authority to revoke an acceptance of nonconforming goods, the requisite impairment of the value of the goods to the buyer must be *substantial.* It is not sufficient that the nonconformance be worrisome, aggravating, or even potentially dangerous. It must be a nonconformity which diminishes the value of the goods to the buyer to a substantial degree. The mere possibility that the new car in this case would have a flat tire in the early hours of the morning in an unsafe area of the City of Detroit, leaving its driver with no spare tire, although real, is unlikely. In all events, it is not a possibility which can reasonably be said to elevate the absence of a spare tire, a temporary deficiency easily remedied, to the level of a "substantial impairment" of the value of the new automobile for its ordinary use as a motor vehicle.

Consequently, I would reverse the judgment of the Court of Appeals and affirm the finding of the trial court on this issue.

BOYLE, J. (dissenting). I disagree with the conclusion reached by the majority for the reasons stated by Judge Cynar in his dissent in the Court of Appeals. 116 Mich. App. 78, 87; 322 N.W.2d 549 (1982) (Cynar, P.J., dissenting). I agree with Judge Cynar's analysis of the law of substantial impairment and its application to the facts in this case. As he succinctly summarized:

> A buyer may properly revoke acceptance where the nonconformity substantially impairs its value. The existence of such nonconformity depends on the facts and circumstances of each case. Jorgensen v. Pressnall, 274 Or. 285; 545 P.2d 1382 (1976). The determination of substantial impairment has been made from the buyer's subjective view, considering particular needs and circumstances. See Summers & White, Handbook of the Law Under the Uniform Commercial Code (2d ed.), §8-3, p.308; Committee Comment 2 to MCL 440.2608; MSA 19.2608. An objective approach was utilized in Fargo Machine & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364 (E.D. Mich., 1977), and an objective and subjective test was employed in Jorgensen, supra.

The purpose of the requirement of substantial impairment of value is to preclude revocation for trivial defects or defects which may be easily corrected. Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120; 224 A.2d 782 (1966).

The trial judge's determination that the temporarily missing spare tire did not constitute a substantial impairment in value under either the subjective or objective test was not clearly erroneous. Id., pp. 88-89.

Therefore, I do not agree that defendant Miller properly rejected the vehicle, and I would affirm the trial court's finding on that issue.

NOTES AND QUESTIONS

1. Increasingly, courts have used a subjective and objective test in making a determination of "substantial impairment." First, the subjective test: Did the buyer have a specific need that, in the buyer's mind, was not met by the product? The objective test is whether a reasonable person in the shoes of the buyer would find the product failed to meet the need. Such objective evidence can go to the effect the failure had on the buyer's safety as in the current case or other factors such as the timing of breakdowns and the number of such breakdowns. Midwest Mobile Diagnostic Imaging, L.L.C. v. Dynamics Corp. of Am., 965 F. Supp. 1003 (W.D. Mich. 1997).

2. Was the court correct in usurping the jury's findings re the substantial impairment issue?

3. Note that one of the effects of an acceptance is that the burden of proof shifts from the seller to the buyer per UCC §2-607(4). This means that prior to acceptance, the seller has the burden of establishing a perfect tender under §2-601 (or a substantial one under §2-612 for installment sales), but after the buyer accepts the goods, the buyer must prove a substantial impairment and the other elements necessary to revoke acceptance under §2-608.

NOTE ON THE RIGHT TO CURE AND ON INCONSISTENT USE

The right of rejection is subject to the right to cure under §2-508. Did the buyers in the last two cases give the seller the right to cure? How?

The right to cure is not unlimited. "[T]he buyer . . . is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty." Orange Motors of Coral Gables, Inc. v. Dade Co. Dairies, Inc., 258 So. 2d 319, 321 (Fla. Dist. Ct. App. 1972).

The cure concept is also endorsed in the Restatement (Second) as follows:

Comment a to §242

Under §§237 and 238, a party's uncured material failure to perform or to offer to perform not only has the effect of suspending the other party's duties (§225(1)) but, when it is too late for the performance or the

offer to perform to occur, the failure also has the effect of discharging those duties (§225(2)). Ordinarily there is some period of time between suspension and discharge, and during this period a party may cure his failure. Even then, since any breach gives rise to a claim, a party who has cured a material breach has still committed a breach, by his delay, for which he is liable in damages. Furthermore, in some instances timely performance is so essential that any delay immediately results in discharge and there is no period of time during which the injured party's duties are merely suspended and the other party can cure his failure.

Use by the buyer of goods after attempted revocation or rejection may show a waiver of the right to reject or revoke. Use of the product for an extended period may destroy the right to revoke. However, use by the buyer may be allowed if reasonable and relatively short term. For example, if the buyer is using the product for a time after revocation in a good faith attempt to mitigate damages, the defendant has given no contra instructions to the buyer, and the defendant is not harmed, such may be allowed. Wilk Paving, Inc. v. Southwirh-Milton, Inc., 162 Vt. 552, 649 A.2d 778 (1994). Futher, buyer's use for a limited time when the buyer has no real option may not prohibit rejection or revocation. For example, the party who has revoked acceptance of a mobile home may have no other place to live while the right of revocation is litigated. See, e.g., Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972). Also consider Johnson v. General Motors Corp., Chevrolet Motor Div., 233 Kan. 1044, 668 P.2d 139, 36 U.C.C. Rep. 1089 (Kan. 1983) (continuing use of defective truck after revocation was permissible where buyer would have had to purchase another vehicle while paying for the defective one). Contra Gasque v. Mooers Motor Car Co., 227 Va. 154, 313 S.E.2d 384 (1984) (dicta that any use of an automobile after revocation improper).

V. EXCUSE

A. Prevention and Cooperation

SULLIVAN v. BULLOCK
Court of Appeals of Idaho, 1993
124 Idaho 738, 864 P.2d 184

WALTERS, Chief Judge.

The issue at trial in this action was whether it was the homeowner or the contractor who breached a written contract to remodel several rooms in a home. The jury returned a special verdict finding that although the contractor had not substantially performed under the contract, he had been prevented from doing so by the homeowner. The jury awarded $2,956.40 in damages to the contractor, essentially the balance of the contract price. The homeowner filed a motion for

judgment n.o.v. or for a new trial, which was denied. The homeowner appeals the judgment and denial of her motion. She contends that the jury's verdict is contrary to the law and the evidence presented. She also claims that the trial court erroneously rejected one of her proposed jury instructions, excluded evidence, and awarded costs and attorney fees to the contractor.

We affirm the denial of the motions in so far as the decision below holds that the homeowner prevented the contractor's complete performance. However, we reverse and remand the decision to the extent it approved an erroneous measure of damages in favor of the contractor. We also vacate the award of attorney fees and remand for further consideration by the district court.

I. Facts

The evidence presented at trial established that in April 1991, Cora Sullivan hired Dallas Bullock, doing business as New Home Development, to remodel her kitchen, hallway, utility room, bathroom and sewing room, for a total price of $6,780. The written contract set out the major aspects of the project but lacked detail. No design sketches were agreed to by the parties. Less than detailed communications between Mrs. Sullivan and Mr. Bullock resulted in misunderstandings regarding exactly what the final product would look like. Eventually the contract was breached in several respects. The work was not begun or completed by the dates set out in the contract. Mrs. Sullivan, however, assented to the delays. Evidence was presented that the work performed by Mr. Bullock and the subcontractors he hired was sometimes below the industry standard for the area, not as Mrs. Sullivan had requested, and was not performed to her satisfaction. In other words, according to Mrs. Sullivan and other witnesses, the improvements were not "constructed and completed in a good and workmanlike manner" as expressly required by the contract. However, evidence was presented that during the time the work was being performed, Mrs. Sullivan did not clearly convey to Mr. Bullock her dissatisfaction and he continued with the perception that the project was progressing with approval. During the project, Mr. Bullock incurred costs not provided for in the contract, primarily for electrical work to bring the kitchen up to code and for plumbing. There was no evidence that Mrs. Sullivan approved the extra costs for the electrical work.

For a period while construction was progressing, Mrs. Sullivan did not live at the home. Eventually, however, she moved in while the remodeling continued. At one time, Mrs. Sullivan told Mr. Bullock that she would not be at home on a certain day and, feeling protective of her personal belongings, she did not want the workman there while she was gone. Unfortunately, and unbeknownst to Mr. Bullock, one of the workman entered the home through a window to complete some work while Mrs. Sullivan was gone. This so upset Mrs. Sullivan that she angrily confronted Mr. Bullock and told him that neither he nor his workman were to ever set foot in her house again. Further requests by Mr. Bullock and others to enter the home and continue the project were refused by Mrs. Sullivan.

On July 1, 1991, Mr. Bullock submitted a "final" bill to Mrs. Sullivan for $2,956.40, purportedly for work completed, but also representing the contract balance for the completed project.

II. Procedural History

In October 1991, Mrs. Sullivan filed a complaint in the district court, asserting that Mr. Bullock's workmanship was grossly defective and that he had been unresponsive to requests to improve his product. The complaint sought damages in the amount of $19,703 to completely redo the work Mr. Bullock had started and return of the $5,932 she had already paid him. Mr. Bullock answered Mrs. Sullivan's complaint and filed a counterclaim. He alleged that his work was satisfactory, that any unsatisfactory work could be fixed, but that Mrs. Sullivan had prohibited him from finishing the project or fixing defects. He stated that Mrs. Sullivan had paid $5,906 and he requested $2,956.40 in damages for the work he had performed. He also asserted a claim against Mrs. Sullivan, seeking damages for slander.

The trial addressed the breach of contract claim. The counterclaim alleging slander was voluntarily dismissed. The jury returned a special verdict finding that Mr. Bullock had not substantially performed under the contract, but that he had been prevented or substantially hindered from performing by Mrs. Sullivan. The jury awarded him $2,956.40, and the court awarded him costs and attorney fees as provided by the contract. Mrs. Sullivan moved for judgment n.o.v. or new trial. Her motion was denied. She appeals the judgment and the denial of her motion.

III. Analysis . . .

1A. Prevention

First, we examine the jury's finding that Mrs. Sullivan prevented or hindered Mr. Bullock's performance. Implied in every contract is a condition to cooperate. In any case where the plaintiff's performance requires the cooperation of the defendant, as in a contract to serve or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this cooperation and if he fails to do so, he is immediately liable although his only express promise is to pay money at a future day. Indeed, there is generally in a contract subject to either an express or an ~~implied condition an~~ implied promise not to prevent or hinder performance of the ~~condition~~. Such prevention, if the condition could otherwise have been performed, is, therefore, an immediate breach of contract, and if of sufficiently serious character, damages for the loss of the entire contract may be recovered. In construction contracts, the duty to cooperate encompasses allowing access to the premises to enable the contractor to perform the work. 17A C.J.S. Contracts §468.

The duty to cooperate is recognized in Idaho. In McOmber v. Nuckols, 82 Idaho 280, 353 P.2d 398 (1960), our Supreme Court held that the

plaintiff who had refused to allow the defendant to perform the rental service for which he had been contracted, or who had imposed conditions which made performance by the defendant impracticable, could not recover damages. A similar result was found in Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P.2d 651 (1934), wherein the Court held that a party to a contract to construct a drainage tunnel could recover damages if he had been prevented by the other party from completing the project. In other words, nonperformance under the contract was excused if the other party prevented the performance.

To excuse a party's nonperformance, however, the conduct of the party preventing performance must be "wrongful" and "in excess of their legal rights." 17A C.J.S. Contracts §468. Other authorities have stated that the conduct of the party preventing performance must be outside what was permitted in the contract and "unjustified," or outside the reasonable contemplation of the parties when the contract was executed. Our Supreme Court has echoed this standard in *Molyneux* by stating:

> If, at the time appellant [the canal company] ordered respondent [Molyneux] to stop work, it intended to drill the tunnel any additional length and then or later should proceed with the tunnel without having previously *in good faith and pursuant to the contract* determined to terminate the tunnel, it was obligated to let respondent do the work, and if it did not permit respondent to do such work appellant would, in such case, have breached its contract with respondent.

Molyneux, 54 Idaho at 629, 35 P.2d at 655 (emphasis added).

Here, the trial court's instructions to the jury properly reflected this statement of the law. Jury instruction twenty-one set out the elements required to be proved by Mrs. Sullivan for her to prevail on her complaint. It also set out the elements required of Mr. Bullock in his counterclaim. The issue of prevention was described in instruction twenty-two, which follows the theory stated in *Molyneux* that the act of prevention must have been unreasonable, in other words, outside the contemplation of the parties as expressed in the contract.

The jury returned a verdict stating that Mr. Bullock had not substantially performed but that Mrs. Sullivan had unreasonably prevented his performance. There was substantial evidence from which the jury could conclude that Mr. Bullock's failure was to be excused by Mrs. Sullivan's act of denying access to her home. True, an employee did enter Mrs. Sullivan's home when he was not supposed to. However, when Mrs. Sullivan denied any further access to the home she acted in a manner that was outside the contemplation of the contract or the parties when they executed the contract. Viewing the record in the light most favorable to Mrs. Sullivan, we hold that a reasonable view of the evidence supports the verdict. . . .

QUESTION

Well, what do you think; do you believe Mrs. Sullivan should have allowed admittance to her home?

Problem 151

Sangazure General Construction Company signed a contract with Pointdextre Plumbing and Fixtures to use the latter for the plumbing work on the new building for Wells & Associates. The contract provided that Sangazure could dismiss the subcontractor if Pointdextre Plumbing at any point became insolvent. The construction lasted for a two-year period. During the second year, Sangazure General Construction Company itself had financial problems, leading it to be late on a number of occasions with the progress payments it was required to make to Pointdextre Plumbing. This in turn upset the delicate financial status of Pointdextre so that it became insolvent — under any definition of the term — whereupon Sangazure exercised the insolvency clause and dismissed Pointdextre, planning to do the plumbing itself. Pointdextre sued, and Sangazure pointed to the insolvency clause as its defense. Is that clause effective in this circumstance?

Problem 152

When Bob Cratchit interviewed for a job with the firm of Scrooge and Marley, Mr. Marley told him that he would be permanently employed there at a salary to be negotiated from time to time. They agreed on a starting salary, and Cratchit took the position. He worked tirelessly for three years, pleasing both of the partners. Then Mr. Marley died and Scrooge became harder and harder to please. On a Tuesday, he fired Cratchit, saying that he couldn't stand to see his face one more day. Advise Cratchit, who is in your law office asking whether a lawsuit against Scrooge has any chance of succeeding. See Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988); Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744 (1989).

NOTE ON GOOD FAITH

Concepts of good faith, cooperation, and prevention are closely related. When one party actively attempts to torpedo the contractual relationship, the court may find a material breach of an implied promise (covenant): (a) not to prevent the other party from performing; (b) to cooperate in ensuring performance is achieved; or (c) to act in good faith. Just as the material breach of an express promise can result in the discharge of performance, the material breach of such an implied promise can provide a viable defense for nonperformance by the nonbreaching party. The boundaries of the duty of good faith, etc., are generally defined by the parties' intent and reasonable expectations in entering into the contract. See, e.g., Cross & Cross Properties, Ltd. v. Everett Allied Co., 886 F.2d 497 (2d Cir. 1989). Generally, there can be no breach of the implied

covenant of good faith if a party is only doing what it is entitled to do under the contract provisions. PDQ Lube Center, Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

Occasionally, courts find that the breach of the implied covenant of good faith gives rise to remedies for the breach of the good faith obligation itself. For example, courts in a number of states have allowed an insured to recover for breach of the implied covenant of good faith by an insurer. See, e.g., Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987). California courts have allowed such an action in a variety of other contracts, including an agreement to make mutual wills (Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 878 (1949)); to sell real property (Osborne v. Cal-Am Financial Corp., 80 Cal. App. 3d 259, 145 Cal. Rptr. 584 (1978)); employee incentive contracts (Foley v. U.S. Paving Co., 262 Cal. App. 2d 499, 68 Cal. Rptr. 780 (1968)); leases (Cordonier v. Central Shopping Plaza Associates, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (1978)); and contracts to provide leasing services (Masonite Corp. v. Pacific Gas & Electric Co., 65 Cal. App. 3d 1, 135 Cal. Rptr. 170 (1976)). In some states, the breach of an implied covenant of good faith may also constitute a tortious act giving rise to damages. California has led the league in this type of action. For a discussion of the history of the development of this tort and its limitations, see the discussion in both the majority and dissent in Seaman's Direct Buying Service v. Standard Oil, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (Cal. 1984). See also Viles v. Security National Ins. Co., 788 S.W.2d 566 (Tex. 1990), an insurance case, adopting the view that a tort will lie only in those cases in which a special relationship exists between the parties. Quinn Cos. v. Herring-Marathon Group, Inc., 299 Ark. 131, 773 S.W.2d 94 (1989) (limiting the tort to contractual relationships involving insurance claims). However, the general rule is that the duty of good faith does not give rise to an independent cause of action but only to a right to defend against a party's own failure to perform; that is, because of the breach of the implied condition of good faith the party argues that its own performance obligation was excused. See, e.g., Permanent Editorial Board Commentary 10 (the PEB is a board set up to review and offer suggestions and comments concering interpretation of the UCC).

One issue that won't go away is whether a bank can be liable for suddenly cutting off an agreed line of credit. Such "lender liability" lawsuits sound in contract, and sometimes involve allegations that the bank has failed to act in good faith (which is required by both the common law and §1-203 of the Uniform Commercial Code). In the leading case of K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985), the bank cancelled a line of credit without notice and the court held that this breach of the implied obligation of good faith exposed the bank to $7,000,000 in damages. See Comment, 81 Nw. U. L. Rev. 539 (1987); see also Reid v. Key Bank of Southern Maine, 821 F.2d 9, 3 U.C.C. Rep. Serv. 2d 1665 (1st Cir. 1987) (similar facts, $100,000 in damages). While banks and other lenders often win these lawsuits, (for example, if the obligation is one payable on demand rather than at a certain date, with restrictions do not apply) cases like those cited should make them wary of precipitous actions when dealing with their customers. Alarmed

by this expanding liability, many states have passed statutes prohibiting any action on an oral commitment to lend. And courts have shown an increasing reluctance to find any basis of independent relief based on breach of good faith obligations.

B. *Forfeiture as an Excuse*

BURGER KING CORP. v. FAMILY DINING, INC.
United States District Court, Eastern District of Pennsylvania, 1977
426 F. Supp. 485, affd., 566 F.2d 1168 (3d Cir. 1977)

HANNUM, District Judge. Presently before the Court is defendant's motion for an involuntary dismissal in accordance with Rule 41(b), Federal Rules of Civil Procedure, advanced at the close of plaintiff's case. The trial is before the Court sitting without a jury.

In bringing the suit plaintiff seeks a determination under the Declaratory Judgment Act, Title 28, United States Code §2201, that a contract between the parties, by its own terms, is no longer of any force and effect. A request for declaratory relief is appropriate in a case such as this where the primary question is whether such a termination has occurred. See: Wright and Miller, Federal Practice and Procedure: Civil §2765, n.35.

Jurisdiction of the parties is based on diversity of citizenship in accordance with Title 28, United States Code §1332(a).

FACTS ESTABLISHED IN PLAINTIFF'S CASE

Plaintiff Burger King Corporation (hereinafter "Burger King") is a Florida corporation engaged in franchising the well-known Burger King Restaurants. In 1954, James W. McLamore, founder of Burger King Restaurants, Inc. (the corporate predecessor of Burger King) built the first Burger King Restaurant in Miami, Florida. In 1961 the franchise system was still relatively modest size having only about 60 or 70 restaurants in operation outside of Florida. By 1963, however, Burger King began to experience significant growth and was building and operating, principally through franchisees, 24 restaurants per year. It was also at this time that Burger King's relationship with defendant Family Dining, Inc., (hereinafter "Family Dining") was created.

Family Dining is a Pennsylvania corporation which at the present time operates ten Burger King Restaurants (hereinafter "Restaurant") in Bucks and Montgomery Counties in Pennsylvania. Family Dining was founded and is currently operated by Carl Ferris who had been a close personal friend of McLamore's for a number of years prior to 1963. In fact they had attended Cornell University together in the late 1940's. It would seem that this friendship eventually led to the business relationship between Burger King and Family Dining which was conceived in the

'Burger King Territorial Agreement" (hereinafter "Territorial Agreement") entered on May 10, 1963.

In accordance with the Territorial Agreement Burger King agreed that Family Dining would be its sole licensee, and thus have an "exclusive territory," in Bucks and Montgomery Counties provided Family Dining operated each Restaurant pursuant to Burger King license agreements[1] and maintained a specified rate of development. Articles I and II of the Territorial Agreement are pertinent to this dispute. They provide as follows:

I

For a period of one year, beginning on the date hereof, Company will not operate or license others for the operation of any Burger King restaurant within the following described territory hereinafter referred to as "exclusive territory," to-wit:

The counties of Bucks and Montgomery, all in the State of Pennsylvania as long as Licensee operates each Burger King restaurant pursuant to Burger King restaurant licenses with Company and faithfully performs each of the covenants contained.

This agreement shall remain in effect and Licensee shall retain the exclusive territory for a period of ninety (90) years from the date hereof, provided that at the end of one, two, three, four, five, six, seven, eight, nine and ten years from the date hereof, and continuously thereafter during the next eighty years, Licensee has the following requisite number of Burger King restaurants in operation or under active construction, pursuant to Licenses with Company:

One (1) restaurant at the end of one year;
Two (2) restaurants at the end of two years;
Three (3) restaurants at the end of three years;
Four (4) restaurants at the end of four years;
Five (5) restaurants at the end of five years;
Six (6) restaurants at the end of six years;
Seven (7) restaurants at the end of seven years;
Eight (8) restaurants at the end of eight years;
Nine (9) restaurants at the end of nine years;
Ten (10) restaurants at the end of ten years;

and continually maintains not less than ten (10) restaurants during the next eighty (80) years.

Licensee and company may mutually agree to the execution of a restaurant license to a person other than the Licensee, herein, if such restaurant license is executed same will count as a requisite number as set forth in paragraph above.

II

If at the end of either one, two, three, four, five, six, seven, eight, nine or ten years from the date hereof, or anytime thereafter during the next eighty (80) years, there are less than the respective requisite number of Burger King operations or under active construction in the "exclusive territory" pursuant to licenses by Company, this agreement shall terminate and

1. Each Restaurant is opened pursuant to a separate Burger King license agreement.

be of no further force and effect. Therefore, Company may operate or license others for the operation of Burger King Restaurants anywhere within the exclusive territory, so long as such restaurants are not within the "Protected Area," as set forth in any Burger King Restaurant License to which the Licensee herein is a party.

The prospect of exclusivity for ninety years was clearly intended to be an inducement to Family Dining to develop the territory as prescribed and it appears that it had exactly this effect as Family Dining was to become one of Burger King's most successful franchisees. While Burger King considered Carl Ferris to be somewhat of a problem at various times and one who was overly meticulous with detail, it was nevertheless through his efforts which included obtaining the necessary financing and assuming significant risks, largely without assistance from Burger King, that enabled both parties to benefit from the arrangement.

On August 16, 1963, Family Dining opened the First Restaurant at 588 West DeKalb Pike in King of Prussia, Pennsylvania. The second Restaurant was opened on July 2, 1965, at 409 West Ridge Pike, Conshohocken, Pennsylvania, and the third Restaurant was opened October 19, 1966, at 2561 West Main Street, Norristown, Pennsylvania.

However, by April, 1968, Family Dining had not opened or begun active construction on a fourth Restaurant which, in accordance with the development rate, should have been accomplished by May 10, 1967, and it was apparent that a fifth Restaurant would not be opened by May 10, 1968, the date scheduled. On May 1, 1968, the parties entered into a Modification of the Territorial Agreement (hereinafter "Modification") whereby Burger King agreed to waive Family Dining's failure to comply with the development rate. There is nothing contained in the record which indicates that Burger King received anything of value in exchange for entering this agreement. However, McLamore testified that if the fourth and fifth Restaurants would be built nearly in compliance with the development rate for the fifth year he would overlook the year or so default in the fourth Restaurant. This attitude seems to be consistent with his overall view toward the development rate with respect to which, he testified, was "designed to insure the company of an orderly process of growth which would also enable the company to produce a profit on the sale of its franchises and through the collection of royalties that the restaurants would themselves produce."

The fourth Restaurant was opened on July 1, 1968, at 1721 North DeKalb Pike, Norristown, Pennsylvania, and the fifth Restaurant was opened on October 17, 1968, at 1035 Bustleton Pike in Feasterville, Pennsylvania.

On April 18, 1969, Ferris forwarded a letter to McLamore pertaining to certain delays in site approval and relating McLamore's earlier statement that there would be no problem in waiving the development schedule for the sixth Restaurant. The letter expressed Ferris' concern regarding compliance with the development rate. By letter dated April 26, 1969, from Howard Walker of Burger King, Ferris was granted a month extension in the development rate. With respect to this extension McLamore

testified that "it never crossed my mind to call a default of this agreement on a technicality."

On October 1, 1969, the sixth Restaurant was opened at 1515 East High Street in Pottstown, Pennsylvania. The seventh Restaurant was opened on February 2, 1970, ahead of schedule, at 560 North Main Street in Doylestown, Pennsylvania.

At this point in time Burger King was no longer a modest sized franchise system. It had become a wholly owned subsidiary of the Pillsbury Company and had, in fact, evolved into a complex corporate entity. McLamore was elevated to Chairman of the Board of Burger King and, while he remained the chief executive officer for a time, Arthur A. Rosewall was installed as Burger King's President. Ferris was no longer able to expect the close, one to one relationship with McLamore that had previously obtained in his dealings with the company. It seems clear that as a result Family Dining began to experience difficulties in its day to day operations with Burger King.

One of the problem areas which arose concerned site selection. In a typical situation when a franchisee would seek approval for a building site an application would be submitted to the National Development Committee comprised of various Burger King officials. Based on Ferris' prior showing regarding site selection it could be expected that he would have little difficulty in obtaining their approval. In McLamore's view, Ferris was an exceptionally fine franchisee whose ability to choose real estate locations was exceptional. However, in August, 1970, a Frankford Avenue location selected by Ferris was rejected by the National Development Committee. The reasons offered in support of the decision to reject are not entirely clear and it seems that for the most part it was an exercise of discretion. The only plausible reason, given Ferris' expertise, was that the site was 2.7 miles from another Burger King franchise operated by Pete Miller outside Family Dining's exclusive territory. Yet Burger King chose not to exercise its discretion in similar circumstances when it permitted another franchisee to build a Restaurant in Devon, Pennsylvania, approximately 3 miles away from an existing Family Dining Restaurant.

In his August 25, 1970, memo to the Carl Ferris file McLamore observed that Burger King "had sloppy real estate work involved in servicing him and that [Burger King was] guilty of many follow up delinquencies." This was during a time, as Burger King management was well aware, where it was one thing to select a location and quite another to actually develop it. That is, local governing bodies were taking a much stricter view toward allowing this type of development. It was also during this time, as McLamore's memo points out, Burger King realized that the Bucks-Montgomery territory was capable of sustaining substantially more Restaurants than originally thought.

Amidst these circumstances, the eighth Restaurant was opened ahead of schedule on October 7, 1970, at 601 South Broad Street in Lansdale, Pennsylvania. And in December, 1971, Burger King approved Family Dining's proposed sites for two additional Restaurants in Ambler, Pennsylvania and Levittown, Pennsylvania.

In early 1972, Arthur Rosewall became the chief executive officer of Burger King. At this time it also became apparent that the ninth Restaurant

would not be opened or under construction by May 10, 1972. On April 27, 1972, in a telephone conversation with McLamore, Ferris once again expressed his concern to Burger King regarding compliance with the development rate. Burger King's position at that time is evidenced by McLamore's Memo to the Carl Ferris file dated April 28, 1972, wherein he provides that "Ferris' territorial arrangement with the company is such that he must have his ninth store (he has eight open now) under construction next month. I indicated to him that, due to the fact that he was in the process of developing four sites at this time, the company would consider he had met, substantially, the requirements of exclusivity." McLamore testified that at that time he had in mind a further delay of 3 to 6 months.

In April, 1973, Burger King approved Family Dining's proposed site for a Restaurant in Warminster, Pennsylvania. However, as of May 10, 1973, neither the ninth or the tenth Restaurant had been opened or under active construction.

A letter dated May 23, 1973, from Helen D. Donaldson, Franchise Documents Administrator for Burger King, was sent to Ferris. The letter provides as follows:

> Dear Mr. Ferris:
>
> During a periodic review of all territorial agreements we note that as of this date your development schedule requiring ten restaurants to be open or under construction by May 10, 1973, has not been met. Our records reflect eight stores open in Bucks and/or Montgomery County, and one site approved but not manned.
>
> Under the terms of your territorial agreement failure to have the required number of stores in operation or under active construction constitutes a default of your agreement.
>
> If there are extenuating circumstances about which this office is not aware, we would appreciate your earliest advice.

It is doubtful that the Donaldson letter was intended to communicate to Ferris that the Territorial Agreement was terminated. The testimony of both Rosewall and Leslie W. Paszat, an executive of Burger King, who worked closely with Rosewall on the Family Dining matter indicates that even Burger King had not settled its position at this time. Ferris' letter dated July 27, 1973, to Rosewall, and Rosewall's reply dated August 3, 1973 also fail to demonstrate any understanding that the Territorial Agreement was terminated.

It seems that throughout this period Burger King treated the matter as something of a "hot potato" subjecting Ferris to contact with several different Burger King officials. Much of Ferris' contact with Rosewall was interrupted by Rosewall's month long vacation and a meat shortage crisis to which he had to devote a substantial amount of his time. Ultimately Paszat was given responsibility for Family Dining and it appears that he provided Ferris with the first clear indication that Burger King considered the Territorial Agreement terminated in his letter of November 6, 1973. Burger King's corporate structure had become so complex that the question of who, when or where the decision was made could not be answered. The abrupt manner in which Burger King's position was

communicated to Family Dining, under the circumstances, was not straightforward.

From November, 1973, until some point early in 1975, the parties attempted to negotiate their differences with no success. The reason for the lack of success is understandable given that Burger King from the outset considered exclusivity a non-negotiable item. It was during this period on September 7, 1974, that Family Dining began actual construction of the ninth Restaurant in Warminster, Pennsylvania.

Several months before the instant litigation was begun Family Dining informed Burger King that it intended to open a ninth Restaurant on or about May 15, 1975, on Street Road, Warminster, Pennsylvania. In February, 1975, Burger King notified Family Dining that a franchise agreement (license) had to be entered for the additional Restaurant without which Family Dining would be infringing Burger King's trademarks. A similar notice was given in April, 1975, in which Burger King indicated it would retain counsel to protect its rights. Nevertheless Family Dining proceeded with its plans to open the Warminster Restaurant.

In May, 1975, Burger King filed a complaint, which was the inception of this lawsuit, seeking to enjoin the use of Burger King trademarks by Family Dining at the Warminster Restaurant. The Court granted a Temporary Restraining Order until a hearing on the complaint could be held. On May 13, 1975, the parties reached an agreement on terms under which the Burger King trademarks could be used at the Warminster Restaurant. Pursuant to the agreement Burger King filed an amended complaint seeking the instant declaratory relief. Subsequently and also pursuant to this agreement Family Dining opened its tenth Restaurant in Willow Grove, Pennsylvania, the construction of which began on March 28, 1975.

Discussion

Family Dining raises several arguments in support of its motion pursuant to Rule 41(b). One of its principal arguments is that the termination provision should be found inoperative because otherwise it would result in a forfeiture to Family Dining. For reasons which have become evident during the presentation of Burger King's case the Court finds Family Dining's position compelling both on legal and equitable grounds and is thus persuaded that the Territorial Agreement should not be declared terminated. Under Rule 41(b) when a plaintiff in an action tried by the Court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law plaintiff has shown no right to relief. Inasmuch as termination is the only relief sought by Burger King, it follows that dismissal of the action is appropriate.

In bringing this suit Burger King maintains that the Territorial Agreement is a divisible contract wherein Family Dining promised to open or have under active construction one new Restaurant in each of the first

ten years of the contract in exchange for which Burger King promised to grant one additional year of exclusivity for each new Restaurant. This, to be followed by an additional eighty years of exclusivity provided the first ten Restaurants were built on time. In support Burger King relies on the opening language of Article I of the Territorial Agreement which provides that "[f]or a period of one year, beginning on the date hereof, Company will not operate or license. . . ." It is thus argued that since Family Dining clearly failed to perform its promises the Court must, in accordance with the express language of Article II, declare the contract terminated. Burger King further argues that because Family Dining did not earn exclusivity beyond the ninth year, upon termination, it could not be found that Family Dining would forfeit anything in which it has an interest.

Not a promise, but a Condition subsequent

Contrary to the analysis offered by Burger King, the Court considers the development rate a condition subsequent, not a promise, which operates to divest Family Dining of exclusivity. Where words in a contract raise no duty in and of themselves but rather modify or limit the promisees' right to enforce the promise such words are considered to be a condition. Whether words constitute a condition or a promise is a matter of the intention of the parties to be ascertained from a reasonable construction of the language used, considered in light of the surrounding circumstances. Feinberg v. Automobile Banking Corporation, 353 F. Supp. 508, 512 (E.D. Pa. 1973); Williston, Contracts, §§665, 666. It seems clear that the true purpose of the Territorial Agreement was to create a longterm promise of exclusivity to act as an inducement to Family Dining to develop Bucks and Montgomery Counties within a certain time frame. A careful reading of the agreement indicates that it raises no duties, as such, in Family Dining. Both Article I and Article II contain language which refers to ninety years of exclusivity subject to limitation. For instance, Article I provides in part that "[t]his Agreement shall remain in effect and licensee shall retain the exclusive territory for a period of ninety (90) years from the date hereof, provided that at the end of one, two. . . ." Failure to comply with the development rate operates to defeat liability on Burger King's promise of exclusivity. Liability, or at least Family Dining's right to enforce the promise, arose upon entering the contract. The fact that Burger King seeks affirmative relief premised on the development rate and the fact that it calls for a specified performance by Family Dining tend to obscure its true nature. Nevertheless, in the Court's view it is a condition subsequent. 8 P.L.E. Contracts §264 (1971).

Furthermore, the fact that performance is to occur in installments does not necessarily mean that the contract is divisible. Once again, this is a question of the intention of the parties ascertained, if possible, from a reasonable interpretation of the language used. Continental Supermarket Food Service, Inc. v. Soboski, 210 Pa. Super. 304, 232 A.2d 216, 217 (1967). In view of the fact that there was a single promise of exclusivity to have a ninety year duration, assuming the condition subsequent did not occur by a failure to comply with the development rate, the Court believes, consistent with the views previously expressed herein, that the contract was intended to be entire rather than severable.

The question arises whether Burger King has precluded itself from asserting Family Dining's untimeliness on the basis that Burger King did

not demand literal adherence to the development rate throughout most of the first ten years of the contract. Nothing is commoner in contracts than for a promisor to protect himself by making his promise conditional. Ordinarily a party would be entitled to have such an agreement strictly enforced, however, before doing so the Court must consider not only the written contract but also the acts and conduct of the parties in carrying out the agreement. As Judge Kraft, in effect, provided in Dempsey v. Stauffer, 182 F. Supp. 806, 810 (E.D. Pa. 1960), after one party by conduct indicates that literal performance will not be required, he cannot without notice and a reasonable time begin demanding literal performance.

In the early going Burger King did not demand that Family Dining perform in exact compliance with the development schedule. It failed to introduce any evidence indicating that a change in attitude had been communicated to Family Dining. At the time of the Donaldson letter Family Dining's non-compliance with the development rate was no worse than it was with respect to the fourth and fifth Restaurants. The letter itself was sent by a documents administrator rather than a Burger King official and it seems to imply that the Territorial Agreement would not be terminated. Assuming that at some point between May and November, or even at the time of the Donaldson letter, Ferris realized literal performance would be required, the circumstances of this type of development are such that Burger King was unreasonable in declaring a termination such a short time after, if not concurrent with, notice that literal performance would be required.

Considerable time was consumed in negotiations between November, 1973, until shortly before suit although it appears that these efforts were an exercise in futility given Burger King's view on exclusivity. Moreover, it could be expected that Burger King would have sued to enjoin any further progress by Family Dining, during this lengthy period, just as it did when Family Dining attempted to get the ninth Restaurant under way. The upshot being that the hiatus in development from November, 1973, until active construction began on the ninth and tenth Restaurants is not fully chargeable to Family Dining.

Based on the foregoing the Court concludes that Burger King is not entitled to have the condition protecting its promise strictly enforced.

Moreover and more important, even though a suit for declaratory relief can be characterized as neither legal nor equitable, United States Fidelity & Guaranty Co. v. Koch, 102 F.2d 288, 290 (3d Cir. 1939), giving strict effect to the termination provision involves divesting Family Dining of exclusivity, which, in the Court's view, would amount to a forfeiture. As a result the Court will not ignore considerations of fairness and believes that equitable principles, as well, ought to govern the outcome of this suit. Barraclough v. Atlantic Refining, 230 Pa. Super. 276, 326 A.2d 477 (1974).

The Restatement, Contracts, §302 provides:

> A condition may be excused without other reason if its requirement
> (a) will involve extreme forfeiture or penalty, and
> (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance.

Taking the latter consideration first, it seems clear that throughout the early duration of the contract Burger King was more concerned with a general development of the territory than it was with exact compliance with the terms of the development rate. Burger King offered no evidence that it ever considered literal performance to be critical. In fact, the evidence indicates quite the contrary. Even though McLamore testified that he never contemplated a delay of the duration which occurred with the ninth and tenth Restaurants, he felt a total delay of approximately 19 months with respect to the fourth and fifth Restaurants was nearly in compliance. On the basis of his prior conduct and his testimony considered in its entirety his comments on this point command little weight.

Clearly Burger King's attitude with respect to the development rate changed. Interestingly enough it was sometime after Burger King realized Bucks and Montgomery Counties could support substantially more than ten Restaurants as had been originally thought. It was also at a time after Rosewall replaced McLamore as chief executive officer.

Burger King maintains that Ferris' conduct indicates that he knew strict compliance with the development rate was required. This is based on the several occasions where Ferris expressed concern over non-compliance. However, during the presentation of Burger King's evidence it was established that Ferris was an individual who was overly meticulous with details which caused him to be, in many respects, ignored by Burger King officials. Given this aspect of his personality and Burger King's attitude toward him very little significance can be attached to Ferris' expressions of concern. In short, the evidence fails to establish that either Burger King or Family Dining considered the development rate critical. If it eventually did become critical it was not until very late in the first ten years and in such a way that, in conscience, it cannot be used to the detriment of Family Dining.

As previously indicated, the Court believes that if the right of exclusivity were to be extinguished by termination it would constitute a forfeiture. In arguing that by termination Family Dining will lose nothing that it earned, Burger King overlooks the risks assumed and the efforts expended by Family Dining, largely without assistance from Burger King, in making the venture successful in the exclusive territory. While it is true that Family Dining realized a return on its investment, certainly part of this return was the prospect of continued exclusivity. Moreover, this is not a situation where Burger King did not receive any benefit from the relationship.

In making the promise of exclusivity Burger King intended to induce Family Dining to develop its Restaurants in the exclusive territory. There is no evidence that the failure to fulfill the time feature of this inducement was the result of any intentional or negligent conduct on the part of Family Dining. And at the present time there are ten Restaurants in operation which was all the inducement was intended to elicit. Assuming all ten were built on time Burger King would have been able to expect some definable level of revenue, a percentage of which it lost due to the delay. Burger King did not, however, attempt to establish the amount of this loss at trial.

In any event if Family Dining were forced to forfeit the right of exclusivity it would lose something of incalculable value based on its investment

of time and money developing the area, the significant risks assumed and the fact that there remains some 76 years of exclusivity under the Territorial Agreement. Such a loss would be without any commensurate breach on its part since the injury caused to Burger King by the delay is relatively modest and within definable limits. Thus, a termination of the Territorial Agreement would result in an extreme forfeiture to Family Dining.

In accordance with the foregoing the Court finds that under the law and based upon the facts adduced in Burger King's case, it is not entitled to a declaration that the Territorial Agreement is terminated. Therefore, Family Dining's Rule 41(b) motion for an involuntary dismissal is granted.

NOTE ON THE DIFFERENT USES OF THE FORFEITURE CONCEPT

In the first part of this chapter, we saw that the concept of forfeiture is sometimes used to justify an interpretation of contract clauses as language of promise rather than of condition. If a court feels that the consequence of interpreting language as an express condition is an unfair loss of a bargained-for benefit for one party, the court will be more apt to find the parties intended only a promise.

Despite the possibility of forfeiture, the court may feel compelled to find the existence of a condition because the intent of the parties is clear. Or the court may feel it necessary to find a constructive condition so that there is some order to the performances of the parties. However, if the consequence of the failure of the conditioning event is a potential "disproportionate forfeiture," the court may find that the condition is excused. The Restatement (Second) accepts this approach:

> **§229. Excuse of a Condition to Avoid Forfeiture**
>
> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

As you might expect, the line between these two uses of the forfeiture concept blurs in the real world as courts try to give effect to the parties' agreement and traditional contract doctrine while reaching a just result.

Problem 153

Fibber McGee and his wife Molly had lived in their apartment for ten years. Every two years they went down to the landlord's office and signed a new lease, the lease ending every two years on May 31. One year they were amazed when the landlord refused their offer of renewal on June 1, noting that their option had expired at midnight of the day before and saying that he planned to raze the building and turn it into a parking lot. They come to your office for help. Do they have a case? Should there be a

different rule for the exercise of an option to renew a lease than to purchase real property?

INMAN v. CLYDE HALL DRILLING CO.
Supreme Court of Alaska, 1962
369 P.2d 498

DIMOND, J. This case involves a claim for damages arising out of an employment contract. The main issue is whether a provision in the contract, making written notice of a claim a condition precedent to recovery, is contrary to public policy.

Inman worked for the Clyde Hall Drilling Company as a derrickman under a written contract of employment signed by both parties on November 16, 1959. His employment terminated on March 24, 1960. On April 5, 1960, he commenced this action against the Company claiming that the latter fired him without justification, that this amounted to a breach of contract, and that he was entitled to certain damages for the breach. In its answer the Company denied that it had breached the contract, and asserted that Inman had been paid in full the wages that were owing him and was entitled to no damages. Later the Company moved for summary judgment on the ground that Inman's failure to give written notice of his claim, as required by the contract, was a bar to his action based on the contract.[2] The motion was granted, and judgment was entered in favor of the Company. This appeal followed.

A fulfillment of the thirty-day notice requirement is expressly made a "condition precedent to any recovery." Inman argues that this provision is void as against public policy. In considering this first question we start with the basic tenet that competent parties are free to make contracts and that they should be bound by their agreements. In the absence of a constitutional provision or statute which makes certain contracts illegal or unenforceable, we believe it is the function of the judiciary to allow men to manage their own affairs in their own way. As a matter of judicial policy the court should maintain and enforce contracts, rather than enable parties to escape from the obligations they have chosen to incur.

We recognize that "freedom of contract" is a qualified and not an absolute right, and cannot be applied on a strict, doctrinal basis. An

2. The portion of the contract with which we are concerned reads:

> You agree that you will, within thirty (30) days after any claim (other than a claim for compensation insurance) that arises out of or in connection with the employment provided for herein, give written notice to the Company for such claim, setting forth in detail the facts relating thereto and the basis for such claim; and that you will not institute any suit or action against the Company in any court or tribunal in any jurisdiction based on any such claim prior to six (6) months after the filing of the written notice of claim hereinabove provided for, or later than one (1) year after such filing. Any action or suit on any such claim shall not include any item or matter not specifically mentioned in the proof of claim above provided. It is agreed that in any such action or suit, proof by you of your compliance with the provisions of this paragraph shall be a condition precedent to any recovery.

established principle is that a court will not permit itself to be used as an instrument of inequity and injustice. As Justice Frankfurter stated in his dissenting opinion in United States v. Bethlehem Steel Corp., "The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases." In determining whether certain contractual provisions should be enforced, the court must look realistically at the relative bargaining positions of the parties in the framework of contemporary business practices and commercial life. If we find those positions are such that one party has unscrupulously taken advantage of the economic necessities of the other, then in the interest of justice — as a matter of public policy — we would refuse to enforce the transaction. But the grounds for judicial interference must be clear. Whether the court should refuse to recognize and uphold that which the parties have agreed upon is a question of fact upon which evidence is required.

The facts in this case do not persuade us that the contractual provision in question is unfair or unreasonable. Its purpose is not disclosed. The requirement that written notice be given within thirty days after a claim arises may have been designed to preclude stale claims, and the further requirement that no action be commenced within six months thereafter may have been intended to afford the Company timely opportunity to rectify the basis for a just claim. But whatever the objective was, we cannot find in the contract anything to suggest it was designed from an unfair motive to bilk employees out of wages or other compensation justly due them.

There was nothing to suggest that Inman did not have the knowledge, capacity or opportunity to read the agreement and understand it; that the terms of the contract were imposed upon him without any real freedom of choice on his part; that there was any substantial inequality in bargaining positions between Inman and the Company. Not only did he attach a copy of the contract to his complaint, which negatives any thought that he really wasn't aware of its provisions, but he also admitted in a deposition that at the time he signed the contract he had read it, had discussed it with a Company representative, and was familiar with its terms. And he showed specific knowledge of the thirty-day notice requirement when, in response to a question as to whether written notice had been given prior to filing suit, he testified:

A. Well now, I filed — I started my claim within 30 days, didn't I, from the time I hit here. I thought that would be a notice that I started suing them when I first came to town.
Q. You thought that the filing of the suit would be the notice?
A. That is right.

Under these circumstances we do not find that such a limitation on Inman's right of action is offensive to justice. We would not be justified in refusing to enforce the contract and thus permit one of the parties to escape his obligations. It is conceivable, of course, that a thirty-day notice of claim requirement could be used to the disadvantage of a workman by an unscrupulous employer. If this danger is great, the legislature may act

to make such a provision unenforceable.[11] But we may not speculate on what in the future may be a matter of public policy in this state. It is our function to act only where an existent public policy is clearly revealed from the facts and we find that it has been violated. That is not the case here.

Inman's claim arose on March 24, 1960. His complaint was served on the Company on April 14. He argues that since the complaint set forth in detail the basis of his claim and was served within thirty days, he had substantially complied with the contractual requirement.

Service of the complaint probably gave the Company actual knowledge of the claim. But that does not serve as an excuse for not giving the kind of written notice called for by the contract. Inman agreed that no suit would be instituted "prior to six (6) months *after the filing of the written notice of claim.*" (Emphasis ours.) If this means what it says (and we have no reason to believe it does not), it is clear that the commencement of an action and service of the complaint was not an effective substitute for the kind of notice called for by the agreement. To hold otherwise would be to simply ignore an explicit provision of the contract and say that it had no meaning. We are not justified in doing that.

The contract provides that compliance with its requirement as to giving written notice of a claim prior to bringing suit "shall be a condition precedent to any recovery." Inman argues that this is not a true condition precedent — merely being labelled as such by the Company — and that non-compliance with the requirement was an affirmative defense which the Company was required to set forth in its answer under Civ. R. 8(c). He contends that because the answer was silent on this point, the defense was waived under Civ. R. 12(h).

The failure to give advance notice of a claim where notice is required would ordinarily be a defense to be set forth in the answer. But here the parties agreed that such notice should be a condition precedent to any recovery. This meant that the Company was not required to plead lack of notice as an affirmative defense, but instead, that Inman was required to plead performance of the condition or that performance had been waived or excused. The Company may not be charged under Civ. R. 12(h) with having waived a defense which it was not obliged to present in its answer.

Relying upon the doctrine of anticipatory breach of contract, Inman argues that when the Company discharged him it repudiated the employment agreement, and he was then excused from any further performance, including performance of the condition precedent of giving written notice of his claim.

What the Company allegedly did was not an anticipatory breach of contract in the strict sense of the term. Such a breach would have been committed only if the Company had repudiated its contractual duty before the time fixed for its performance had arrived. That was not the case here. Both parties had commenced performance on November 16, 1959, and

11. In Oklahoma the constitution (art. XXIII, §9) provides: "Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void." See Brakebill v. Chicago, R.I.&P. Ry., 37 Okl. 140, 131 P. 540 (1913).

they continued to perform until March 24, 1960. We believe Inman's real claim is that there was a breach of an existing duty accompanied by words or acts disclosing the Company's intention to refuse performance in the future, and that this conferred upon him the privilege to deal with the contract as if broken altogether.

But even assuming that there had been a breach which excused Inman from further performance of his contractual obligation to work for the Company for the full term of the contract, it does not follow that he was also excused from performing the condition precedent to commencement of this action for damages. He did not allege, nor does the record indicate, that his failure to give notice was caused by the Company's fault. There is no showing nor any inference that the Company, by words or conduct, induced Inman not to give the required notice, or led him to believe that giving notice would be a futile gesture. In fact, he admitted in his deposition that his reason for not complying with the condition was because he thought the filing of the suit would constitute the required notice.

Inman's last point is that the trial court erred in entering a final judgment. He argues that the failure to give written notice was merely a matter in abatement of his action until the condition could be performed, and that the most the court ought to have done was to dismiss the action without prejudice.

This argument is unsound. At the time judgment was entered Inman could no longer perform the condition precedent to recovery by giving written notice of his claim within thirty days after the claim arose, because this time limitation had expired. In these circumstances his right to seek redress from the court was barred and not merely abated. Final judgment in the Company's favor was proper.

The judgment is affirmed.

NOTE

This has been a much-discussed case. Robert Childress in Conditions in the Law of Contracts, 45 N.Y.U. L. Rev. 33, 34-35 (1970), took a dim view of *Inman* and the use of condition theory to avoid nonperformance.

> [T]he law of contracts has been forced by pressure for just decisions to develop numerous doctrines to nullify what is said to be the law of conditions. Waiver, estoppel, substantial performance and abhorrence of forfeitures are among the doctrines which have allowed the law of conditions to survive by making it inoperative. Since most cases end well, it would be a simple matter to conclude that all is well with the law of contract conditions. But the failure to articulate the real ground of decision misleads the profession and thereby promotes uncertainty and litigation. Some might still argue that the traditional law of conditions is a stabilizing influence in the law of contracts. A look at the present function of the doctrine will show why this is not so. Its sole function today is to allow a disputant to make a fact or event operative beyond the scope of its demonstrated materiality in the circumstances. As in *Inman,* courts still occasionally claim to allow an irrelevancy to be decisive in litigation. This tempts people to try to escape contract duties

by asserting irrelevancies. They rarely succeed, but the attempts make the traditional law of conditions quite the opposite of a stabilizing influence. . . .

Because of its function, the law of conditions claims to bar analysis based upon good faith contract performance. In fact, it only drives such analysis underground where it is conducted under the mysterious shrouds of waiver, estoppel and the other various repealers of the law of conditions. The operation of these repealers is not mysterious and obscure by accident. Obscurity is necessary to the survival of rules about the law of conditions. It continues to be said to exist, but it is allowed to be decisive only in cases whose decisions would go unchanged if there were no law of conditions.

C. Waiver and Estoppel

Problem 154

Mr. and Mrs. America bought a $20,000 automobile from Swank Motors, promising to make installment payments on the first of each month. The contract provided that "time is of the essence" and the failure to make payments as agreed was a ground for declaring a default and repossessing. Nonetheless, they were frequently late on the payments, some months as much as ten days late. After seven months of late payments, Swank had had enough, and without warning it repossessed the car. The Americas sued for conversion and breach of contract. Who should win the lawsuit? See UCC §2-208. UCC 2 0 9

yes (a) Would it affect your answer if each month Swank had vigorously protested the late payment, and threatened repossession if it happened again?

(b) Would it affect your answer if the contract contained a clause saying that the "acceptance of late payments shall not be construed as a waiver of the right to declare a default because payments are not made as agreed; in spite of the acceptance of such late payments, time remains of the essence"? See the case below.

(c) Swank Motors calls you, its attorney, with this question. It knows that its acceptance of the late payments has probably resulted in a waiver of the ability to repossess, but it has grown weary of the sloppy payment practices of the Americas. Is it possible to reinstate the "time is of the essence" clause? What procedure would you advise? See UCC §2-209(5).

MOE v. JOHN DEERE CO.
Supreme Court of South Dakota, 1994
516 N.W.2d 332

MOSES, Circuit Judge.

This is an appeal by Ted Moe (Moe) from a summary judgment granted by Third Judicial Circuit Court in favor of John Deere Company (Deere) and Day County Implement Company (Implement). We reverse.

Facts

On September 29, 1983, Moe bought a farm tractor from Day County Equipment in Watertown, South Dakota. He purchased a John Deere D8850 for a cash price of $121,268.00. In financing the transaction, Moe traded in two old tractors for the amount of $77,543.00 and agreed to pay the $59,802.40 difference in five equal installments of $11,960.48 each due on October 1st for the years 1984, 1985, 1986, 1987 and 1988. After the contract was completed it was assigned to Deere on September 30, 1983.

Moe was two months late in paying his first installment. Rather than paying $11,960.48 on October 1, 1984, Moe paid $12,212.87 on December 3, 1984. On October 1, 1985, Moe was again unable to timely pay his second installment. Deere waived full payment and extended the time in which Moe was to make this payment. On January 13, 1986, Moe made a partial payment in the amount of $6,200.00, over three months late. Moe and Deere agreed that Moe was to pay a second amount on March 1, 1986 in the amount of $6,350.17 to complete the second installment. On March 10, 1986, Deere sent a notice to Moe indicating that Moe's second installment was past due and that he had until March 20, 1986 to pay $6,389.48 to bring his account current. Again Moe missed this payment deadline.

Deere did not follow up on the delinquent payment until a representative from Deere contacted Moe sometime in May or the first part of June 1986, over seven months after the second installment was originally due. Deere's representative and Moe agreed that Moe would pay $2,000.00 of the $6,389.48 plus interest owing to Deere and Deere would allow Moe to pay the balance when he started to harvest. Deere's representative and Moe failed to specify the due date for either the $2,000.00 payment or when the balance was due. Moe had no further conversations with the representative from Deere about the $2,000.00 until after Deere repossessed the tractor on July 30, 1986.

Moe, who was in Oklahoma at the time of repossession, did not receive any notice from Deere's representative that the tractor was going to be repossessed because his payments were delinquent. Deere reassigned Moe's contract to Implement following the repossession. On August 1, 1986, Deere mailed from Minneapolis, Minnesota a certified letter dated July 31, 1986 to Moe which indicated that Deere "[found] it necessary to gain possession of the equipment involved." This letter apparently was returned to Deere undelivered to Moe. Thus, Deere hand-addressed a new letter and sent it to Moe who picked it up on August 18, 1986. The letter indicated:

> We intend to reassign your contract to the above named dealer. Once we reassign it, two weeks from the date of this letter, you will contact them on all matters concerning the disposition of the equipment or the amount owed under the contract. They intend to dispose of said collateral by public or private sale. If you wish to redeem this equipment, you must pay to John Deere Company $37,591.20 plus any expenses incurred from this repossession, in cash certified funds, before we reassign the contract. We hope you will be able to pay this amount within the prescribed period. If you have any

questions regarding this matter please contact us. M. K. Mehus, Manager Financial Services.

Implement sold the tractor on August 19, 1986 for $44,000.00. Implement paid Deere in full on the contract and applied the proceeds to the debt and turned over the excess proceeds to Moe's lender by mailing two (2) checks totalling $2,616.77 to the Farmers and Merchants Bank on December 1, 1986.

Moe sued Deere and Implement on the following causes of action: (1) wrongful repossession; (2) fraudulent repossession; (3) commercially unreasonable sale; and (4) failure to account for the surplus.

Deere moved for partial summary judgment on the third and fourth issues of commercially unreasonable sale and failure to account for surplus. The trial court granted Deere's motion. Then, Deere moved for summary judgment on the first and second issues of wrongful repossession and fraudulent repossession. On February 5, 1993, the trial court issued an order granting Deere's summary judgment motion on both issues. Moe appeals. . . .

ISSUE

DO GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER MOE WAS IN "DEFAULT" PRECLUDE THE GRANTING OF SUMMARY JUDGMENT?

We recognized in First Nat. Bank of Black Hills v. Beug, 400 N.W.2d 893, 896 (S.D. 1987), that "[t]he term 'default' is not defined in the Uniform Commercial Code, thus we must look to other sources for a definition." Id. at 895. Then, we turned to hornbook law for a definition of default:' " 'Default' triggers the secured creditor's rights under Part Five of Article Nine. But what is 'default?' Article Nine does not define the word; instead it leaves this to the parties and to any scraps of common law lying around. Apart from the modest limitations imposed by the unconscionability doctrine and the requirement of good faith, default is 'whatever the security agreement says it is.' " Id. at 896 (quoting J. White & R. Summers, Uniform Commercial Code §26-22 at 1085-86 (2d ed. 1980)).

Several jurisdictions recognize that the determination of default is not a matter of law for the court to decide. Whether a breach or a default exists is a question of fact. . . .

Here, the promissory note provided a definition of default:

> The borrower shall be in default upon the occurrence of any one or more of the following events: (1) the Borrower shall fail to pay, when due, any amount required hereunder, or any other indebtedness of the borrower to the Lender of any third parties; (2) the Borrower shall be in default in the performance of any covenant or obligation under the line of credit or equivalent agreement for future advances (if applicable) or any document or agreement related thereto; (3) any warranty or representation made by the

Borrower shall prove false or misleading in any respect; (4) the Borrower or any Guarantor of this promissory note shall liquidate, merge dissolve, terminate its existence, suspend business operations, die (if individual), have a receiver appointed for all or any part of its property, make an assignment for the benefit of creditors, or file or have filed against it any petition under any existing or future bankruptcy or insolvency law; (5) any change that occurs in the condition or affairs (financial or otherwise) of the Borrower or any Guarantor of this promissory note which, in the opinion of the lender, impairs, the Lender's security or increases its risk with respect to this promissory note or (6) an event of default shall occur under any agreements intended to secure the repayment of this promissory note. Unless prohibited by law, the Lender may, at its option, declare the entire unpaid balance of principal and interest immediately due and payable without notice or demand at any time after default as such term is defined in this paragraph.

Technically, there was a breach of the security agreement and the promissory note when Moe did not make his payment on October 1, 1984, but instead paid it on December 3, 1984. One could find Moe in default, and under SDCL 57A-9-503, Deere would have had a right to repossess the tractor. However, Deere's right to a default or remedies under breach of contract can be modified or waived by the conduct of the parties.

The trial court's memorandum opinion indicated that "The terms of the written contract should control. Further the 'course of dealing' between the parties is not persuasive." However, here there is a question of fact. Did the oral statements and conduct of the parties modify the written agreement? In Alaska Statebank v. Fairco Fin., 674 P.2d 288 (Alaska 1983), the issue was if the parties' oral statements and conduct between September 15, 1978 and November 6, 1978 modified the written agreement so that pre-possession notice was required. The court held:

> [M]odification of a written contract may be effected either through subsequent conduct or oral agreements. Whether a modification has occurred is a question of fact. The superior court found that the parties had agreed to such modification, "[g]iven the course of dealings between the parties. . . ."

Id. at 292 (quoting Nat. Bank of Alaska v. J.B.L. & K. of Alaska, Inc., 546 P.2d 579, 586-87 (Alaska 1976)). See SDCL 53-8-7 (1990); See also South Dakota Pattern Jury Instruction No. 47-16 for Modification of a Written Contract by Subsequent Oral Agreement.

The record reveals through affidavits and depositions that the oral statements and conduct of the parties herein between October 1, 1984 and July 30, 1986 appear to modify the written agreement. Deere sent notice to Moe that he had until March 20, 1986 to pay $6,389.48 including late charges. Moe admits that in May or the first week of June 1986 he agreed to pay the March installment in two parts. He agreed to pay $2,000.00 with the balance due in August 1986 when he commenced his wheat harvest. There was no date certain by which Moe was to pay the $2,000.00. In determining if there was a default on the part of Moe in complying with this contract, all statements and conduct of the parties are essential in determining whether there was an oral modification or waiver of the promissory note or security agreement by John Deere.

WHETHER A NON-WAIVER CLAUSE IN THIS CONTRACT IS ENFORCEABLE?

The second issue that needs to be addressed is whether the "non-waiver clause" is enforceable in this contract. Deere's brief refers to this clause as an "anti-waiver" clause but we will refer to it as a "non-waiver" clause. See Lewis v. National City Bank, 814 F. Supp. 696, 699 (N.D. Ill. 1993) (referring to the clause dealing with waiver provisions as a "non-waiver" clause). The security agreement between Moe and Deere contained the following provisions:

> In the event of default (as defined on the reverse side hereof), holder may take possession of the Goods and exercise any other remedies provided by law. This contract shall be in default if I (we) shall fail to pay any installment when due. . . . In any such event (default) the holder may immediately and without notice declare the entire balance of this contract due and payable together with reasonable expenses incurred in realizing on the security interest granted hereunder, including reasonable attorney's fees. Waiver or condonation of any breach or default shall not constitute a waiver of any other or subsequent breach or default.

We now turn to other jurisdictions' interpretations of the "non-waiver" clause.

Courts have adopted two basic rules for interpreting situations where repeated late payments have been accepted by a creditor who has the contractual (i.e., "non-waiver" clauses) and the statutory right (i.e., SDCL 57A-9-503) to repossess the collateral without notice. Some courts have held that the acceptance of late payments does not waive or otherwise affect the right of a creditor to repossess without notice after subsequent late payment defaults. Westinghouse Credit Corp. v. Shelton, 645 F.2d 869 (10th Cir. 1981). . . . Other courts have imposed a duty on the creditor to notify the debtor that strict compliance with the time for payment will be required in the future or else the contract remedies may be invoked. See, e.g., Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232 (Minn. 1980). . . .

need notice

Deere urges us to adopt the position that the acceptance of late payments does not waive or otherwise affect the right of a creditor to repossess without notice after subsequent late payment defaults stating to do so would mean that the "non-waiver" clause is a nullity.

A majority of states who have considered the issue adhere to the general rule that "a secured party who has not insisted upon strict compliance in the past, who has accepted late payments as a matter of course, must, before he may validly rely upon such a clause to declare a default and effect repossession, *give notice* to the debtor . . . that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided." *Huff*, 582 P.2d at 369 (citations omitted) (emphasis in original).

The basis for imposing this duty on the secured party is that the secured party is estopped from asserting his contract rights because his conduct has induced the debtor's justified reliance in believing that late payments were acceptable. SDCL 57A-1-103 preserves the law of estoppel. The acts which induced reliance are the repeated acceptance of late payments. The reliance is evidenced by the continual pattern of irregular and late payments.

The debtor has the right to rely on the continuation of the course of performance and that right to rely is sufficient to satisfy the reliance element. See *Waters,* supra. This right to rely is supported by the policy of the Uniform Commercial Code which encourages the continual development of "commercial practices through, custody, usage, and agreement between the parties." See U.C.C. §1-102(2) or SDCL 57A-1-102(2). South Dakota's adaptation of the Uniform Commercial Code is found in Title 57A of the South Dakota Code. The purpose of Title 57A is found in SDCL 57A-1-102 and states in pertinent part as follows:

> (1) This title shall be liberally construed and applied to promote its underlying purposes and polices. (2) Underlying purposes and polices of this title are (a) To simplify, clarify and modernize the law governing commercial transactions; (b) To permit the continued expansion of commercial practices, through custom, usage and agreement of the parties; SDCL 57A-1-102(1)-(2) (1988).

The Uniform Commercial Code should be liberally construed and applied to promote its underlying purposes and policies. First Nat. Bank v. John Deere Co., 409 N.W.2d 664 (S.D. 1987).

Adopting the rule that a creditor must give pre-possession notice upon modification of a contract results in both the debtor and the creditor being protected. The debtor would be protected from surprise and from a damaging repossession by being forewarned that late payments would no longer be acceptable. Likewise, the creditor would be protected utilizing the device of "one letter." The creditor can totally preserve his remedies so that if the account continues in default, repossession could be pursued as provided in the contract without further demand or notice. It is recognized that this rule does place the creditor in a slightly worse position because if a creditor sends out a letter to preserve his rights and then once again accepts late payments another notice would be required. The second notice would be required because the acceptance of the late payment after the initial letter could again act as a waiver of the rights asserted in the letter.

We hold that the repeated acceptance of late payments by a creditor who has the contractual right to repossess the property imposes a duty on the creditor to notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral.

The dispositive issue is if the plaintiff was in default. Whether a default exists is a factual question not properly resolved on a motion for summary judgment. Defendant's right to repossess turns on this default. Therefore what constitutes a "breach of the peace" when repossessing collateral is premature at this time. We reverse this order and the judgment of the circuit court and remand for trial.

NOTES

1. Speaking to the issue in the last case, Professor Grant Gilmore, one of the drafters of the Uniform Commercial Code once said, "[C]ourts pay

little attention to clauses which appear to say that meaningful acts are meaningless and that the secured party can blow hot or cold as he chooses." G. Gilmore, Security Interests in Personal Property §44.1, at 1214 (1965).

2. Courts rarely distinguish between estoppel and waiver in a case such as the instant case. In fact either doctrine is arguably applicable under the facts of the instant case: Debtor was attempting to demonstrate its rights under the contract (to retain the collateral) still existed because of the creditor's actions in ignorning missed payment and not treating the obligation in default. Debtor was arguing that creditor should not be able to proceed because it would be unfair to allow the creditor to proceed without notice because debtor relied upon creditor's ignoring the late payments: estoppel. Such action may also show waiver: the intentional relinquishment of a known right. However, when a party attempts to establish contractual rights counter to those in the express agreement which provide the basis for affirmative relief, courts will typically refuse the use of estoppel doctrine. See, e.g., Bennett v. Farmers Ins. Co., 150 Or. App. 63, 945 P.2d 595 (1997). On the related issue of the implied covenant of good faith see the note on good faith at pages 722-724.

3. *Installment payment obligations.* Under traditional contract doctrine discussed in the next chapter, if a debtor fails to pay an installment payment, the creditor is entitled to sue only for the missed installment even though the missed payment might represent a repudiation of the entire obligation. This presents a dilemma for the creditor who must wait as each installment becomes past due before suing. Instead, the creditor can include in the agreement an *acceleration clause* — a clause allowing the creditor to treat the entire obligation as due, once a payment has been missed. Such a clause was present in the contract in the *John Deere* case.

4. *Waiver of constructive conditions vs. waiver of express conditions.* Consider the following excerpts from Farnsworth:

> **§8.19.** . . . For the most part, the rules governing waiver of constructive conditions are similar to those governing express conditions. . . . [H]owever, a constructive condition of exchange can be waived, even if it is a material part of the agreed exchange, since the injured party will still be compensated for the breach.
>
> **§8.5.** . . . The concept of waiver — including both ordinary and election waiver — has been responsible for substantial erosion of the rule of strict compliance generally applicable to conditions. To keep this erosion in check, the concept of waiver is restricted to conditions that are relatively minor [citing Restatement (Second) of Contracts §84(1)(a)]. A vendor who has made an offer coupled with an option contract to sell land on condition that the purchaser pay $100,000 cannot waive this condition. . . . Parties can most easily waive conditions that are essentially procedural or technical, such as the furnishing of architect's certificates as a condition of the duty to make progress payments. Waiver is often invoked to excuse delay in the occurrence of a condition, and courts have been especially receptive to claims that an insurer has waived the insured's delay in giving notice of loss.

D. Election

Problem 155

Mr. and Mrs. America took out insurance policies with NoRisk Insurance Company on each of their lives. The policies provided that notice of death had to be given in writing within ten days of occurrence or the insurance company had no liability. Mr. America suffered a heart attack while jogging and died. The next afternoon, Mrs. America phoned the NoRisk office and informed the company of his death. The person who took the call expressed sympathy. Two weeks later a claims adjuster from the company called on Mrs. America and had her fill out the appropriate forms. He discussed with Mrs. America the possibility of settling the claim for one-half its face value "because of some concern about the insurance application." Two days after that she received a letter from the company stating that its review of the file revealed that she had never given a written notice of her husband's death as required by the policy, so it was denying liability. Distraught, Mrs. America phones you, her attorney. What is your theory? Can she prove reliance here? Does it matter? See Farnsworth §8.19, at pp. 595-96 both distinguishing the effect of election versus simple waiver and discussing the merits of such a doctrine in such a setting.

E. Impossibility

As with the contract as a whole, impossibility of performance can excuse the performance of conditions in the contract. If this occurs the courts must adjust the resulting contractual liabilities. If a condition's occurrence becomes impossible, is the contract at an end? In resolving this issue, courts look to the same risk allocation factors we explored in the section on impossibility.

Problem 156

Opera singer Beverly Pipes was engaged to sing the role of Pat Nixon in a new opera entitled *Watergate*. The opera went into rehearsal in May, with a scheduled opening date of September 1. During the first week of August, Ms. Pipes fell ill with pneumonia and missed all subsequent rehearsals. The producer of the opera engaged another soprano to take over the role, and the show opened as scheduled. It was a tremendous sensation. At the end of the first week of performances, Beverly Pipes showed up at the opera house, ready to sing. She said that she felt fine and that her voice was never better. She knew the role and wanted it back. The producer refused and a lawsuit followed. Is Ms. Pipes in breach for failing to rehearse? Is the manager in breach for failing to give her the part

back? This problem is based on the well-known case of Poussard v. Spiers & Pond, 1 Q.B.D. 410 (1876).

Problem 157

Luciano Uvula, world-renowned tenor, was engaged by the Chicago Opera Association to sing a series of roles in famous operas, all of which were already in his extensive repertoire. He agreed to come to Chicago on May 1 and begin rehearsals with the company, but he came down with a cold and didn't show up in Chicago until May 15, at which time he announced he was ready to rehearse. The opera season was scheduled to start July 1 and extend through April of the next year. The management refused to let Uvula rehearse, saying that missing the beginning of rehearsals was too serious. He sued. How should this come out? The case is Bettini v. Gye, 1 Q.B.D. 183 (1876).

F. A Short Drafting Exercise

Problem 158

The City of Fargo, North Dakota, was delighted to receive the award of the Winter Olympics for the year 2014. You are the city attorney, and the city officials have asked you to draft a contract with Sports Facilities, Inc., a construction firm that the city has hired to build a bobsled run. The bobsled run *must* be completed by October 1, 2013, in time for the pre-Olympics trials, or the city will be ruined. The city officials tell you that they do not want to have to pay a cent if the bobsled run is not completed by that date. Which of the following clauses or clause would you use?

(a) "Sports Facilities, Inc., hereby promises to complete the bobsled run by October 1, 2013." mere promise

(b) "Unless the bobsled run is completed by October 1, 2013, the City shall not be liable for any amount." mere condition

(c) "Sports Facilities, Inc., hereby promises to complete the bobsled run by October 1, 2013, and unless it does so the City shall not be liable for any amount." both a cond & promise

Draft your own clause or clauses to make sure the city gets what it wants and be prepared to read it aloud in class.

failure of cond. relieves city of liability but city can't sue b/c of failure of promise.

CHAPTER

8

ANTICIPATORY REPUDIATION

Problem 159

For a trip to the moon from the space station in 2020, NASA requested bids on a gravity-free scooter capable of making the trip. It awarded the contract in early 2012 to Venture's Vehicles, a company specializing in experimental craft. The contract price was $32 billion payable on delivery in 2020. In mid-2016, Venture's Vehicles sent NASA a letter sadly informing the agency that it was unable to fulfill its contract by the date scheduled. NASA was able to purchase a substitute vehicle elsewhere for $56 billion. Can it recover from Venture's Vehicles now (in 2016), or must it wait until 2020, the scheduled date of delivery?

HOCHSTER v. DE LA TOUR
Queen's Bench, 1853
2 El. & Bl. 678, 118 Eng. Rep. 922

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

of the agreement, before that day, to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage; Short v. Stone (8 Q.B. 358). If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract; Ford v. Tiley (6 B.&C. 325). So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them; Bowdell v. Parsons (10 East, 359). One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton v. Emmens,[a] which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to

a. 6 Com. B. 160. Affirmed in Dom. Proc.; Emmens v. Elderton, 4 H.L. Ca.

sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August 1852: according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of September, when the three months would expire. . . .

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.

QUESTIONS

1. Does it follow, as Lord Campbell says, that the desirability of allowing the aggrieved party to mitigate also necessarily means that suit may be brought before the date set for performance? See Corbin §960.

2. Is allowing the early suit good policy? What factors militate in either direction? See Corbin §961. For an economic analysis, see Jackson, Anticipatory Repudiation and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance, 31 Stan. L. Rev. 69 (1978).

Problem 160

Assume that in the same basic fact pattern as in the last Problem, NASA had phoned Venture's Vehicles in 2016 and inquired how production was going. John Venture, president of the company, replied, "Well, I'm really not sure if we are going to be able to do the job. We've encountered some glitches on this one." May NASA immediately take steps to mitigate? What should NASA do? See UCC §2-609 and its Official Comment. If NASA sent a §2-609 notice, which of the following responses by Venture's Vehicles would be satisfactory in your opinion?

(a) "We're sorry if we worried you. Production is now on schedule and we will deliver as agreed."

(b) "We have solved our internal difficulties and will produce the scooters as agreed. Please send your personnel to our offices and we'll make our plans and schedules available to them for inspection."

(c) "Our local bank is willing to issue you a letter of credit for the damages payable in the event we default."

Restatement (Second) of Contracts §251 is similar to UCC §2-609. However, under the Restatement provision the demand for assurance need not be in writing and there is no 30-day limit on the time to provide adequate assurances of due performance. For a comparison of UCC §2-609 and Restatement §251 and an interesting study of their application in actual lawsuits, see White, Eight Cases and Section 251, 67 Cornell L. Rev. 841 (1982); for a comprehensive discussion of §2-609, see Larry T. Garvin, Adequate Assurance of Performance: Of Risk, Duress, and Cognition, 69 U. Colo. L. Rev. 71 (1998).

HOPE'S ARCHITECTURAL PRODUCTS v. LUNDY'S CONSTRUCTION

United States District Court, District of Kansas, 1991
781 F. Supp. 711, 16 U.C.C. Rep. Serv. 2d 1059

LUNGSTRUM, District Judge. This case presents a familiar situation in the field of construction contracts. Two parties, who disagreed over the meaning of their contract, held their positions to the brink, with litigation and loss the predictable result of the dispute. What is rarely predictable, however, (and what leads to a compromise resolution of many construction disputes when cool heads hold sway) is which party will ultimately prevail. The stakes become winner-take-all.

Plaintiff Hope's Architectural Products (Hope's) is a New York corporation that manufactures and installs custom window fixtures. Defendant Lundy's Construction (Lundy's) is a Kansas corporation that contracted to buy windows from Hope's for a school remodeling project. Defendant Bank IV Olathe (Bank IV) is a national banking organization with its principal place of business in Kansas. Bank IV