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Contracts (1965)

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CHAPTER 6

Contracts

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§6.1. General. The most important development of the decade in contract law has been the gradual acceptance of the Uniform Commercial Code. Now, as over forty states have adopted the Code, another significant task is being undertaken: a revision of the Restatement of Contracts. A hurried reading of the first hundred-odd sections prompts a few general and tentative observations.

It appears that the committee, which is headed by Harvard's Professor Robert Braucher as Reporter, is attempting more than a simple updating of the original. Cases and statutes decided and enacted during the past thirty years are responsible for some of the revisions but many more seem to emerge as the result of new thinking. The influence of Corbin, Fuller, Patterson, Kessler, Sharp, Dawson, and others is evident. Williston is still continually cited by the Reporter in his Notes, but even here there is change. Williston has been once revised by Thompson and is now undergoing a second revision by Professor Jaeger.

The many changes being advocated belie the general feeling that Contracts is a dead subject. The number of alterations is more than might be expected, but none of the changes are surprising. It seems as though Restatement I has grown old gracefully and with comparatively little notice.

§6.2. Building contracts: Damages. Two cases decided during the 1965 SURVEY year appear to be simple applications of long-standing rules. Read separately they provoke little interest, but when they are compared a dissonant note is faintly audible. The cases involve, in somewhat different settings, a builder's right to compensation where he has failed to substantially perform a contract for the construction of a house.

In *Concannon v. Galanti*[1] the defendant agreed to build a house for the plaintiff. The contract price was $17,800 and the lower court found that the house would have had a fair market value of $20,000 had it been completed according to specifications. Owing to intentional deviations by the defendant, the cost of repairing defects was $5000 and even after these were cured the value of the house would be only

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§6.2. [1] 1964 Mass. Adv. Sh. 1205, 202 N.E.2d 236.

$15,000. During the course of construction the plaintiff had paid $16,435 and given his note to the defendant for $1078, which represented the balance due under the contract less adjustments. In this action the plaintiff sued for damages caused by the faulty construction and the defendant attempted to set off the amount of the unpaid note.

The trial court granted the plaintiff judgment in the amount of $10,000 ($5000 to repair defects and $5000 diminution in value), and refused to allow the defendant's setoff "either because of failure of proof or because [the defendant] had intentionally deviated from the contract."[2] Upon appeal the Supreme Judicial Court reduced the plaintiff's recovery by the amount of the note upon the rationale that the plaintiff "should have had a house worth $20,000 for a payment of $17,513.95" and that "they should not receive the equivalent of $20,000 for a payment of only $16,435."[3]

This result appears fair and it is difficult to fault the Court's reasoning. The decision gives the plaintiff full compensation for his damages and the benefit that he would have received had the contract been fully performed, and yet the defendant is not penalized for his breach. Note, however, the case of *S. Onorato Corp. v. Levin*[4] which also seems correctly decided.

In the *Onorato* case the plaintiff agreed to build a house for the defendant, the price was $41,900, and work was to be completed on December 15th. After beginning construction the defendant had financial difficulties and only about half of the work was completed by the deadline. At the end of December the defendant ordered the plaintiff to discontinue work and a new builder was hired to complete the house. In this action the plaintiff sued for breach of contract and in quantum meruit for the labor and materials furnished but not paid for. The defendant counterclaimed alleging breach of contract.

The lower court found that the plaintiff had furnished work and materials under the contract worth $1600 more than the defendant had paid during the course of construction, that the plaintiff also provided $1725 worth of extras for which the defendant had not paid, and that the defendant had not been damaged by the breach. The trial court denied recovery and this was affirmed by the Supreme Judicial Court. As to the quantum meruit count for work under the contract the Court held that there could be no recovery since there had not been substantial performance. The claim for extras was denied for the same reason on the theory that this claim became merged with the claim under the original contract.

The *Onorato* case can be written off as a typical example of the substantial performance doctrine where the plaintiff has failed to bring himself within the exception. Technically, the case cannot be criticized. But, contrasting the *Concannon* case with *Onorato*, there

[2] Id. at 1206, 202 N.E.2d at 237.
[3] Id. at 1208, 202 N.E.2d at 238.
[4] 1965 Mass. Adv. Sh. 525, 205 N.E.2d 722.

does appear to be an inconsistency. In *Concannon* the builder indirectly recovered the unpaid part of the contract price by receiving credit for the amount of the note. If he had sued on the note instead of raising it as a setoff, presumably he would have failed as the plaintiff in *Onorato* failed in his quantum meruit action. In *Onorato* the builder was refused recovery for materials and labor furnished even though his breach caused the homeowner no damage; in *Concannon* the homeowner's damages were adjusted by the unpaid balance.

Even though a lawyer may explain and defend both decisions competently by invoking doctrines of constructive conditions of exchange, substantial performance, and benefit of the bargain damages, logic questions and perhaps even rebels. It is submitted that the real or apparent inconsistency is caused by inherent deficiencies in the doctrine of constructive conditions of exchange as it is applied to contracts that have been partially performed before a breach occurs.

When one party to a bilateral contract has offered no performance it is common sense to prohibit his recovery on the contract and the judicially developed doctrine of conditions provides a useful rationalization. When, however, a party has partially performed before his breach, he should be allowed to recover the value of his performance less any damages caused by the breach. Otherwise, there is a forfeiture. Penalizing the breaching party, even though society may applaud it as the just deserts of a "bad buy," serves no purpose in a civilized community of complicated commercial transactions.

The *Concannon* case may be an indication of a slowly developing trend prophesied by Williston forty-five years ago:

> It seems probable that the tendency of decisions will favor a builder who has not unjustifiably abandoned his contract or been guilty of conscious moral fault in its performance.[5]

§6.3. Statute of frauds: Debts of another. A troublesome exception to the rule that promises to answer for the debt of another must be written is the "main purpose" rule. In *Nelson v. Boynton*,[1] Chief Justice Shaw expressed the rule in the following manner:

> Cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute.[2]

Professor Simpson has criticized this and other statements of the rule as so vague that they provide "no forward step in certainty or predict-

[5] 3 Williston, Contracts §1475 (1st ed. 1920). See also 2 Restatement of Contracts §357 (1932).

§6.3. [1] 3 Met. 396 (Mass. 1841).
[2] Id. at 402.

ability."[3] Yet, neither he nor any other writer offers a more workable test. If predictability and reconcilability are to exist in this area they must be accomplished by the courts.

Cases involving the main purpose rule are generally roughly classified according to fact patterns. One of the most common type of cases involves a promise made to a subcontractor. *Hayes v. Guy*,[4] decided during the 1965 SURVEY year, is a typical example.

In this case the defendant contracted with a general contractor for the construction of a house and the general contractor subcontracted with the plaintiff for the rough wiring. During the course of construction, the defendant ordered the plaintiff-subcontractor to change work from that originally specified. After the rough wiring was completed the defendant asked the plaintiff to connect the electrical service, a job not covered by the plaintiff's agreement with the general contractor. At this time the plaintiff was having difficulty collecting from the general contractor for the rough wiring and the defendant promised to pay not only for the connection of the service but also for the rough work. This action was brought by the plaintiff to collect for all of the work that he performed, including the rough wiring.

The defendant prevailed in the trial court on plaintiff's claim for the rough wiring. This was reversed by the Appellate Division. On appeal by the defendant, the Supreme Judicial Court affirmed the Appellate Division, finding that the defendant's purpose in making the promise to pay for the rough wiring was to get the electrical service installed and that the discharge of the general contractor's debt was purely incidental.

The case is a significant departure from the limited acceptance of the main purpose rule by this state in subcontractor cases. Although subcontractors in similar situations to the plaintiff in *Hayes* have recovered on a theory of novation[5] and upon the somewhat ambiguous theory that the original contract had ended,[6] this appears to be the first Massachusetts decision in which the main purpose rule has been applied in this type of case.

The Court distinguished the case of *Collins v. Abrams*[7] in which the pertinent facts were identical except for the form of the promise. In *Hayes* the defendant unqualifiedly promised to pay for the rough wiring while in *Collins* the promise by the defendant was that he "would see that the plaintiff was paid." The Court made much of this distinction stating that the language used by the defendant in *Collins* "indicates an intent that the defendant was only guaranteeing the payment of the debt of the general contractor."[8]

The form of the promise should not be the only controlling factor.

[3] Simpson, Suretyship 139 (1950).
[4] 1965 Mass. Adv. Sh. 543, 205 N.E.2d 699.
[5] Slotnick v. Smith, 252 Mass. 303, 147 N.E. 737 (1925).
[6] Greenberg v. Weisman, 345 Mass. 700, 189 N.E.2d 531 (1963).
[7] 276 Mass. 106, 176 N.E. 814 (1931).
[8] 1965 Mass. Adv. Sh. 543, 546, 205 N.E.2d 699, 701.

It is only one indication of the intent or purpose of the promisor, and perhaps a weak one at that. Since the promise is oral, it is not likely to be carefully worded nor to be recalled at trial with complete accuracy.

§6.4. **Covenants not to compete.** Discussed in the 1964 SURVEY[1] were two cases[2] where the Supreme Judicial Court held that an implied covenant not to compete attached to the sale of a business. In an unusual case decided during the 1965 SURVEY year, a seller maintained that an implied covenant should be imposed upon the buyer.

In *C. K. Smith & Co. v. Charest*[3] the plaintiff and defendant corporations were competitors in the business of selling oil, installing oil burners, and in the general repair of heating equipment. During 1954 the defendant sold his account's receivable to the plaintiff, and agreed to allow the plaintiff to use his business name and not to compete in the business of selling oil for five years. The individual defendant, who had been an employee prior to 1947 and was the president, treasurer, a director, and 99 per cent owner of the defendant corporation, agreed to work for the plaintiff and not to compete in the sale of oil for five years after the termination of his employment.

From 1954 to 1961, the defendant corporation continued to service oil burners and occupied the same office as the plaintiff corporation. During this period, there was some disagreement over whether the oil customers who were formerly the defendant's customers should be furnished service and repairs by the plaintiff or the defendant corporation. These differences of opinion were not settled but they did not cause abandonment of the relationship between the parties. There was nothing in either the contract for the sale of the accounts or the contract employing the individual defendant covering the question of who should do this repairing.

In 1961, the corporate defendant and the individual defendant began to solicit customers of the plaintiff for the sale of oil. The plaintiff brought this action against the two defendants seeking damages from both and an injunction against the individual defendant. The plaintiff was successful in both these requests and there was no appeal. The defendant had counterclaimed asking that the plaintiff be enjoined from competing for the service and repair business connected with those accounts originally sold to the defendant. The trial court refused to grant the injunction and upon appeal this was affirmed.

The Supreme Judicial Court noted that it had found implied covenants not to compete in both *Tobin v. Cody*[4] and *Cap's Auto Parts, Inc. v. Caproni*,[5] even though the sales agreements were silent on the

§6.4. [1] 1964 Ann. Surv. Mass. Law §§5.7, 6.1.

[2] Cap's Auto Parts, Inc. v. Caproni, 347 Mass. 211, 196 N.E.2d 874 (1964), and Tobin v. Cody, 343 Mass. 716, 180 N.E.2d 652 (1962).

[3] 1965 Mass. Adv. Sh. 35, 203 N.E.2d 565.

[4] 343 Mass. 716, 180 N.E.2d 652 (1962).

[5] 347 Mass. 211, 196 N.E.2d 874 (1964).

question. Two connected reasons were given by the Court for not similarly implying a covenant in the present case. First, here a seller was arguing that a buyer had agreed not to compete in a related business that was not a part of the sale whereas in the *Tobin* and *Cap's* cases it was the buyer who was attempting to enjoin the seller. The Court stated that it was more likely that a covenant would be understood but unexpressed in the prior cases. Secondly, the Court noted that both parties had been represented by attorneys in the *C. K. Smith* case and that the negotiations were extensive. The Court concluded that it would be expected that they would have included such a covenant if this had been the agreement of the parties.