

Annual Survey of Massachusetts Law

Volume 1985

Article 5

1-1-1985

Chapter 1: Contracts

Thomas J. Barton

Jeffrey C. Hadden

Elizabeth M. Leonard

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>

 Part of the [Contracts Commons](#)

Recommended Citation

Barton, Thomas J.; Hadden, Jeffrey C.; and Leonard, Elizabeth M. (1985) "Chapter 1: Contracts," *Annual Survey of Massachusetts Law*: Vol. 1985, Article 5.

CHAPTER 1

Contracts

SURVEY Staff†

§ 1.1. Recovery for Loss of Good Will under Breach of Implied Warranty.* In Massachusetts, an implied warranty of merchantability is provided for in the General Laws, chapter 106, section 2-314.¹ Under this section, an implied warranty runs with all goods purchased from a seller who is a merchant with respect to goods of that kind, unless the warranty is otherwise properly modified or excluded.² In order to recover where the goods prove to be unmerchantable, the buyer must show that he notified the seller within a reasonable time after the discovery of the defect.³

Where both breach of implied warranty of merchantability and sufficient notice of that breach are established, the Uniform Commercial Code (U.C.C. or Code) incorporated in General Laws, chapter 106, permits remedies to be administered liberally so as to place the aggrieved party in as good a position as if the other party had fully performed.⁴ Thus, under the General Laws, chapter 106, section 2-715, a buyer may recover all reasonable incidental and consequential damages arising from the breach.⁵ Moreover, where there is adequate evidence that the breach of warranty caused injury to a buyer's business reputation, courts have awarded damages for loss of good will.⁶ Because of its speculative nature, however, loss of good will is often more difficult to prove. As a result, courts often have denied recovery for loss of good will on the basis of

† Thomas J. Barton, Jeffrey C. Hadden, Elizabeth M. Leonard.

* Thomas Barton, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.1. ¹ G.L. c. 106, § 2-314.

² *Id.* While there is no one definition of merchantability, section 2-314 enumerates several criteria for determining whether in fact goods are merchantable. Among other requirements, the goods sold must pass without objection in the trade under the contract description and must be fit for the ordinary purpose for which the goods are used. *Id.*

³ G.L. c. 106, § 2-607(a)(3). For a discussion of the type of notice required under the Uniform Commercial Code see R. ANDERSON, 2 ANDERSON ON THE COMMERCIAL CODE §§ 2-607:25-44 (2d ed. 1971).

⁴ G.L. c. 106, §§ 1-106 and 2-715.

⁵ G.L. c. 106, § 2-715.

⁶ *See, e.g.,* Texusun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660 (5th Cir. 1971); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

insufficiency of evidence.⁷ Furthermore, the inherent difficulty in proving good will damages has led some jurisdictions, such as Pennsylvania, to disallow such damages as a matter of law.

Under Pennsylvania law, which like Massachusetts, is modeled on the U.C.C., loss of good will is never recoverable.⁸ Pennsylvania courts reason that the U.C.C. was not intended to enlarge the scope of damages previously recoverable under the Uniform Sales Act which made no provision for loss of good will.⁹ Pennsylvania courts also have emphasized that good will is by nature too speculative to afford any reasonable calculation.¹⁰

In spite of these concerns, Massachusetts and several other jurisdictions will allow recovery for loss of good will due to breach of warranty in appropriate cases.¹¹ Before the enactment of the Code in chapter 106, Massachusetts case law recognized loss of good will as an available remedy for damages resulting from the use of warranted material proving to be unfit.¹² Since the adoption of the Code, Massachusetts has addressed the issue of good will damages for breach of warranty only once in *Matsushita Electric Corporation of America v. Sonus Corporation*.¹³ Although the Supreme Judicial Court upheld the award in *Matsushita*, the Court noted that the injury actually represented loss of prospective profits rather than good will.¹⁴ During the Survey year in *Delano Growers Cooperative Winery v. Supreme Wine Co.*, the Supreme Judicial Court of Massachusetts specifically held that recovery for loss of good will is an appropriate remedy under sections 2-314, and -715, where there is both sufficient evidence connecting the breach to an injury to business reputation, and an adequate basis for calculation of the resulting loss.¹⁵

From 1935 to November 1978, the Supreme Wine Company (Supreme) operated a plant which bottled finished wine.¹⁶ In 1968, Supreme began

⁷ See, e.g., *Aldon Indus., Inc. v. Don Meyers & Associates, Inc.*, 517 F.2d 188 (5th Cir. 1975); *Certain-Teed Products Corp. v. Goslee Roofing and Sheet Metal, Inc.*, 26 Md. App. 452, 339 A.2d 302 (1975).

⁸ See, e.g., *Eastern Dental Corp. v. Isaac Masel Co.*, 502 F. Supp. 1354, 1365 (E.D. Pa. 1980); *Traynor v. Walters*, 342 F. Supp. 455, 465 (M.D. Pa. 1972); *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 512-13, 153 A.2d 472, 476 (1959).

⁹ E.g., *Rubin & Sons, Inc.*, 396 Pa. at 512-13, 153 A.2d at 476.

¹⁰ E.g., *id.* at 513, 396 A.2d at 476.

¹¹ See *supra* note 7; see also *infra* notes 49 to 53.

¹² See, e.g., *Royal Paper Box Co. v. Munro & Church Co.*, 284 Mass. 446, 452, 188 N.E. 223, 225 (1933).

¹³ 362 Mass. 246, 264, 284 N.E.2d 880, 890 (1972).

¹⁴ *Matsushita*, 362 Mass. at 264, 284 N.E.2d at 890.

¹⁵ *Delano Grower's Cooperative Winery v. Supreme Wine Co.*, 393 Mass. 666, 473 N.E.2d 1066 (1985).

¹⁶ *Id.* at 669, 473 N.E.2d at 1069.

purchasing sweet wine from the Delano Winery (Delano) in California.¹⁷ Around April or May of 1973, a large number of customers began returning the sweet wine because it contained a cottony substance later analyzed as *lactobacillus trichodes* (Fresno mold).¹⁸ Shortly thereafter, Supreme identified the defective wine as originating from the Delano vineyards, and notified the seller through oral reports and complaints about the problem.¹⁹

Because Supreme's patrons continued to return sweet wine identified as Delano's, Supreme withheld a payment of \$25,823.25 due on the last shipment of wine, and again notified Delano of the problems with the spoiled wine.²⁰ When Delano failed to act upon its promises of assistance for over a year, Supreme's vice-president wrote a letter requesting assistance and explaining the crisis caused by the tainted wine.²¹ As a result of this letter, Delano sent one of its experts to Supreme's Boston plant.²² Delano's agent advised Supreme to pasturize, reprocess, refilter and rebottle the defective wine.²³ Supreme complied with this advice and managed to resell some of the wine but still refused to pay for the last shipment.²⁴ Subsequently, Supreme was forced to liquidate.²⁵

The Delano winery brought suit in Suffolk Superior Court seeking \$25,823.25 in damages for nonpayment of wine delivered.²⁶ Supreme acknowledged receipt of the wine but as a defense asserted that the goods were not merchantable due to the presence of the mold.²⁷ In addition, Supreme counterclaimed, demanding incidental and consequential damages arising from earlier, similarly spoiled shipments which, according to Supreme, destroyed the company's reputation and forced it into liquidation.²⁸ The case was referred, facts not final, to a master.²⁹ The master found Delano responsible for the presence of Fresno mold and accordingly awarded damages to Supreme.³⁰ For the most part, the damages awarded reflected Supreme's loss of profits on the sale of the bad wine.³¹

¹⁷ *Id.*

¹⁸ *Id.* at 670, 473 N.E.2d at 1069.

¹⁹ *Id.* at 670, 473 N.E.2d at 1069–70.

²⁰ *Id.* at 671, 473 N.E.2d at 1070.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 668, 671, 473 N.E.2d at 1068, 1070.

²⁵ *Id.* at 668, 473 N.E.2d at 1068.

²⁶ *Id.* at 667, 473 N.E.2d at 1068.

²⁷ *Id.* at 667–68, 473 N.E.2d at 1068.

²⁸ *Id.* at 668, 473 N.E.2d at 1068.

²⁹ *Id.* at 668, 473 N.E.2d at 1069. The rules governing the appointment of masters in civil proceedings in Massachusetts are set forth in Mass. R. Civ. P. 53(a)–(h).

³⁰ *Supreme Wine*, 393 Mass. at 668, 473 N.E.2d at 1069.

³¹ *See id.* at 679 n.6, 473 N.E.2d at 1074 n.6. The measure of damages included the lost

While the master also found that the unmerchantable wine caused Supreme's liquidation, because Supreme failed to carry its burden of proof, the master refused to award damages for loss of good will.³²

At trial, the judge, relying on the master's findings, dismissed Delano's complaint. The judge also agreed with the master's determinations that Delano had breached its implied warranty as well as his assessment of \$60,634.00 in damages largely representing lost profits.³³ Additionally, the trial judge found sufficient evidence of loss of good will and thus ordered \$100,000.00 in compensation.³⁴

On appeal, the superior court judgment was transferred directly from the appeals court to the Supreme Judicial Court, on its own motion.³⁵ Delano argued several issues before the Court. First, Delano claimed that the judge applied the wrong standard in reviewing the master's report and improperly denied a motion to strike that report.³⁶ Also, Delano asserted that it did not violate the warranty of merchantability and in any event, Supreme failed to give the requisite timely and sufficient notice.³⁷ Finally, the appellant argued that the judge erred in his award of damages for loss of good will as well as his determination of the other consequential and incidental damages allowed.³⁸ In turn, Supreme cross-appealed insofar as it was required to deduct the purchase price of the last shipment of wine from its damages.³⁹

On review, the Supreme Judicial Court affirmed the Suffolk Superior Court decision.⁴⁰ The Court affirmed each issue presented on appeal, including Delano's breach of implied warranty which ran with the sale of the sweet wine.⁴¹ The Court found that Supreme had met its burden of identifying the wine as Delano's and of proving that the presence of

profits on 8,000 cases of wine (\$104,000.00), payment for the cost to Supreme's reimbursement of customers in returning the wine (\$6,250.00), costs of rebottling and resale of the wine in accordance with Delano's recommendations (\$25,207.25) and costs for reprocessing the wine (\$21,000.00). From this total the judge deducted the amounts received for reprocessed wine (\$70,000.00), and the amount of the unpaid shipment (\$25,823.25). Thus, total damages other than good will equaled \$60,634.00. *Id.*

³² *Id.* at 668, 473 N.E.2d at 1069.

³³ *See id.* at 669, 473 N.E.2d at 1069.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* See also *supra* note 32 for a discussion of the calculation of damages other than good will.

⁴⁰ *Id.* at 667, 473 N.E.2d at 1068.

⁴¹ The Court affirmed the other issues on appeal as well including the standard of review of the master's findings and the calculation of the damages other than those representing good will. *Id.* at 671-84, 473 N.E.2d at 1070-77.

the mold rendered the wine unmerchantable.⁴² The Court emphasized that the course of dealing between the respective parties since 1968 in which Supreme had always followed the same procedures and never before experienced difficulty, controlled this issue.⁴³ Consequently, the Court rejected Delano's arguments that the wine was merchantable because all California sweet wine contained Fresno mold and that trade usage requires the buyer-bottler to add sulfur dioxide to inhibit further growth of the mold. Based on this reasoning, the Court affirmed the lower court's finding of a breach of implied warranty of merchantability.

Where a seller has breached an implied warranty of merchantability, the buyer is required in accordance with General Laws, chapter 106, section 2-607, to inform the seller of the breach.⁴⁴ Addressing this issue, the Court held that notice is sufficient where it fulfills the purpose of the section of allowing an opportunity for settlement and alerting the seller that the buyer is asserting its legal rights.⁴⁵ On the question of whether Supreme offered proper notice, the Court ruled that Supreme's ongoing oral and written communications were not as a matter of law, insufficient and untimely notification.⁴⁶ Thus, according to the Supreme Judicial Court, the trial judge could have found that Supreme's conduct constituted sufficient notice.⁴⁷

After affirming the trial court's rulings on the issues of breach of warranty and sufficient notice, the Court considered the award of \$100,000.00 in damages for loss of good will. Although neither party raised the question of whether such damages are proper under General Laws, chapter 106, section 2-715, the Court nonetheless expressly addressed this issue.⁴⁸ In its examination, the Court referred to the case law permitting good will damages for breach of implied warranty before the adoption of the Code in Massachusetts.⁴⁹ The Court recognized, however, that some jurisdictions following the Code prohibit recovery for loss of good will based on their own pre-Code case law and the speculative nature of such damages.⁵⁰ Finally, the Court noted that where good will damages were recovered, there was adequate evidence to show that the injury arose from the breach and that the amount of the damage

⁴² *Id.* at 673–74, 473 N.E.2d at 1071–72.

⁴³ *Id.* at 673, 473 N.E.2d at 1071. For a definition of course of dealing and its effect on the standard of merchantability see G.L. c. 106, § 1-205(4).

⁴⁴ G.L. c. 106, § 2-607. See generally R. ANDERSON, *supra* note 4, at 2-607:25–34.

⁴⁵ *Supreme Wine*, 393 Mass. at 675, 473 N.E.2d at 1072.

⁴⁶ *Id.* at 675, 473 N.E.2d at 1073.

⁴⁷ *Id.*

⁴⁸ *Id.* at 683, 473 N.E.2d at 1077.

⁴⁹ *Id.* at 683–84, 473 N.E.2d at 1077.

⁵⁰ *Id.* at 683, 473 N.E.2d at 1077.

could be calculated.⁵¹ The Court concluded that damages for loss of good will are proper where there is adequate evidence to show that the injury arose from the breach and that the amount of this damage can be calculated.⁵²

Examining the facts of the case, the Supreme Judicial Court found the award proper since there was sufficient evidence both to support a causal connection between Delano's breach and damage to Supreme's business reputation and to justify a calculation of the resulting loss of good will.⁵³ The Court first found that the record supported the contention that the bad wine was responsible for the injury to Supreme's business reputation.⁵⁴ In addition to the testimony of former Supreme officers and customers, the evidence at trial included the master's report which found that the defective wine was the primary reason for Supreme's subsequent decline in sales after 1973.⁵⁵ Based on this evidence, the Court concluded that the finding of a link between the breach and loss of good will by the trial court was not clearly erroneous.⁵⁶

Once the Court affirmed the connection between the defective wine and loss of good will, it also refused to disturb the trial judge's calculation of the amount of this loss.⁵⁷ On appeal, Delano attacked this valuation by asserting both that there was a lack of evidence to support the judge's appraisal of the damage, and that the judge relied on extraneous material in determining the value of the good will loss.⁵⁸ In response, noting initially that Delano offered no evidence in rebuttal, the Court reviewed the record and concluded that the valuation of \$100,000.00 was appropriate in light of the evidence presented.⁵⁹ At trial, the evidence offered included, among other information, expert testimony by a wine broker who valued Supreme's loss of good will in excess of \$300,000.00, based on business records and posed hypotheticals.⁶⁰ Not being bound by expert testimony, the judge determined through the use of evidence contained in the record and an examination of the various valuation methods presented that Supreme's loss of good will attributable to Delano's breach was \$100,000.00.⁶¹ The Supreme Judicial Court upheld the valuation, noting that it need not be based on mathematical certainty and that the

⁵¹ *Id.*

⁵² *See id.* at 683, 684, 473 N.E.2d at 1076, 1077.

⁵³ *Id.* at 684, 473 N.E.2d at 1077.

⁵⁴ *Id.* at 681, 473 N.E.2d at 1075-76.

⁵⁵ *Id.*

⁵⁶ *Id.* at 681, 473 N.E.2d at 1076.

⁵⁷ *Id.* at 681-82, 473 N.E.2d at 1076-77.

⁵⁸ *Id.* at 681, 682, 473 N.E.2d at 1076.

⁵⁹ *Id.*

⁶⁰ *See id.* at 682, 473 N.E.2d at 1076-77.

⁶¹ *Id.*

judge's weighing of the evidence, as with the earlier proof of a connection between the breach and the sustained damage, was not clearly erroneous.⁶² Therefore, the Court affirmed the trial court's findings of damages for loss of good will as being based upon a sufficiency of evidence.⁶³

The resolution of the award of good will damages is significant in several respects. First, the Court explicitly held that good will damages will not be prohibited as a matter of law but instead will be awarded for breach of implied warranty in appropriate situations. In this respect, although there is authority to the contrary, Massachusetts joins several jurisdictions that have squarely confronted the issue.⁶⁴ Also, *Supreme Wine* sets out the circumstances where the award of good will damages will be appropriate — there must be adequate evidence to establish both that the breach caused the injury to good will and the value of the loss of good will. Through these requirements of sufficient evidence, Massachusetts seems to address the concerns of jurisdictions which prohibit recovery as a matter of law because such damages are too speculative. The position taken by the Court in *Supreme Wine* seems preferable to those jurisdictions which unconditionally bar recovery of good will since there is a possibility of recovery for good will damages when these damages are justified by the evidence. And theoretically, good will damages will not be awarded where there is insufficient evidence.

Where courts do not prohibit recovery as a matter of law, they must address the difficult task of evaluating the evidence of loss of good will. Engaged in such an inquiry, these courts often have prohibited recovery for lack of sufficiency of evidence. In many of these cases, the evidence either failed to establish a relationship between the broken agreement and the later loss, or inadequately supported a reasonable calculation of damages.⁶⁵

Concerning the connection between the breach and loss of good will, in *Supreme Wine* there seemed to be adequate evidence to support a link between the defective product and the buyer's loss. This evidence included the testimony of several employees and customers as well as a finding of the seller's responsibility by the master who reviewed the facts.⁶⁶ In its ruling, the Court intimated that it would leave determination of this connection largely within the discretion of the factfinder as long as the record was not completely devoid of supporting evidence.⁶⁷

Beyond the issue of whether the loss of good will is sufficiently related

⁶² *Id.* at 683, 473 N.E.2d at 1077.

⁶³ *Id.* at 684, 473 N.E.2d at 1077.

⁶⁴ See *supra* note 7. See also 96 A.L.R.3d § 18[a], 395 (2d ed. 1979).

⁶⁵ See *supra* note 8. See also 96 A.L.R.3d § 18[b], 397–98.

⁶⁶ *Supreme Wine*, 393 Mass. at 681, 473 N.E.2d at 1075–76.

⁶⁷ *Id.* at 681, 473 N.E.2d at 1076.

to a breach of warranty according to U.C.C. section 2-715, a court must be able to determine the amount of damages.⁶⁸ In specific cases, courts have held that there was insufficient evidence to calculate the amount of alleged damage to good will and that any award by the factfinder would be pure speculation.⁶⁹ For example, in a case applying Michigan law where owners of a “fish ranch” purchased diseased fish, the buyers failed to prove the profitability of their business or assign any kind of good will value to it.⁷⁰ The court held that it would be sheer speculation on the part of the jury “to attempt to establish damages due to alleged loss of good will.”⁷¹ In another decision denying good will recovery as speculative, the Oregon Supreme Court stated that good will is recoverable only to the extent that the evidence affords an estimation of damages with reasonable certainty.⁷² In that case, although evidence existed that the buyer faced some resistance by potential customers as the result of a defective trailer sold, the court held that it was impossible to determine whether any actual orders were foregone due to the incident.⁷³

In contrast to cases requiring a certain level of accuracy in their valuation, the determination of good will damages in *Supreme Wine* seems to allow a less precise measurement. In his calculation of this value, the trial judge, according to the Supreme Judicial Court, disregarded the expert testimony and the testimony offered by the company’s president, and reached his own formulation based upon the evidence in the record.⁷⁴ The Supreme Judicial Court upheld the amount of the award as not clearly erroneous stating that the factfinder was not bound by expert opinion and that damages need not be proven with mathematical certainty.⁷⁵

The broad latitude granted the trial court in *Supreme Wine*, has at least some support in Massachusetts case law.⁷⁶ In *Matsushita Electric Corporation*, the Supreme Judicial Court affirmed the lower court’s valuation of good will loss where the trial judge did not set forth the details of his computations which were based generally on the evidence.⁷⁷ The Supreme Judicial Court supported its holding in part by reference to Comment 1 to section 1-106 of the Uniform Commercial Code: “[damages]

⁶⁸ See *infra* notes 72–78 and accompanying text.

⁶⁹ See *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743, 746 (7th Cir. 1967); see also 96 A.L.R.3d at 396.

⁷⁰ *Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990, 995 (6th Cir. 1979).

⁷¹ *Id.*

⁷² *Kwipco, Inc. v. General Trailer Co.*, 267 Or. 184, 515 P.2d 1317 (1973).

⁷³ See *id.* at 187, 515 P.2d at 1319–20.

⁷⁴ *Supreme Wine*, 393 Mass. at 682, 473 N.E.2d at 1076.

⁷⁵ *Id.* at 682–83, 473 N.E.2d at 1077.

⁷⁶ See *Matsushita Electric Corp. of America v. Sonus Corp.*, 362 Mass. 246, 284 N.E.2d 880 (1972).

⁷⁷ *Id.* at 263, 284 N.E.2d at 889.

have to be proved with whatever definiteness and accuracy the facts permit but no more."⁷⁸

In conclusion, the award of damages for loss of good will as the result of a breach of implied warranty of merchantability is permitted under General Laws, chapter 106. This position is consistent with several other jurisdictions allowing such damages. Although good will damages may be inherently speculative, the Massachusetts courts can guard against unwarranted awards by ensuring that there is a sufficient basis in the evidence for a finding of a connection between the breach and the resulting damage to business reputation as well as adequate grounds for the calculation of these damages. While the courts that allow good will damages require differing levels of proof, in *Supreme Wine* the Court ruled that it would not disturb a finding unless there was no support in the record. In allowing such damages where they can be proven, *Supreme Wine* is consistent with the liberal recovery posture of the U.C.C.

§ 1.2. Measure of Damages—Breach of Contract to Purchase Real Estate.* The traditional measure of damages for a purchaser's breach of a contract to purchase real estate is the difference between the contract price and the fair market value of the property at the time of the breach.¹ A minority of jurisdictions, however, have developed a caveat to this rule to allow recovery of the actual losses sustained by the vendor as a result of a breach when the losses are reasonably foreseeable or within the contemplation of the parties.² During the *Survey* year, in *American*

⁷⁸ *Id.* at 264, 284 N.E.2d at 890.

* Jeffrey Hadden, staff member ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.2. ¹ *Capaldi v. Burlwood Realty Corp.*, 350 Mass. 765, 765, 214 N.E.2d 71, 72 (1966); *Rozone v. Sverid*, 4 Mass. App. Ct. 461, 465–66, 351 N.E.2d 541, 545 (1976). See also 5 CORBIN ON CONTRACTS § 1098A (1964) (In the case of breach by the purchaser of an executory contract to buy land, the vendor's damages are the full contract price minus the market value of the land at date of breach and also minus any payment received); 11 WILLISTON ON CONTRACTS § 1399 (3d ed. 1968) (where the purchaser of land makes total default, the general rule allows recovery of the difference between the contract price and the market price).

² See *Roper v. Milbourn*, 93 Neb. 809, 814, 142 N.W. 792, 794 (1913) (in an action for a breach of a contract for the sale of real estate, the court permitted vendor to recover damages fairly within the contemplation of the parties at the time they made their contract including profits which were within the contemplation of the parties); *Brewer v. Vanek*, No. 84–CA–56, Slip Op. (Ohio Ct. App., February 21, 1985) (court held that vendor entitled to recover actual damages from vendee's breach of agreement to purchase real estate including reasonably foreseeable losses from breach due to foreclosure sale); *Borton v. Medicine Rock Land Co.*, 275 Or. 59, 67, 549 P.2d 1122, 1127 (1976) (court held that vendor was entitled to recover loss sustained by a forced sale of its land because such a loss was within the contemplation of the parties and was directly caused by vendee's misconduct); *Senior Estates, Inc. v. Bauman Homes, Inc.*, 272 Or. 577, 583–92, 539 P.2d 142, 145–49 (1975) (vendor may recover, in addition to his loss of bargain damages all those damages

Mechanical Corporation v. Union Machine Company of Lynn, Inc.,³ the Massachusetts Appeals Court established that the correct measure of damages for a buyer's breach of a contract to purchase real estate is the full amount of the actual loss including those damages which reasonably are to be expected as the probable result of the breach of the purchase agreement.⁴

The dispute in *American Mechanical* concerned an action brought by a vendor of property against the purchaser after the deal fell through.⁵ In *American Mechanical*, the plaintiff, American Mechanical Corporation (American) owned property which it used to conduct a precision machine parts manufacturing business.⁶ American, however, was in arrears on its loan payments and the bank which held the mortgage on the property was pressing American to sell the business.⁷ In September of 1976, American commenced negotiations with the defendant, Union Machine Company of Lynn, Inc. (Union), for the sale of American's real estate, machinery, and equipment.⁸ American informed Union that it was selling the property because of financial difficulties and the pressure from the bank.⁹

On October 16, 1976, the parties reached an agreement for the sale of the real estate, machinery, and equipment.¹⁰ Union gave American a check for \$5,000.¹¹ The terms of the agreement, which were printed on the back of the check, provided that Union would buy the real estate, machinery, and equipment for \$135,000 contingent upon Union's obtaining a \$90,000 mortgage and upon American's ability to convey free and clear title.¹² Two days later, without informing American, Union stopped

which are contemplated by the parties and which are a natural and proximate result of the vendee's breach including interest on unpaid balance of purchase price, property taxes, and the wages, payroll taxes and advertising expenses incurred to resell property). In other jurisdictions, the usual rule for measuring damages for a buyer's breach of a real estate purchase and sale agreement is the difference between the contract price and the price obtained on resale. See *Green v. Ansley*, 92 Ga. 647, 648-49, 19 S.E. 53, 53 (1893); *Tator v. Salem*, 81 A.D.2d 727, 727-28, 439 N.Y.S.2d 497, 498-99 (1981); *Harris v. Dawson*, 479 Pa. 463, 466, 388 A.2d 748, 749 (1978); *Clever v. Clever*, 38 Pa. Super. 66, 75 (1909). See also Uniform Land Transactions Act § 2-504 (1980).

³ 21 Mass. App. Ct. 97, 485 N.E.2d 680 (1985).

⁴ *Id.* at 102-03, 485 N.E.2d at 684.

⁵ *Id.* at 98, 485 N.E.2d at 681.

⁶ *Id.* at 98, 485 N.E.2d at 682.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 98-99, 485 N.E.2d at 682.

payment on the check.¹³ Shortly thereafter, Union representatives visited the premises and spoke with a bank regarding a mortgage for the property.¹⁴ During this period, American was phasing out its business and referred several new business orders to Union.¹⁵

On November 1, 1976, Union informed American that Union would not go through with the deal.¹⁶ American immediately informed the bank holding the mortgage on the property and the bank in turn instructed American to cease operations.¹⁷ The bank then took possession of the property and sold the machinery for \$35,000.¹⁸ Finally, on June 1, 1977, the bank sold the real estate at a foreclosure sale for \$55,000.¹⁹

American brought an action against Union based upon an alleged breach of contract and violation of chapter 93A of the General Laws of Massachusetts.²⁰ The trial court found that Union had breached the contract to purchase American's property.²¹ However, the judge concluded that although there was a breach of contract, the right to recovery was limited to nominal damages.²² The trial judge followed the traditional measure of damages for breach of a contract to purchase real estate — the difference between the contract price and the fair market value of the property at the time of the breach.²³ The trial court was unconvinced, however, that the price for the property at the foreclosure sale seven months after the buyer's breach represented the fair market value at the

¹³ *Id.* at 99, 485 N.E.2d at 682.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The bank purchased the property at the foreclosure sale and a representative of Union was present. *Id.*

²⁰ *Id.* at 98, 485 N.E.2d at 681. Chapter 93A, section 2 provides that: “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful.” G.L. c. 93A, § 2(a). Chapter 93A, sections 9 and 11 provide remedies to any person injured by another person's act which is illegal under this chapter. *Id.* §§ 9, 11. Section 11 permits any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of another's violation of this chapter or the rules promulgated thereunder, to bring an action in superior court for damages and such equitable relief the court deems necessary and proper. *Id.* § 11. At trial, Union contended that the writing on the back of the check was insufficient to satisfy the Statute of Frauds. *American Mechanical*, 21 Mass. App. Ct. at 99, 485 N.E.2d at 682. Union also took the position that since Union had failed to obtain financing, the mortgage contingency had not been satisfied. *Id.* The trial judge rejected both these arguments. *Id.*

²¹ *Id.*

²² *Id.* at 98, 485 N.E.2d at 681–82.

²³ See *supra* note 1.

time of the breach.²⁴ Moreover, the judge found that the plaintiff failed to introduce other evidence regarding the property's fair market value.²⁵ Accordingly, applying the traditional rule of damages for a breach of a contract to purchase real estate, the trial court ruled that American failed to show actual damages.²⁶ American appealed the superior court decision claiming that American should have been awarded more than nominal damages on its contract claim²⁷ and that the chapter 93A claim should have been decided on its merits.²⁸

On review, the Massachusetts Appeals Court held that American was entitled to damages for its full actual losses in the amount of the difference between the contract price and the amount received for the property at the foreclosure sale.²⁹ In so holding, the Appeals Court first pointed out that the general aim in measuring damages for a breach of contract is to place the non-breaching party in as good a position as he would have been in had the contract been performed.³⁰ The court also noted that an

²⁴ *American Mechanical*, 21 Mass. App. Ct. at 100, 485 N.E.2d at 683. The Appeals Court noted that the foreclosure sale price was only evidence of the property's market value and was not binding as the market value of the property on the date of the breach. *Id.* The Appeals Court also noted, however, that when the sale of a piece of property occurs through an arms-length transaction, the sale price is strong evidence of the market price. *Id.* The Appeals Court concluded that the foreclosure sale was conducted properly. *Id.* at 100-01, 485 N.E.2d at 683.

²⁵ *Id.* at 100, 485 N.E.2d at 683.

²⁶ *Id.* at 101, 485 N.E.2d at 683. The judge also concluded that in absence of proof of a demand letter, recovery under chapter 93A was limited to section 11 remedies which were not pleaded. *Id.* at 98, 485 N.E.2d at 682.

²⁷ *Id.* at 99, 485 N.E.2d at 682. For a discussion of the Appeals Court's treatment of the breach of contract claim, see *infra* text accompanying notes 29-57.

²⁸ *American Mechanical*, 21 Mass. App. Ct. at 99, 485 N.E.2d at 682. The trial court held that in the absence of proof of a demand letter, recovery under chapter 93A could only be made under section 11 of that chapter and that American failed to plead a violation of section 11. *Id.* at 98, 485 N.E.2d at 682. The Appeals Court disagreed with the trial court on the chapter 93A issue and remanded that count to the superior court for finding of fact, conclusions of law and entry of judgment on that count. *Id.* at 104-05, 485 N.E.2d at 685. The Appeals Court held that recovery under chapter 93A, section 11 is not conditioned upon sending a demand letter. *Id.* The Appeals Court further held that the complaint alleged facts from which it may be inferred that the parties were engaged in trade or commerce, and that the complaint stated all the other necessary elements of a valid claim under section 11. *Id.* at 104, 485 N.E.2d at 685. The Appeals Court found that there was sufficient evidence for the trial judge to find that Union had committed unfair and deceptive practices. *Id.* Accordingly, the Appeals Court found that dismissal of the chapter 93A count without a decision on the merits was improper. *Id.* at 104-05, 485 N.E.2d at 685.

²⁹ *Id.* at 102-03, 485 N.E.2d at 684.

³⁰ *Id.* See *Laurin v. DeCarolis Construction Co.*, 372 Mass. 688, 691-93, 363 N.E.2d 675, 678-79 (1977) (where vendors of property breached a contract for purchase and sale of the land by removing gravel from property without purchasers' consent, the purchasers were

important aspect of this principle of contract law is to determine whether the non-breaching party suffered an actual loss of such a nature that such loss was reasonably foreseeable by the parties or actually within their contemplation at the time of the contract.³¹ In light of these principles, the court noted, the traditional measure of damages relied upon by the trial judge may not always be appropriate. Therefore, the court held that the actual loss from a breach may be recovered in an action for damages.³²

The Appeals Court then concluded that there is no logical reason for applying a different rule for damages in actions for breaches of real estate purchase and sale agreements from that rule applied to determine damages in contract actions generally.³³ The court reasoned that the traditional rule for measuring damages in actions for breaches of real estate purchase and sale agreements³⁴ is merely a formulation of the general rule for measuring contract damages.³⁵ When these formulas represent the injured party's actual loss, the court noted, they afford the non-breaching party an adequate remedy.³⁶ However, in some cases, the court concluded, the actual loss suffered as a result of a breach exceeds the amount yielded by the traditional formula — contract price minus the market value at the time of breach.³⁷ Therefore, the court concluded that in cases involving real estate, the general rule of contract damages which gives recognition to actual losses sustained as a result of a breach should be applied when the losses are reasonably foreseeable or within the contemplation of the parties.³⁸ The Appeals Court noted that such a rule

entitled to the value of the gravel as it lay in the land); The Restatement (Second) of Contracts provides that a purpose of the judicial remedies under the Restatement rules is to protect a promisee's "'expectation interest,' which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979).

³¹ *American Mechanical*, 21 Mass. App. Ct. at 101, 485 N.E.2d at 683.

³² *Id.* See *Monadnock Display Fireworks, Inc. v. Town of Andover*, 388 Mass. 153, 157–58, 445 N.E.2d 1053, 1056–57 (1983) (court allowed corporation which presented fireworks display that injured a boy to indemnify town because the loss could be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as a probable result of the town's breach of a contract to employ reasonable measures to control the crowd); *Stein v. Almeder*, 253 Mass. 200, 204–05, 148 N.E. 441, 442 (1925) (court awarded purchaser of bad apples total loss for forty-eight barrels rather than difference in value of the apples at the time of delivery and the value they would have had if answering to the warranty because when the defendant vendor sold the apples, he knew that they were subject to condemnation and forfeiture).

³³ *American Mechanical*, 21 Mass. App. Ct. at 101, 485 N.E.2d at 684.

³⁴ See *supra* note 1 and accompanying text.

³⁵ *American Mechanical*, 21 Mass. App. Ct. at 101–02, 485 N.E.2d at 684.

³⁶ *Id.* at 102, 485 N.E.2d at 684.

³⁷ *Id.*

³⁸ *Id.* at 102–03, 485 N.E.2d at 684.

has been adopted by other jurisdictions where the traditional rule produced inadequate remedies.³⁹

In adopting this rule for measuring damages in real estate contract cases, the Appeals Court relied upon a recent Ohio Appeals Court decision, *Brewer v. Vanek*, which involved facts nearly identical to those at issue in *American Mechanical*.⁴⁰ The Ohio trial court entered a judgment in favor of the plaintiffs for \$1,000, such amount being the difference between the contract price and the market value of the property at the time of the breach.⁴¹ The Ohio Appeals Court reversed the judgment and remanded the case for reassessment of damages because the rule relied upon by the trial court did not provide an adequate remedy.⁴² The Appeals Court in *Brewer* held that because the purchaser's breach was voluntary and because the purchaser was aware of the probable consequences of her actions, the foreclosure sale, additional damages which were reasonably to be expected by the breach should be included in the award.⁴³

Applying the approach outlined by the Ohio court to Union's breach of the purchase and sale agreement, the *American Mechanical* court found that at the time Union and American entered into the contract, Union knew that if the sale of the property did not go through, the result would be that the bank would enforce its rights under the mortgage and that a foreclosure sale was likely.⁴⁴ Accordingly, the Appeals Court ruled that the correct measure of damages, on traditional contract principles, was the full amount of the actual loss or, in this case, the contract price minus the amount received at the foreclosure sale.⁴⁵

The Appeals Court also held that general contract principles required the damages be reduced to the extent that American could reasonably

³⁹ *Id.* at 102, 485 N.E.2d at 684. See *supra* note 2 for a partial list of the courts adopting this approach.

⁴⁰ *Brewer v. Vaneck*, No. 84-CA-56, Slip Op. (Ohio Ct. App., February 21, 1985). In *Brewer*, the plaintiffs entered a contract to sell their home to the defendant for \$63,000. *Id.* After the defendant refused to purchase the home, the property was sold by the sheriff at a foreclosure sale for \$42,700 because the plaintiffs were in arrears on a mortgage loan. *Id.*

⁴¹ *Brewer*, No. 84-CA-56, Slip Op. (Ohio Ct. App., February 21, 1985).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *American Mechanical*, 21 Mass. App. Ct. at 102, 485 N.E.2d at 684.

⁴⁵ *Id.* at 102-03, 485 N.E.2d at 684. The Appeals Court vacated the trial court judgment and entered a final judgment for the plaintiff on the breach of contract count in the amount of \$45,000 with interest. *Id.* at 105, 485 N.E.2d at 685. The Appeals Court found that American had sustained an actual loss of \$45,000, the difference between the contract price of \$135,000 and the \$90,000 received from the foreclosure sale, and the sale of the machinery and equipment. *Id.* at 102, 485 N.E.2d at 684.

have avoided the loss.⁴⁶ Thus, the court examined whether American could have taken reasonable steps to sell the property to someone else prior to the foreclosure sale.⁴⁷ The court concluded that the evidence supported a finding that American was unable to secure another purchaser for the property.⁴⁸ According to the court, the burden of proving that losses could have been avoided rests with the breaching party, and Union had not met its burden of proof.⁴⁹ Therefore, the court held that there was no basis for reducing the damages to which American was entitled.⁵⁰

American Mechanical clarifies the rule for measuring damages in breach of contract cases involving the sale of real estate by eliminating the distinction between damages for the breach of a contract to purchase real estate and damages for breach of a contract to purchase goods. Many courts agree that there is no logical basis for making such a distinction.⁵¹ The new rule articulated by the Appeals Court provides that a non-breaching vendor of real estate may recover in an action for damages the actual losses sustained as a result of the breach which are reasonably foreseeable or within the contemplation of the parties.⁵² This rule properly assigns the economic burden created by a breach upon the party at fault.⁵³ Moreover, this approach is consistent with the general principle of contract law that the non-breaching party is entitled to the benefit of the contract bargain.⁵⁴

⁴⁶ *Id.* at 103, 485 N.E.2d at 684. Section 350 of the Restatement (Second) of Contracts states:

- (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
- (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

⁴⁷ *American Mechanical*, 21 Mass. App. Ct. at 103, 485 N.E.2d at 684–85.

⁴⁸ *Id.* The Appeals Court noted that the bank moved quickly to take possession of the property. *Id.* at 103, 485 N.E.2d at 685. Moreover, the court found that the property was not of the nature that a ready market for its sale was available. *Id.*

⁴⁹ *Id.* at 103–04, 485 N.E.2d at 685. See also *Clark v. General Cleaning Co.*, 345 Mass. 62, 65, 185 N.E.2d 749, 751 (1962); *Food Specialties, Inc. v. John C. Dowd, Inc.*, 339 Mass. 735, 748, 162 N.E.2d 276, 283 (1959); *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 6, 85 N.E. 877, 879 (1908); *Nat'l Medical Care, Inc. v. Zigelbaum*, 18 Mass. App. Ct. 570, 581, 468 N.E.2d 868, 876 (1984).

⁵⁰ *American Mechanical*, 21 Mass. App. Ct. at 103–04, 485 N.E.2d at 685.

⁵¹ See *supra* note 2 for courts adopting a single approach to measuring damages for breach of real estate contracts and contracts generally.

⁵² *American Mechanical*, 21 Mass. App. Ct. at 102–03, 485 N.E.2d at 684.

⁵³ See *Brewer*, No. 84–CA–56, Slip Op. (Ohio Ct. App., February 21, 1985) (bland application of the traditional rule on real estate contract damages would require a complete disregard of the element of fault).

⁵⁴ See *supra* note 35.

The measure of damages adopted in *American Mechanical* is especially appropriate in real estate transactions which ultimately result in foreclosure sales. If the seller is forced to sell the property because of financial difficulties, such a seller is rarely in a position to enforce specific performance of the contract.⁵⁵ Moreover, the seller who is forced into foreclosure by the purchaser's breach loses control over the sale of the property and cannot ensure that the market price will be obtained at the foreclosure sale. In the extreme case, the breaching vendee could purchase the property at the foreclosure sale, which occurred because of his default, at a price substantially below the contract price.⁵⁶

When a purchaser enters an agreement to buy real estate from a vendor in financial difficulty, such purchasers generally know that the probable result of the purchaser's breach is a foreclosure sale. Therefore, the breach of a purchase and sale agreement involving a vendor in financial trouble often results in losses which are reasonably foreseeable or within the contemplation of the parties.⁵⁷ In these cases, the breaching party is protected from abuse of this rule by the condition that the seller must take reasonable steps to avoid the loss.⁵⁸ In sum, when a resulting foreclosure is reasonably foreseeable or within the contemplation of the parties at the time of contracting, the loss generated by a forced sale should be borne by the party at fault.

§ 1.3. Liability of Repudiating Seller—Materiality of Buyer's Financial Position.* Until recently, some doubt remained as to whether a buyer in Massachusetts could recover damages from a repudiating seller despite the buyer's inability to fulfill his or her contractual obligations. An early line of cases, beginning with *Lowe v. Harwood*¹ in 1885, stood for the proposition that a repudiating seller is liable for damages to a buyer who

⁵⁵ One justification for the distinction between recovery in the case of goods and the case of land is that in real estate transactions, the vendor can unquestionably get specific performance in equity. See 11 WILLISTON ON CONTRACTS § 1399 (3d ed. 1968).

⁵⁶ In *American Mechanical*, a representative of Union was present at the foreclosure sale at which the property was sold for \$55,000. 21 Mass. App. Ct. at 99, 485 N.E.2d. at 682. Accordingly, if Union had purchased the property at the foreclosure sale, it could have obtained the property for \$56,000 — the \$55,000 foreclosure sale price plus the \$1,000 nominal damages awarded by the trial judge applying the traditional test for real estate damages. See *id.* at 100–01, 485 Mass. at 683.

⁵⁷ A basic condition to recovery under the rule adopted by the Appeals Court is that the consequences of the breach are foreseeable or within the contemplation of the parties at the time of entering into the contract. See *id.* at 101, 102–03, 485 N.E.2d at 683, 684.

⁵⁸ See *id.* at 103, 485 N.E.2d at 684–85.

* Elizabeth M. Leonard, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.3. ¹ *Lowe v. Harwood*, 139 Mass. 133, 29 N.E. 538 (1885).

could not have carried out his or her end of the bargain.² *Lowe* involved a defendant farmer who repudiated a contract to trade farms with the plaintiff and who subsequently sold the farm to another buyer.³ The Supreme Judicial Court in *Lowe* found that the ability of the plaintiff to meet his end of the bargain was irrelevant to his breach of contract action⁴ and held that the defendant's repudiation of the contract excused the plaintiff from making any tender and established a breach of contract.⁵ Two subsequent decisions, *Foternick v. Watson*⁶ in 1903 and *Hawkes v. Kehoe*⁷ in 1907, recognized the *Lowe* decision as authority for the principle that a buyer need not prove his ability to perform under the contract in order to maintain a breach of contract action against a repudiating seller.⁸

Later Massachusetts case law demonstrates diminished regard for the *Lowe* principle. In the 1911 case *Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co.*,⁹ the Supreme Judicial Court of Massachusetts held that the seller was entitled to recover from the repudiating buyer because the jury could infer that had the buyer not repudiated the contract, the seller would have been able to carry out his part of the agreement.¹⁰ Similarly, the Appeals Court in *Thomas v. Christensen*¹¹ held that the buyer was not required to complete his obligations under the contract once the seller had repudiated the contract.¹² Instead, the court held that all the buyer would have to show is that he would have been able to purchase the shares if the seller had not repudiated the contract.¹³ These Massachusetts cases reflect the majority rule in this country that the financial ability of the injured party is a material issue in the action for damages against the repudiating party for breach of contract.¹⁴

² *Lowe*, 139 Mass. at 135, 29 N.E. at 539; see also *Hawkes v. Kehoe*, 193 Mass. 419, 427, 79 N.E. 766, 768 (1907); *Foternick v. Watson*, 184 Mass. 187, 193–94, 68 N.E. 215, 217–18 (1903).

³ *Lowe*, 139 Mass. at 134, 29 N.E. at 538.

⁴ *Id.* at 135, 29 N.E. at 539.

⁵ *Id.* at 135–36, 29 N.E. at 539.

⁶ 184 Mass. 187, 68 N.E. 215 (1903).

⁷ 193 Mass. 419, 79 N.E. 766 (1907).

⁸ *Hawkes*, 193 Mass. at 427, 79 N.E. at 768; *Foternick*, 184 Mass. at 193–94, 68 N.E. at 217–18.

⁹ 208 Mass. 121, 94 N.E. 457 (1911).

¹⁰ *Id.* at 132, 94 N.E. at 458.

¹¹ 12 Mass. App. Ct. 169, 422 N.E.2d 472 (1981).

¹² *Id.* at 177, 422 N.E.2d at 478.

¹³ *Id.* at 178, 422 N.E.2d at 478.

¹⁴ See, e.g., *Dennis v. McLean*, 53 Or. App. 282, 289, 631 P.2d 839, 843 (1981); *Spartans Indus., Inc. v. John Pilling Shoe Co.*, 385 F.2d 495, 498–99 (1st Cir. 1967); *Strasbourg v. Leerburger*, 233 N.Y. 55, 60, 134 N.E. 834, 836 (1922).

During the *Survey* year, in *Kanavos v. Hancock Bank & Trust Co.*,¹⁵ the Massachusetts Supreme Judicial Court disapproved the *Lowe* line of cases and held that the financial ability of an injured party to perform is relevant to his claim for damages against the repudiating party for breach of contract.¹⁶ In addition, the Court held that the burden of proof in such circumstances falls on the plaintiff to demonstrate ability to perform.¹⁷ *Kanavos* involved an option contract between the plaintiff, Harold J. Kanavos and the defendant, Hancock Bank & Trust Company.¹⁸ The bank had given Kanavos the right to acquire all the stock of 1025 Hancock, Inc., a corporation owning a fourteen-story apartment building.¹⁹ Later, the option contract was amended when the executive vice president of the bank offered Kanavos \$40,000 and a right of last refusal in exchange for Kanavos' surrender of his option.²⁰ The bank subsequently sold the stock to a third party without giving Kanavos notice and opportunity to exercise the option to match the offer and purchase the stock.²¹

The plaintiff, Kanavos, sued in the superior court for breach of contract.²² The superior court allowed the bank's motion for a directed verdict.²³ On the plaintiff's appeal, the Appeals Court reversed the superior court, invalidating the directed verdict.²⁴ The bank then appealed the case to the Supreme Judicial Court, which denied review of the Appeals Court's decision to reverse the directed verdict.²⁵ On remand, the superior court held that the ability of Kanavos to pay the purchase price was not material to his action for damages.²⁶ The bank appealed and the Supreme Judicial Court, after transferring the case on its own initiative, held first that the right to recover in a breach of contract action depended on the financial ability of the injured party to perform under the contract²⁷ and, second, that the burden was on the injured party to prove his or her ability to fulfill the obligations of the contract.²⁸

In discussing whether the buyer's financial ability is material in a

¹⁵ 395 Mass. 199, 479 N.E.2d 168 (1985).

¹⁶ *Id.* at 204, 479 N.E.2d at 171.

¹⁷ *Id.* at 205, 479 N.E.2d at 172.

¹⁸ *Id.* at 200, 479 N.E.2d at 169.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Kanavos v. Hancock Bank & Trust Co.*, 14 Mass. App. Ct. 326, 326-27, 439 N.E.2d 311, 312 (1982).

²³ *Id.* at 327, 439 N.E.2d at 312.

²⁴ *Id.* at 333, 439 N.E.2d at 316.

²⁵ *Kanavos v. Hancock Bank & Trust Co.*, 387 Mass. 1103, 440 N.E.2d 1177 (Sept. 30, 1982).

²⁶ *Kanavos*, 395 Mass. at 201, 479 N.E.2d at 170.

²⁷ *Id.* at 204, 479 N.E.2d at 171.

²⁸ *Id.* at 205, 479 N.E.2d at 172.

breach of contract action, the Court began by stating that the general rule governing contracts which involve concurrent obligations is that one party may not put another party in default unless that party has shown an ability to perform through some offer of performance.²⁹ However, a tender of performance is not required if the other party has shown an inability or refusal to perform.³⁰ Thus, in view of the facts of *Kanavos*, the Court stated that Kanavos was not required to make a meaningless offer of the purchase price because the bank had already sold the stock and thus was unable to perform under the contract.³¹

Although Kanavos was not obliged to tender the purchase price once the bank had repudiated the agreement, the Court, relying on the majority rule in this country, held that Kanavos' ability to pay the purchase price remained a material issue in Kanavos' action for damages against the bank for its breach of contract.³² Furthermore, the Court rejected Kanavos' reliance on *Lowe v. Harwood* as setting forth the principle that the financial ability of the buyer is irrelevant to his claim for damages against the repudiating seller.³³ Instead, the Court pointed to the *Beach & Claridge Co.* line of cases as authority for the materiality of the buyer's financial position in his or her action for damages under Massachusetts case law.³⁴

The Court next considered whether the burden of proof should be placed on Kanavos to show his ability to perform or on the bank to show Kanavos' lack of ability to do so.³⁵ The general rule, according to the Court, places the burden of proof on the plaintiff to prove his or her ability to perform the obligations of the contract,³⁶ although authority exists for placing the burden of proof on the defendant.³⁷ Reasoning that Kanavos' proof of his ability was essential to his claim and that he was more knowledgeable of his financial ability than the bank, the Court concluded that the burden was on Kanavos to prove his ability to purchase the stock.³⁸ In view of the inequity of placing on the defendant the burden of proving a fact essential to the plaintiff's case, the Court rejected the argument that the risk of failing to demonstrate Kanavos' inability should fall on the bank because the bank created the conflict.³⁹

²⁹ *Id.* at 202, 479 N.E.2d at 170.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 203-04, 479 N.E.2d at 171.

³⁴ *Id.* at 204, 479 N.E.2d at 171.

³⁵ *Id.* at 204-05, 479 N.E.2d at 171-72.

³⁶ *Id.* at 204, 479 N.E.2d at 172.

³⁷ *Id.* at 205, 479 N.E.2d at 172.

³⁸ *Id.*

³⁹ *Id.*

The Court remanded the case for a retrial on the issue whether Kanavos would have been able to purchase the stock during the option period had the bank given him proper notice of his right to exercise the option.⁴⁰

Well-supported by previous decisions, the *Kanavos* case removes any doubt as to the relevance of the buyer's financial ability to his or her claim for damages in a breach of contract action. Although the authority of the *Lowe* decision had been undermined by later Massachusetts cases,⁴¹ the *Kanavos* Court explicitly disapproves of prior cases which allowed a buyer to recover in a breach of contract action despite his or her inability to perform under the contract.⁴² The *Kanavos* Court correctly points out that although Kanavos was not obligated to perform once the bank had repudiated, Kanavos must demonstrate that had the bank complied with the agreement, he could have performed his end of the bargain.⁴³ Because the promises of the agreement created concurrent obligations, Kanavos' tender of the purchase price for the stock was a condition to the bank's obligation to pay for them.⁴⁴ Thus, if Kanavos had been unable to pay for the stock, the bank's duty to sell the shares never would have arisen and Kanavos would have no right to recover.

The *Kanavos* Court's holding that Kanavos must prove his ability to perform his obligations under the contract is consistent with prior Massachusetts case law. In cases involving conditions precedent, the Court has placed the burden on the plaintiff to show at least substantial performance on its part in order to recover.⁴⁵ Because it is only the time of performance which distinguishes conditions precedent from concurrent conditions, in keeping with these cases, the *Kanavos* Court was correct in placing the burden of proof on the plaintiff buyer. In addition, in the *Thomas v. Christensen* case, which, like *Kanavos*, involved concurrent obligations under an option contract, the Appeals Court stated that the

⁴⁰ *Id.* at 206, 479 N.E.2d at 172.

⁴¹ *Thomas v. Christensen*, 12 Mass. App. Ct. 169, 178, 422 N.E.2d 472, 478 (1981); *Gomes v. Fagerberg*, 10 Mass. App. Ct. 927, 928, 413 N.E.2d 343, 344 (1980); *Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co.*, 208 Mass. 121, 132, 94 N.E. 457, 458 (1911).

⁴² *Kanavos*, 395 Mass. at 203-04, 479 N.E.2d at 171.

⁴³ *Id.* at 203, 479 N.E.2d at 171.

⁴⁴ See Farnsworth, *The Problems of Non-Performance in Contract*, 17 NEW ENG. L. REV. 249, 306 (1982).

⁴⁵ *Previews v. Everets*, 326 Mass. 333, 335, 94 N.E.2d 267, 268 (1950); *Waldo Bros. v. Platt Contracting Co.*, 305 Mass. 349, 359, 25 N.E.2d 770, 774 (1940); *Pye v. Perry*, 217 Mass. 68, 69, 104 N.E. 460, 461 (1914); *Bennett v. Kupfer Bros.*, 213 Mass. 218, 221, 100 N.E. 332, 333 (1913).

plaintiff must show that he would have been able to purchase the stock had the contract not been repudiated.⁴⁶

It is now clear, in view of the *Kanavos* decision, that the financial ability of a prospective buyer will be a material issue in an action for damages against a repudiating seller for breach of contract. Moreover, the plaintiff buyer will bear the burden of proof in establishing his or her ability to perform under the contract.

⁴⁶ *Thomas*, 12 Mass. App. Ct. at 178, 422 N.E.2d at 478.

