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Chapter 4: Contracts and Agency

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C H A P T E R 4

Contracts and Agency

PAUL M. SISKIND

A. CONTRACTS

§4.1. Impossibility of performance: Restitution. There is no doubt that by virtue of the historic employment of identical procedure for recovery in express or implied contract in the common counts and for recovery in noncontractual situations involving restitution, statutory obligations, and other forms of the so-called "quasi-contractual" obligations there exists in no other field of law commonly practiced more confusion and more misconception than in the area of recoveries in Massachusetts practice under the common counts of quantum meruit and quantum valebat. An illuminating opinion by Justice Whittemore in the significant case of *Ahern Co. v. John Bowen Co.*¹ remakes distinctions recently obscured or forgotten. More than that, however, the decision definitively clarifies Massachusetts law on the issue of quasi-contractual recovery when there has been no direct material benefit to the defendant.

In the *Ahern* case, the plaintiff, as a subcontractor, had furnished labor and materials under a contract with the defendant, which contract referred specifically to compliance with a basic contract between the defendant and the Commonwealth. The contract between the defendant and the Commonwealth was declared void in the case of *Gifford v. Commissioner of Public Health*² on the basis that the awarding authority had substantially deviated from the statutory procedure with respect to the creation of such contract. As a result of the *Gifford* case, the contract between the plaintiff and the defendant was void as "impossible of performance." The Supreme Judicial Court held, however, that "the absence of an express provision in the contract to cover the unexpected contingency has not deterred this court or other American courts from giving recovery in cases of excusable impossibility for such performance as has been received."³ (Emphasis supplied.)

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§4.1. 1 1956 Mass. Adv. Sh. 459, 133 N.E.2d 484.

2 328 Mass. 608, 105 N.E.2d 476 (1952).

3 1956 Mass. Adv. Sh. 459, 461, 133 N.E.2d 484, 485. The Court quoted 6 Williston on Contracts §1977 (rev. ed. 1938).

The defendant, conceding this, argued that the theory of quasi-contractual recovery for services, labor, or materials furnished under a contract so voided has as its basis the doctrine of restitution, for benefits received by the other party under such a situation which otherwise would be unjustly retained by him. The Court stated categorically that the cases permitting recovery in such situations are not "based in the ultimate analysis on the principle of unjust enrichment . . . wherein recovery is limited to benefits received."⁴ Rather, said the Court, recovery seems to have been based on an implication that proportionate payment was to be made for that which was received. The Court rejected the benefit theory, unless it was enlarged and given a meaning "wider than is natural." It rejected flatly the proposition that that which was received by the defendant must necessarily be of pecuniary value to him. It adopted a statement by Professor Williston that "a recovery on a quantum meruit or quantum valebat should prima facie be such a proportion of the price as the work which the plaintiff has done bears to the full amount of the work for which the [voided] contract provided."⁵ It must be noted, however, that the Court expressly found the defendant partially responsible for the circumstances which resulted in the voiding of the underlying contract between these parties. This was the factor which enabled the Court to say that it was "clearly fair and just" to require the defendant to pay, even though the defendant would then suffer uncompensable loss.

The doctrine of the case would appear to be that a party to a contract now impossible of performance may have quasi-contractual recovery in the common counts, even though the defendant received no material benefit, where the defendant was in some measure responsible for the voiding of the contract. Thus, it would appear that all the elements of restitution are required as a basis for such recovery except the concept of material benefit. It would likewise appear that were the defendant in no way responsible for the situation resulting in the legal impossibility, no recovery would be granted. This case, then, might well lead to the establishment of a much needed clear-cut understanding that the employment of the common counts for noncontractual recovery must fall into one of three defined categories: (1) statutory obligations; (2) traditional rights in restitution; or (3) proportionate recovery for part performance of contracts voided in course.

§4.2. Interpretation of general releases: Mutual mistake. Massachusetts attorneys who have traditionally treated general releases as sacrosanct may well rest uneasy after the decision in *Century Plastic Corp. v. Tupper Corp.*¹ The parties were in the course of litigation of an account between them originating in 1946 and were proceeding to settle it after extended negotiations which concerned this account only.

⁴ 1956 Mass. Adv. Sh. at 461, 133 N.E.2d at 485.

⁵ 1956 Mass. Adv. Sh. at 462, 133 N.E.2d at 486.

§4.2. 1 333 Mass. 531, 131 N.E.2d 740 (1956).

Prior to the settlement, another account originated between them in 1950 (through shipment from a separately located division of the plaintiff to the defendant's agents). In the course of settlement, the plaintiff executed and delivered to the defendant a formal general release in the broadest terms covering "all claims" which the plaintiff then had against the defendant. Upon the plaintiff's petition, and notwithstanding the unambiguous terms of the release, the Court sustained the action of the equity court below in reforming the release so as to exclude from its terms the claim for the 1950 account, on the grounds of *mistake*. The Court based its finding of mistake on the fact that at no time during negotiations was the 1950 account ever mentioned; never was there any dispute relative to the amount or conditions of the 1950 account; and, more significantly, the settlement was *less* than the amount claimed on the 1946 account alone. The Court treated the mistake as being mutual in that the plaintiff's "mistaken" use of the term "all claims" should have been recognized as such by the defendant. To the defendant's argument that the plaintiff's negligence should not relieve it from its contractual obligations, the Court stated that the plaintiff's conduct did not amount to "inexcusable negligence barring the plaintiff from maintaining the suit."² The everyday practice of using the "all claims" release seems to have proceeded on the basis that such release would be inviolate. It is suggested that the practitioner commonly gives such release upon the conscious calculated risk that he may be discharging claims the existence of which he has no knowledge. The extent to which this case may eliminate that risk appears to be substantial; yet, it would seem to reopen a considerable number of claims previously treated as barred. The draftsman had best redraft his release.³

§4.3. "Promise to pay when able" contracts. The textbooks and the practitioners have often been at odds as to what is properly includable in that category of promises called "illusory," a type of promise characterized as being too vague and indefinite to be enforceable.¹ The issue on one of the most common of these was joined in the case of *Smith v. Graham Refrigeration Products Co.*,² wherein the plaintiff sought to recover an amount of salary voted to him which was, by the terms of such vote, not to be paid "until the defendant's financial condition warranted such payment."³ The Court quite properly characterized the promise as being, in essence, a promise "to pay when able," determined that such a promise was not too vague or uncertain to be enforceable, and indicated that it was a conditional promise and would be enforceable only on proof that the ability to pay existed. As opposed to a promise to pay "when money is needed,"

² 333 Mass. at 536, 131 N.E.2d at 743.

³ At least, perhaps, to add the phrase "whether or not demand has been made or the claim otherwise has been referred to by the parties."

§4.3. ¹ See 1 Restatement of Contracts §§2, 79.

² 333 Mass. 181, 129 N.E.2d 884 (1955).

³ 333 Mass. at 182, 129 N.E.2d at 885.

which has been held illusory as being too subjective a standard, the promise to "pay when able" would appear to have sufficiently objective elements to be determinable. It is curious to note that the Court considered that this sort of promise presented greater difficulties when made by a corporation than when made by an individual. It would seem that the very standards and tests of ability which the Court imposes would be in any event more clearly defined in the case of a corporation than in the case of the individual with many responsibilities and obligations collateral to and independent of his business transactions. In any event, the standards established in the case will present a workable test for this type of promise, which is one of substantial practical importance in small corporate employment transactions. This requires proof by the plaintiff that "the funds of the defendant were of such amount, in excess of current expenses and such reserves of cash accumulated in the busy seasons as were required to carry the business during slack periods, as would permit withdrawals without prejudice to the current conduct of the corporate business."⁴ It might be suggested that bank credit or other forms of normal financing applicable to seasonal operations might be substituted for cash reserves.

§4.4. **Acts constituting waiver of written conditions.** It has been traditionally axiomatic in Massachusetts contract jurisprudence that "conditions bite hard." Today, apparently, we should qualify that statement by adding "depending upon the nature of the condition." Illustrative of this is the case of *Staples Coal Co. v. Ucello*¹ which concerned, in part, the interpretation of a provision involving waiver. The written agreement between the parties provided that it should constitute "the entire agreement between the company and the purchaser, and no provision of this contract may be altered or waived *except by a written instrument* duly executed by the parties hereto."² (Emphasis supplied.) Among other subsequent deviations alleged, it was proved that work had been done by subcontractors other than those specifically authorized to perform. The record indicates that the defendant "first learned of this change when he saw . . . [the unauthorized subcontractor's] . . . men working on the job but made no objection after learning of that fact."³

The Court, without citation of authority, simply concluded that the record indicated that the defendant had waived any right which he may have had to object to the use of these subcontractors. The condition that any waiver must be in writing was presumably considered to have itself been waived, leaving the status of such waiver provision definitely subordinate to the ordinary conduct of the parties, and, to all intents and purposes, as ineffective as if it had not been drafted. This construction is not novel. It appears surprising, however, that it is so taken for granted.

⁴ 333 Mass. at 185, 129 N.E.2d at 886.

§4.4. ¹ 333 Mass. 464, 131 N.E.2d 763 (1956).

² 333 Mass. at 465, 131 N.E.2d at 764.

³ *Ibid.*

§4.5. Concurrent conditions: Temporal and instantaneous acts. The law as to dependency of covenants has traveled a long tortuous path from the original English doctrine of complete independence of all covenants to the present rules of construction which would tend to find dependency as the normal intent of the parties wherever possible.¹ In *Vander Realty Co. v. Gabriel*,² the Court was called upon to apply such rules to a real estate agreement which contained a covenant, in form and position unrelated to any particular portion of the draft agreement, that the seller agreed to "tar surface of roadway to town . . . [specifications]."³ The trial court found that the promise to surface the road was not a condition precedent to the buyer's obligation to perform.

The Supreme Judicial Court held this finding to be reversible error, referring to this condition as "concurrent." It would seem that the decision was eminently sound, but that the description of the covenants as being conditions "concurrent" would tend to perpetuate confusion. If the nature of the covenants in question were analyzed to determine whether or not the acts involved were "temporal" acts, i.e., acts involving any period of time for performance, or "instantaneous" acts, the Court could reach with clarity of position the correct result by a simple application of a rule that, unless otherwise expressly stated, a temporal act will be presumed to be precedent to an instantaneous act.⁴ To characterize a time-consuming covenant as "concurrent" with an instantaneous act leaves considerable doubt as to when, during the performance of the temporal act, the instantaneous act should be performed.

The case also reiterated the Court's earlier position that tender of performance is not necessary where the other party "has shown that he cannot or will not perform,"⁵ and said that the buyer was excused from tendering the price when, at the time for passing, the seller had demonstrated his inability to perform by having failed to tar the road. The cautious, with good reason, still tender and demand.

§4.6. Conditions precedent in real estate purchase and sales contracts. An increasingly prevalent practice, and one which is most essential in the money market of the moment, is the inclusion in real estate purchase and sale contracts of a provision making the purchase conditional upon the buyer's ability to procure a mortgage or mortgages in specified amounts and on specified terms. Such a provision came up for construction in *Sorota v. Baskin*,¹ wherein the particular issue was concerned with the extent to which the buyer was required to "make efforts" to procure the specified mortgages. The buyer

¹§4.5. 13 Williston on Contracts §§816 et seq. (rev. ed. 1938).

²1956 Mass. Adv. Sh. 731, 134 N.E.2d 901.

³1956 Mass. Adv. Sh. at 732, 134 N.E.2d at 902.

⁴The duty to perform the "instantaneous" act (as, payment) would arise on notice of the completion of the "temporal" act.

⁵1956 Mass. Adv. Sh. at 734, 134 N.E.2d at 903.

¹§4.6. 1956 Mass. Adv. Sh. 553, 134 N.E.2d 428.

had visited the assistant treasurer of the designated bank and made his request, and had at a later date visited the treasurer of the same bank, which latter officer was authorized to make the commitment. After consideration by both he was rejected and did nothing further until the date set for passing. The Court said that the buyer was not required, as a matter of law, to do any more than he did, and specifically noted that he was under no duty to "continue to endeavor to procure . . . [the loan] . . . up to the date of the performance of the agreement."² In short, the record of the buyer's efforts in this case was sufficient for the jury to find that he had used "due diligence" and made "reasonable efforts." It would seem that a bona fide request of an authorized officer of a designated lending agency will in itself satisfy the condition. Where the particular lending agency is not designated, it is suggested that such requests of three or more reputable local lending agencies would meet the condition. This decision would seem to be in accord with good business practices.

B. AGENCY

§4.7. **Insurance adjuster: Agency status.** The agency status of an insurance adjuster, if questionable before, was made crystal clear by the Court in *MacKeen v. Kasinskas*.¹ The adjuster for the defendant's insurance company told the plaintiffs that they "would not have to bother with getting a lawyer or suing the company as the insurance company would take care of everything." The plaintiffs, allegedly in reliance on this statement, did not retain counsel and did not institute suit until after the statutory period had run. When the defendant pleaded the statute of limitations to the suit, the plaintiffs asserted that by virtue of the representations of the adjuster, the defendant should be estopped from setting up the statute of limitations. The Court, quoting from an earlier Court of Appeals case² which applied Massachusetts substantive law, said: "The only authority which the agent need have to constitute his conduct an estoppel is the authority to promise a settlement. *It is clear that all insurance adjusters have at least apparent authority to make promises of settlement.*"³ (Emphasis supplied.) The Court applied the estoppel and the case went to the merits.

The unusual feature of the case, however, is that despite the statement of the Court that an insurance adjuster has "at least apparent authority" to settle claims, the Court distinguished the case from the earlier Massachusetts case of *Ford v. Rogovin*,⁴ in which the insurance adjuster had told the plaintiff's attorney that he would "see to it that his insurance company would settle the case," on the basis that there

² 1956 Mass. Adv. Sh. at 555, 134 N.E.2d at 430.

§4.7. ¹ 333 Mass. 695, 132 N.E.2d 732 (1956).

² *Bergeron v. Mansour*, 152 F.2d 27 (1st Cir. 1945).

³ 333 Mass. 695, 697, 132 N.E.2d 732, 733 (1956).

⁴ 289 Mass. 549, 194 N.E. 719 (1935).

was no evidence in that case that the adjuster had any authority to bind his insurer and the plaintiff's attorney knew of this lack of authority. If apparent authority exists, as stated so flatly by the Court in this case, it is difficult to understand why evidence of authority would be required of the plaintiff to establish the basis for the estoppel.

§4.8. **Apparent authority and reliance.** The case of *Simonelli v. Boston Housing Authority*¹ restates familiar agency doctrine in holding that managers of a housing project have no implied or apparent authority to bind the Authority to life employment contracts with watchmen and maintenance personnel, and further held that statements to the plaintiff by the managers that he could "stay on the job as long as he was healthy, as long as he felt like working, and as long as he desired," would not constitute a promise of permanent employment, but were rather "a hopeful encouragement sounding only in prophecy."²

The reported facts of the case, however, leave a definite impression of a resulting hardship. The plaintiff, who was employed as a watchman and maintenance laborer by the Housing Authority when he was sixty-two years of age, later sought counsel of the managers as to whether or not he should join a retirement program, which program would make it mandatory upon him to retire at seventy. The managers advised him not to join the program and in that connection made the statements above referred to. If there were any possibility that the courts of this state might accept the doctrine of promissory estoppel as set forth in Section 90 of the Restatement of Contracts,³ there seems little doubt that these were statements which would qualify as having induced a substantial and definite reliance. This is evidenced by the fact that plaintiff signed a written waiver of membership in the program which was witnessed by one of the managers involved. Now, at age seventy-three, he is discharged, allegedly for lack of funds, and with no retirement benefits. It would seem questionable that he could be expected to appreciate either the fact that men who were his superiors, carrying titles of "manager" and "personnel director," had no authority to make such commitments or the fact that these statements made in connection with specific advice not to join the retirement program would be held by the law to be advisory and nonpromissory, leaving him without recourse to anyone.

§4.8. 1 1956 Mass. Adv. Sh. 1049, 137 N.E.2d 670.

2 1956 Mass. Adv. Sh. at 1050, 137 N.E.2d at 672.

3 Despite expressions of repudiation, it would seem certain that the Massachusetts law of charitable subscriptions follows the doctrine squarely.