

# Annual Survey of Massachusetts Law

---

Volume 1975

Article 8

---

1-1-1975

## Chapter 4: Contracts

Thomas F. Maffei

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

 Part of the [Contracts Commons](#)

---

### Recommended Citation

Maffei, Thomas F. (1975) "Chapter 4: Contracts," *Annual Survey of Massachusetts Law*: Vol. 1975, Article 8.

C H A P T E R 4

Contracts

THOMAS F. MAFFEI\*

**§4.1. Real Estate Broker's Commission: New Rule.** In recent years, the Supreme Judicial Court has steadfastly adhered to the rule that, absent special circumstances, a real estate broker, engaged by a seller to find a buyer, earns a commission when he produces a buyer who is ready, willing, and able to buy upon the terms and for the price set by the owner.<sup>1</sup> During the *Survey* year, in *Tristram's Landing, Inc. v. Wait*,<sup>2</sup> the Court, although relying on the established rule to resolve the issues before it, adopted a new rule for future decisions. The new rule, now followed in a growing minority of jurisdictions,<sup>3</sup> provides that, in the absence of an agreement to the contrary, a broker's commission is not earned unless the sale is consummated.<sup>4</sup>

In *Tristram's Landing*, the defendant-owner permitted the plaintiffs<sup>5</sup> to act as nonexclusive brokers in connection with the sale of certain property in Nantucket, at a price of \$110,000. Although there was no specific mention of a commission during the negotiations preceding the sale, the defendant was aware that the normal brokerage commission in Nantucket was five percent of the gross sales price. In early 1973, the plaintiffs produced a buyer who made a written offer to purchase the property for \$100,000. Shortly thereafter, the defendant instructed the plaintiffs to make a counteroffer of \$105,000.<sup>6</sup> The counteroffer was accepted and a purchase and sale agreement, pre-

---

\*THOMAS F. MAFFEI is an associate with the law firm of Choate, Hall & Stewart, Boston.

§4.1. <sup>1</sup> *Gaymor v. Laverdure*, 1973 Mass. Adv. Sh. 111, 291 N.E.2d 617; *Talanian v. Phippen*, 357 Mass. 765, 256 N.E.2d 445 (1970); *Spence v. Lawrence*, 337 Mass. 355, 149 N.E.2d 379 (1958); *Henderson & Beal, Inc. v. Glen*, 329 Mass. 748, 110 N.E.2d 373 (1953).

<sup>2</sup> 1975 Mass. Adv. Sh. 1360, 327 N.E.2d 727.

<sup>3</sup> See cases cited in note 14 *infra*.

<sup>4</sup> 1975 Mass. Adv. Sh. at 1370, 327 N.E.2d at 731. In view of the waiver by the plaintiffs of the counts in quantum meruit, the Court expressly left undecided the important issue whether and to what extent a broker may be entitled to share in a forfeited deposit or other benefit received by the seller as a result of the broker's efforts. *Id.* at 1370-71 n.5, 327 N.E.2d at 730 n.5.

<sup>5</sup> Plaintiffs were *Tristram's Landing, Inc.*, and an individual real estate broker. *Id.* at 1360, 327 N.E.2d at 727.

<sup>6</sup> 1975 Mass. Adv. Sh. at 1361, 327 N.E.2d at 728.

pared by the plaintiffs, was executed by the buyer and returned with a deposit of \$10,500 to the defendant. The purchase and sale agreement provided as follows: "It is understood that a broker's commission of five (5) per cent on the said sale is to be paid to . . . [the broker] by said seller."<sup>7</sup> On the day scheduled for closing, the buyer failed to appear and the sale was never completed. No reason appears in the opinion for the failure of the buyer to complete the purchase. The defendant retained the deposit and refused to honor the plaintiff's claim for a commission of \$5,250.<sup>8</sup>

Ordinarily, a broker becomes entitled to a commission when a purchase and sale agreement is executed.<sup>9</sup> The Court did not apply that rule in *Tristram's Landing* because it construed certain language in the agreement to require completion of the sale as a condition precedent to payment of the commission. Specifically, the Court stated:

We cannot construe the purchase and sale agreement as an unconditional acceptance by the seller of the buyer, as the agreement itself contained conditional language. The purchase and sale agreement provided that the commission was to be paid "on the said sale," and we construe this language as requiring that the said sale be consummated before the commission is earned.<sup>10</sup>

The Court distinguished a substantial number of cases in which it had held that a broker's commission was earned notwithstanding language in the agreement to the effect that payment of the commission was due when the agreement is "carried into effect"<sup>11</sup> or "when title is passed."<sup>12</sup> The particular language involved in the latter cases was interpreted as merely setting the time for payment.

Although the Court in *Tristram's Landing* decided the issue before it by resort to the traditional rules in this area, it seized upon the opportunity to "join the growing minority of states"<sup>13</sup> by adopting the rule promulgated by the Supreme Court of New Jersey in *Ellsworth Dobbs, Inc. v. Johnson*:<sup>14</sup>

<sup>7</sup> *Id.* at 1363, 327 N.E.2d at 729.

<sup>8</sup> *Id.* at 1362, 327 N.E.2d at 728.

<sup>9</sup> See *Richards v. Gilbert*, 336 Mass. 617, 146 N.E.2d 921 (1958), where the Supreme Judicial Court held that the execution of a purchase and sale agreement is usually conclusive evidence of the seller's acceptance of the buyer; see also *Stone v. Melbourne*, 326 Mass. 373, 94 N.E.2d 761 (1950); *Johnson v. Holland*, 211 Mass. 363, 97 N.E. 755 (1912); *Roche v. Smith*, 176 Mass. 595, 58 N.E. 152 (1900).

<sup>10</sup> 1975 Mass. Adv. Sh. at 1365, 327 N.E.2d at 729.

<sup>11</sup> *Alvord v. Cook*, 174 Mass. 120, 121, 54 N.E. 499, 500 (1899).

<sup>12</sup> *Lord v. Williams*, 259 Mass. 278, 156 N.E. 421 (1927); *Rosenthal v. Schwartz*, 214 Mass. 371, 372, 101 N.E. 1070, 1071 (1913).

<sup>13</sup> 1975 Mass. Adv. Sh. at 1368, 327 N.E.2d at 730.

<sup>14</sup> 50 N.J. 528, 236 A.2d 843 (1967). For other cases applying the *Ellsworth* rule, in whole or in part, see *Potter v. Ridge Realty Corp.*, 28 Conn. Supp. 304, 259 A.2d 762 (1969); *Rogers v. Hendrix*, 92 Idaho 141, 438 P.2d 653 (1968); *Winkelman v. Allen*, 214 Kansas 22, 519 P.2d 1377 (1974); *Brown v. Grimm*, 258 Ore. 55, 481 P.2d 63 (1971); *Staab v. Messier*, 128 Vt. 380, 264 A.2d 790 (1970).

When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. If the contract is not consummated because of lack of financial ability of the buyer to perform or because of any other default of his . . . there is no right to commission against the seller. On the other hand, if the failure of completion of the contract results from the wrongful act or interference of the seller, the broker's claim is valid and must be paid.<sup>15</sup>

In view of the realities of broker transactions, adoption of the new rule was long overdue. In the first instance, the traditional rule failed to take into account that in most, if not all, broker transactions the seller's reasonable expectation is that the commission will be paid from the proceeds of the sale. Secondly, the rule failed to recognize that, in most broker transactions, the seller is the party least familiar with the legal details of the sale. On the former point, the Court quoted Lord Justice Denning, in *Dennis Reed, Ltd. v. Goody*,<sup>16</sup> as follows:

When a house owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale. . . . The house-owner wants to find a man who will actually buy his house and pay for it. He does not want a man who will only make an offer or sign a contract. He wants a purchaser "able to purchase and able to complete as well."<sup>17</sup>

Perhaps in view of the compelling reasonableness of the new rule and the implicit recognition that the burden of a defaulting buyer should rest on the shoulders of the broker and not the seller, the Court, in a significant move, expressed an intention to limit the ability of brokers to modify the new rule by agreement. Although the Court acknowledged that an agreement regarding a brokerage commission, if fairly made and understood by both parties, serves a useful purpose, it warned that an agreement by a seller to pay a commission even if the buyer defaults will be carefully scrutinized and, if not fairly made, might be unenforceable as unconscionable or against public policy.<sup>18</sup>

---

<sup>15</sup> 1975 Mass. Adv. Sh. at 1370, 327 N.E.2d at 731, *citing* Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. at 551, 236 N.E.2d at 855. Using the Court's formulation of the rule, it would appear that failure to consummate the sale because of a defect in the title might not entitle the broker to a commission.

<sup>16</sup> [1950] 2 K.B. 277.

<sup>17</sup> *Id.* at 284-85.

<sup>18</sup> 1975 Mass. Adv. Sh. at 1371, 327 N.E.2d at 731-32.

In the past, it has been common for brokers to present sellers with standard listing agreements that, consistent with the old rule, required payment of the commission when a ready, willing, and able buyer was found for the property. In light of the decision in *Tristram's Landing*, it is highly questionable whether, in the ordinary residential real estate transaction involving an unsophisticated seller, such an agreement would be enforceable. On the other hand, although the issue was not dealt with by the Court, it would appear that provisions in standard form agreements requiring a seller to share with a broker the deposit of a defaulting buyer are consistent with the Court's concern that a seller have funds available from which to pay a broker.

**§4.2. Employee Covenants Not to Compete.** The familiar issue of the enforceability of noncompetition agreements in employment contracts reached the appellate courts of Massachusetts in two cases decided during the *Survey* year.<sup>1</sup> In both cases, the courts' concern was primarily safeguarding the legitimate business interest of the former employers. In the first case, *Blackwell v. E.M. Helides, Inc.*,<sup>2</sup> the Supreme Judicial Court reversed a decision of the Appeals Court and enforced the restriction contained in the employment agreement. In the second, *Middlesex Neurological Associates, Inc. v. Cohen*,<sup>3</sup> the restriction in question was upheld by the Appeals Court.

In *Blackwell*, the employer sought to restrain a former employee from engaging in the real estate brokerage business, in certain cities and towns for a period of three years, pursuant to a standard restriction in a written employment contract.<sup>4</sup> Among the trial judge's findings of fact<sup>5</sup> were: (1) the employee fully understood the restriction; (2) the restriction was reasonable in scope, territory, and duration; (3) no fraud or duress was involved in the contract; (4) the real estate business involved was highly successful; (5) numerous listing cards containing valuable and confidential information had been compiled in the course of developing that business; (6) the employee had volun-

§4.2. <sup>1</sup> For a discussion of three recent cases that involved noncompetition agreements in employment contracts, see Posternak, *Contracts*, 1974 ANN. SURV. MASS. LAW §7.1, at 136.

<sup>2</sup> 1975 Mass. Adv. Sh. 2133, 331 N.E.2d 54.

<sup>3</sup> 1975 Mass. App. Ct. Adv. Sh. 401, 324 N.E.2d 911, *appeal denied*, 1975 Mass. Adv. Sh. 1281.

<sup>4</sup> 1975 Mass. Adv. Sh. at 2134-35, 331 N.E.2d at 54-55. The provision stated:

It is further expressly agreed and understood by the Sales Associate that in the event of the termination of this agreement . . . the Sales Associate will not enter or engage in any phase of the real estate brokerage business which requires licensing as a Sales Associate, Salesman, or Broker . . . in any capacity whatsoever in the town and cities of Taunton, Raynham, Berkley, Norton, Dighton, Rehoboth, Seekonk, Bridgewater, West Bridgewater, East Bridgewater, Easton, Brockton, Lakeville and Middleboro, for a period of thirty-six months following the termination of this agreement.

*Id.* at 2134-35, 331 N.E.2d at 55.

<sup>5</sup> *Id.* at 2135-36, 331 N.E.2d at 55.

tarily terminated his employment after he unsuccessfully attempted to cause his employer to fire him; and (7) the business “would suffer irreparable harm and damage and a large potential loss of sales”<sup>6</sup> if the restriction was not enforced.

The decree entered by the trial judge enforced the restriction as written. The Appeals Court modified the lower court’s decree to enjoin the former employee only from engaging in the real estate brokerage business for three years “with respect to any property in the area which was sold by or through the respondent’s office . . . pursuant to a listing received by the office during the period of the petitioner’s employment.”<sup>7</sup> The Supreme Judicial Court reversed the Appeals Court and reinstated the lower court’s decree enforcing the restriction as written.<sup>8</sup>

In enforcing the restriction in its entirety, the Court reaffirmed the governing principles in this area: “In determining whether a covenant will be enforced, in whole or in part, the reasonable needs of the employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest.”<sup>9</sup>

The Court emphasized the former employer’s right to have his carefully developed business protected from the harmful conduct of a former employee. The Court noted that the modification order by the Appeals Court substantially impaired the value of the restriction as a means of protecting the former employer’s business since it only restricted the employee from handling properties listed and sold by the former employer during his employment. The Appeals Court’s order did not, as it should have, prevent the former employee from exploiting previous contacts with individuals who used the firm and whose properties were either not listed or listed but not sold. Further, the order did not sufficiently guard against the former employee’s use of confidential information gained while in the firm’s employ.<sup>10</sup>

In *Middlesex Neurological*, the restriction prohibited the former employee from engaging in the practice of neurology for a period of two years and within a five mile radius of Malden, Massachusetts.<sup>11</sup> The

<sup>6</sup> *Id.* at 2136, 331 N.E.2d at 55.

<sup>7</sup> *Id.* at 2136-37, 331 N.E.2d at 55.

<sup>8</sup> *Id.* at 2137, 331 N.E.2d at 55-56.

<sup>9</sup> *Id.* at 2138, 331 N.E.2d at 56, *citing* *All Stainless, Inc. v. Colby*, 1974 Mass. Adv. Sh. 329, 333, 308 N.E.2d 481, 485.

<sup>10</sup> *Id.* at 2139, 331 N.E.2d at 56.

<sup>11</sup> The restriction provided:

For a period of two (2) years after the termination of this Agreement, the Employee agrees not to solicit business from, nor engage in the practice of medicine, in the specialty of neurology, directly or indirectly . . . in . . . [various named hospitals]. The Employee further agrees that for a period of two (2) years from the date of termination of this Agreement he will not open an office for the practice of medicine in the specialty of neurology, directly or indirectly . . . in or within a radius of five (5) statute miles from the borders of the City of Malden, Massachusetts.

1975 Mass. App. Ct. Adv. Sh. at 403-04 n.2, 324 N.E.2d at 913 n.2.

employment contract containing the restriction was executed shortly after the defendant became associated with plaintiff's assignor, a neurosurgeon, in the practice of neurology in Malden and vicinity.<sup>12</sup> Less than a year later, the parties agreed to terminate their association. As soon as the association was terminated, the defendant violated the restrictive covenant in almost every respect<sup>13</sup> and plaintiff-corporation, of which the employer-neurosurgeon was the sole stockholder, brought an action as assignee of the contract to enforce the covenant.

The defendant challenged the reasonableness of the restriction on the grounds that it was overly broad in its territorial coverage. Since the evidence demonstrated that the plaintiff actively practiced throughout the area covered by the restriction, however, the Appeals Court found that the restriction was "not broader than the plaintiff's legitimate interests require."<sup>14</sup> The court did not address the defendant's argument that restrictive covenants in medical employment contracts are invalid per se as against public policy<sup>15</sup> but noted that the weight of authority seems to favor such contracts.<sup>16</sup> Finally, the court rejected the defendant's argument that enforcement of the restriction was not necessary for the economic protection of the plaintiff.<sup>17</sup> It was enough that the defendant had begun treating former patients of the plaintiff and that physicians who had formerly referred patients to the plaintiff were now making referrals to the defendant.

Both *Blackwell* and *Middlesex Neurological* turn on judicial determinations that the restrictions contained in the noncompetition agreements are "reasonable" in scope, territory, and duration. The "reasonableness" test does not readily lend itself to the formation of concrete rules for future application, since each case is to be decided on its own particular facts.<sup>18</sup> However, *Blackwell* and *Middlesex Neurological*

<sup>12</sup> The same neurosurgeon was the president and sole stockholder of the plaintiff corporation to which the employment agreement was assigned. *Id.* at 403, 324 N.E.2d at 913.

<sup>13</sup> *Id.* at 403-04, 324 N.E.2d at 913.

<sup>14</sup> *Id.* at 407, 324 N.E.2d at 915.

<sup>15</sup> Defendant failed to present a discussion of authorities on the subject. *Id.*

<sup>16</sup> *Id.* See *Dwight v. Hamilton*, 113 Mass. 175 (1873); *Gilman v. Dwight*, 79 Mass. (13 Gray) 356 (1859); A. CORBIN, CONTRACTS § 1393, at 84-86 (1962).

<sup>17</sup> The Court noted that even if the subsidiary findings of the master established that the plaintiff had suffered no loss of business, that finding, without more, would not establish that the plaintiff had not suffered a loss of good will. 1975 Mass. App. Ct. Adv. Sh. at 410-11, 324 N.E.2d at 915. See generally *Marine Contractors Co. v. Hurley*, 1975 Mass. Adv. Sh. 737, 327 N.E.2d 920; *All Stainless, Inc. v. Colby*, 1974 Mass. Adv. Sh. 329, 308 N.E.2d 48.

<sup>18</sup> *Becker College of Business Administration and Secretarial Science v. Gross*, 281 Mass. 355, 358, 183 N.E. 765, 766 (1933). See also *Whiting Milk Co. v. O'Connell*, 277 Mass. 570, 179 N.E. 169 (1931); *May v. Angoff*, 272 Mass. 317, 172 N.E. 220 (1930); *Padover v. Axelson*, 268 Mass. 148, 167 N.E. 301 (1929); *Club Aluminum Co. v. Young*, 263 Mass. 223, 160 N.E. 804 (1928).

do offer some practical guidance for the practitioner since they indicate that the Court, in appropriate circumstances, will stress the legitimate business interest of the employer,<sup>19</sup> as opposed to other factors,<sup>20</sup> as the interest that deserves initial, and perhaps controlling consideration when the reasonableness of a covenant not to compete is at issue.

**§4.3. Guarantor's Liability: Bank Deposit: Set Off.** In an action against a guarantor, the question often arises whether resort must first be had against either the primary obligor or collateral supplied by the primary obligor.<sup>1</sup> In *Town Bank & Trust Co. v. Silverman*,<sup>2</sup> decided during the *Survey* year, the Appeals Court held that a bank was not required to first apply the primary obligor's deposits in a bank in satisfaction of the amounts owing to the bank before proceeding against the guarantor.

The plaintiff-bank brought suit against the defendant on a written contract of guaranty.<sup>3</sup> The defendant admitted the validity of the underlying obligation but denied that he was indebted to the plaintiff, claiming that the primary obligor had funds on deposit at the bank and that the plaintiff was required to exhaust those funds prior to making any demands against the guarantor. In response to defendant's argument, the court noted that although a bank is generally entitled to apply the balance of an account due a depositor to the satisfaction of a debt due the bank from the depositor,<sup>4</sup> the relationship between the bank and the depositor is merely that of debtor to creditor and, therefore, the guarantor is not entitled, as a matter of right, to have the funds applied in reduction of the principal obligation.<sup>5</sup> Further, the court observed that the defendant, by agreement, had waived any rights that he might have had to require

<sup>19</sup> *Blackwell*, 1975 Mass. Adv. Sh. at 2139, 331 N.E.2d at 56; *Middlesex Neurological*, 1975 Mass. App. Ct. Adv. Sh. at 407, 324 N.E.2d at 915-16.

<sup>20</sup> The other factors that should be considered are the degree of restraint imposed upon the former employee, and the public interest. *All Stainless, Inc. v. Colby*, 1974 Mass. Adv. Sh. 329, 334, 308 N.E.2d 481, 485.

§4.3. <sup>1</sup> Ordinarily, the matter is the subject of an agreement between the parties. See *Gordon & Dilworth, Inc. v. Abbott*, 258 Mass. 35, 154 N.E. 523 (1926).

<sup>2</sup> 1975 Mass. App. Ct. Adv. Sh. 149, 322 N.E.2d 192.

<sup>3</sup> The contract of guaranty provided, in part, that:

[The guarantor] hereby waives any and all legal requirements that the [blank . . . shall institute any action or proceedings at law or in equity against [the primary obligor] or anyone else or exhaust remedies against [the primary obligor] or anyone else in respect of said letter of credit or in respect of any other security held by the [blank as a condition precedent to bringing an action against him upon this . . . [guaranty].

*Id.* at 154-55, 322 N.E.2d at 194.

<sup>4</sup> *Forastiere v. Springfield Inst. for Savings*, 303 Mass. 101, 20 N.E.2d 950 (1939).

<sup>5</sup> 1975 Mass. App. Ct. Adv. Sh. at 153-54, 322 N.E.2d at 194. See *Furber v. Dane*, 203 Mass. 108, 90 N.E.2d 859 (1909); *National Mahaiwe Bank v. Peck*, 127 Mass. 298 (1879).



the creditor to first exhaust all remedies against the primary obligor.<sup>6</sup>

Provisions in instruments of guaranty have previously been construed to permit first resort to the guarantor. For example, in *Merchants Bank v. Stone*,<sup>7</sup> the plaintiff brought suit against a guarantor on an agreement of guaranty that, together with the note guaranteed, provided, *inter alia*, that the bank “may enforce its rights against the principal obligor and/or may take or release security and/or surrender documents, grant extensions, renewals and indulgences.”<sup>8</sup> The defendant filed an answer in which he alleged that the bank held security for the principal obligation and failed to exhaust that security before proceeding against the guarantor. The Supreme Judicial Court sustained the trial judge’s ruling, which excluded all evidence relating to the existence and use of the collateral,<sup>9</sup> and affirmed a finding for the plaintiff, holding that “when one guarantees the contract of another, the guarantor is bound by the terms of the contract guaranteed. His rights rise no higher than those of the principal obligor, and his obligations are coextensive with those of the principal obligor.”<sup>10</sup> The Court noted that the principal obligor had assented to a release of the collateral and that the guarantor was bound by the provision.<sup>11</sup>

Likewise, in *Snelling v. State Street Bank & Trust Co.*,<sup>12</sup> the guaranty read, in part, that “the undersigned hereby unconditionally guarantees to SBA . . . payment when due” of all amounts owing to SBA, and further provided that “the obligations of the [guarantors] . . . shall not be released . . . or in any way affected . . . by . . . any actions SBA may take or omit to take . . . .”<sup>13</sup> The guaranty in *Snelling* was secured and the defendant maintained that the SBA was required to first exhaust the collateral before proceeding against the guarantor. In support of his position, the defendant offered evidence that the coguarantor who furnished the security told the defendant that he was putting up collateral and that the defendant would never have to make good on the guaranty. As to this evidence, the Court stated: “[T]hat testimony, even if accepted, need not be viewed as inconsistent with the probate judge’s conclusion that the co-guarantors each had the same liability as did Snelling on their respective guaranties.”<sup>14</sup> In other words, a guarantor under a direct and unconditional guaranty is liable regardless of the existence of collateral securing the debt.

<sup>6</sup> 1975 Mass. App. Ct. Adv. Sh. at 154-55, 322 N.E.2d at 194. See note 3 *supra*.

<sup>7</sup> 296 Mass. 243, 5 N.E.2d 430 (1936).

<sup>8</sup> *Id.* at 246, 5 N.E.2d at 432.

<sup>9</sup> All evidence offered by the defendant relating to the collateral was excluded except insofar as that evidence indicated that the proceeds from a liquidation of the collateral were not applied to the outstanding debt. *Id.* at 248-49, 5 N.E.2d at 433.

<sup>10</sup> *Id.* at 251, 5 N.E.2d at 434.

<sup>11</sup> *Id.*

<sup>12</sup> 358 Mass. 397, 265 N.E.2d 350 (1970).

<sup>13</sup> *Id.* at 399-400 n.2, 265 N.E.2d at 352 n.2.

<sup>14</sup> *Id.* at 404, 265 N.E.2d at 355.

The result reached in *Town Bank* is consistent with prior law and forces individuals who guarantee the obligation of others to carefully review the instrument of guaranty to insure that the creditor must first resort to the primary obligor or collateral supplied by him before proceeding against the guarantor.

**§4.4. Public Contract: Binding: Damages.** In *Paul Sardella Construction Co. v. Braintree Housing Authority*,<sup>1</sup> the Appeals Court was presented with the novel question of the appropriate measure of damages to be awarded to a bidder whose award was rescinded in violation of statutory bidding requirements. After a lengthy discussion of the governing principles, the court held that the reasonable cost of preparing the bid, not the anticipated profit,<sup>2</sup> is the proper measure of damages under such circumstances.<sup>3</sup>

Pursuant to the competitive bidding statute,<sup>4</sup> the Braintree Housing Authority ("Authority") invited bids for the construction of a housing project for the elderly. The defendant Mazza submitted the lowest eligible subbid for the plumbing subcontract. Mazza's subbid was unrestricted with respect to its willingness to subcontract with any general contractor. When the bids of the general contractors were opened, the plaintiff was found to be the lowest eligible and responsible bidder. Mazza was listed as the plumbing subcontractor in both the plaintiff's and the second lowest bidder's bid. The third lowest bidder, the defendant Findlen, listed a different plumbing subcontractor.

Shortly after the general bids were opened, Mazza attempted to withdraw its subbid on the basis of an alleged clerical error.<sup>5</sup> Following the attempted withdrawal, the Authority voted to award the general contract to the plaintiff. The plaintiff, in turn, notified Mazza that it had been selected as the subcontractor and sent Mazza the subcontracts for signing. Mazza failed to execute the contracts within five days as required by the statute<sup>6</sup> and returned them to the plaintiff.<sup>7</sup>

In view of Mazza's refusal to execute the subcontract, the Authority reviewed all other eligible plumbing subbids and determined that a substitution of any available plumbing subbid would make Findlen's general bid the lowest. Shortly thereafter, the Authority voted to rescind its award of the general contract to the plaintiff and awarded that contract to Findlen. The plaintiff was not invited and did not participate in the meeting at which the rescission vote was taken.<sup>8</sup> He

§4.4. <sup>1</sup> 1975 Mass. App. Ct. Adv. Sh. 820, 329 N.E.2d 762, *appeal granted*, 1975 Mass. Adv. Sh. 2447.

<sup>2</sup> *Id.* at 829, 329 N.E.2d at 766.

<sup>3</sup> *Id.* at 833-34, 329 N.E.2d at 766-67.

<sup>4</sup> G.L. c. 149, §§ 44A-44L.

<sup>5</sup> 1975 Mass. App. Ct. Adv. Sh. at 821-22, 329 N.E.2d at 763.

<sup>6</sup> *See* G.L. c. 149, § 441(3).

<sup>7</sup> 1975 Mass. App. Ct. Adv. Sh. at 822, 329 N.E.2d at 764.

<sup>8</sup> At a later meeting, the Authority found that a bona fide clerical error had been made and voted to return Mazza's deposit. *Id.* at 823, 329 N.E.2d at 764.

filed a protest with the Department of Labor and Industries, which upheld the Authority's action.<sup>9</sup>

In February, 1972, the plaintiff filed a bill for declaratory relief that, in effect, challenged the Authority's action.<sup>10</sup> The trial judge found that the Authority was liable to the plaintiff for unlawfully rescinding its award, that Findlen was not liable to the plaintiff for performing the contract, and that Mazza was not liable to the plaintiff for refusing to execute the subcontract.<sup>11</sup> On review, the Appeals Court affirmed with respect to the Authority's liability to plaintiff, but further held that the plaintiff's damages were limited to the reasonable cost of preparing the bid.<sup>12</sup>

In holding that the Authority erred in rescinding the plaintiff's award, the Appeals Court pointed out that the Authority acted pursuant to section 44I(2)<sup>13</sup> of chapter 149 of the General Laws, the public bidding statute, a provision that was not directly applicable to the situation before it.<sup>14</sup> Instead, the court ruled, the Authority should have applied section 44I(3)<sup>15</sup>, which expressly covers the situation in which the subbidder fails to execute his subcontract within five days of its submission to him by the general contractor.<sup>16</sup> The latter section requires that in the event that a subbidder fails to execute his subcontract, the Authority and the selected general bidder shall together select another subbidder and adjust the total contract price by the difference between the defaulting and new subbids. Unlike section 44I(2), section 44I(3) does not permit the selection of another general contractor.

Having determined that the plaintiff's award had been illegally rescinded, the court turned to the "difficult and novel question"<sup>17</sup> of the

<sup>9</sup> *Id.* Findlen began and had substantially completed the project by February, 1973.

*Id.*

<sup>10</sup> *Id.* The bill filed by the plaintiff sought a binding declaration of rights, duties, and status and prayed for an award of damages against all defendants. The bill also included prayers for injunctive relief against the Authority and Findlen, which, if granted, would have required the Authority to rescind the award to Findlen and reinstate the plaintiff's contract. It appears that no request for injunctive relief was made to the superior court. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 833-34, 329 N.E.2d at 766.

<sup>13</sup> G.L. c. 149, § 44I(2).

<sup>14</sup> 1975 Mass. App. Ct. Adv. Sh. at 826-27, 329 N.E.2d at 762.

<sup>15</sup> G.L. c. 149, § 44I(3).

<sup>16</sup> G.L. c. 149, § 44I(3) provides, in part:

(3) If a selected sub-bidder fails within five days . . . after presentation of a subcontract by the general bidder selected as the general contractor, to perform his agreement to execute a subcontract . . . such general bidder and the awarding authority shall select, from the other sub-bids duly filed with the awarding authority for such sub-trade . . . the lowest responsible and eligible sub-bidder at the amount named in his sub-bid as so filed against whose standing and ability the general contractor makes no objection, and the contract price shall be adjusted by the difference between the amount of such sub-bid and the amount of the sub-bid of the delinquent sub-bidder.

<sup>17</sup> 1975 Mass. App. Ct. Adv. Sh. at 828, 329 N.E.2d at 766.

proper measure of damages to be recovered by a bidder whose award was rescinded in violation of statutory requirements. The plaintiff argued that the Authority was liable to it for the profit that it would have made had it been allowed to perform the contract.<sup>18</sup> The court, however, held that since the plaintiff had never actually entered into the contract under which it would have made the profit, recovery of the profit was not available.<sup>19</sup>

Although the rejection of an express contract theory precluded recovery of lost profits, plaintiff was not left without a remedy because the court held that the plaintiff was entitled to the reasonable cost of preparing the bid, on the basis of an implied contract between the bidder and the Authority, which obligated the Authority to give fair consideration to every submitted bid:<sup>20</sup> "Should the public contracting authority fail to give such consideration, the implied contract formed by the submission of such a bid is broken, and recovery of bid preparation costs is deemed a proper remedy."<sup>21</sup> The court emphasized that there must be strict compliance with the competitive bidding statute and that neither the absence of bad faith nor the best of motives on the part of an awarding Authority excuse noncompliance with the statute.<sup>22</sup> Commenting on the legislative objectives underlying the statute, the court observed that the statute establishes an "open and honest procedure for competition for public contracts and, in so doing, places all general contractors and subbidders on an equal footing in the competition to gain the contract."<sup>23</sup> Thus, where fair consideration of a bid is lacking, the aggrieved bidder is entitled to some measure of relief.

The court was not required to answer the question of what the measure of damages might be if the Authority were to act in bad faith. It would seem that a recovery of lost profits remains a possibility in that event.

**§4.5. Specific Performance: Misrepresentation: Estoppel.** The doctrine of estoppel surfaces most often when a representation is intended to, and does, induce a detrimental course of conduct on the part of the person to whom it is made.<sup>1</sup> The doctrine is frequently

<sup>18</sup> *Id.* The theory of damages advanced by plaintiff is the appropriate one in breach of contract cases of this type. See *Coyne Industrial Laundry of Schenectady, Inc. v. Gould*, 359 Mass. 269, 277, 268 N.E.2d 848, 853 (1971).

<sup>19</sup> 1975 Mass. App. Ct. Adv. Sh. at 829, 329 N.E.2d at 766.

<sup>20</sup> *Id.* at 831, 329 N.E.2d at 766-67.

<sup>21</sup> *Id.* at 832-33, 329 N.E.2d at 767.

<sup>22</sup> *Id.* at 830, 329 N.E.2d at 766, citing *Grande & Son, Inc. v. School Housing Comm. of North Reading*, 334 Mass. 252, 135 N.E.2d 6 (1956); *Gifford v. Commissioner of Public Health*, 328 Mass. 608, 105 N.E.2d 476 (1952).

<sup>23</sup> 1975 Mass. App. Ct. Adv. Sh. at 831, 329 N.E.2d at 766, citing *Interstate Eng'r. Corp. v. Fitchburg*, 1975 Mass. Adv. Sh. 1556, 1564, 329 N.E.2d 128, 132.

§4.5. <sup>1</sup> *Industrial Bankers of Mass., Inc. v. Reid, Murdoch & Co.*, 297 Mass. 119, 124, 8 N.E.2d 19, 22 (1937); *Cleveland v. Malden Savings Bank*, 291 Mass. 295, 297-98, 197 N.E. 14, 15 (1935).

raised to avoid the effect of a party's noncompliance with certain legal requirements, such as the Statute of Frauds. During the *Survey* year, in *Cellucci v. Sun Oil Co.*,<sup>2</sup> the Appeals Court was presented with an interesting case in which the doctrine of estoppel was successfully raised in an action for specific performance where the defendant had pleaded the Statute of Frauds as an absolute defense.<sup>3</sup>

In *Cellucci*, the plaintiff was the owner of a certain parcel of commercial property in Hudson, Massachusetts. One Patterson, a real estate representative of the defendant, Sun Oil Company, approached the plaintiff through a broker and inquired about purchasing the property for use by the defendant as a gasoline station. The plaintiff advised Patterson that the land could be purchased for "\$100,000 net."<sup>4</sup> About a month later, Patterson, through the broker, sent the plaintiff a purchase and sale agreement that provided for a purchase price of \$110,000, of which \$10,000 was a brokerage fee.

The purchase and sale agreement was a standard agreement that had been used by the defendant for many years. It contained a typical merger clause,<sup>5</sup> and a provision that bound the defendant to the agreement "only when executed by an official of Buyer, regardless of any written or verbal representation of any agent, manager or other employee of Buyer to the contrary."<sup>6</sup> The evidence at trial did not indicate that the agreement was ever signed by an "official" of the defendant.

The purchase and sale agreement was expressly made conditional on the defendant's ability to purchase an abutting parcel of land and to secure all necessary licenses to permit the defendant to operate a gasoline station on the property. Approximately two months after the parties first made contact, the plaintiff signed the agreement. Shortly thereafter, the owner of the abutting parcel signed a purchase and sale agreement respecting that parcel with the defendant. Both agreements were forwarded to Patterson. The evidence indicated that the plaintiff knew that Patterson lacked the authority to bind the defendant and that further approvals from the defendant were required, but it was also established that Patterson had told the plaintiff that such further approvals from the defendant were automatic or perfunctory.<sup>7</sup>

Shortly after the executed agreements were sent to Patterson, a

<sup>2</sup> 1974 Mass. App. Ct. Adv. Sh. 2181, 320 N.E.2d 919, *aff'd*, 1975 Mass. Adv. Sh. 2373, 331 N.E.2d 813 (rescript).

<sup>3</sup> *Id.* at 2197, 320 N.E.2d at 926.

<sup>4</sup> *Id.* at 2182, 320 N.E.2d at 921.

<sup>5</sup> The agreement provided: "This agreement merges all prior negotiations and understandings between the parties and constitutes their entire contract which is binding upon the Seller . . . when executed by Seller . . ." *Id.* at 2182-83, 320 N.E.2d at 921.

<sup>6</sup> *Id.* at 2183, 320 N.E.2d at 921.

<sup>7</sup> *Id.* at 2184, 320 N.E.2d at 921.

representative of a competing oil company attempted to purchase the same property from the plaintiff. Patterson was immediately advised by the plaintiff of the competing company's interest, and responded by assuring plaintiff that the deal with the defendant was "all set" but would take some time "to go through channels."<sup>8</sup> Although the testimony was conflicting, the trial judge found that, in reliance on the latter representations by Patterson, the plaintiff broke off all negotiations with the competing oil company.<sup>9</sup>

About nine months after the defendant first expressed an interest in the property, the plaintiff was advised that defendant's home office personnel thought the price for the two parcels was too high. The plaintiff's attempts to renegotiate the price with defendant and to renew the interest of the competing oil company met with no success; whereupon, counsel for the plaintiff tendered a deed to the defendant, which was rejected, and the litigation seeking specific performance ensued.

At first glance, the defendant appeared to have an absolute defense to the action for specific performance. It argued that the plaintiff's execution of the standard agreement was merely an offer, which the defendant had the power to accept or reject,<sup>10</sup> and that since the defendant had not signed an agreement to purchase the parcel as required by the Statute of Frauds, it was not liable for the price. Notwithstanding the apparent validity of the defendant's position, the court affirmed an award in favor of plaintiff by applying the doctrine of estoppel.<sup>11</sup>

The doctrine of estoppel requires: (1) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and (3) detriment to such person as a consequence of the act or omission.<sup>12</sup> Although certain of the plaintiff's actions were predetermined and not the direct result of any representation or conduct on the part of the defendant, the plaintiff's breaking off of negotiations with the defendant's competitor was alone sufficient to estop the defendant from pleading the Statute of Frauds or other defense since

<sup>8</sup> *Id.* at 2185, 320 N.E.2d at 922.

<sup>9</sup> *Id.* at 2186, 320 N.E.2d at 922. There was further evidence that, when informed of the competing company's interest in the property, Patterson told Cellucci: "You [Cellucci] cannot do anything with the property. We [Sunoco] have a purchase and sale agreement on the property. We bought it." *Id.* at 2185, 320 N.E.2d at 922.

<sup>10</sup> See *Kuzmeskus v. Pickup Motor Co.*, 330 Mass. 490, 493, 115 N.E.2d 461, 464 (1953); *Cruver Mfg. Co. v. Rousseau*, 240 Mass. 168, 169, 132 N.E. 723, 724 (1921).

<sup>11</sup> 1974 Mass. App. Ct. Adv. Sh. at 2197, 320 N.E.2d at 926.

<sup>12</sup> *Id.* at 2190, 320 N.E.2d at 924, citing *Industrial Bankers of Mass., Inc. v. Reid, Murdoch & Co.*, 297 Mass. 119, 124, 8 N.E.2d 19, 22 (1937); *Cleaveland v. Malden Savings Bank*, 291 Mass. 295, 297-98, 197 N.E. 14, 15 (1935).

that action by the plaintiff was taken in reliance on Patterson's misrepresentations.<sup>13</sup>

The court found that Patterson's misrepresentations were both factual and legal. Regarding the former, the court emphasized that Patterson repeatedly assured the plaintiff that the deal was "all set" and that the approval by the defendant at its higher levels was purely a formal or perfunctory matter.<sup>14</sup> Although, generally, representations as to future events are not actionable,<sup>15</sup> the court relied on an exception to that rule that applies where a representation is made by one who has superior bargaining power or who possesses greater knowledge regarding the matters at issue.<sup>16</sup> Reviewing Patterson's representation that the contract was "all set," the court noted that "a prediction that Sunoco will sign a contract is not like a prediction as to the weather. It lies within the entire and exclusive control of Sunoco."<sup>17</sup> Finally, the court found that representations concerning the internal processes of the defendant and the likelihood of its acceptance of an offer to sell were within the authority of Patterson.<sup>18</sup>

The court viewed Patterson's statements, to the effect that Cellucci could not "do anything with the property" due to the purchase and sale agreement, as misrepresentations of law.<sup>19</sup> The import of Patterson's statements, the court observed, was that the legal effect of plaintiff's having signed the agreement was to deprive him of the right to sell the property to the defendant's competitor.<sup>20</sup> Although as a legal matter, no binding agreement was ever reached, the court stated that it was sufficient that the plaintiff was led to believe that the agreement was binding upon him when signed by him.<sup>21</sup>

The court observed that a misrepresentation of law, as well as one of fact, by one who possesses superior knowledge in order to take advantage of the relative ignorance of another may be grounds for judicial relief.<sup>22</sup> In particular, the rule applies where the misrepresentation concerns private rights or interests under a written instrument.<sup>23</sup> The court found that the plaintiff had a right to rely on Patterson's

<sup>13</sup> 1974 Mass. App. Ct. Adv. Sh. at 2189-90, 320 N.E.2d at 924.

<sup>14</sup> *Id.* at 2192-93, 320 N.E.2d at 924.

<sup>15</sup> *Loughery v. Central Trust Co.*, 258 Mass. 172, 175, 154 N.E. 583, 585 (1927); *Brown v. C. A. Pierce & Co.*, 229 Mass. 44, 47, 118 N.E. 266, 267 (1918).

<sup>16</sup> S. WILLISTON, *CONTRACTS* § 1496, at 373-74 (3d ed. 1970).

<sup>17</sup> 1974 Mass. App. Ct. Adv. Sh. at 2193, 320 N.E.2d at 924.

<sup>18</sup> *Id.* See *McCarthy v. Brockton National Bank*, 314 Mass. 318, 325, 50 N.E.2d 196, 199 (1943).

<sup>19</sup> 1974 Mass. App. Ct. Adv. Sh. at 2194, 320 N.E.2d at 924.

<sup>20</sup> *Id.* at 2194, 320 N.E.2d at 925.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2195, 320 N.E.2d at 925.

<sup>23</sup> *Joseph v. Tata*, 339 Mass. 600, 161 N.E.2d 763 (1959); *Hashem v. Massachusetts Security Co.*, 255 Mass. 29, 150 N.E. 846 (1926); *Rosenberg v. Doe*, 148 Mass. 560, 20 N.E. 176 (1889).

misrepresentations as to the legal effect of the defendant's own stand-ard purchase and sale agreement.<sup>24</sup>

Finally, the court held that the agreement could be specifically enforced against the defendant even though certain conditions required to be performed by the plaintiff were not met.<sup>25</sup> As a general rule, when an agreement is conditional, all conditions must be met before a party seeking to enforce the agreement is entitled to specific performance.<sup>26</sup> In *Cellucci*, the agreement was conditioned upon, *inter alia*, the plaintiff's securing all licenses necessary to operate a gasoline station at the site. Nonetheless, the court held that the defendant's repudiation of the agreement excused performance of any remaining condition, particularly since some of the conditions remained unsatisfied as a result of the defendant's own inaction.<sup>27</sup>

The result reached in *Cellucci* was not only legally correct but eminently fair in view of the facts found by the trial judge. Although the agreement that was specifically enforced did not comply with the Statute of Frauds and certain conditions of the agreement remained unsatisfied, the legal irregularities were caused, in large measure, by the defendant's own inaction. Therefore, the court's well-reasoned use of the doctrine of estoppel placed the burden of loss on the defendant, where it properly belonged.

---

<sup>24</sup> 1974 Mass. App. Ct. Adv. Sh. at 2197, 320 N.E.2d at 925.

<sup>25</sup> *Id.* at 2198, 320 N.E.2d at 926.

<sup>26</sup> *Guerrette v. Cheetham*, 289 Mass. 240, 193 N.E. 836 (1935); *Barrell v. Britton*, 252 Mass. 504, 148 N.E. 134 (1925).

<sup>27</sup> 1974 Mass. App. Ct. Adv. Sh. at 2198, 320 N.E.2d at 926.