Chapter 4: Contracts and Agency

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A. CONTRACTS

§4.1. Conditions precedent: Parol evidence. An interesting application of the well-settled doctrine that a condition precedent to the taking effect of a contract may be shown by parol was seen in *Tilo Roofing Co. v. Pellerin.*¹ The defendant testified that an order for residing of his house which he signed was upon a prior oral statement of the plaintiff’s salesman “to look over a job which his company had performed on an adjoining street and if they did not like it, the defendants could notify the plaintiff company to that effect and their signatures would mean nothing and the order would be called off.” Within a reasonable time the defendant notified the plaintiff in writing of his cancellation of the order.²

Action was commenced for breach of contract. The Supreme Judicial Court affirmed a verdict for the defendant, allowing the above testimony to show a condition precedent to the contract’s becoming effective. The Court cited Section 241 of the Restatement of Contracts as authority for the allowance of parol evidence in the case. That section provides that where the parties agree beforehand or contemporaneously with the making of the written contract that it shall not become effective until the happening of a future event, the oral

¹ *131 Mass. 743, 122 N.E.2d 460 (1954).*
² *331 Mass. at 744, 122 N.E.2d at 461.* One of the plaintiff’s contentions concerned the sufficiency of this notice to cancel the order. Defendant did not say that he did not like the plaintiff’s work but simply that he could not fit to pay for it. The Court, however, held the notice sufficient.
condition is operative unless there is something in the written contract inconsistent with it.

The testimony of the defendant quoted above might have been construed otherwise. It allows the defendant, after he has signed the order, to look at another job done by the plaintiff and, if he is not satisfied, he can notify the plaintiff and “the order will be called off.” However, the fact that all of this took place during the negotiations and before any work on the defendant’s house could be done, and with the defendant doing nothing but signing a printed “order blank,” aided the Court in its decision. The Court also, it should be noted, asserted, “Persuasive evidence that the contract was not to be effective immediately was afforded by the testimony relating to the proposed investigation of the defendant’s credit rating.”

§4.2. Silence as acceptance: Uncontradicted invoices. A defendant may be held liable for work done where circumstances warrant the plaintiff’s assumption that defendant is liable and invoices to defendant are not contradicted. In Wiley & Foss, Inc. v. Saxony Theatres, Inc. one Sisson engaged the plaintiff to remodel the Saxony Theatre owned by defendant corporation. Thereafter Sisson requested work to be done on another theatre, the Gem. The latter was not owned by the defendant, but the plaintiff thought it was. Invoices of the latter work were sent the defendant and not contradicted until some time after the work was completed. It seems that Sisson was president of Saxony Theatres, Inc., and also of a corporation owning the Gem Theatre, both being in Fitchburg. The addresses of both corporations were the same and the plaintiff’s invoices were, of course, sent to this address. The trial judge directed a verdict for the defendant.

The Supreme Judicial Court reversed the trial court decision and held the evidence of the invoices was enough to show “some liability” and therefore enough to take the case to the jury. The decision seems an eminently fair one. The outward appearances and the position of Sisson were enough to give the plaintiff reasonable grounds to believe that Sisson was representing both theaters. The thin corporate veil in this case was not enough to prevent recovery where the invoices were received and not contradicted for so long a time by the defendant corporation.

§4.3. Illegal contracts: Failure to procure installation permit. There has been a growing interest in the subject of restitution in recent years. It has caused some re-examination of the older rules in

3 331 Mass. at 746, 122 N.E.2d at 462.


regard to remedies in the event of illegality in contracts.² A significant Massachusetts decision during the 1955 Survey year deserves examination in this regard.

In *Hawes Electric Co. v. Angell*³ the Supreme Judicial Court had before it a case involving the failure to procure a fire department permit for the installation of an oil burner. On the matter of the contract itself, the Court asserted, “There was evidence tending to show that the price of the burner was $1,150 and the cost of installation $131.50. But there was evidence tending to show that the price of the burner and its installation were included in an entire price of $1,281.50.”⁴

Finding that the plaintiff clearly had failed to obtain an installation permit, the Court held he could not recover the cost of services for installation. Here the Court cited as the only prior authority on the point *Tocci v. Lembo.*⁵ In the latter case, the plaintiff was denied recovery for construction of a house immediately after World War II because of a failure to get authorization for construction from the housing authority. The public policy giving veterans preference was involved rather than a safety regulation.

In the instant case, however, the Court allowed the plaintiff to recover for the cost of the oil burner itself, holding that contract could be found to have been separable to this extent. The Court also reversed the trial court’s action in leaving to the jury the question of seriousness of the illegality in the contract, holding that this was a question of law.

The language quoted from the opinion above will indicate that the evidence was not strong to indicate separability in this contract. To that extent the decision of the Court may be considered as a mitigation of the stronger rules in regard to illegality. In *Tocci v. Lembo*⁶ the Court distinguished an earlier Holmes decision, *Fox v. Roger,*⁷ where a contractor who had failed to procure a local permit for the plumbing work involved, and who installed a different type of pipe than that required by statute, was allowed to recover. Justice Holmes said, “There is no policy of the law against the plaintiff’s recovery, unless his contract was illegal and a contract is not necessarily illegal because it is carried out in an illegal way.”⁸ The Fox decision has been criticized by Williston⁹ and perhaps the instant *Hawes Electric* is further indication of the present Court’s reluctance to follow it.

⁶ Ibid.
⁷ 171 Mass. 546, 50 N.E. 1041 (1898).
⁸ 171 Mass. at 547, 50 N.E. at 1042.
§4.4. Modification of contracts. It is very dangerous to strike provisions from contracts without the most careful review of the effect of the provisions remaining. In A-I Beverage Co. v. American Dry Ginger Ale Co.¹ a contract was canceled except for an agreement of indebtedness in a specific sum, and a single paragraph under which the plaintiff assumed "full responsibility" for the manufacture, bottling, sale and distribution of beverages involved, and in no event would the defendant "be held responsible for improper preparation, bottling or manufacture" of the beverages,² and that the defendant not be liable for claims growing out of acts of the plaintiff. In a suit for money due, the defendant sought to recoup for loss to its good will through negligent and improper preparation, manufacture, and bottling by the plaintiff.

The Supreme Judicial Court noted that the paragraph in the original agreement in regard to the duties owed to the defendant in respect to the manufacture and bottling of the beverage was stricken out. The remaining paragraph relates to a different subject, namely, the obligation on the part of the plaintiff to indemnify and save harmless the defendant from claims of third parties resulting from acts of the plaintiff in manufacture and distribution. The Court held that damage to good will was not recoverable under this paragraph.

§4.5. Interpretation of contracts: Business custom. A somewhat broad interpretation of the "business custom" rule for imposing restrictions on contract rights was applied by the Court in Northeast Wholesale Flower Corp. v. Boston Flower Exchange, Inc.¹ The defendant operates the Boston flower exchange and rents space to flower growers and "in certain instances to commission salesmen."² The defendant rented space to one Given who in turn made an arrangement with the plaintiff, a commission salesman, to sell at this space flowers grown by Given. It seems that Given asked permission from the defendant to allow the plaintiff to act in this way for him and was refused. The plaintiff brought an action against defendant to compel him to give such permission.

The lower court found the material facts and reported the case to the Supreme Judicial Court. The lower court found that it was "the long established and universal custom" for lessees to ask permission of the defendant before allowing commission agents to act for them on the floor. The Court affirmed this finding as not plainly wrong. Since nothing in the lease was in conflict with this custom, the Court found it a part of the agreement. Justice Ronan asserted:

The orderly operation by the defendant of the exchange requires supervision by the defendant over the conduct of those who use its

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² Ibid.
facilities. Their character, integrity, financial ability must be such that the reputation of the exchange will not be injured. Outside or competitive interests of proposed commission merchants must not be permitted if in the judgment of the directors it would be better for the defendant that they should not be allowed to do business on the floor of the exchange. 3

The Court did not discuss any need for actual knowledge of the custom on the part of Given or the plaintiff. This would seem to be on the well-settled doctrine that a universal business custom is binding on those engaged in the business regardless of actual knowledge. 4 Here, the custom was not a part of the "business" of growing and selling flowers, but was so essentially tied up with these as to come within the rule, since it concerned the flower exchange itself. The case is an interesting one in regard to the application of custom to "annex terms to a contract," to use Williston's phrase, 5 in a situation where the custom actually restricts one of the parties in exercising a right inherent in the contract, but concerning which the contract was silent.

However, it would seem that the essential point in the case was treated rather lightly. Even assuming the custom of getting permission is operative (and, after all, the lessee Given did ask permission), what is the breadth of discretion in the exchange to grant or refuse permission? The language quoted from the opinion seems more directed at initial leasing to commission salesmen as such, rather than to a grower's hiring of the salesmen merely to sell his flowers for him. The character of the grower and his financial status must stand behind the salesman in this case. The salesman is not then "competing" with the market, either. There is no indication in the opinion of the grounds for refusing permission in this case.

B. Agency

§4.6. Apparent authority. A significant decision applied the rules of apparent authority in an agent to bind the principal, a municipal government agency, even though the agency was bound by another controlling state agency not to make such a contract without its approval. In Chessman v. Somerville Housing Authority 1 the plaintiff was employed by the defendant agency as executive director under a five-year contract. The defendant was empowered by statute to employ such a director and to make and carry out contracts. 2 The con-

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5 Id. §653.
tract with the plaintiff was made by the chairman of the board with the approval of all its members.

However, before the employment of plaintiff the defendant authority "had agreed with the Commonwealth" not to enter any contracts without prior approval of the State Housing Board. After the contract was made the State Housing Board specifically disapproved it. The defendant authority then discharged the plaintiff. He sought a declaratory decree to be reinstated.

The Supreme Judicial Court reversed the trial court's finding for the defendant and ordered a decree be entered declaring the contract valid and still in force. It found that the plaintiff, being unaware of the "agreement" between the defendant and the Commonwealth, could hold the defendants to the contract on the apparent authority of the chairman. The statutory grants of authority to the local housing authority could certainly also be relied on by the plaintiff in such circumstances.

§4.7. Broker's commission: Revocation of authority. The decision in Dragone v. Dell'Isola1 is addressed to the always troublesome question of a broker's commission. The defendant requested the plaintiff, a real estate broker, to procure a customer to buy the defendant's land for $8500. The broker saw one Grande, or a representative of his corporation, who stated the price was too high. Thereafter one D'Angelo, not knowing of the dealings of the plaintiff with Grande, saw the defendant and was told he would sell for $8000. D'Angelo told Grande who agreed to buy the property. The defendant then told the plaintiff of the sale, including Grande's name. The plaintiff asserted Grande was his customer. The defendant thus learned this for the first time. He proceeded to sell to Grande. The trial judge found the plaintiff's efforts were the active and efficient cause of the agreement of sale; that the failure of the plaintiff to disclose the identity of his customer was not material; and that the defendant proceeded with the sale in bad faith.

The Supreme Judicial Court held the subsidiary findings did not support the conclusions of the trial judge. There was no employment and the defendant could withdraw any offer before he had notice of a customer procured by the plaintiff. There was no bad faith because the defendant learned of the plaintiff's negotiations with Grande only when he called to revoke the plaintiff's authority.2

In its opinion, the Court stressed the fact that the broker had not produced a customer ready, willing, and able to pay the agreed price, $8500, before the plaintiff's revocation.3 In addition, the broker never introduced the defendant to Grande and did nothing further after Grande told him the price was too high. The necessary import of the

3 Ibid.
Court's decision is that the plaintiff was not the active and efficient cause of the sale under all the circumstances of the case.

In another interesting broker's commission case, *Livingston v. George McArthur & Sons, Inc.*, the Court reiterated the principle that an offer to the broker may be revoked until the contract comes into existence, i.e., until the broker has turned the customer over to his employer, all in the absence of bad faith on the part of the employer. The broker cannot recover for time or expense, even if the employer avails himself to some extent of the fruits of the broker's labor and the revocation occurs in the midst of negotiations with a possible or probable customer. Up to the time the defendant notified the plaintiff that all sales included in his territory were being handled by someone else, he had only talked and negotiated. A letter was held a sufficient revocation of the authority of the plaintiff.