Chapter 10: Contracts and Commercial Law

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§10.1. Reliance—Promissory Estoppel. In Loranger Construction Corp. v. E.F. Hauserman Co.,\textsuperscript{1} the Supreme Judicial Court, in a decision upholding recovery on the basis of "typical bargain" analysis, shed some light on the status of the theory of promissory estoppel in Massachusetts.\textsuperscript{2} The plaintiff, Loranger Construction Corp. (Loranger), in preparing its bid to become general contractor on a construction job, received by telephone a subcontract "quotation" of $15,900 for metal partitions from a sales engineer employed by defendant E.F. Hauserman Company (Hauserman).\textsuperscript{3} Although the quotation had been prepared about two weeks earlier, it was not given to Loranger and other general contractors until May 20, 1968, the day bids were due on the general contract. Loranger, having received no other quotations on the partitions, submitted its bid using Hauserman's quotation, and was awarded the general contract in June, a month later.\textsuperscript{4} In September 1968, Loranger sent Hauserman a subcontract agreement for signature with the $15,900 figure, which Hauserman rejected.\textsuperscript{5} Loranger then engaged another company to supply and install the partitions for $23,000.\textsuperscript{6}

Loranger brought an action against Hauserman to recover the $7,100 difference between Hauserman's quoted price used in Loranger's bid and the amount paid to the substituted subcontractor.\textsuperscript{7} At the close of its evidence, Loranger waived all but the first count of its complaint.\textsuperscript{8}

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\textsuperscript{2} Id. at 3022-27, 384 N.E.2d at 179-81.
\textsuperscript{3} Id. at 3021-22, 384 N.E.2d at 178.
\textsuperscript{4} Id. at 3022, 384 N.E.2d at 178.
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{8} Id. Loranger's complaint contained four counts. In the fourth count, Loranger alleged that Hauserman's quotation was an offer which was accepted by Loranger after Loranger's bid on the general contract had been accepted. Id.
which alleged that Hauserman's telephone quotation was an offer, which Loranger accepted and relied upon in submitting its bid on the general contract.\(^9\) The defendant rested and moved for a directed verdict, which was denied.\(^10\) The jury returned a verdict for Loranger and Hauserman moved for judgment notwithstanding the verdict, which also was denied.\(^11\)

On appeal, the Appeals Court held that Loranger was entitled to recover "on the theory of promissory estoppel, a basis for recovery not previously explicitly accepted in the courts of this Commonwealth."\(^12\) On further review, the Supreme Judicial Court affirmed the judgment, but on the basis that the evidence supported a finding that there was a "typical bargain"—offer and acceptance supported by consideration.\(^13\) The Court also observed that the evidence would support a finding on the basis of the plaintiff's reliance on the defendant's promise, as the Appeals Court held. The Court, however, rejected use of "the expression 'promissory estoppel,' since it tends to confusion rather than to clarity."\(^14\)

The Appeals Court found that Loranger was foreclosed from recovery on any traditional contract theory because it could find no evidence of acceptance, a requisite element of the "typical bargain."\(^15\) Consequently, the court adopted the theory of promissory estoppel as formulated in section 90 of the Restatement of Contracts, which allows recovery if "(1) a promisor makes a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise does induce such action or forbearance, and (3) injustice can be avoided only by enforcement of the promise."\(^16\) The court then applied this theory to the facts. Hauserman had submitted its bid knowing that Loranger might use it in the general bid. Hauserman realized that if its quotation were used and Loranger were awarded the general contract, Loranger would be bound by its bid price. Because Hauserman later rejected the subcontract, Loranger was forced to pay a higher price to another subcontractor.\(^17\) On these facts, the Appeals Court stated, "[t]he jury could have found that Loranger had relied upon Hauserman's quotation, that

\(^{9}\) Id.
\(^{10}\) 1978 Mass. Adv. Sh. at 3022, 384 N.E.2d at 179.
\(^{11}\) Id.
\(^{14}\) Id. at 3024, 384 N.E.2d at 179.
\(^{16}\) Id. (citing Restatement of Contracts § 90 (1932)).
\(^{17}\) Id. at 268-69, 374 N.E.2d at 309.
the reliance was reasonable, and that injustice could be avoided only by the imposition of appropriate damages."  

In its petition to the Supreme Judicial Court for further appellate review, Hauserman set forth several arguments relating to the question whether the evidence made a case for the jury. It contended that the Appeals Court decision, resting on "the new theory of promissory estoppel," departed from the pleadings and from the theory on which the case was tried." In observing that the Appeals Court holding was based on Loranger's reliance on Hauserman's promise, the Court held that the promise was "enforceable pursuant to a 'traditional contract theory,'" rather than "promissory estoppel." Thus, it agreed that the holding was supported by the evidence. Since, however, the charge to the jury was based on offer, acceptance, and consideration, with no reference to reliance on a promise, the Court went on to consider whether the evidence supported the jury's finding.

In reviewing the evidentiary basis for the jury's finding, the Court stated that the jury was warranted in its finding that Hauserman's quotation, in the circumstances, was an offer or promise. In contrast to the Appeals Court's finding, the Court stated that the jury could have found that Loranger accepted Hauserman's offer in any one of three ways: (1) an exchange of promises during the telephone conversation; (2) the doing of an act—using Hauserman's estimate in submitting the general bid; or (3) the offer, unrevoked, was accepted

18 Id. at 269, 374 N.E.2d at 309-10.
20 Id., 384 N.E.2d at 179.
21 Id. The Court labeled the holding of the Appeals Court as reliance on the promise. See text at note 14 supra. The Court also observed that this is not a "novel" doctrine as Hauserman had contended in its petition for further appellate review, but rather is "a 'traditional contract theory' antedating the modern doctrine of consideration." 1978 Mass. Adv. Sh. at 3024, 384 N.E.2d at 179.
22 Id. at 3023, 384 N.E.2d at 179.
23 Id. at 3025, 384 N.E.2d 180. The defendant Hauserman contended that the Appeals Court decision, "resting on the new theory of promissory estoppel," departed from the pleadings and from the theory on which the case was tried. Id. at 3024, 384 N.E.2d at 179-80. The Court pointed out that the plaintiff's complaint alleged an exchange of promise for promise, as well as the submission of a bid in reliance upon the agreement between the parties, and that, if either allegation was sustained by proof, the other could be treated as surplusage. Id. at 3024-25, 384 N.E.2d at 180. The Court also reviewed the judge's charge to the jury. Since the charge made no reference to reliance on a promise, it found that it could not "attribute to the jury a finding that the offer or promise of the defendant induced action 'of a substantial character' on the part of the plaintiff." Id. at 3025, 384 N.E.2d at 180. Such a finding is an essential element of the reliance doctrine. See text at note 16 supra. Consequently, the Court considered the case on the basis on which it was submitted to the jury. 1978 Mass. Adv. Sh. at 3025, 384 N.E.2d at 180.
24 Id. at 3023, 384 N.E.2d at 179.
when Loranger sent the subcontract agreement. The Court stated that the jury would have been warranted in finding both that Hauserman invited acceptance in any one of these three ways and that Loranger’s promise or act constituted consideration, the only remaining element necessary to make Hauserman’s promise binding. The Court applied the Restatement description of the “typical bargain” in which “the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration.” Thus, the Court reasoned, the jury could have found that Hauserman’s sales engineer intended to induce Loranger’s promise or action in the hope that Hauserman would benefit and that his offer or promise was induced by the hoped-for acceptance. Even more clearly, the jury could have found that Loranger’s promise or action was induced by Hauserman’s offer or promise. These findings would warrant the conclusion that there was a “typical bargain” supported by consideration. The Court concluded that a review of the cases suggests that many decisions based on reliance might also have been based on bargain.

The Court, by finding consideration and “bargain,” did not need to consider the reliance theory of section 90 of the Restatement. In declining to consider this theory, the Court noted the apparent confusion surrounding the phrase “promissory estoppel.” Despite such confusion, the Supreme Judicial Court nevertheless made it clear that the doctrine of enforceability because of detrimental reliance will be applied in the appropriate case.

§10.2. Third-Party Beneficiary Contracts. In Choate, Hall & Stewart v. SCA Services, Inc., the Supreme Judicial Court joined the vast majority of jurisdictions in recognizing the right of a creditor beneficiary to sue on a contract to which it is not a party. While announcing this “long anticipated but relatively minor change” in Massachusetts law,
the Court also presaged a change in the choice of law applicable in contract cases.5

The contract at issue arose in 1976 out of a dispute within the eight-member board of directors of SCA Services, Inc. (Company), a Delaware corporation engaged in the waste disposal business.6 The dispute involved allegations that a former president and treasurer of the Company had diverted Company funds unlawfully with the possible knowledge and/or assistance of some of the members of the board.7 The board of directors, divided on the issues, was at an impasse, and four separate lawsuits had been commenced involving the Company, its former president, and several members of the board of directors including Steir, the chairman of the board.8

The dispute was settled by a contract among the eight directors and the Company, providing for the dismissal with prejudice of the pending lawsuits, mutual releases, and the resignations as directors and officers of half of the board members.9 The provision of the settlement contract at issue in the present case required the company to

"continue to indemnify and hold harmless" each of the resigning directors for "all losses, liabilities or expenses" incurred by him resulting "from any acts or omissions to act . . . while a director, officer or employee of [the Company] . . . and each of the [resigning directors] may select his own counsel whose reasonable fees and out-of-pocket expenses will be paid on a current basis directly by [the Company], 'all to the maximum extent permissible under Delaware law.' 10

This obligation expressly included legal fees and expenses arising from a then-pending investigation of the Company by the Securities and Exchange Commission (SEC).11

During the settlement negotiations, one of the directors, Steir, was represented by the law firm of Choate, Hall & Stewart (Choate, Hall).12 The Company paid attorneys representing the other resigning directors and paid Choate, Hall on two statements of fees and expenses for representing Steir in the SEC investigation.13 Thereafter it refused payment to Steir’s attorneys, Choate, Hall, apparently upon learning of

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5 Id. at 1882-85, 392 N.E.2d at 1048-49. See text at notes 24-30 infra.
7 Id. at 1878, 392 N.E.2d at 1046.
8 Id., 392 N.E.2d at 1046-47.
9 Id. at 1879, 392 N.E.2d at 1047.
10 Id. at 1879-80, 392 N.E.2d at 1047.
11 Id. at 1880, 392 N.E.2d at 1047.
12 Id. at 1880-81, 392 N.E.2d at 1047.
13 Id.
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an SEC determination to bring suit.\textsuperscript{14} The Company took the position that it would decline further payment of legal fees and expenses of Steir until Steir either vindicated himself in the SEC matter or restored to the Company the funds (\$125,000) it claimed Steir had misappropriated.\textsuperscript{15}

Choate, Hall brought suit in superior court against the Company, seeking a declaratory judgment.\textsuperscript{16} Choate, Hall also sought and obtained (on condition that it post bond) a preliminary injunction enjoining the Company from failing to pay Choate, Hall's bills previously submitted or bills that would be submitted for later work on Steir's behalf.\textsuperscript{17} The Company's answer included several affirmative defenses: (1) Choate, Hall was not a party to the settlement contract and therefore could not sue to enforce it; (2) indemnification was unlawful in the circumstances; and (3) the provision sued upon had been procured by misrepresentations on the part of Steir.\textsuperscript{18} In addition, the Company included a claim to set off \$125,000, the funds allegedly misappropriated by Steir, against any recovery to which Choate, Hall would be otherwise entitled.\textsuperscript{19}

The Company moved for judgment on the pleadings on its first affirmative defense, that Choate, Hall could not sue to enforce a settlement contract to which it was not a party, and affidavits were submitted by both parties.\textsuperscript{20} Treating the motion as one for summary judgment, the judge granted summary judgment for the Company and denied Choate, Hall's motions to amend its complaint to substitute Steir for itself as plaintiff in the action and as party to the preliminary injunction.\textsuperscript{21} Later, the judge granted the Company's motion to enforce liability on the bond obligation.\textsuperscript{22} Choate, Hall's appeals from the summary judgment, denial of its motions to substitute, and judgment on the bond were consolidated and the Supreme Judicial Court ordered direct appellate review.\textsuperscript{23}

In reversing the trial judge's decision, the Court focused on two issues: (1) choice of law and (2) suit by a third-party beneficiary.\textsuperscript{24} The first issue was significant at the superior court level because, prior

\textsuperscript{14} Id. at 1881, 392 N.E.2d at 1047. The Company continued to make payments to attorneys representing another director, however, apparently because he had "made good" the amounts he earlier misappropriated. \textit{Id.}, 392 N.E.2d at 1048.

\textsuperscript{15} \textit{Id.}, 392 N.E.2d at 1047.

\textsuperscript{16} \textit{Id.}, 392 N.E.2d at 1048.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} at 1881-82, 392 N.E.2d at 1048.

\textsuperscript{20} \textit{Id.} at 1882, 392 N.E.2d at 1048.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} The bond obligation was in the amount of \$34,528.31.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}
to this case, the law of Massachusetts on third-party beneficiary contracts differed from the law of Delaware. The Court concurred with the judge below that the reference in the contract to Delaware law did not indicate that Delaware law should govern all issues. Rather, the Court stated, the contract reference referred to the Delaware corporation law merely to fix the permissible extent of corporate indemnification of directors and officers. Noting that the contract was executed in Massachusetts and that most of the contacts were with Massachusetts, the Court ruled that Massachusetts law governed.

Having determined that Massachusetts law would govern the outcome, the Court briefly reviewed "[t]he rather confusing patchwork" of the third-party beneficiary rule in Massachusetts. The Court began by noting that it had adopted, in *Mellen v. Whipple*, the doctrine of privity of contract as the law of Massachusetts. The Court agreed with commentators that, despite formal adherence to the *Mellen* doctrine, the Court's various exceptions to the general prohibitory rule of *Mellen* have resulted in the implicit recognition of the right of suit of creditor beneficiaries. Thus, Massachusetts courts in fashioning "exceptions" have actually reached results similar to the results of jurisdictions which recognize third-party beneficiary contracts. There has been uncertainty, however, concerning the scope of various exceptions. Consequently, the Court adopted the general rule recognizing the right of third-party creditor beneficiaries to sue and applied it retroactively to permit Choate, Hall's suit.

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25 Id.
26 See text at note 10 supra.
28 Id.
29 Id. The Court noted that Choate, Hall is a "Boston partnership" (presumably meaning a partnership formed under Massachusetts law and located in Boston), that the Company's principal place of business is in Massachusetts, that Steir resides in Massachusetts, and that the only contact with Delaware was that it was the Company's state of incorporation. Id.
30 Id. at 1882, 392 N.E.2d at 1048.
31 Id. at 1888, 392 N.E.2d at 1051.
34 Id. at 1887-88, 392 N.E.2d at 1050-51.
35 Id.
36 Id. at 1888-89, 392 N.E.2d at 1051. The Court uses the term "creditor" beneficiary as defined in the original *Restatement of Contracts* § 133 (1932). 1979 Mass. Adv. Sh. at 1891 n.21, 392 N.E.2d at 1052 n.21. In the original *Restatement*, "intended beneficiary" explicitly encompassed the categories of creditor and donee beneficiaries as defined therein. The second *Restatement* abandons this specific terminology in favor of the general inclusive term "intended beneficiary" but retains the now nameless classifications. *Restatement (Second) of Contracts* § 133(1)(a)-(b) (1973).
37 1979 Mass. Adv. Sh. at 1889, 392 N.E.2d at 1051. The Court noted that "the handwriting has long been on the wall," regarding adoption of the general
In applying the general rule to the facts of the case, the Court looked to the intention of the parties to determine whether Choate, Hall qualified as a creditor beneficiary entitled to sue the promisor, or whether it was no more than an incidental beneficiary without right of suit. The basic test is whether the performance promised will satisfy an obligation of the promisee to pay money to the beneficiary. In general, third parties are not accorded a right of action against an indemnitor to recover payments due an indemnitee. In this case, however, as the Court noted, although words of indemnity were used, the contract provided that the payments would be made “directly” to Steir’s counsel, evidencing an intention to benefit the third party, Choate, Hall, and thus qualifying Choate, Hall as a creditor beneficiary.

In finally espousing the general rule relating to creditor beneficiaries, the Court has laid the groundwork for even further changes in Massachusetts contract law. Although, as the Court observed, the choice of law issue was easily resolved in this particular case under existing Massachusetts law, the Court clearly suggests that change in the choice-of-law test applicable in contract cases is imminent. Just as the Court has reexamined the choice-of-law approach in tort cases, the Court apparently plans to change the rule in contract cases from the choice of the law of the place where the contract was made to a more functional approach.

In revising a judgment dismissing a complaint seeking recovery of certain deferred compensation benefits, the Court enunciated the relevant considerations concerning the enforceability of a forfeiture for competition clause in an employment contract.

Cheney, the plaintiff, was an employee of the defendant Automatic Sprinkler Corporation of America (Corporation) from 1956 to 1972. He served as salesman, then district manager, and finally eastern regional vice president, under a series of one-year contracts, each apparently containing similar provisions. The contract provided for a base salary, a direct incentive payment based on a certain percentage of the annual operating profit of the employee's district, and a bonus. Any direct incentive payment for one year would be paid during the first quarter of the next year up to an amount equal to fifty percent of the employee's base salary, with the remainder to be paid in equal amounts during the first quarter of each of the following four years. Bonuses for each year were to be determined by a compensation committee and paid from a bonus fund during the first quarter of each of the succeeding four years, in equal amounts. The contract further provided that the award of any direct incentive or bonus was wholly discretionary with the Corporation and that "no person [would] be deemed to have earned or acquired any right thereto at any time prior to actual receipt of payment." In addition, the contract provided:

One who dies, retires, or leaves the Corporation with the approval of the Board of Directors will receive all direct incentive and bonus installments as described above. One who is discharged for cause, terminates his employment, joins a competitor, or engages in activities which are harmful to the Corporation, will forfeit all installments which remain unpaid on the date of the occurrence of any of such events. However, final authority over the payment or forfeiture of direct incentive and bonus installments will be vested in the Compensation Committee.

In June 1972, Cheney resigned from the Corporation to form a competing company, and the Corporation discontinued all direct incentive

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4 Id.
5 Id. at 180-81, 385 N.E.2d at 962-63.
6 Id. at 181, 385 N.E.2d at 963.
7 Id. at 181 & n.1, 385 N.E.2d at 963 & n.1.
8 Id. at 181 n.1, 385 N.E.2d at 963 n.1.
9 Id. at 182-83, 385 N.E.2d at 963. The Court treated the pleadings as including an allegation that the plaintiff resigned to form a competing corporation, although this representation was made only in plaintiff's brief. Id. at 183, 385 N.E.2d at 963. Plaintiff averred that defendant was aware of his intent when it accepted plaintiff's resignation. Id.
and installment payments. 10 Cheney brought suit in superior court against his former employer to recover $34,800 in unpaid direct incentive installments and $14,000 in unpaid bonus installments attributable to the years 1968 through 1971 under the employment contracts. 11 After Cheney filed a more definite statement pursuant to the Corporation's motion, the superior court allowed the Corporation's motion to dismiss. 12 The Supreme Judicial Court transferred Cheney's appeal. 13

Acknowledging that under the employment contract Cheney clearly had no explicit right to unpaid incentive and bonus installments when he left the Corporation's employ to work for a competitor, on appeal the Court considered "whether there [was] any theory under which, in the circumstances, the discretionary provisions of the agreement should not be enforced." 14 The Court recognized that its previous decisions had upheld agreements providing for the loss of unpaid compensation if a former employee went to work for a competitor. 15 It noted that the majority view in other jurisdictions is that "a forfeiture for competition clause in an employment agreement is enforceable without regard to the reasonableness of the restraint on the former employee." 16 Nonetheless, the Court stated that, just as it would reconstruct a covenant not to compete, so it would enforce a forfeiture of deferred compensation only to the extent that the restraint is reasonable. 17

On this basis the Court ruled that the complaint and the more definite statement failed to allege a claim on which relief could be granted, because they failed to include any allegations of fact indicating "(a) that the defendant acted in bad faith in denying further payments to the plaintiff or (b) that the provision denying benefits if the plaintiff went to work for a competitor was an unreasonable restraint on the plaintiff." 18

The Court, however, permitted Cheney to amend his complaint. 10 In reaching its decision, the Court enumerated the considerations appropriate in determining the reasonableness of a clause providing

10 Id. at 182, 385 N.E.2d at 963.
11 Id. at 179, 385 N.E.2d at 962, 963.
12 Id. at 179, 385 N.E.2d at 962.
13 Id. at 179-80, 385 N.E.2d at 962.
14 Id. at 183, 385 N.E.2d at 964.
18 Id. at 190, 385 N.E.2d at 966.
19 Id.
for the forfeiture of post-termination financial benefits: the amount and nature of the forfeiture and the nature of the employee’s duties and responsibilities in his former and current employment.\textsuperscript{20} The Court noted that if in the circumstances a covenant not to compete would be unenforceable, the burden of justification of a forfeiture clause would be “onerous.”\textsuperscript{21} The Court stated that even if a covenant not to compete would be reasonable in the circumstances, a forfeiture clause “might be modified to a reasonable level.”\textsuperscript{22} Applying these considerations to the allegations of the complaint, the Court stated that it found “no allegation, or even a hint, of facts that would justify relief . . . .”\textsuperscript{23}

In \textit{Cheney}, the Court adopts an approach to “forfeiture” or “divestment” clauses that has been recommended by commentators.\textsuperscript{24} Among the possible contractual provisions to induce employees to remain in their present employment positions, a clause providing for forfeiture of incentive payments acts as a positive deterrent and a covenant not to compete acts as a negative sanction. As the Court points out, however, each provision may have an inhibitory effect on present and former employees in much the same way.\textsuperscript{25} Consequently, the Court reasoned, if forfeiture provisions are enforced without regard to the reasonableness of their terms, while noncompetition covenants are subject to such a test, some employers may be tempted to rely on the threat of forfeiture as a means of restraining employees from seeking employment with competitors.\textsuperscript{26}

The \textit{Cheney} opinion does more, however, than simply compare forfeiture clauses with noncompetition covenants. In setting forth the two areas of vulnerability of forfeiture clauses—employer bad faith and unreasonable restraint\textsuperscript{27}—the Court further expands the notion of employer “good faith” imported into employment contracts in 1977 by

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\item \textsuperscript{20} \textit{Id.} at 187, 385 N.E.2d at 965.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 188, 385 N.E.2d at 965.
\item \textsuperscript{23} \textit{Id.} at 189, 385 N.E.2d at 966. In fact, the Court noted that Cheney had been employed in key sales positions for the Corporation, ending his employment in a position with responsibility for a wide geographic area, circumstances which would “tend to justify restraints on the plaintiff’s assumption of competing employment . . . .” \textit{Id.} at 190 n.9, 385 N.E.2d at 966 n.9.
\item \textsuperscript{25} 1979 Mass. Adv. Sh. at 187 n.7, 385 N.E.2d at 965 n.7.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 190, 385 N.E.2d at 966.
\end{itemize}
Fortune v. National Cash Register Co.\textsuperscript{28} Furthermore, the Court suggests that a stricter test of “reasonableness” will be applied to forfeiture clauses than to noncompetition covenants.\textsuperscript{29}

In Fortune, the Court implied a covenant of good faith in an employment contract terminable at will. It expressly attempted to limit its holding to the employer’s decision to terminate its at-will employee where commissions are to be paid for work performed by the employee.\textsuperscript{30} The Cheney decision, by suggesting a different result if the plaintiff alleged that the employer had acted in bad faith in denying further payments,\textsuperscript{31} expands the applicability of the good faith requirement to cover the employer’s decision to not pay discretionary incentive payments after termination, if the employee goes to work for a competitor. The Fortune case is now cited for the proposition that an employer may not rely on the express terms of its agreement with an employee in order to avoid payment of compensation attributable to past services.\textsuperscript{32} It remains unclear, however, whether the requirement of good faith is tantamount to a good cause standard, what measure of damages should be applied, and what proof is required to establish a prima facie case.

Although the “bad faith” issue was not treated at length in Cheney, the Court did elaborate on this second ground for attack on a forfeiture clause, namely, that a forfeiture clause, like a noncompetition clause, is an unreasonable restraint on the employee.\textsuperscript{33} The rule in Massachusetts applicable to covenants not to compete generally is that they are enforceable only to the extent they are necessary to protect the legitimate business interests of the employer.\textsuperscript{34} These interests include trade secrets, confidential data, and goodwill. The restraint must be limited reasonably in time and space.\textsuperscript{35} The Court stated that even if a forfeiture clause passes the test applicable to noncompetition covenants, the forfeiture clause still may be modified to a “reasonable level.”\textsuperscript{36} The applicable considerations are: (1) the amount and nature of the forfeiture and (2) the nature of the employer’s duties and responsibilities

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\textsuperscript{28} 373 Mass. 96, 364 N.E.2d 1251 (1977).
\textsuperscript{29} 1979 Mass. Adv. Sh. at 188, 385 N.E.2d at 965. See text at note 14 supra.
\textsuperscript{30} 373 Mass. at 104-05, 364 N.E.2d at 1257-58. For a more complete discussion of the Fortune case, wherein it is suggested that the Court’s struggle to avoid establishing a new general rule may be unsuccessful, see Sherry, Contracts and Commercial Law, 1978 Ann. Surv. Mass. Law § 8.2, at 151-58.
\textsuperscript{31} 1979 Mass. Adv. Sh. at 190, 385 N.E.2d at 966.
\textsuperscript{32} Id. at 190 n.9, 385 N.E.2d at 966 n.9.
\textsuperscript{33} Id. at 186-88, 385 N.E.2d at 965.
\textsuperscript{34} Id. at 186, 385 N.E.2d at 965.
\textsuperscript{36} 1979 Mass. Adv. Sh. at 188, 385 N.E.2d at 965.
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in his former and current employment.\textsuperscript{37} Therefore, following Cheney, in order to show reasonable circumstances for a forfeiture clause, the employer should carefully draft the clause to recite his interest in providing a financial inducement to a key employee to continue to work for the employer. Furthermore, if a forfeiture clause is attacked, consideration should be given to showing that loss of compensation is reasonable in the particular circumstances and is far less restrictive than a noncompetition clause.

\textsuperscript{37} \textit{Id.} at 187, 385 N.E.2d at 965.