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Contracts—Reformation of Restrictive Covenant

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receipts should be the base, but when referring to the concession, the word "income" was used. Placing themselves in the position of the parties,³⁶ the Court reasoned that the parties must have intended a different conclusion by changing the base to "income" for the concession, *viz*: income used to denote that costs were first to be deducted from gross receipts.

It should be noted, however, that the lease, when referring to the sale of admissions or coupons outside the box office, stated that "net receipts" was to be the applicable base there. Thus, at various places in the lease, the words "gross receipts," "income" and "net receipts" were used. The Court, in effect, equated "net receipts" and "income." They did so, however, on the basis that since "income" was used instead of "gross receipts," their meanings must have been intended to be different. *Quare* whether the same argument could not be used in favor of a conclusion that "income" should be equated to "gross receipts," *i.e.*, since the word "income" was used instead of "net receipts," was it not just as likely that the parties intended a different meaning when comparing those two?

The case at hand shows how two completely adverse interpretations may be given a word that supposedly has but one traditional meaning in the business world. It should be concluded, then, that no definitive label will be placed upon certain words, but that their meanings will be determined solely in the context in which they were written.

REFORMATION OF RESTRICTIVE COVENANT

In *Ross v. Food Specialties Inc.*³⁷ plaintiff-appellant contracted with defendant Corporation for the purchase of certain of the latter's trade names, trademarks, copyrights, designs and formulas, for some of its products. Among the items sold was a line of Chinese condiments, as to which a restrictive covenant was signed by defendant's President. The covenant provided that defendant's President would not "engage directly or indirectly in any capacity whatsoever in the business of manufacturing or selling Chinese condiments under any trade name heretofore employed by [defendant's President], anywhere in the United States for a period of two (2) years." Defendant's President was actively connected with another corporation, which corporation, immediately after the contract in question was signed, began competing with plaintiff by processing Chinese condiments under various other brand names. Plaintiff brings this action to reform the restrictive covenant in the original contract to apply to not only the brand names sold to plaintiff, but to "any other brand name," claiming that to be the true intention of the parties and that its omission was by mutual mistake. The Supreme Court reformed the contract, but the Appellate Division reversed, the Court of Appeals affirming.

In order to have reformation of a contract there must exist at the time

36. *Ibid.*

37. *Ross v. Food Specialties Inc.*, 6 N.Y.2d 336, 189 N.Y.S.2d 857 (1959).

of the contract either fraud or mutual mistake.³⁸ Since the former is not an issue here plaintiff's claim is decided on the matter of mutual mistake. In order to show this plaintiff must establish his case by submitting something more than a mere preponderance of evidence in his favor.³⁹ The Court held that plaintiff's proof fell short of these requirements, as he did not show that the words sought to be added were the true intention of the parties.

It should be noted that defendant's President was reluctant to sign the covenant in question, but agreed only on the promise of one of the owners of the defendant corporation to pay him \$10,000 to do so. Also, since plaintiff had already received exclusive rights to the various trade names, trade-marks and copyrights in question, by the contract itself, *queare*, whether the only logical meaning of a restrictive covenant was to apply it to any trade name, not just the ones purchased.

MATERIAL ELEMENTS OF A REAL PROPERTY PURCHASE CONTRACT

An enforceable contract is not formed until the parties have agreed on all material elements of the contract.⁴⁰ Whether the questions left for future negotiation by the parties were material elements of the contract was the principal issue in *Willmott v. Giarraputo*.⁴¹ In this action for specific performance of a contract for the sale of real property, the Court of Appeals held that, in leaving the terms of payment of mortgage interest and of amortization of principal for future determination, the parties had failed to agree upon a material element of the contract, and for that reason the contract was unenforceable.⁴² Among other cases, the Court relied on *Pollak v. Dapper*,⁴³ a case in which the Court had reached the same decision on an almost identical state of facts. In view of the integral relationship of interest payments and principal amortization to real estate purchase contracts, there is no doubt as to the soundness of the Court's conclusion that these matters are material elements of such a contract.

38. *Metzger v. Aetna Insurance Co.*, 227 N.Y. 411, 125 N.E. 814 (1920).

39. *Amend v. Hurley*, 293 N.Y. 587, 59 N.E.2d 416 (1944).

40. *Ansorge v. Kane*, 244 N.Y. 395, 398, 155 N.E. 683, 684 (1927).

41. 5 N.Y.2d 250, 184 N.Y.S.2d 97 (1959).

42. In the lower court the defendant pleaded the Statute of Frauds. N.Y. REAL PROP. LAW § 259. By way of dicta the Court of Appeals upheld this defense on the ground that the parole evidence offered by the plaintiff did not sufficiently connect the signed and the unsigned papers, and did not show the defendant's assent to the unsigned papers.

43. 245 N.Y. 628, 157 N.E. 886 (1927), *aff'd* 219 App. Div. 455, 220 N.Y. Supp. 104 (1st Dep't 1927).