IV

INCOMPLETE "CONTRACTS" IN RECENT CASES

The Problem

The maxims "there cannot be a contract to make a contract" and "the courts will not make a contract for parties who have themselves failed to do so" reflect a philosophy of contract rooted in the idea of subjective coalescence of freely consenting wills. They reveal a reluctance to impose contractual obligation without a promisor's deliberate consent to all its terms. If uncritically applied, however, these maxims can cause injustice. Business men often wish to stabilize future outlets and sources of supply by contracting for the sale or purchase of goods for delivery at distant dates, but if markets are volatile they may hesitate to tie themselves to inflexible prices; not all long term contracts are designed to throw the risk of rising prices on the seller or of falling prices on the buyer: the parties may prefer to leave prices to be set before deliveries by agreement or by some other standard.[1] It is also not unusual for business men to agree on subject matter, prices and quantities, but to reserve precise arrangements for transportation for later settlement. Then, too, commercial people often use terms that are meaningful to themselves, but which are well nigh unintelligible to those who are unfamiliar with the ways of the trade. Agreements such as these, though vague and imprecise, are no doubt concluded in the belief that binding commitments have been made. They create reasonable expectations of legal recognition and enforcement. The maxims quoted do, however, threaten disappointment of the hopes so aroused.

My theme is the judicial resolution of the tension between the desire to support reasonable expectations created by business and private agreements however ineligantly phrased and reluctance to impose contractual duties not completely and voluntarily defined and accepted. The interests in conflict in such cases often are not susceptible of easy adjustment by application of broad maxims. More specifically, the problems to be considered arise out of these types of agreement:

1. The parties may in so many words agree to agree on a term whose content is for the time being left indeterminate.
2. The agreement may contain no specific undertaking to negotiate further, but one so phrased as to suggest that such negotiation was intended.
3. Though a term may be so worded as in its context to indicate finality of bargain, its meaning may be very obscure.

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1. Fuller: **Basic Contract Law**, pp. 87-89.

Obviously these problems are but species of a general category which includes the whole variety of problems centering around determination of the precise moment at which negotiation ends and legal right and duty begin.

Specific Agreement to Agree

Discussion of the specific agreement to agree on a term in an otherwise settled document may conveniently begin with a well known case, *May and Butcher, Limited v. The King*[2] A very detailed agreement had been made for the purchase by the plaintiff from a government commission of all tentage becoming surplus during a defined period. Price was to be as agreed from time to time. All disputes arising out of the agreement were to be submitted to arbitration. After several shipments of tentage had been taken at agreed prices, the commission refused to proceed, and the plaintiff sued. The defence was that there was no contract because of the agreement to agree on price. This contention was sought to be answered by submitting that, absent agreement, the price by implication would be a reasonable one, and its reasonableness arbitrable. Reliance was placed on the section of the English Sale of Goods Act corresponding to our s. 9:

> "9. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.
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> (2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price . . ."[3]

On the basis of this section it was argued that the price was a reasonable one, but the argument was rejected. Lord Warrington of Clyffe's answer was that to imply a reasonable price would not be "to imply something about which the parties have been silent; it would be to insert in the contract a stipulation contrary to that for which they have bargained . . . not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed."[4] And the arbitration clause was inoperative simply because there was no contract. Lord Buckmaster said that the "clause refers 'disputes with reference to or arising out of this agreement' to arbitration, but until the price has been fixed, the agreement is not there."[5]

Thus the plaintiff failed; in the often quoted words of Viscount Dunedin: "To be a good contract there must be a concluded bargain,

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2. [1934] 2 K.B. 17 (H.L. 1929).
3. Sale of Goods Act, R.S.N.B. 1952, c. 199.
4. [1934] 2 K.B. 17, at p. 22.
5. Ibid., at p. 20.

and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties."[6]

An express term to agree on price may not be fatal, however, otherwise *Foley v. Classique Coaches, Limited*[7] would not have been decided as it was. The owner of adjoining lots, on one of which was a filling station, sold the other to the defendant for a bus depot. Part of the consideration was a promise to buy all gasoline required by buses operating out of the depot from the vendor and not elsewhere at prices to be agreed from time to time; differences under the agreement were referable to arbitration. The defendant took his gasoline from the plaintiff for three years at agreed prices, but then refused to buy any more, and relied on *May & Butcher v. The King*. An important difference, however, was that immediately the agreement was made in the *Foley* case title to the lot vested so that there was at once substantial performance. To give business efficacy to the contract it was necessary to imply a promise that, failing agreement, the price would be a reasonable one.

Similarly in *British Bank Ltd. v. Novinex Ltd.*[8] the Court of Appeal imposed contractual liability despite the inclusion in a letter from the defendant of a proposal to pay "an agreed commission" for a stipulated service. The defendant, wishing to buy oilskins, wrote to the plaintiff offering to pay a commission in respect to a consignment of such skins if the plaintiff would put the defendant in contact with a supplier. The letter stated: "We also undertake to cover you with an agreed commission on any other business transacted with your friends. In return for this you are to put us in direct contact with your friends." This the plaintiff did. The defendant entered into further transactions with the supplier so introduced, but refused to pay the plaintiff commissions because none had been agreed. The Court of Appeal, finding for the plaintiff, applied the legal principle Denning, J. at first instance had extracted from the earlier cases on agreements to agree, though on its application to the facts the Court differed from his Lordship. Denning, J. had said that if an essential term is to be agreed and there is no express or implied provision for its solution there is no contract. He proceeded:

> "In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an

6. Ibid., at p. 21.
7. [1934] 2 K.B.1 (C.A.).
8. [1949] 1 K.B. 623 (C.A. 1948); [1949] 1 All E.R. 155.

> agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid."[9]

This rule, with respect, poses a difficulty. It appears to mean that a bilateral executory agreement containing as an essential term an unqualified promise to pay a price to be agreed in return for the promise of an act is not a contract, but is transformed into one by performance of the act, the promise becoming not simply one to pay a sum to be agreed but also to pay a reasonable sum failing agreement. It would follow that before performance of the act either party could resile. There is no contract until the act is done (or possibly begun);[10] but, the act done, a promise is at once implied different in a material respect from the original non-contractual promise which was simply to pay a price to be agreed. Actually, on the facts of the *Novinex* case, the defendant's letter might have been interpreted as the offer of a unilateral contract—an express offer of a promise to pay a commission to be agreed, coupled with an implied offer to pay a reasonable commission if agreement were not reached, in return for an introduction. Alternatively, if the agreement were bilateral but failed as a contract, recovery for an act done under it might have been permitted in quasi-contract by way of restitution of a benefit conferred under a "contract" that failed. Professor Williston, writing of the effect of part performance upon an indefinite promise given in exchange for a definite one said this: "Let it be supposed first that the promise which originally was definite is performed; this cannot make the indefinite promise enforceable but may give rise to a quasi contractual obligation to pay the fair value of what has been received."[11] *Craven-Ellis v. Canons, Ltd.*[12] and the *Degelman* case[13] might afford precedents.

Another example of a contract containing an express term to agree is the Ontario case, *DeLaval Co. Ltd. v. Bloomfield.*[14] Here the price of the article sold was definite, but the manner of payment was not: the price was $400, of which $200 were payable on a named date, "balance to be arranged". The vendor succeeded in an action for the first instalment, despite the plea that the agreement was too indefinite. Several possible explanations of the result are suggested by the judgment. One seemed to be that there was a contract for a definite price, but with payment subject to a condition precedent — agreement on

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9. [1949] 1 K.B. 623, at pp. 629 and 630.

10. See **Errington v. Errington and Woods**, [1952] 1 K.B. 290 (C.A. 1951), per Denning, L.J. at p. 295; [1952] 1 All E.R. 149; but see **Dawson v. Helicopter Exploration Co. Ltd.**, [1955] 5 D.L.R. 404, per Rand, J. at p. 410.

11. Williston on Contracts (Revised ed. 1936) s. 49, at p. 139.

12. [1936] 2 K.B. 403 (C.A.); [1936] 2 All E.R. 1066.

13. **Degeman v. Guaranty Trust Co. of Canada and Constantineau**, [1954] S.C.R. 725; [1954] 3 D.L.R. 785.

14. [1938] O.R. 294 (C.A.); [1938] 3 D.L.R. 405.

the mode of payment. By refusing to agree the buyer discharged the seller from the need to show performance of the condition: the price thus became payable at once. Another explanation might be that refusal to agree was a breach which vested in the vendor an immediate right to damages, the measure being the contract price.[15]

The *DeLaval* case has been condemned and defended by learned commentators.[16] The British Columbia courts have refused to follow it. In the recent case, *Cherewick v. Moore and Dean*,[17] for example, the trial judge expressly stated that it was not an authority in British Columbia. In the Cherewick case, though the amount of royalties to be paid by the defendant to an inventor for a license under his patent were fixed, and a cash price of $10,000 agreed, it was held that the agreement was not a contract because the $10,000 was to be financed by a promissory note on terms to be settled by the solicitors of the parties. ". . . where the parties have not settled a method of payment but have left it to be agreed upon later . . . a British Columbia Court cannot treat the refusal of the buyer to enter into an agreement as to the method of payment as an act entitling the vendor to immediate payment."[18]

In theory there is of course no reason why a promise to negotiate for price or any other term should not be enforceable if supported by consideration. Such a right may be valuable and bargained for. Lord Wright said as much in *Hillas v. Arcos*.[19] However, an agreement that price or some other term is to be as agreed is not a promise to negotiate. In *Colwell & Jennings Ltd. v. J. W. Creaghan Co. Ltd.*[20] it was argued that a lessor's refusal to negotiate where the lessee purported to exercise an option to take a new lease on terms to be agreed before a named date, the lessor undertaking not to lease to another during that period, was an anticipatory breach of an implied promise to negotiate and that the lessee was entitled to at least nominal damages. But Harrison, J. described the lessor's promise as illusory. "Contract" is mirage where unfettered power not to perform is reserved by the promisor. Of course, if a promise to negotiate had been implied, power would have been fettered, and in principle nominal damages recoverable.

If *Foley v. Classique Coaches* and the *Novinex* case are right, an agreement to agree on price may in a fit context be construed as implying a reasonable price failing agreement. The maxim "there cannot be a contract to make a contract", though not inconsistent with these holdings, would mislead if the possibility of such implication were overlooked. But there is a better reason for handling the maxim with care: it is really quite inaccurate. As Sargent, L.J. said in *Chillingworth*

15. See also **Hall v. Conder**, 2 C. & B. (N.S.) 22, per Williams, J. at p. 40; 140 E.R. 318, at p. 326.
16. Gordon, (1939) 17 Can. B. Rev. 205; C.A.W., (1939) 17 Can. B. Rev. 208.
17. [1955] 2 D.L.R. 492.
18. Ibid., at p. 501.
19. (1932) 147 L.T. 503.
20. (1951) 28 M.P.R. 40 (N.B. Ch. 1950); [1951] 4 D.L.R. 840.

v. Esche: "It should be 'contract to enter into an indeterminate contract.' The court will enforce a contract to enter into a determinate contract as for example to renew a lease."[21] Or it might be added to give a lease or a conveyance. The terms of the lease or conveyance would, however, have to be certain. The New Brunswick case, *Post v. Bean,* [22] is illustrative. The plaintiff alleged that the defendant company had agreed to give a lease of fishing rights fronting on the defendant's land adjoining the Tobique River until such time as the company should build piers and booms at the location. These works were not constructed and the defendant granted the exclusive fishing rights to another. The plaintiff sought a declaration that he was entitled to these rights. Though the allegation was traversed, the trial judge held that the alleged agreement had been made and that it could be performed by the grant of a lease for the life of the plaintiff or for ninety-nine years, subject to termination on the happening of the event stipulated. The Court of Appeal reversed (Harrison, J. dissenting) holding that the duration of the lease was too uncertain for specific performance. Michaud, C.J.Q.B., said:

> "The Court will decree specific performance of an agreement for lease, . . . only where such agreement has the essential elements required for a valid lease, and the same are admitted or distinctly proved. The essential terms of an agreement for a lease are:
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> (1) The identification of the lessor and the lessee.
> (2) The premises to be leased.
> (3) The commencement and duration of the term.
> (4) The rent or other consideration to be paid."[23]

Vague Terms

No express agreement to agree may be present, yet a term may be so vague as to suggest that the parties must have intended further agreement or, if there is no such suggestion, it may be difficult or impossible to give the term a reasonable meaning. Lord Wright, in a familiar passage, said of the very sketchy agreement in *Hillas v. Arcos* that "business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; . . ."[24] Courts can and should where possible save such agreements by "the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail."[25] The implied term is the judicial tool used to save business agreements vague and sketchy in their expression.

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21. [1924] 1 Ch. 97, at p. 100.
22. (1947) 20 M.P.R. 168 (N.B.C.A. 1946), aff'd [1947] 3 D.L.R. 513 (Can. S. Ct.).
23. (1947) 20 M.P.R. 168, at pp. 192 and 193.
24. (1932) 147 L.T. 503, at p. 514.
25. Ibid.

But it is a tool that requires malleable material. The facts in the much discussed case, *G. Scammell and Nephew, Limited v. H. C. and J. G. Ouston*,[26] must at first sight have seemed workable. The plaintiff agreed to buy a lorry from the defendants for £268; he was to be allowed £100 on the turn-in of a second-hand truck, balance payable on hire-purchase terms over two years. Later the defendants refused to deliver and the plaintiff sued for damage for breach of contract. The defence was that the agreement was not a contract because of the indefiniteness of the hire-purchase terms. All the judges in the lower courts agreed there was a contract: the hire-purchase contract would be such as would be reasonable in the trade though the judges differed widely in their views on what form it should take. The House of Lords, reversing, were of opinion that there are no usual or ordinary hire-purchase terms in the automobile trade; sometimes only two parties are involved, the seller and buyer; often a finance company is a party; and the actual terms relating to repair, repossession on default and interest vary. Again, in this case, there was no past course of dealing between the parties as there had been in *Hillas v. Arcos*. Lord Wright found two fatal defects in the agreement: either the parties never got beyond negotiation (they must have intended to agree later on the hire-purchase terms)or, even if, in intention, they had concluded their bargain it was too indefinite to ground legal obligation.

The *Scammell* case leads naturally to a series of Canadian cases dealing with agreements to convey land, part of the price to be financed by a purchaser's mortgage. A agrees in writing to sell Blackacre to B for $20,000 payable $10,000 in cash, balance on mortgage at six percent. Is this a contract or is the agreement for the mortgage too vague?

Only two of the series of cases will be considered. In *Jackson v. Macaulay, Nicholls, Maitland & Company Limited and Willett*,[27] there was an agreement for the purchase of realty; the price was $7,500, payable $4,000 in cash, balance by assuming a first mortgage of $3,500 at six percent. No mortgage existed at the time of the agreement but there was a contract of sale under which payments were still owing. The purchaser repudiated and successfully sued to recover a deposit, the court holding that the agreement was too indefinite because of uncertainty over the identity of the mortgagee and the length of the mortgage term. In*Thomson Groceries Ltd. v. Scott*[28] on the other hand an agreement "to purchase these premises for the sum of seven thousand three hundred and seventy-five dollars . . . Terms $4,000.00 cash, balance 1st mortgage. Interest at 5% per annum" was held to be a contract. The mortgagee would be the seller; the mortgage deed would take the form provided in *The Short Forms of Mortgages Act*,[29] and, accord-

26. [1941] A.C. 251; [1941] 1 All E.R. 14.
27. [1942] 2. W.W.R. 33 (B.C.C.A.); [1942] 2 D.L.R. 609.
28. [1943] O.R. 290 (C.A.); [1943] 3 D.L.R. 25.
29. R.S.O. 1950, c. 362.

ing to Kellock, J. the principal would be payable on demand. It was, of course, urged that neither party would have contemplated demand liability, but his Lordship held that such liability was the consequence either of the covenant read into the mortgage by the Ontario Act or of the obligation to repay raised by the mortgage loan itself.[30]

One might speculate on the enforceability in New Brunswick of an agreement like the one in the *Scott* case. Against enforceability could be urged the lack of a specified mortgage period and of agreement on taxes, insurance and power of sale. In this Province there is no statutory form of mortgage nor is there in practice a standard mortgage deed.[31] On the other hand the rule that the mortgage principal would, in the absence of a contrary stipulation, be payable on demand, if such is the law, would seem applicable, and our statutory powers of sale and insurance could be invoked. Interest might be at the legal rate.[32] The lesson seems to be, however, that in drafting an agreement of sale, the solicitor ought to specify at least the amount of the purchase money mortgage, the parties, the term, rate and times of payment of interest and any special convenants desired.

An agreement, though obviously complete in intention contemplating no further negotiation, may yet contain a meaningless clause. Is such a defect fatal? *Nicolene Ltd. v. Simmonds*[33] is a recent authority

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30. The authorities cited by Kellock, J. for the proposition that the mortgage loan itself creates a demand obligation seem indecisive. In **Farquhar v. Morris**, (1797) 7 T.R. 124; 101 E.R. 889, it was held that a bond with no date of payment stipulated created a present obligation. **King v. King and Ennis**, (1735) 3 P. Wms. 358; 24 E.R. 1100, held that every mortgage implies a debt though there is no bond or covenant. Neither case specifically indicates that the obligation would be conditional on a demand. In **Sutton v. Sutton**, (1883) 22 Ch. D. 511 (C.A. 1882), Jessel, M.R., said in a dictum at p. 516: " . . . every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced." The actual holding of the case was that the limitation period on the express covenant to pay on demand involved in the case ran from the date of the last payment made before the action. **Kellock, J.'s** citation from Corpus Juris, 41 C.J. 396, on the other hand, reads: ". . . if no time is fixed in the mortgage the law will supply the omitted element and prescribe that performance take place within a reasonable time after demand." **Higgins v. McLaughlan**, reported in Russell's Nova Scotia Equity Cases 441, is an authority for saying that if no time is mentioned an obligation arises, but it is not helpful on whether it is performable on demand. Nor is the law altogether clear on the legal effect of a promise to pay on demand. In **Canada Permanent Mortgage Corporation v. Saynor**, [1946] O.W.N. 406, decided since the Thomson Groceries case, the Assistant Master said at pp. 411 and 412: "The law appears to be that where a mortgage is payable on demand the right of action accrues immediately it is executed, and unless there is a stipulation to the contrary a demand is not considered to be a condition precedent to the bringing of the action." **Wakefield and Barnsley Union Bank, Limited v. Yates**, [1916] 1 Ch. 452 (C.A.) and **In re J. Brown's Estate. Brown v. Brown**, [1893] 2 Ch. 300 were cited. In the Brown case a distinction was taken between, on the one hand, "a present debt and a promise to pay on demand", where demand was said not to be a condition precedent to action, and, on the other, "a promise to pay a collateral sum on request, for then the request ought to be made before action brought." In the **Wakefield** case an action to foreclose a mortgage given to secure a demand loan was held barred because the limitation period had run out since the last acknowledgement. Both the **Brown** and **Wakefield** cases must now be read in the light of **Lloyds Bank Ltd. v. Margolis**, [1954] 1 W.L.R. 644 (Ch.). In that case a demand mortgage collateral to a running account between bank and customer was held to be actionable where the demand was made within, but the loan before, the limitation period. The case could have been decided on the basis of the distinction taken in the **Brown** case, but Upjohn, J. said that he preferred to base his judgment on the broad ground that purely as a matter of construction the covenant to pay on demand meant just that.

31. See **Buyers v. Begg**, (1951) 3 W.W.R. (N.S.) 673 (B.C.C.A.); [1952] 1 D.L.R. 313.

32. See **Buyers v. Begg**, [1952] 1 D.L.R. 313, per Robertson, J.A. at p. 316. **Interest Act**, R.S.C. 1952, c. 156, s. 3.

33. [1953] 1 Q.B. 543 (C.A.); [1953] 1 All E.R. 822.

for saying it is not. In an exchange of letters containing detailed terms the plaintiff offered to buy specified goods; the defendant wrote purporting to accept the offer but saying "I assume that we are in agreement that the usual conditions of acceptance apply." There were no "usual conditions of acceptance" between the parties, so the clause lacked meaning. In holding that nonetheless there was a contract, in effect that a blue pencil could be drawn through the offending words, Denning, L.J. said:

> "In the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties agreed that 'the usual conditions of acceptance apply.' That clause was so vague and uncertain as to be incapable of any precise meaning. *It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole*, and it should be so rejected. The contract should be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them; and it would be most fortunate if the law should say otherwise."[34] (Italics added).

The test of validity is this: Is the meaningless clause collateral to the main purpose and can it be severed without impairing the sense of what remains? On this ground his Lordship distinguished **Scammell** v. Ouston insofar as that decision rested on the vagueness of the hire-purchase clause: "It [the term in this case] was clearly severable from the rest of the contract, whereas the term in *G. Scammell & Nephew Ltd. v. Ouston* was not."[35]

Conclusion

These cases may be considered from the viewpoint of either advocate or solicitor. From both aspects one might almost be forced to the traditional counsel of despair: "Whether an agreement is so vague as to be devoid of legal efficacy depends on the wording of the particular clause read in the context of the document as a whole and against the relevant factual background." In this type of case such a formula is not without utility: it permits a relatively free weighing of the conflicting interests involved and leaves room for protection of reasonable expectations. But more precise formulations seem possible.

For counsel deciding whether to litigate an agreement containing a clause that the parties agree to agree on price or some other term, the presumption is that the agreement is not a contract for negotiation is not ended. It may, however, be possible to imply a promise to pay a

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34. [1953] 1 Q.B. 543, at p. 552.

35. Ibid. See also **Parento and Parento v. Jacobsen**, [1955] 2 D.L.R. 510 (B.C.) and compare **Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.**, [1944] K.B. 12 (C.A. 1943); [1943] 2 All E.R. 598 and **British Electric and Associated Industries (Cardiff) Ltd. v. Patley Pressings Ltd.**, [1953] 1 W.L.R. 280 (Q.B.); [1953] 1 All E.R. 94.

reasonable price or some other reasonable term failing agreement in order to give efficacy to the agreement. Such implication is more likely when either party has wholly or substantially executed his promise, though the precise legal basis of this distinction is debatable. Again, an agreement to agree on a relatively insignificant item may be ignored as **de minimis.**[36] Recent important advances in the law of restitution to prevent unjust enrichment might also be explored.

A solicitor drafting a contract should of course avoid the agreement to agree. If the client insists that firm agreement on price is not presently feasible, it may be possible to insert an agreement to agree on price with a provision that failing agreement the price should be reasonable and arbitrable or fixed in accordance with some clear formula: for example, in a long term lease of commercial premises, it might be possible to set a fixed minimum with an added variable rental tied to sales.

If the challenged clause is vague, the courts will tend to uphold it by implying what is reasonable if it clearly appears that the parties intended to strike a final bargain. Much will depend in such cases on the skill of counsel in developing by evidence the details of business background which give meaning to the apparently obscure. The solicitor will of course avoid obscurity in his drafting.

And to conclude — if a clause is meaningless the contract may be saved by its severance if a clear excision is possible and the clause is relatively unimportant.

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36. Williston on Contracts (Revised ed. 1936) s. 48.