In no more than three (3) single-spaced pages, please answer the following questions:

1. Drawing from your assigned readings\(^1\),

   a. Goren v. Royal Investments and Blomendale v. Imbrescia were decided by the same panel of Massachusetts Appeals Court judges on the same day (December 9, 1987), yet their outcomes differ. Discuss the distinctions between the two Offers to Purchase that led the Appeals Court to its respective decisions. (2 points)

   b. Based on these decisions, as well as the decision in McCarthy v. Tobin, should the Appeals Court find that the Letter of Intent\(^2\) between TECHniche Development LLC and Taylor Transport, Inc. creates a binding, enforceable contract for the sale of the property? (2 points)

   c. DSF Investors arguably played tough with both Tribeca Associates and The Lyme Timber Company in connection with the redevelopment of the Necco Building. Despite the fact that (i) Lyme Timber Company was strung along for more than a year (providing free pre-development consulting) before being spurned by DSF and (ii) DSF represented that “We’ve got a deal, we’ve got a partnership, we are going to make tons of money”, the Court found that no


\(^2\) See Exhibit E to Riverfront Redevelopment (A).
contract (written, oral, or in reasonable reliance on a promise) had been formed between the parties.

i. Briefly discuss the court’s reasoning. (2 points)

ii. Is there a lesson here? (1 point)

2. What’s “detrimental reliance” and how did that concept factor into the decision in Suominen v. Goodman? (2 points)

3. Can an email serve as a valid writing under the Statute of Frauds? (1 point)

4. Do the following provisions in the Purchase and Sale Agreement favor the Seller, the Buyer or neither party? What concerns do such provisions raise for the Seller (if it favors the Buyer), the Buyer (if it favors the Seller) or each party if it favors neither?

   a. Paragraph 9 – Zoning Approvals (2 points)

   b. Paragraph 21 – Default; Damages (1 point)

   c. Paragraph 27 – Assignment (2 points)
Riverfront Redevelopment (B)

You got Tony to sign the Right of Entry Agreement but, in the process, took on a little more potential liability than you anticipated. But at least now you can get onto the site and kick some dirt around.

Tony also required that you notify him or his shift supervisor of your expected visits to the site as well as the nature of each planned investigation. While that initially sounded like a hassle, it’s turned out to be worthwhile. One of the shift supervisors has worked on the site for over three decades and knows all of the historical procedures used to transport, store, and dispose of hazardous materials that were brought onto the site. And while the procedures he described certainly seemed prudent, the site is reasonably large and apparently there have been a few small petroleum spills on the northern side of the site up toward the river. But he assured you that the rainwater over the past few decades has taken care of any problems that may have existed.

Glad to hear that.

Based on your discussions with the supervisor, your environmental engineers have already begun installing groundwater monitoring wells along the perimeter of the proposed excavation area for the underground parking and related building substructure. The good news is that, based on their initial assessment, they think that any contaminated soils they might find in that area of the site can be completely removed in connection with the excavation for the building foundations. The bad news is that the strict monitoring, removal and disposal procedures that will have to be followed could cost a half million dollars.

The Purchase and Sale Agreement

So you and Tony may have a little bit more to discuss in connection with buying the property. Assuming you remain comfortable with the results of your physical due diligence, you know you’ll need to execute a Purchase and Sale Agreement in a form similar to Exhibit 1.

Time to get down to details, like: what needs to happen before he gets paid, when will that actually occur, what type of deposit(s) will be required, what happens if financing can’t be arranged, what happens if either of you can’t perform or want to flip the contract …
Exhibit 1

PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT (“Agreement”) is made as of this 26th day of September, 2013, by and between Taylor Transport, Inc. (hereinafter called the Seller) and TECHniche Development LLC (hereinafter called the Buyer).

WITNESSETH

WHEREAS, Seller desires to sell certain real property located at 100 River Road, as more particularly described on Exhibit A attached hereto (the “Real Property”); and

WHEREAS, Buyer desires to buy the Real Property and Premises described below;

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants, promises and undertakings set forth herein, and other good and valuable consideration, Seller and Buyer agree as follows:

1. Premises. Subject to all the terms, conditions and provisions of this Agreement, and for the consideration herein set forth, and other good and valuable consideration, Seller agrees to sell and Buyer agrees to purchase the Real Property, together with the following buildings, structures, and improvements now thereon, and the built-in equipment and fixtures belonging to the Seller and used in connection therewith. All of the above is hereinafter referred to as the “Premises”.

2. Title Deed. Said Premises are to be conveyed by a good and sufficient quitclaim deed running to the Buyer, or to the nominee designated by the Buyer by written notice to the Seller at least seven (7) days before the deed is to be delivered as herein provided, and said deed shall convey a good and clear record and marketable title thereto, free from encumbrances, except (a) provisions of existing building and zoning laws; (b) existing rights and obligations in party walls which are not the subject of written agreement; (c) such taxes for the then current year as are not due and payable on the date of the delivery of such deed; (d) any liens for municipal betterments assessed after the date of this Agreement; (e) easements, restrictions and reservations of record, if any, so long as the same do not prohibit or materially interfere with the current or proposed use of said Premises; and (f) permitted encumbrances described on Exhibit B, attached hereto and made a part hereof (the “Permitted Encumbrances”).

Without limitation, title to the Premises shall not be treated as being satisfactory and in compliance with the provisions of this paragraph 2 of the Agreement unless, on the date set for the closing hereunder:
(a) A national title insurance company acceptable to Buyer is willing to issue to Buyer, upon delivery from Seller to Buyer of the deed contemplated by this Agreement and upon recordation of such deed, at normal title insurance premium rates, an owner’s title insurance policy in form and substance acceptable to Buyer. In order to enable Buyer to obtain such a title insurance policy, Seller agrees to provide Buyer, at the time of delivery of the deed, with an affidavit and indemnity directed to Buyer’s title insurance company and Buyer that there have been no laborers who have worked on the Premises except as have been fully paid for their services and that no person is occupying or has the right to occupy said Premises other than pursuant to leases approved by Buyer;

(b) no building, structure, improvement or property of any kind not intended to comprise the Premises encroaches upon or under said Premises from other premises; and

(c) no building, structure, improvement or property intended to comprise the Premises encroaches upon or under other premises.

3. Plans. If said deed refers to a plan necessary to be recorded therewith the Seller shall deliver such plan with the deed in form adequate for recording or registration.

4. Registered Title. In addition to the foregoing, if the title to the Premises is registered, said deed shall be in form sufficient to entitle the Buyer to a Certificate of Title of said Premises, and the Seller shall deliver with said deed all instruments, if any, necessary to enable the Buyer to obtain such Certificate of Title.

5. Purchase Price. The agreed purchase price for said Premises is $___________ and 00/100 dollars, of which $_______________ have been paid as a deposit this day and $_______________ are to be paid at the time of delivery of the deed in cash, or by certified, cashier’s, treasurer’s or bank check(s) for a total of $__________________.

6. Time for Performance; Closing Date. Such deed is to be delivered at ______ o’clock ____ on the ___ day of ____________, 20__, at the Registry of Deeds, unless otherwise agreed upon in writing (the “Closing Date”). It is agreed that time is of the essence of this Agreement. Buyer, at its option, may elect to extend the Closing Date for an additional __________(_____) days (the “Extended Closing Date”) by written notice to Seller received on or prior to the Closing Date. If Buyer so elects, and in consideration for the extension of the Closing Date, Buyer shall forward, on or prior to the Closing Date, an additional __________ and 00/100 Dollar ($_____) deposit (the “Extension Deposit”), to Escrow Agent, which Extension Deposit shall be held with the Deposit in accordance with the provisions of Paragraph 20 below.

7. Right to Inspections/Investigations. Seller acknowledges that the Buyer intends to conduct an investigation of the Premises, which may include examination of all structural and mechanical aspects thereof, review of any and all documentation with respect to the Premises, including without limitation its income and expenses, all leases and tenant files, records of repairs and capital improvements, examination of the title to the Premises, conducting tests to determine the presence or absence of hazardous waste, asbestos, lead paint, radon and other similar materials and substances, obtaining a current as-built survey thereof, obtaining an appraisal thereof, and determining the compliance of the Premises with all applicable laws, rules,
codes and regulations. From and after the date hereof, Buyer shall have the right of reasonable access to the Premises for purposes of making surveys, appraisals, test borings, soil tests, percolation tests and like additional tests and examinations of the Premises, but agrees to do the same at reasonable times so as not to interfere unreasonably with Seller’s use and enjoyment of the Premises, all per the specification of the Right of Entry Agreement between the parties dated as of September 12, 2013.

8. Additional Investigation Materials. In order to facilitate Buyer’s investigations, Seller shall deliver to Buyer, on or before ____________, copies of the following:

(i) All leases for portions of the Premises, if any;

(ii) All service contracts for the Premises, if any;

(iii) Income, expense and other operating statements for the Premises for the prior three (3) calendar years and for each month to date for the current calendar year, and a current rent roll and make available to Buyer for review Seller’s books and records relating to the Premises, if any;

(iv) To the extent in Seller’s possession or control, final as-built plans and specifications for the Premises, if any;

(v) Seller’s owner’s title insurance policy and all documents listed therein, if any;

(vi) To the extent in Seller’s possession or control, all licenses and permits required or appropriate for the use and operation of the Premises (the “Licenses and Permits”), including occupancy permits/certificates, if any;

(vii) Any and all surveys of the Premises, if any;

(viii) Any and all engineering reports, soil boring tests and reports, and reports relating to toxic and/or hazardous materials or substances including without limitation asbestos, materials containing asbestos, lead paint, radon gas, petroleum products, urea-formaldehyde and other similar or dissimilar chemical or materials, prepared by or on behalf of Seller or its affiliates, or otherwise within Seller’s possession or control, if any;

(ix) Any written reports or other materials within Seller’s possession or control relating to capital expenditures previously incurred or anticipated to be incurred at the Premises, if any; and

(x) Such other documents relating to the Premises as Buyer may reasonably request or which are otherwise within Seller’s control and are or may be relevant to the use and operation of the Premises, if any.

9. Zoning and Other Approvals. Buyer may desire: (i) to institute proceedings for a change or modification in the zoning classification pertaining to the Premises; (ii) to apply for
variances, special permits, and/or other approvals required under applicable zoning ordinances; (iii) to apply for permits and approvals, including, without limitation, wetland, subdivision, environmental, utility, curb-cut, and other like permits and approvals which may be required from any and all applicable municipal, county, state or federal authorities; and (iv) to defend against or challenge actions taken by third parties that may adversely affect the Premises or the use thereof. Seller agrees to cooperate with Buyer and execute any and all papers presented to it by Buyer in connection with (i), (ii), (iii) and/or (iv) above, provided, however, Seller shall have no financial responsibility whatsoever with respect to any such proceedings. Applications for the foregoing items may be filed by Buyer in the name of, or on behalf of, Seller.

10. **Right to Terminate Based on Inspections/Investigations.** Notwithstanding anything to the contrary contained in this Agreement, Seller acknowledges the Buyer shall have the right in its sole and absolute discretion, based upon its disapproval of any of the inspections or investigations it conducts pursuant to Paragraphs 7 and 8 to terminate this Agreement by written notice to Seller on or before ______________, 20____ (________(___) days from the date of this Agreement) (the “Due Diligence Date”). If this Agreement shall be terminated, the Deposit (hereinafter defined), together with interest thereon, shall be returned to Buyer forthwith. In such case, upon the return of the Deposit to Buyer, all obligations of the parties hereto shall cease and this Agreement shall be terminated and the parties shall be without further recourse or remedy thereunder.

11. **Possession and Condition of Premises.** Full possession of the Premises free of all tenants and occupants, except as herein provided, is to be delivered at the time of the delivery of the deed, said Premises to be then (a) in the same condition as they now are, reasonable use and wear thereof excepted, (b) not in violation of applicable building and zoning laws, and (c) in compliance with provisions of any instrument referred to in paragraph 4 hereof. The Buyer shall be entitled personally to inspect said Premises prior to the delivery of the deed in order to determine whether the condition thereof complies with the terms of this clause.

12. **Extension to Perfect Title or Make Premises Conform.** If the Seller shall be unable to give title or to make conveyance, or to deliver possession of the Premises, all as herein stipulated, or if at the time of the delivery of the deed the Premises do not conform with the provisions hereof, then the Seller shall use reasonable efforts to remove any defects in title, or to deliver possession as provided herein, or to make the said Premises conform to the provisions hereof, as the case may be, in which event the Seller shall give written notice thereof to the Buyer at or before the time for performance hereunder, and thereupon the time for performance hereof shall be extended for a period of ___________ days.

13. **Failure to Perfect Title or Make Premises Conform, etc.** If, at the expiration of the extended time period referred to in paragraph 12 above, the Seller shall have failed so to remove any defects in title, deliver possession, or make the Premises conform, as the case may be, all as herein agreed, or if at any time during the period of this Agreement or any extension thereof, the holder of a mortgage on said Premises shall refuse to permit the insurance proceeds, if any, to be used to restore said Premises in the event of a casualty, then any payments made under this Agreement shall be forthwith refunded and all other obligations of the parties hereto shall cease and this Agreement shall be void without recourse to the parties hereto.
14. **Buyer’s Election to Accept Title.** The Buyer shall have the election, at either the original or any extended time for performance, to accept such title as the Seller can deliver to the Premises in their then condition and to pay therefor the purchase price, without deduction, in which case the Seller shall convey such title, except that in the event of such conveyance in accord with the provisions of this clause, if the said Premises shall have been damaged by fire or casualty insured against, then the Seller shall, unless the Seller has previously restored the Premises to their former condition, either (a) pay over or assign to the Buyer, on delivery of the deed, all amounts recovered or recoverable on account of such insurance, less any amounts reasonably expended by the Seller for any partial restoration, or (b) if a holder of a mortgage on said Premises shall not permit the insurance proceeds or a part thereof to be used to restore the said Premises to their former condition or to be so paid over or assigned, give to the Buyer a credit against the purchase price, on delivery of the deed, equal to said amounts so recovered or recoverable and retained by the holder of the said mortgage less any amounts reasonably expended by the Seller for any partial restoration.

15. **Acceptance of Deed.** The acceptance of a deed by the Buyer or its nominee, as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after the delivery of said deed.

16. **Use of Money to Clear Title.** To enable the Seller to make conveyance as herein provided, the Seller may, at the time of delivery of the deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests, provided that all instruments so procured are recorded simultaneously with the delivery of said deed.

17. **Insurance.** Until the delivery of the deed, the Seller shall maintain insurance on said Premises as follows:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Amount of Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Fire and Extended Coverage</td>
<td>As currently insured</td>
</tr>
</tbody>
</table>

18. **Adjustments.** Collected rents, mortgage interest, water and sewer use charges, operating expenses (if any), and taxes for the then current fiscal year, shall be apportioned and fuel value shall be adjusted, as of the day of performance of this Agreement. Seller shall be allocated income and costs attributable to the period preceding the Closing Date and Buyer shall be allocated such income and costs from and after the Closing Date. The net amount thereof shall be added to or deducted from, as the case may be, the purchase price payable by the Buyer at the time of the delivery of the deed. Uncollected rents for the current rental period shall be apportioned if and when collected by either party.

19. **Adjustment of Unassessed and Abated Taxes.** If the amount of said taxes is not known at the time of the delivery of the deed, they shall be apportioned on the basis of the taxes assessed for the preceding fiscal year, with a reapportionment as soon as the new tax rate and valuation can be ascertained; and, if the taxes which are to be apportioned shall thereafter be reduced by abatement, the amount of such abatement, less the reasonable cost of obtaining the
same, shall be apportioned between the parties, provided that neither party shall be obligated to institute or prosecute proceedings for an abatement unless herein otherwise agreed.

20. **Deposit.** ___________ and 00/100 Dollars of the deposit made hereunder shall be held in escrow by ________________, as escrow agent, (the "Escrow Agent"), subject to the terms of this Agreement and shall be duly accounted for at the time for performance of this Agreement. In the event of any disagreement between the parties, the escrow agent may retain all deposits made under this Agreement pending instructions mutually given by the Seller and the Buyer. It is understood and agreed that the Escrow Agent shall promptly, when collected, place the Deposit in interest-bearing accounts at a bank, trust company or institutional depositary in ___________. At the closing hereunder, the Deposit will be credited against the Purchase Price due to Seller or paid to Seller, and all interest which has been earned on the Deposit will be paid one-half (1/2) to each of Seller and Buyer; and upon the execution hereof Seller and Buyer each will furnish Escrow Agent with their respective Tax Identification Numbers for tax reporting purposes. If the Closing does not occur for any reason whatsoever and this Agreement is terminated, then all such interest will be delivered with and paid to the party ultimately receiving the Deposit. The Escrow Agent will have no responsibility to maximize such interest, but only to place the Deposit in accounts as provided for herein promptly upon collection thereof by the Escrow Agent. The Escrow Agent will not be liable for any action or non-action taken in good faith in connection with the performance of their duties hereunder, but shall be liable only for their own willful default or misconduct. The Escrow Agent will not be liable for any failure of the institutions in which the Deposit is being held. In the event of any dispute relating to the right of possession or the disposition of the Deposit, the Escrow Agent will be entitled to retain dominion and control over the same until such dispute shall have been settled by mutual agreement of Buyer and Seller with notice thereof to the Escrow Agent, whereupon the Deposit will be paid over in accordance with such mutual agreement of the parties; or, if such dispute is taken to a court of competent jurisdiction, the Deposit will be paid over into the custody of such court or otherwise paid over in accordance with the final order, decree or judgment of such court. It is contemplated that the Escrow Agent will not incur any cost or expense in the performance of its duties hereunder; and, in the event of a dispute, the Escrow Agent shall be reimbursed prior to its disposition of the Deposit for its reasonable out-of-pocket costs and expenses incurred in connection with such dispute and the settlement thereof, such reimbursement to be made between Buyer and Seller as they may mutually agree incident to the settlement of such dispute; or, if such dispute shall be resolved by a final order, decree or judgment by a court as aforesaid, such reimbursement shall be made by the unsuccessful party in such proceeding. In no event shall the Escrow Agent be under any duty to institute or defend any such proceeding nor shall the Escrow Agent be required under any circumstances to take any action requested by Seller or Buyer until indemnified to the Escrow Agent’s reasonable satisfaction by the party or parties requesting such action.

21. **Default; Damages.** If the Buyer shall fail to fulfill the Buyer’s agreements herein, all deposits made hereunder by the Buyer shall be retained by the Seller as liquidated damages and shall be Seller’s sole remedy at law and equity for such breach.

22. **Liability of Trustee, Shareholder, Beneficiary, etc.** If the Seller or Buyer executes this Agreement in a representative or fiduciary capacity, only the principal or the estate represented shall be bound, and neither the Seller or Buyer so executing, nor any shareholder or
beneficiary of any trust, shall be personally liable for any obligation, express or implied, hereunder.

23. **Warranties and Representations.** The Buyer acknowledges that the Buyer has not been influenced to enter into this transaction nor has it relied upon any warranties or representations not set forth or incorporated in this Agreement or previously made in writing, except for the following additional warranties and representations, if any, made by the Seller.

24. **Broker.** Buyer represents and warrants to Seller that Buyer has dealt with no broker in connection with the transaction contemplated by this Agreement and agrees to indemnify Seller against any claim, expense, or liability that may arise from a breach of this representation and warranty. Seller represents and warrants to Buyer that Seller has dealt with no broker in connection with the transaction contemplated by this Agreement and agrees to indemnify Buyer against any claim, expense, or liability that may arise from a breach of this representation and warranty. The provisions of this Paragraph 24 shall survive the Closing.

25. **Mortgage Contingency.** In order to help finance the acquisition of the Premises, the Buyer shall apply for a conventional bank or other institutional mortgage loan of $_________ at prevailing rates, terms and conditions. If, despite the Buyer’s diligent efforts, a commitment for such loan satisfactory to Buyer cannot be obtained on or before ________________, 20____ (____________ (___) days from the date of this Agreement), the Buyer may terminate this Agreement by written notice to the Seller prior to the expiration of such time, whereupon any payments made under this Agreement shall be forthwith refunded and all other obligations of the parties hereto shall cease and this Agreement shall be void without recourse to the parties hereto.

26. **Seller Documentation at Closing.** Seller agrees to sign and deliver at the Closing such affidavits, certificates and other documents as are reasonably requested by Buyer’s lender or closing agent or Buyer’s title insurer.

27. **Assignment.** The benefits of this Agreement may be assigned by Buyer, and in the event of any assignment or reassignment thereof, the term “Buyer” shall be construed to mean the then holder of Buyer’s rights hereunder. Title hereunder shall be conveyed to Buyer, or to the assignee designated by Buyer by written notice to Seller at least seven (7) days before the Closing Date. Except as aforesaid, all of the terms and provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

28. **Disputes.** Any dispute as to any title issue or conveyancing practice remaining unresolved at the scheduled time for performance under this Agreement shall be resolved in accordance with applicable Standards or Practices of the Conveyancers Association, to the extent possible.

29. **Foreign Person.** Seller represents and warrants that it is not a “foreign person” as defined by Section 1445 of the Internal Revenue Code of 1986, as amended, and agrees to execute and deliver to Buyer at closing an affidavit or certificate in compliance with said Section 1445 and the applicable regulations there under. The provisions of this paragraph shall survive the delivery of the deed hereunder.
30. **Notice.** Any notice or other communication hereunder shall be deemed to have been duly given if in writing and sent by hand, by registered or certified mail, return receipt requested with all charges prepaid, by overnight or other commercial courier, or by telecopy, in the case of Buyer to:

_____________________________
TECHniche Development
120 Massachusetts Avenue
Cambridge, MA 02139

With a copy to:

Paul F. McDonough, Jr., Esq.
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110

and in the case of Seller, to the Seller at:

Tony Taylor
Taylor Transport, Inc.
100 River Road

With a copy to:

Susan Murphy, Esq.
Dain, Le Ray, Wiest, Torpy & Garner, P.C.
129 South Street
Boston, MA 02111

Any such notice shall be deemed to have been given upon receipt if by hand, upon deposit in said mail, or with said overnight courier, or upon confirmation of telecopy transmittal, provided the same is received in the ordinary course.

31. **Construction of Agreement.** This instrument, executed in multiple counterparts, is to be construed as a contract governed by the law of the place where the Premises are located, is to take effect as a sealed instrument, sets forth the entire contract between the parties, is binding upon and inures to the benefit of the parties hereto and their respective heirs, devisees, executors, administrators, successors and assigns, and may be canceled, modified or amended only by a written instrument executed by both the Seller and the Buyer. If two or more persons are named herein as Buyer their obligations hereunder shall be joint and several. The captions and marginal notes are used only as a matter of convenience and are not to be considered a part of this agreement or to be used in determining the intent of the parties to it.
32. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall be deemed one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed the day and year first mentioned.

Seller:

Taylor Transport, Inc.

By: ____________________________
   Its:

Buyer:

TECHniche Development LLC

By: ____________________________
   Its:

The undersigned joins herein solely for the purpose of agreeing to the provisions hereof pertaining to the Deposit.

ESCROW AGENT

_______________________________
W. Tod McGrath
EXHIBIT A

Legal Description
EXHIBIT B

Permitted Encumbrances
Introduction

It is important for any individual participating in the business of real estate development to understand the basic elements of the contract. "Contract" is a term used frequently in the parlance of the business person. A contract is fundamentally a legally enforceable agreement between two (or more) parties concerning their future actions. For example, an employment contract (either verbal or written) is an agreement between the employer and the employee stating that a certain package of benefits will be paid if a job of a particular description is performed. A purchase and sale contract is an agreement to convey a real property from A to B in exchange for a payment of some form from B to A. Contracts is the law of exchanged promises.

Many agreements that do not meet the legal requirements for an enforceable contract (e.g., a simple promise) are nonetheless complied with. The legal doctrines become relevant only when one of the parties defaults on an obligation and the other party attempts to enforce the contract. Contracts cases are the stories of broken promises.

Contract formation involves three distinct steps. First there is the offer, with which the offeror (the party making the offer) binds herself to take some action if the offeree takes some action (e.g., "I promise to pay you $10 if you cut my lawn.") The second step is the acceptance. The offeree accepts the offer by taking the action requested of her in the offer (e.g., the offeree cuts the lawn or says "I accept," thereby promising to cut the lawn.) The final basic element of a legally enforceable contract is consideration. If you simply promise to cut my lawn, I cannot enforce that promise in court. However, if you promise to cut my lawn in exchange for something of value (payment or a promise), then my promise serves as consideration for your promise, and vice versa. Something of value must be given by each party. This characteristic distinguishes contracts from the great class of unenforceable promises called gratuitous promises.
Background

The law upon which our courts base their decisions can be divided into three sets. First, there are the United States and state constitutions. These occupy the top spot in the hierarchy of legal doctrine. Any actions or doctrines that violate the Constitution will be disallowed by the courts. The second tier of binding legal doctrine is statutory law. This is the cumulative set of laws adopted by the Congress and the state and local (e.g., city council) legislatures. If a statute covers the area of conflict before the court, then it must be followed by the court unless the statute is found to be unconstitutional. The third source of law is called common law. Common law is the product of the court’s history rather than the legislature’s. Courts follow the rule of stare decisis, a Latin phrase which means that courts will follow the precedent of the courts’ earlier decisions. As a result, certain areas of law have evolved from early English law through the precedent following process, without the benefit of legislative direction, into the current body of common law. There is no simple exposition of "the common law," for it is made up of all the courts’ previous decisions. Courts will follow common law doctrines only on points not addressed in the constitutional or statutory law.

For the most part, contracts are not dealt with in constitutions or statutes. There are some exceptions. The United States Constitution states that "No State shall. . . pass any. . . Law impairing the Obligation of Contracts." Furthermore, the Uniform Commercial Code (UCC) has codified (put into statutory form) the common law, with some modifications, concerning some sorts of contracts (most importantly contracts for the sale of goods). The Statute of Frauds imposes some requirements on which types of contracts must be written, with the purpose of preventing fraud.

The bulk of the law concerning contracts is state common law. Thus, some particulars vary from state to state. However, the general principles described below represent the law throughout the United States.

The Offer

The first step in the formation of a contract is the offer. The offer is a statement by one party that she is willing to enter into a contract with particular terms. If the offer is accepted, the contract is formed. A statement is an offer only if a reasonable man would have expected it to raise
the anticipation that an affirmative response (e.g., I'll take it!) would form a contract. In addition, the communication must set out the terms with sufficient certainty to make the resulting agreement enforceable. There is a fine line between the conversation of ongoing negotiations and the language of an offer.

An offer does not stand open for acceptance indefinitely. Some offers state a period during which an acceptance will be valid (i.e., acceptance will form a contract). If no termination date is specified, the law implies that the offer will remain open for a "reasonable time." The rejection of the offer by the offeree will terminate the offer, as will the communication of a counter-offer by the original offeree. The death or incapacitation of either the offeree or the offeror will terminate the offer, as will the destruction of the object of the negotiations.

The offeror can revoke an offer simply by explicitly stating his or her revocation to the offeree at any time prior to the acceptance. The option contract is one important exception to the power of the offeror to revoke an offer. An option is essentially a contract to keep an offer open for a specified period of time. The offeror gives up his or her right to revoke the offer during the specified period in exchange for some form of payment by the offeree. Although most offers are not assignable (i.e., the offeree may not give someone else the opportunity to enter into a contract on the terms offered by the offeror), option contracts are a form of property and thus are assignable.

There are other situations in which an offer cannot be revoked. The legal doctrine of promissory estoppel prevents the revocation of an offer if the offer has been reasonably relied upon by the offeree. This situation commonly comes up in the contractor–subcontractor relationship. If a subcontractor makes a bid that is included in the larger bid of a general contractor, the subcontractor cannot revoke the offer if such revocation will damage the contractor (e.g., the contractor loses a performance bond), even if the revocation precedes the acceptance. The contractor has relied on the offer remaining open without accepting it or purchasing an option. The courts have protected such reasonable reliance in certain situations.

The Acceptance

One key distinction in the law of contracts is the distinction between unilateral and bilateral contracts. A unilateral contract is one in which the
acceptance is accomplished by performing an act. "If you can plow my field on your day off, I will pay you $200." The offer is not accepted by promising to plow, but rather by plowing. There is no obligation on the part of the offeree to do anything. If he wishes to plow before the offer expires, he will be paid. The unilateral contract is described as the exchange of a promise for an act. The act is the acceptance.

In contrast, a bilateral contract is the exchange of a promise for a promise. The offer — "I promise to convey my house to you if you promise to pay me $60,000." The acceptance — "I accept." Both parties have promised to do something. Each party is bound. Probably all of the contracts you will run across in the real estate development process will be of the bilateral form.

The unilateral/bilateral distinction determines how the offer is validly accepted. The acceptance in the bilateral case is relatively straightforward, for the offeree need only make the requested promise. In the case of the unilateral contract, the offeree accepts by completing the act. The law offers some special protections to the offeree in the unilateral case. Once the performance of the requested act has begun, the offeror cannot revoke the offer. I cannot allow you to plow nine-tenths of my field with the expectation of getting paid and then revoke my offer before the bargained-for act is completed.

What constitutes an acceptance in the case of an offer to enter into a bilateral contract? Legal doctrine requires that the acceptance be unequivocal. If the offeree simply accepts the offer, then a contract is formed. If the offeree accepts most of the terms of the offer but insists on one or more changes (e.g., "I can accept these terms if the construction completion date is moved up six months.")), then there is no acceptance and instead the offeree's statement constitutes a counter-offer. If the offeree accepts the terms of the offer but requests some changes (e.g., "I can accept these terms, but I'd like to move the completion date up six months.")), the required unequivocal acceptance is present. An agreement to iron out integral terms of a contract later (e.g., "We can't agree on a completion date now. Let's agree to the rest of the terms and decide on the completion date later.") does not constitute a contract. If a contract is to be enforced, the terms must be certain and complete.

There are many legal rules concerning the details of which party bears the risk of mistakes and miscommunications in the offer/acceptance process. For instance, the offer is accepted once the acceptance is placed, with
adequate postage, into the mailbox, as long as the mail is the method expressly or implicitly authorized by the offeror for communicating the acceptance. Such details are not important in this course, except to recognize that such minuscule issues of fact and law can be critical in contracts cases.

Meeting of the Minds

The legal doctrines of offer and acceptance are sometimes summarized as a requirement that there be a "meeting of the minds" before a contract is formed. There must be an agreement at some point in time concerning acceptable terms of the resultant contract. Without an agreement, there is no contract.

Consideration

The third element that must be present to establish an enforceable contract is "consideration." Consideration is the valuable action (promise or action itself) each party gives in exchange for the promise of the other party. If a promisee wishes to enforce a promise as part of a contract, she must show that she gave up something of value in the bargain for the promise. For example, if A and B have a bilateral contract whereby A will give his car to B and B will give $1,000 to A, then the promise to deliver the car serves as consideration for the promise to pay and the promise to pay serves as the consideration for the promise to deliver the car. Consideration may be either a legal detriment to the promisor (i.e., the promisor binds herself to do something she would not otherwise have to do, or to refrain from doing something she has a legal right to do) or a legal benefit to the promisee (he gets the right to something he would not otherwise be able to claim by right). Legal benefit and detriment are different than actual benefit or detriment; if I am a non-smoker, my promise not to smoke is a legal detriment since I have a right to smoke, though there is no actual detriment.

The need for consideration is founded in the requirement of mutuality. Contracts that represent the endpoints of authentic bargaining in which each side is conveying something of value will be enforced by the courts. Where there is no reciprocity, the courts find unenforceable gratuitous promises.

The courts will not look into the "fairness" of the exchange in deciding whether to enforce a contract. All that is required is "legally
sufficient" consideration, that is, consideration that constitutes a legal detriment. The relative magnitudes of the legal detriments are not an issue. For example, many contracts are accompanied by nominal but legally sufficient consideration, such as conveyances of substantial real estate holdings for $1.00. This renders enforceable promises that would otherwise be gratuitous. The courts will not consider whether the price is reasonable for the goods or service purchased (the problems of misrepresentation are handled by the legal concept of fraud.)

**Promissory Estoppel - Exception to Contract Formation Doctrine**

Some promises that do not satisfy the offer-acceptance-consideration criteria will nevertheless be enforced by the courts. Promissory estoppel is a legal doctrine which states that a contract of sorts is formed by gratuitous promise if the promisor should reasonably have expected the promisee to rely on the promise to the promisee's detriment and if substantial detrimental reliance has, in fact, occurred. For example, A promises to give B $5,000, with the knowledge that B will use the money to purchase a lot. B thereafter buys for $500 an option to purchase the lot. B could not find financing elsewhere. The contract can be found under a theory of promissory estoppel, since: (1) A should have expected B to rely on his promise, (2) B did rely on the promise to his detriment (he wasted $500), (3) the damage was substantial, and (4) injustice can be avoided only by enforcing the promise.

**Statute of Frauds and the Parol Evidence Rule**

The Statute of Frauds has been adopted with minor modifications in every state. The law requires that certain types of contracts be written and signed by at least the purchasers. The types of contracts covered include: any contract that cannot be fully performed within one year of the making of the contract; a promise to pay another's debts or defaults; any agreement to sell real property or an interest in real property, or any lease to last longer than one year; any agreement authorizing or employing a real estate broker to buy or sell for compensation; wills; and agreements to assume a mortgage on a property when purchased. The written contract need not be formal. The critical elements are the names of the parties, a certain description of the subject matter, the terms and conditions of the promises, and the signature or initials of the party to be charged.
The parol evidence rule is a doctrine concerning the interpretation of written contracts. The doctrine states that the plain meaning of the written contract overrides any other evidence (oral or written) concerning the intent of the parties at the time the contract was signed. Evidence which conflicts with or adds to the written terms will not be accepted. Such evidence will be allowed if used to clarify the meaning of vague written terms. Oral or written agreements made prior to or contemporaneously with the final written contract can be legitimately reviewed by the court if such agreements are specifically referred to in the final agreement with adequate certainty. Agreements made subsequent to the written contract are validly considered. The conclusion to be drawn is that a contract should be written and the contract document should be complete and unambiguous.

Assignments and Delegations

Assignment is the legal term for the transfer of a contractual right or benefit from the original promisee to another party. Delegation of contract duties is the transfer of contractual obligations from the original promisor to another party. Assignment and delegation may occur simultaneously; putting the transferee (new party) into the same contractual position, with both rights and duties, as the transferor (original party). However, the rights and duties may also be transferred separately.

Generally, all contract rights are assignable unless the contract language states otherwise. There are more restrictions on delegations of contractual duties. Here, the law makes a distinction between personal and impersonal services. Impersonal duties, such as the duty to pay money, are delegable if there is no prohibition in the language of the contract. Personal duties, such as rendering professional services, cannot be delegated.

Contract Conditions

In many cases, the promises exchanged as part of a contract are unconditional, i.e., they are obligations of the promisor regardless of any outside events. However, in some cases, the parties may offer only conditional promises, i.e., promises that bind the promisor only if specified events have occurred. For example, A might contract to mow B's lawn for $10 on Thursday if it is not raining. If it rains, there is no obligation. The
use of contract conditions gives parties greater flexibility in formalizing agreements subject to uncertain future events.

Conditional contracts are used frequently in real estate transactions. For example, purchase and sale contracts are often made subject to conditions that financing can be found, that the title is delivered free of all encumbrances, and that the necessary zoning modifications are approved. If such conditions are not satisfied, then no enforceable obligation to perform (i.e., deliver the deed or tend the purchase money) exists. If the conditions are satisfied, then the contract becomes enforceable.

Extra care must be taken in drafting the conditional terms of a contract. The specification of the events or circumstances that will satisfy the condition must be explicit so the parties (and the court) will know if and when the parties' commitments have matured. Return to the case of the lawn-mowing contract that is contingent on Thursday's rain conditions. Is there an obligation if it rains on Thursday night? If it's foggy on Thursday morning? If the weather forecast says it will rain on Thursday? The terms of the condition, and the means of demonstrating satisfaction of the condition, should be as clear as possible.

When one of the parties is charged with attempting to fulfill the contract conditions, the other party should be careful to specify what steps must be taken. The "subject to financing" clause in purchase and sale contracts is a good example. The buyer has contracted to buy a property if he can find financing. The seller, to avoid the collapse of the sale because of the buyer's decision not to look for financing, will want to make explicit the efforts to be taken by the buyer. This may include a list of lenders with which loan applications must be filed and a definition of what loan terms will be "acceptable."

**Breach**

Breach occurs when the terms of a contract are not complied with by one of the parties to that contract. Breach is a broken contractual promise. Breach is primarily a factual issue, i.e., were the obligations created by the contract actually satisfied by the defendant (the party being sued)? That is not to say that these factual determinations are necessarily simple. If a building contractor leaves a building half completed, then the breach is obvious. But what if instead the building is completed to specifications but is
twenty feet from where it is supposed to be? Two feet? Six inches? What if the wrong sort of doorknobs were used? Or the wrong color of paint?

The plaintiff (the complaining party) will not be compensated, even if there is a breach, unless the breach and corresponding damages are substantial. The courts do not want to be burdened by hearing breach cases in which only nominal damages occurred.

**Remedies**

Typically there are four key issues in any contract litigation:

1. Was there a contract?
2. Was there a breach of a contractual obligation by the defendant?
3. Were there substantial damages to the plaintiff?
4. What sort of remedy or compensation is appropriate?

Once the court has decided that there was a contractual duty to perform, that the duty has not been fulfilled, and that substantial damages have resulted, then it must decide how to rectify the situation. Courts have three basic forms of relief at their disposal: monetary damages (a judgment requiring cash payment from defendant to plaintiff), injunctions (court orders requiring or forbidding some action by the defendant), and declaratory relief (a statement of the parties' rights). The relief granted in contract cases is predominantly damages, though specific performance, a form of injunctive relief that requires the breaching party to perform a contractual obligation, is sometimes used. The fundamental purpose of awarding damages is to make the complaining party "whole"; that is, to compensate her for any damages suffered. The courts will grant monetary damages whenever possible, and will resort to specific performance only when damages will not satisfy the need to make the plaintiff whole.

The process for calculating monetary compensation, or "damages," is not simple. Courts recognize three types of losses in assessing the compensation due breach victims: restitution, reliance, and expectation damages. In all cases, restitution and reliance damages are compensated. Courts are split over whether expectation damages are appropriate.

Restitution is the return of property transferred to the breaching party prior to the breach. The breaching party is not allowed to keep any proceeds from his own breach, and such "unjust enrichment" will be included in the
damages. For example, A and B contract to sell a car for $500. B gives A $500. A never gives B the car and instead sells it to a third party. B sues for breach of contract. B is awarded $500, which equals the illegitimate gain of A and the loss of B.

The reliance component of damages is based on making the plaintiff "whole" by returning her to the position she was in prior to the contract. This includes the return of any transfers made to the breacher in reliance on the contract (restitution) plus compensation for any other expenses incurred in reliance on the performance of the contract. For example, A contracts to sell B a car for $500. B gives A a $100 deposit. B also relies on the contract and buys $200 worth of non-returnable, custom-made parts for the car. A never delivers. B sues. B is awarded $100 for the deposit (restitution) and $200 for the useless parts bought in justifiable reliance on the contract. B is in the same position he was prior to the contract (except, of course, that he has a pile of worthless custom parts).

The expectation measure component makes the plaintiff "whole" by placing him in the same position he would have been in had the contract provisions been fulfilled. The plaintiff is compensated for the loss of the so-called "benefit of the bargain." For example, A contracts to sell B a car for $500. A breaches and sells the car to another. B sues and is awarded $1,500, $500 for restitution and $1,000 for expectation damages (the profit he could have made had the deal gone through).

Specific performance is an injunctive remedy consisting of a court order requiring the party in breach to fulfill the promise at issue. The courts are very reluctant to issue affirmative injunctions (requiring parties to take certain actions) and will do so only when damages are inadequate (fail to make the plaintiff whole). In general, specific performance is not allowed in any area where damages can be put into dollars. One important exception is land transactions. Courts follow a legal fiction that land is unique (i.e., damages cannot be calculated), and thus will sometimes grant specific performance of contracts to convey land in lieu of monetary damages.

Many contracts contain "liquidated damages clauses." In case of breach, these contract provisions state the damages to be paid by the breaching party, replacing the cumbersome process of actual damage calculation. To be valid, such provisions must bear a reasonable relationship to the damages expected by the parties in a breach situation. Penalty clauses are generally found to be against public policy and thus unenforceable.
Mitigation

Once a breach has occurred, the party injured has a duty to mitigate his damages. For instance, if A has leased a shop to B for a period of one year and B breaks the lease (a lease is a form of contract) and abandons the shop after two months, A has a responsibility to try to lease the shop to someone else for the remaining ten months. A cannot leave the shop empty and sue B for ten months rent. However, the injured party will be compensated for any loss he incurs because of the breach if he makes a good faith effort to minimize that loss. For example, if A must reduce the rent to attract a replacement lessee, then B is liable for the difference between B’s rent and the rent paid by the replacement.

Conclusion

Contracts really serve two distinct purposes. First, they describe an agreement between two or more parties. In a few cases, they will also serve as a legal description of the parties' rights in the case of a dispute. Although the business person will be primarily concerned with the economic terms of the deal, the lawyers must prepare for the contingency of a breach.

This note just touches the surface of the law of contracts. Given the constant changes in the law and the enormous complexity of most contract documents, an attorney should be consulted before entering into any major contractual agreements.
Once again we consider in what circumstances a writing, which by context or by terms contemplates a more formal agreement, may nonetheless serve as a binding contract.

We summarize the facts which present the problem. After a course of negotiations during May, 1984, Piatt Associates and Richard A. Goren (collectively called "Opera") as buyer, and Royal Investments Incorporated ("Royal"), as seller, signed a document as of June 6, 1984, contemplating the sale by Royal to Opera of the premises at 565-567 Washington Street, Boston (the "locus"). That document bore the caption "Offer to Purchase." Over the signature of Opera were the words "SUBMITTED BY" and over the signature of Royal there appeared the words "ACCEPTED BY." Prior to the signed document of June 6, 1984, there had been four drafts which successively offered improved terms to the seller but which were not acceptable to it.

The fifth, and accepted, draft, i.e., that of June 6, 1984, offered a price of $762,000, entirely in cash. There were provisions which provided for: sequential deposits (aggregating $50,000); the handling of then current leases and the making of new ones; a closing date; and payment of a broker's commission by the seller. Under a caption which read, "PURCHASE AND SALE," there appeared the following sentence: "A mutually acceptable Purchase and Sale Agreement shall be executed within four weeks of acceptance of this offer."

Before a purchase and sale agreement was signed, Royal received an offer to buy its property that was $78,000 higher than that which Opera had made. Royal became inattentive to calls from Opera or the broker. Although it had expected Royal, as seller, to proffer a purchase and sale agreement, Opera had an agreement prepared (on the 1978 edition of the Greater Boston Real Estate Board form), which incorporated the terms of the June 6th document. Opera then tendered signed copies of that agreement to Royal. On July 11, 1984, twenty-four hours after it had signed an agreement to sell to the party that had offered the better price, Royal informed Opera that their deal was off. "[W]e cannot sign this agreement," Royal explained, "in that we cannot guarantee the removal of the Moto-Photo tenant from the building."
Two days earlier on July 9th, Royal had, for a price, in fact secured the agreement of Moto-Photo to vacate its space in the locus.

Among his detailed findings the trial judge found as follows: The document dated June 6, 1984, and countersigned by the seller on July 7, 1987, had been the end product of active negotiations. It constituted more than a preliminary expression of intent or draft for discussion purposes. Rather, the parties intended to be bound as of June 7, 1984, by the provisions of the June 6th document, and execution of a purchase and sale agreement was no more than a formality intended to tidy up ministerial and nonessential terms of the bargain. The transaction was not particularly complex and did not require intricate final documents. Assertions by Melone, Royal's principal officer, that he would not have agreed to boilerplate provisions in the agreement tendered by Opera (relating, e.g., to state of the title, insurance, liquidated damages in the event of buyer's default) were not credible because the same provisions appeared in the agreement Royal signed to get the higher price.

The provision in the June 6th document looking to execution of a purchase and sale agreement, the judge concluded, contemplated that the parties would exercise good faith in attempting to draft and negotiate such an agreement. Royal, the judge found, did not act in good faith. In its refusal to execute the agreement tendered by Opera, it "was motivated entirely by the increased financial benefits which Royal would realize if it were able to convey the property to Paramount Associates at a purchase price of $840,000...." Judgment entered requiring Royal to convey the locus to Opera for $762,000, the price in the June 6th document.


To be sure, as the court observed in the Rosenfield case, language looking to execution of a final written agreement justifies a strong inference that significant items on the agenda of the transaction are still open and, hence, that the parties do not intend to be bound. Id. 290 Mass. at 216, 195 N.E. 323. See also Doten v. Chase, 237 Mass 218, 220, 129 N.E. 363 (1921); Chapin v. Ruby, 321 Mass. 512, 515, 74 N.E.2d 12 (1947); Currier v. Kosinski, 24 Mass.App.Ct. 106, 108, 506 N.E.2d 895 (1987). Cf. Capezzuto v. John Hancock Mut. Life Ins. Co., 394 Mass. 399, 403, 476 N.E.2d 188 (1985). If, however, the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract. Although the parties exchanged slogans of agreement in the Rosenfield case such as, "that is all settled" and "the deal was closed," it was apparent that the negotiations were imperfect on points which were material and, indeed, weighty in the context of the transaction. Rosenfield concerned a jewelry store lease. The parties had not reached agreement on the design and specifications of a store front; the cost of that work and whether the landlord would bear all of it or part of it was unresolved; the parties were dickering over whether the landlord would pay all of the heat or whether the tenant would pay for heat if gross sales (and, consequently rent) did not attain certain minima; and the parties were still debating who would pay for water. In the circumstances, the court saw the parties' preliminary written memorandum of several business points agreed upon as an agreement to reach an agreement, which imposed no obligation on them.
Here, by contrast, all significant economic issues were resolved in the preliminary agreement. The additional matters with which the form purchase and sale agreement treated were subjects such as state of the title, conformance with local law, condition of the premises, extension provision to allow seller time to remove title defects, buyer's right of election to accept a deficient title, performance to be merged in delivery of the deed, use of purchase money to clear title, maintenance of insurance at not less than eighty percent of sound insurable value, assignment of insurance, closing adjustments, holding of deposit by broker, and disclaimer of implied warranties. These points are not without importance and may, on occasion, be the subjects of bargaining. They are, however, subsidiary matter and norms exist for their customary resolution. The form of agreement tendered by Opera conformed to those norms, and the seller does not suggest that at the time of the preliminary agreement there were differences of position on any of the subsidiary points. Compare Blomendale v. Imbrescia, post 25 Mass.App.Ct.144, 516 N.E.2d 177 (1987).

Royal argues that the highly material matter of delivering the premises free of the tenancy of In and Out Photo of New England, Inc. (known as Moto-Photo), was not resolved. It may not have been resolved between Royal and Moto-Photo (the latter, after the preliminary agreement, appears to have jacked up the price of being bought out), but it was surely resolved in the preliminary agreement, which provided: "Current leases must be terminated by the seller and premises now occupied by Moto-Photo will be delivered vacant at or prior to the closing date."


This is not to say that parties to a preliminary agreement may not provide that they do not intend to be bound until the transaction is buttoned up by a more detailed and formal agreement. There is commercial utility to allowing persons to hug before they marry. See Tull v. Mister Donut Dev. Corp., 7 Mass.App.Ct. 626, 631-632, 389 N.E.2d 447 (1979). If "[p]arties to what would otherwise be a bargain and a contract ... agree that their legal relations are not to be affected [,] [i]n the absence of any invalidating cause, such a term is respected by the law like any other term...." Restatement (Second) of Contracts §21 comment b (1979). A proviso of that sort should speak plainly, e.g., "The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document."

So much of the judgment as declared relief is affirmed. Paragraph 3 of the judgment is modified to provide that Royal Investments Incorporated, its agents, employees or attorneys, as owner and seller, shall in or within thirty days of the issuance of the rescript from the Appeals Court deliver to the plaintiffs or their nominee, good and marketable title by quitclaim deed to the premises at 565-567 Washington Street, Boston, in exchange for payment of $762,000 in cash, certified check, cashier's check, or any combination of the three. The balance of the judgment is affirmed.
So ordered.

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1 James Piatt and Thomas Piatt. With Goren, the Piatts formed a general partnership called Opera Development Associates.

2 F.D. Rich Co., Inc., and Joseph J. Berlandi, who are partners with Royal Investments Incorporated in a partnership known as Paramount Associates.


4 In Coan the preliminary writing provided that the seller would "sign your usual purchase and sale agreement." The words "your usual" are more suggestive of a routine formality than the words "mutually acceptable" which modified "purchase and sale agreement" in the case before us. It is a distinction worth noting but it is not, in our view, dispositive in this case. Forms which contemplate execution of a purchase and sale agreement in a particular form, e.g., the standard purchase and sale agreement published by the local real estate board, are even more suggestive of a routine formality because a promise to execute a particular form comes close to incorporation of a text by reference.

5 Royal introduced evidence from a real estate broker that it was the custom of the real estate business in Boston to look to a full blown purchase and sale agreement before regarding parties as bound. The judge was not required to be persuaded and, in any event, custom would not override intent in a particular case, or settled law. See, however, as to the norm, Currier v. Kosinski, 24 Mass.App.Ct. 106, 108, 506 N.E.2d 895 (1987).
KASS, Justice.


Compared to the detailed offer in the Goren case, the preliminary document upon which the plaintiff Blomendale stakes his rights is crude. The writing consists of a stationer's form captioned "OFFER TO PURCHASE" dated November 16, 1984, the paper says (blanks in the form are filled in handwriting):

"I offer to Sal Imbrescia for the property located at 218 to 230 Broadway in the City of Chelsea, Mass. containing about 12,000 app. sq. ft. of land with the buildings thereon, $750,000.00 to be paid as follows: cash ...

"I hand you check for $10,000 make to S. Imbrescia & McCarthy R.E. check # 109 held by McCarthy R.E. to bind this offer, to be returned to me, if it is not accepted before November 16, 1984. If it is accepted, I agree to sign your usual real estate agreement to carry this out and take title within on or before 90 days by 3-16-85 ..., and to make an additional deposit of $---, the deposit to be applied to the purchase price. Signed in triplicate. No contingencies (sic)."

Imbrescia signed on the line marked "Accepted." The paper was also signed by Blomendale as buyer and by R. W. McCarthy as realtor.

Blomendale delivered to the broker a $10,000 check payable to Sal Imbrescia and McCarthy R.E. The check bore a notation "TBC Upon entering P & S." On deposition, Blomendale testified that "TBC" stood for "to be cashed."

Phrases such as "your usual real estate agreement" suggest that the parties anticipated only a routine formality, such as may be satisfied by an unaltered standard form. See the Coan v. Holbrook, 327 Mass. 221, 97 N.E.2d 649 (1951), line of cases discussed in Goren v. Royal Invs., Inc., supra 25 Mass.App.Ct. at 141-142, 516 N.E.2d at 176. There is no evidence, however, that Imbrescia had any "usual" form of
purchase and sale agreement. Indeed, the evidence is to the contrary, i.e., that Imbrescia relied upon Blomendale to see to the drawing of a purchase and sale agreement and that Imbrescia became impatient when, almost a month after the parties signed the offer form, a purchase and sale agreement had not yet been submitted by Blomendale.

When a purchase and sale agreement (on the Greater Boston Real Estate Board form) was submitted, it contained, in a typewritten addendum, a provision requiring the seller to warrant that information set forth on a rent roll was "true, complete and accurate in all respects, and that all indicated rentals conform with the rent control laws and all rules and regulations of the City of Chelsea in all respects." The draft agreement further called upon the seller to warrant that all leases were in full force and effect and to assign all interests in security deposits.

Other provisions in the addendum required: all new leases to be entered into before closing were to be submitted to the buyer for the buyer's approval; the buyer, before closing, was to have "reasonable access to inspect the premises;" the seller was to deliver a warranty bill of sale of all personal property located on or used in connection with the premises and was to warrant that each apartment had a refrigerator and a stove; and the seller was to warrant that there were no contracts, oral or written, involving "the premises which [would] be binding upon the Buyer or affect the premises in any manner other than the leases and rental arrangement hereinbefore referred to."

None of those provisions could be regarded as astonishing or grasping on the part of the proposed buyer. They were not, however, ministerial matters, and they could be thought to be inconsistent with the "no contingencies" provision in the preliminary document.

We need not decide if the sketchy preliminary document would have had binding status if Blomendale had tendered an unrestricted deposit with it and if Imbrescia had tendered to Blomendale a purchase and sale agreement on an unmodified standard real estate board form. The preliminary document appears to have nailed down the most basic points: place, price, deposit, financing terms (i.e., none), and an outside closing date. Such a document is not without potential force. Certainly any person, intending not to be bound who employs such a form, which says much as to agreement but leaves many points uncovered, must be ready to expect that the other party will think the document binding and actionable.

In the instant case, the restriction on delivery of the deposit and, above all, the various warranties asked of the seller by the buyer reflect imperfect negotiations at the time of the original agreement. The buyer introduced new elements which had not been discussed, let alone agreed upon. It follows that the parties did not intend to be bound by the preliminary document. The case, therefore, falls into the Rosenfield v. United States Trust Co., 290 Mass. 210, 195 N.E. 323 (1935), line of cases discussed in Goren v. Royal Investments, Inc., 25 Mass.App.Ct. 137, 516 N.E.2d 173 decided this day.

Judgment affirmed.
J. Gavin Cockfield, Boston, for plaintiff.

Richard A. Oetheimer, Boston, for defendant.

Shepard Davidson, Boston, for interveners.

Before JACOBS, GILLERMAN and SPINA, JJ.

GILLERMAN, Justice.

The devil that lurks in offers to purchase real estate and like instruments, which contemplate further documentation regarding the same subject matter, once again has triumphed. Here the parties--the buyers (McCarthy and DiMinicos) and the seller (Tobin)--have been in litigation since mid-1995; the subject is a condominium unit at Burroughs Wharf in Boston (premises)

A judge of the Superior Court allowed the seller Tobin's motion for summary judgment and also allowed the interveners' (DiMinicos') motion for partial summary judgment in so far as it requested the declaration that Tobin had no obligation to sell to McCarthy and that McCarthy had no right to buy the premises. He denied McCarthy's motion for summary judgment. We conclude that the judgment must be vacated and that McCarthy is entitled to the allowance of his motion for summary judgment.


On August 9, 1995, McCarthy executed an "Offer To Purchase Real Estate" (OTP) on a printed form published in 1994 by the Greater Boston Real Estate Board. The completed form recites that McCarthy offers to purchase the premises for a total purchase price of $526,000. Tobin's real estate agent accepted a $5,000 deposit on August 10, 1995, and Tobin signed and delivered the OTP on August 11, 1995.

The OTP, as executed by Tobin and McCarthy, includes the material terms and conditions of an offer to purchase residential real estate: a description of the property to be sold, including one parking space; the purchase price; the deposit and the conditions under which the deposit becomes the property of the seller or the buyer, as the case may be; the expiration date of the offer; the manner in which the offer may be accepted; the nature of the title to be conveyed; the identification of items of personal property included, and not included, in the sale; and the time and place for the delivery of the deed.

The OTP also includes several additional provisions which are the subject of this dispute.
Paragraph 3 provides that the parties "shall, on or before 5 P.M. August 16, 1995 execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board ... which, when executed, shall be the agreement between the parties hereto."

Paragraph 6 states, "Time is of the essence hereof."

Paragraph 7 provides for the insertion of "Additional terms and conditions." There follows a typewritten insertion which states, "Subject to a Purchase and Sale Agreement satisfactory to Buyer and Seller."3

An unnumbered paragraph, immediately above the signature lines, states: "NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney."

It was not until after 5 P.M. on August 16, 1995, that Tobin's attorney, Mr. Craig Gilmartin, faxed the first draft of a purchase and sale agreement to McCarthy's attorney, Mr. Bradley Pinta.4 Mr. Gilmartin's delay in preparing the draft obviously made it impossible for Mr. Pinta to respond before 5 P.M. August 16, 1995, as required by the OTP, with the consequence that Mr. Gilmartin, acting for his client (or so it could reasonably be understood), had waived insistence on the par. 6 provision that "Time is of the essence hereof." See Church of God in Christ, Inc. v. Congregation Kehillath Jacob, 3 Mass.App.Ct. 420, 424, 332 N.E.2d 918 (1975).

Mr. Pinta responded by facsimile five days later on August 21, 1995, proposing various changes and additions such as the identification of the parking space referred to in the OTP, recitation of the amount of the broker's fee, provisions regarding casualty prior to sale, and other items which were customary or merely "ministerial and nonessential terms of the bargain." See Goren v. Royal Investments Inc., 25 Mass.App.Ct. 137, 139, 516 N.E.2d 173 (1987). Contrast Blomendale v. Imbrescia, 25 Mass.App.Ct. at 146-147, 516 N.E.2d 177.

Counsel discussed revisions to the draft agreement on August 22, 1995. No mention was made of the August 16 date, and there was no discussion of any extension of that date.

Mr. Gilmartin sent Mr. Pinta a second draft of the agreement on August 23, 1995. It did not include a provision regarding a deadline for execution of the purchase and sale agreement.

Mr. Pinta sent the second draft to McCarthy on August 24, and on August 25 Mr. Pinta called Mr. Gilmartin and told him that the agreement was acceptable, that McCarthy would sign it, and that the agreement would be delivered to Mr. Gilmartin on Monday, August 28, 1995.5

On Saturday, August 26, the following occurred: (i) McCarthy signed the agreement and arranged for its delivery on Monday morning and (ii) Tobin signed a second OTP with the DiMinicos who had offered to pay an additional $50,000 for the premises. Tobin was acting on the advice of a second real estate broker; it does not appear that Mr. Gilmartin was consulted.

On August 28, 1995, Tobin's first broker received the executed agreement and the additional deposit required by the agreement. On the same day McCarthy's check was deposited by the broker and the signed agreement was delivered to Mr. Gilmartin. It was not until the next day that Mr. Gilmartin told Mr. Pinta that the agreement was late and that Tobin had signed a second OTP, this one with the DiMinicos.

The purchase and sale agreement between Tobin and the DiMinicos was signed sometime in September, 1995. On September 25, 1995, before the DiMinicos closed on their purchase, McCarthy commenced this action, and the DiMinicos intervened. The motions for summary judgment were filed February 8, 1996.
Discussion. The familiar issue is whether, on these undisputed facts, Tobin and McCarthy were bound by the OTP they both had signed, or whether they were not bound until they executed the contemplated purchase and sale agreement. Phrased differently, was the OTP a "firm offer" or not? See Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 707 n. 4, 592 N.E.2d 1289 (1992) (a "firm offer" is one that would be enforceable on the offeree's manifestation of acceptance of the terms of the offer).

It is "elementary that an unambiguous agreement must be enforced according to its terms." Schwanbeck, supra at 706, 592 N.E.2d 1289. The problem in this case is not the ambiguity of the terms of the OTP, for there is none. The difficulty is that the OTP is self-contradictory because of two critical clauses.

On the one hand, par. 3 looks to the execution of a purchase and sale agreement, and there are cases, such as Rosenfield v. United States Trust Co., 290 Mass. 210, 195 N.E. 323 (1935) (see note 2, supra), that have held that a clause that expressly contemplates the execution of a later, formal purchase and sale agreement reveals an intention not to be bound until the subsequent agreement is executed. If the clause that refers to a later agreement includes the phrase "satisfactory to both parties," we have said, in obiter dictum, that such a phrase carries "special weight." See Levenson v. L.M.I. Realty Corp., 31 Mass.App.Ct. 127, 130-131, 575 N.E.2d 370 (1991) (holding, however, that because the parties did not intend the preliminary document to be an offer, the document was not binding).

There is also authority, it must be noted, such as Goren v. Royal Investments Inc., 25 Mass.App.Ct. at 141, 516 N.E.2d 173, where we have held that a preliminary agreement is binding upon the parties notwithstanding the inclusion of the sentence, "A mutually acceptable Purchase and Sale Agreement shall be executed within four weeks of acceptance of this offer." Id. at 138, 516 N.E.2d 173. Decisive in Goren was the fact that the judge found that the parties intended to be bound by the preliminary agreement—a finding that we understood to rest on the pivotal fact that "all significant economic issues were resolved in the preliminary agreement." Id. at 141, and at 140 and 142, 516 N.E.2d 173, where the cases are collected.

On the other hand, this OTP includes a provision not discussed, so far as we are aware, in any of the cases. That clause, which is the final provision in the OTP and immediately precedes the signature line, puts the parties on "NOTICE" that the OTP "is a legal document that creates binding obligations. If not understood, consult an attorney." That provision must be taken to mean what it says: the OTP, when completed and signed by the buyer, is intended to be a firm offer, and, when countersigned and delivered by the seller, the offer is accepted and the OTP may become a contract binding upon the parties. McCarthy and Tobin each signed and delivered a copy of the OTP.

While it is not entirely clear what the drafter (identity unknown) had in mind by the insertion of the "subject to" clause in par. 7, that obscurity is not decisive in this case. When the parties have signed an OTP that states all the terms and conditions that are material to the contemplated transaction, and on its face states the understanding that the instrument creates "binding obligations," we hold the parties to the conclusion that reasonably intelligent persons would reach in the circumstances. See Citation Ins. Co. v. Gomez, 426 Mass. 379, 381, 688 N.E.2d 951 (1998) (a "reasonably intelligent person" standard is appropriate to resolve interpretive problems regarding contract terms). That conclusion is that a binding agreement has been reached.

Tobin and the DiMinicos both rely heavily on the deposition testimony of McCarthy, where he testified, "If we didn't sign the [purchase and sale] agreement, the deal would be off." The argument fails because both Tobin and the DiMinicos ignore the second sentence of McCarthy's answer: "If both parties didn't." (Emphasis added). The entire answer of McCarthy makes it clear that only the joint agreement of the parties could work an abandonment of the agreed sale.
The final judgment in favor of Tobin and the DiMinicos is vacated. The case is remanded to the Superior Court for entry of judgment in favor of McCarthy.

So ordered.

1 Juliann DiMinico.

2 An early leading case is Rosenfield v. United States Trust Co., 290 Mass. 210, 195 N.E. 323 (1935). The court, sustaining a directed verdict for the defendant, concluded, as matter of law, that the preliminary agreement was not binding because the surrounding circumstances revealed a "lack of an intention to be bound except upon the execution of a formal written instrument." Id. at 218, 195 N.E. 323.

3 The record does not reveal the author of the "Subject to" clause, nor the circumstances of its creation.

4 There is nothing in the record to suggest that Mr. Pinta was assigned responsibility for the preparation of the first draft of the purchase and sale agreement.

5 The judge noted that the attorneys quibbled in their deposition testimony about the content of the telephone conversation on August 25. Mr. Pinta's version is that Mr. Gilmartin assented to delivery of the signed agreement on August 28. Mr. Gilmartin's version is that he only agreed to receive the copies on August 28, and that the broker would receive a signed copy on August 25. Nothing turns on this dispute.

6 Where the material facts are undisputed, the document in dispute is before us, and each of the parties in the court below moved for summary judgment on those facts, the issue is one of law, not fact. See Rosenfield v. United States Trust Co., 290 Mass. 210, 218, 195 N.E. 323 (1935).

7 "A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381, 688 N.E.2d 951 (1998).

8 That Mr. Pinta and Mr. Gilmartin, and their clients, so quickly and easily came to agreement on the content of the contemplated purchase and sale agreement reinforces that conclusion.

9 The DiMinicos state in their brief that we "need look no further" than this deposition testimony. Tobin agrees that the deposition testimony "unquestionably establishes" that McCarthy did not intend to be bound by the OTP.

10 As we wrote in Goren, 25 Mass.App.Ct. at 142-143, 516 N.E.2d 173, a provision that seeks to avoid having an OTP metamorphose into a contract "should speak plainly," e.g.,

"THE PURPOSE OF THIS DOCUMENT IS TO MEMORIALIZE CERTAIN BUSINESS POINTS. THE PARTIES MUTUALLY ACKNOWLEDGE THAT THEIR AGREEMENT IS QUALIFIED AND THAT THEY, THEREFORE, CONTEMPLATE THE DRAFTING AND EXECUTION OF A MORE DETAILED AGREEMENT. THEY INTEND TO BE BOUND ONLY BY THE EXECUTION OF SUCH AN AGREEMENT AND NOT BY THIS PRELIMINARY DOCUMENT." Id. at 143, 516 N.E.2d 173.
We granted the interveners' application for further appellate review following the Appeals Court's opinion in McCarthy v. Tobin, 44 Mass.App.Ct. 274, 279, 690 N.E.2d 460 (1998), concluding that the plaintiff was entitled to specific performance of a real estate purchase. The plaintiff, John J. McCarthy, Jr., claims that the defendant, Ann G. Tobin, agreed to sell certain real estate to him. He asserts that they created a binding agreement when they signed a standard Offer to Purchase (OTP) form. The DiMinicos intervened because they later agreed to purchase the property in question from Tobin. McCarthy and Tobin each moved for summary judgment and the DiMinicos for partial summary judgment. The motion judge allowed Tobin's and the DiMinicos' motions, declaring that Tobin had no obligation to sell McCarthy and therefore McCarthy had no right to the specific performance of the real estate agreement. The Appeals Court vacated the judgment in favor of Tobin and the DiMinicos and remanded for entry of judgment in favor of McCarthy. The Appeals Court reasoned that the OTP was a firm offer that became a contract binding on the parties when it was accepted.

The facts, which are undisputed, are as follows. On August 9, 1995, McCarthy executed an offer to purchase real estate on a pre-printed form generated by the Greater Boston Real Estate Board. The OTP contained, among other provisions, a description of the property, the price to be paid, deposit requirements, limited title requirements, and the time and place for closing. The OTP also included several provisions that are the basis of this dispute. The OTP required that the parties "shall, on or before 5 P.M. August 16, 1995, execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board ... which, when executed, shall be the agreement between the parties hereto." In the section containing additional terms and conditions, a typewritten insertion states, "Subject to a Purchase and Sale Agreement satisfactory to Buyer and Seller." The OTP provided, "Time is of the essence hereof." Finally, an unnumbered paragraph immediately above the signature line states: "NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney." Tobin signed the OTP on August 11, 1995.
On August 16, 1995, sometime after 5 P.M., Tobin's lawyer sent a first draft of the purchase and sale agreement by facsimile transmission to McCarthy's lawyer. On August 21, McCarthy's lawyer sent a letter by facsimile transmission containing his comments and proposing several changes to Tobin's lawyer. The changes laid out the requirements for good title; imposed on Tobin the risk of casualty to the premises before sale; solicited indemnification, for title insurance purposes, regarding mechanics' liens, parties in possession, and hazardous materials; and sought an acknowledgment that the premises' systems were operational. The next day, the two lawyers discussed the proposed revisions. They did not discuss an extension of the deadline for signing the purchase and sale agreement, and Tobin's lawyer did not object to the fact that the deadline had already passed. On August 23, Tobin's lawyer sent a second draft of the agreement to McCarthy's lawyer. On August 25, a Friday, McCarthy's lawyer informed Tobin's lawyer that the agreement was acceptable, McCarthy would sign it, and it would be delivered the following Monday. On Saturday, August 26, McCarthy signed the purchase and sale agreement. On the same day, Tobin accepted the DiMinicos' offer to purchase the property.

On August 28, McCarthy delivered the executed agreement and a deposit to Tobin's broker. The next day, Tobin's lawyer told McCarthy's lawyer that the agreement was late and that Tobin had already accepted the DiMinicos' offer. In September, 1995, Tobin and the DiMinicos executed a purchase and sale agreement. Before the deal closed, McCarthy filed this action for specific performance and damages.

1. Firm offer. The primary issue is whether the OTP executed by McCarthy and Tobin was a binding contract. Tobin and the DiMinicos argue that it was not because of the provision requiring the execution of a purchase and sale agreement. McCarthy urges that he and Tobin intended to be bound by the OTP and that execution of the purchase and sale agreement was merely a formality.

McCarthy argues that the OTP adequately described the property to be sold and the price to be paid. The remaining terms covered by the purchase and sale agreement were subsidiary matters which did not preclude the formation of a binding contract. Lafayette Place Assocs. v. Boston Redevelopment Auth., 427 Mass. 509, 516, 694 N.E.2d 820 (1998); Blomendale v. Imbrescia, 25 Mass.App.Ct. 144, 147, 516 N.E.2d 177 (1987). We agree.


Tobin argues that language contemplating the execution of a final written agreement gives rise to a strong inference that she and McCarthy have not agreed to all material aspects of a transaction and thus that they do not intend to be bound. See Rosenfield v. United States Trust Co., 290 Mass. 210, 216, 195 N.E. 323 (1935); Goren v. Royal Invs., Inc., 25 Mass.App.Ct. 137, 140, 516 N.E.2d 173 (1987). "If, however, the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." Id., supra. See Coan v. Holbrook, 327 Mass. 221, 224, 97 N.E.2d 649 (1951) ("Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof ").

Although the provisions of the purchase and sale agreement can be the subject of negotiation, "norms exist for their customary resolution." Goren, supra at 141, 516 N.E.2d 173. "If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow
present uncertainties to rights and obligations, their agreement is binding." Lafayette Place Assocs., supra at 518, 694 N.E.2d 820.

The interveners argue that McCarthy departed from the customary resolution of any open issues, and therefore manifested his intent not to be bound, by requesting several additions to the purchase and sale agreement. We agree with the Appeals Court, however, that McCarthy's revisions were "ministerial and nonessential terms of the bargain." McCarthy, supra at 276, 690 N.E.2d 460, quoting Goren, supra at 139, 516 N.E.2d 173. Contrast Blomendale, supra at 146-147, 516 N.E.2d 177 (restrictions on delivery of deposit and warranties sought to be included in purchase and sale agreement reflected imperfect negotiations).

The inference that the OTP was binding is bolstered by the notice printed on the form. McCarthy and Tobin were alerted to the fact that the OTP "create[d] binding obligations." The question is what those obligations were. The DiMinicos argue that the OTP merely obligated the parties to negotiate the purchase and sale agreement in good faith. We disagree. The OTP employs familiar contractual language. It states that McCarthy "hereby offer[s] to buy" the property, and Tobin's signature indicates that "[t]his Offer is hereby accepted." The OTP also details the amount to be paid and when, describes the property bought, and specifies for how long the offer was open. This was a firm offer, the acceptance of which bound Tobin to sell and McCarthy to buy the subject property. We conclude that the OTP reflects the parties' intention to be bound.3

2. Waiver. Even though the purchase and sale agreement was not necessary to bind the parties, its execution was required by the OTP. The agreement is unambiguous in this regard and thus must be enforced.4 Schwanbeck, supra at 706, 592 N.E.2d 1289. Courts hold parties to deadlines they have imposed on themselves when they agree that time is of the essence. Vickery v. Walton, 26 Mass.App.Ct. 1030, 1031, 533 N.E.2d 1381 (1989). The DiMinicos argue that McCarthy violated his obligations by failing to execute the purchase and sale agreement by the August 16 deadline.

The August 16 date is a condition subsequent. Without an executed purchase and sale agreement by that date, the OTP provides that the parties' obligations to each other are extinguished. 3A A. Corbin, Contracts §739, at 442 (1960) ("A fact is a condition subsequent to the legal relation that it extinguishes"). Conditions, however, may be waived. Church of God in Christ, Inc. v. Congregation Kehillath Jacob, 370 Mass. 828, 834, 353 N.E.2d 669 (1976); 3A A. Corbin, supra at § 757.

We are persuaded that Tobin waived the August 16 deadline.5 Tobin's lawyer, acting as her agent, voluntarily undertook the task of drafting the purchase and sale agreement. He did not produce the first draft until it was impossible for McCarthy to sign it before the deadline. He also did not object to the passage of the deadline in the telephone calls and facsimile transmissions that followed. Instead, he continued to deal with McCarthy's lawyer in an effort to craft a mutually satisfactory agreement. In the only express communication concerning the execution of the agreement, Tobin's lawyer implied that a date later than August 16 was satisfactory.6 Words and conduct attributable to Tobin signified her waiver of the August 16 deadline. See Church of God in Christ, Inc., supra at 832, 353 N.E.2d 669 (oral extension, acceptance of payments, and continued dealings between parties signified waiver). Once there was a waiver, time was no longer of the essence. McCarthy's subsequent tender of the signed agreement and a deposit was timely and within reason. We conclude that there is no issue of material fact and that McCarthy was entitled to a judgment as a matter of law. See Mass. R. Civ. P. 56(c), 365 Mass. 824 (1974).

3. Specific performance. On remand, the issue of the appropriate remedy will arise. A judge generally has considerable discretion with respect to granting specific performance, but it is usually granted in disputes involving the conveyance of land. Raynor v. Russell, 353 Mass. 366, 367, 231 N.E.2d 563 (1967), and cases cited. "It is well-settled law in this Commonwealth that real property is unique and
that money damages will often be inadequate to redress a deprivation of an interest in land." Greenfield Country Estates Tenants Ass'n, Inc. v. Deep, 423 Mass. 81, 88, 666 N.E.2d 988 (1996). It is therefore proper to allow McCarthy specific relief.

McCarthy's right to specific performance is unaltered by Tobin's execution of a purchase and sale agreement with the DiMinicos. McCarthy filed this action prior to the execution of that agreement. The DiMinicos had actual notice of McCarthy's claim to the property and assumed the risk of a result favorable to McCarthy.7 Cf. Greenfield, supra at 89, 666 N.E.2d 988 (specific performance was proper remedy to enforce option to purchase real property; [429 Mass. 90] right not extinguished by sale to third party with notice).

The judgment is vacated. The case is remanded to the Superior Court for the entry of a judgment in favor of McCarthy's claim for specific performance.

So ordered.

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1 Juliann DiMinico.

2 McCarthy and Tobin disagree about the content of this conversation. McCarthy claims that Tobin's lawyer agreed to the Monday delivery date. Tobin's lawyer says that the agreement was to be signed on Friday. Because this is not a dispute of material fact, it is irrelevant to our inquiry.


4 The typewritten addition subjecting the OTP to a purchase and sale agreement satisfactory to both parties may be contradictory, but it is not ambiguous. Whether we construe the preprinted language or the addition as controlling, there was a waiver.

5 The issue of waiver is ordinarily one for the fact finder. If the facts are undisputed, however, waiver is a question of law. See, e.g., Linda Coal & Supply Co. v. Tasa Coal Co., 416 Pa. 97, 101, 204 A.2d 451 (1964).

6 Whether Tobin's lawyer agreed to a date of August 25 or August 28 is irrelevant in light of the consequences of the waiver.

7 The DiMinicos closed on the property. They hold legal title, subject to the equitable obligation to convey the property to McCarthy on payment of the purchase price set by Tobin and McCarthy. See Greenfield Country Estates Tenants Ass'n, Inc. v. Deep, 423 Mass. 81, 89, 666 N.E.2d 988 (1996).
INTRODUCTION

Plaintiff DSF Investors, LLC (DSF) filed this action seeking a declaratory judgment that a Term Sheet entered into with defendant Lyme Timber Company is a non-binding agreement creating no legal rights and obligations between the parties.

BACKGROUND

The following is taken from the summary judgment record. The undisputed facts, and any disputed facts viewed in the light most favorable to the non-moving party are as follows. Plaintiff DSF is a Delaware limited liability company with its principal office in Boston. Third-party defendant Arthur Solomon (Solomon) is a principal of DSF, which he established in 2000 as a real estate investment firm to invest in commercial real estate on behalf of private investors.

Defendant Lyme Timber Company (Lyme) is a New Hampshire limited partnership which invests in commercial real estate for its own account and in partnership with its investors. Defendant Woodland Management Associates, LLC (Woodland) is the general partner of Lyme. David Roby (Roby), Lyme's co-founder and its chief executive officer, graduated from Harvard Law School and practiced law for six years as a corporate attorney at the now defunct Boston law firm of Herrick Smith. David Clem (Clem) is a principal of Woodland and Roby's partner. Lyme's commercial real estate operations are managed though its subsidiary Lyme Properties, LLC (Lyme Properties), from an office in Cambridge, and Lyme considers itself to be one of the preeminent developers of biotech laboratory space in Cambridge. Robert Green (Green) is Lyme Properties' chief operating officer and reviews all legal matters for Lyme because he is an attorney who formerly specialized in real estate law at Gadsby Hannah, LLP.

Lyme was interested in purchasing the Necco Building in Cambridge for development if Necco could be convinced to relocate. In 1999, Lyme had done its own internal due diligence and investigated the Necco Building for its own account. However, Lyme fell out of favor with Necco after it purchased property located at 135 American Legion Highway in Revere ("the Revere Property"), which it knew Necco was interested in for its relocation.

In the summer of 2000, Bill Brodsky (Brodsky) and Elliot Ingerman formed Tribeca Associates, LLC (Tribeca) for the purpose of purchasing the Necco Building. (Family connections of Brodsky's led to his introduction to Necco's chairman, Dom Antonellis.) On June 22, 2000, Tribeca and Necco executed a letter of intent for Tribeca's purchase of the Necco Building through a "like-kind" exchange of property under §1031 of the Internal Revenue Code. At that time, Tribeca had an unwritten "handshake" agreement with the Davis-Solomon Investment Fund, run by Solomon, under which Tribeca was the
operating partner and Davis-Solomon was the financial partner in a venture to purchase and develop the Necco Building for telecommunications use. In accordance with this agreement, Tribeca dealt with various brokers and vendors seeking a replacement property for Necco. Brodsky contacted Lyme about DSF's purchasing the Revere Property, but Lyme was not interested in selling at that time. On October 17, 2000, DSF sent a letter to its investors stating that DSF and Tribeca had obtained a letter of intent to purchase the Necco Building.

On November 7, 2000, DSF executed an agreement with Tribeca to jointly pursue opportunities in technology-driven real estate assets. The agreement specifically identifies the Necco Building as one such "investment opportunity" the parties would pursue. With respect to any pursued investment opportunity, the agreement provides that DSF would bear 90 percent of expenses and Tribeca 10 percent, and that DSF would give Tribeca the option to invest up to 15 percent of the total equity in a single purpose entity (referred to in the agreement as a "Newco") formed to hold title to property under development. On November 29, 2000, Davis Solomon Tribeca Cambridge, LLC executed a purchase and sale agreement and an Exchange Agreement for the Necco Building. DSF agreed to assist Necco with moving Necco's headquarters to a new building to be identified and accepted by Necco through a "like-kind" exchange of property under §1031 of the Internal Revenue Code.

In January of 2001, Solomon had meetings with Clem and Brodsky concerning Lyme's Revere Property, which DSF hoped to acquire for the Necco Building exchange. At some point in 2001, the bottom fell out of the telecommunications market and DSF and Tribeca began pursuing a biotechnology use for the Necco Building, although Solomon had no experience in biotechnology development.

By March of 2001, DSF had assembled a team for the Necco Building project which included James Rafferty, an attorney specializing in zoning and planning, architects from Tsoi, Kobus & Assoc., engineers from AHA Consulting Engineers, Inc., structural engineers from McNamara/Salvia, Inc., traffic and parking consultants from Vanesse, and contractors from John Moriarty & Associates. Between March of 2001 and June 2002, this team met weekly to work on issues of permitting and zoning, real estate design and planning, parking and redevelopment.

In early April of 2001, Clem approached Solomon about a venture in which DSF and Lyme would pool Lyme's Cambridge properties with the Necco Building in pursuit of potential biotech tenants. Solomon rejected this proposal because he believed that Lyme's Cambridge properties were vastly inferior to the Necco Building. On April 3, Solomon asked Clem if Lyme would provide consulting services for the Necco Building project in exchange for a fee, and Clem responded that Lyme did not do that. On April 12, Clem met with Solomon and others from DSF about the possibility of Lyme investing in and becoming a partner in DSF's Necco Building project. At this time, DSF was also talking to other potential investors, including Hynes, GE, Boston Properties and Forest City. DSF had already obtained investors in the Necco Building project through subscriptions to its Technology Real Estate Club and the Necco Real Estate Club, and had commitments totaling $65 million. Solomon never told Clem or Roby that DSF was developing the Necco Building under the November 7, 2000, agreement with Tribeca.

Beginning in April of 2001, Lyme assisted DSF by providing insights based on its knowledge of biotech development in Cambridge and guidance with respect to the Article 19 approval process before the Cambridge Planning Board and other permitting issues. Over the next several months, Solomon met with Clem at least fifteen times, and Clem advised Solomon on issues such as price structure, disclosing Lyme's price structure on its deals in Kendall Square and its letters of intent with Infinity, Whitehead and Microbia. Lyme also made other members of its development team available to Solomon, including its engineer in charge of construction project management for biotech development; an engineer with a background in biochemistry and certificates in real estate and real estate financing; and Lyme's chief architect and planner. Lyme's personnel, including Clem and Roby, reviewed and commented on...
architectural drawings of the building and proposed redevelopment plans; offered advice on the selection of contractors, architects, engineers and project managers; offered expertise concerning biotech buildings, including the use of penthouse space, environmental issues, mechanical needs of the building, parking issues and financing; and reviewed and critiqued budget proposals and cost estimates. Meanwhile, DSF was also being advised by its own project team, which as previously described, included architects, construction companies, and attorney James Rafferty. Representatives from Lyme were never present at any of the permitting and zoning meetings attended by Rafferty.

In May of 2001, Solomon and Roby met once at Lyme's office in Cambridge and spoke on the phone to discuss the terms of the proposed venture and in particular, the terms of a confidentiality agreement to be contained in a term sheet. In a May 8, 2001, memo to Clem, Solomon stated, "[s]ince we are starting to make some key decisions I want to select a strategic partner by next Wednesday, May 16." In a May 9 memo to someone else, Solomon stated, "May 18 is our target date for making a decision about a strategic partner." In a follow-up memo dated May 16, Solomon stated, "let's discuss this week so that I can either encourage or discourage the other potential development partners."

Between May and December of 2001, Brodsky met weekly with Solomon and took active steps toward leasing the Necco building, marketing the property to prospective tenants through advertisements, meetings, review of proposals, and walk-throughs. Solomon never mentioned to Brodsky that Lyme was a partner in the Necco Building project, and Brodsky never saw anyone from Lyme at any of the meetings he attended with DSF concerning the project.

In June of 2001, Solomon and Roby discussed by telephone the terms of their proposed venture, to be embodied in a draft term sheet. They also discussed various aspects of the project such as leasing, permitting, and historic tax credits. On June 7, 2001, Solomon faxed Roby a proposed confidential term sheet.

At some point in June, Lyme sold the Revere Property to DSF for $37 million. The property was to be used for the Necco Building exchange.

On July 16, 2001, Solomon sent Roby a draft term sheet with a cover letter stating, "I'm enclosing the Admission to Partnership Agreement for the NECCO Building ... please sign and return to me and then I'll have our attorney use this term sheet as the basis for creating the Operating and Partnership document." On July 31, Solomon forwarded to Roby a financial analysis showing the projected returns for the Necco Building and how the partnership profit and distributions would work. The financial analysis showed that on the assumption that Lyme would be investing $15 million in the project, its return on its investment would be $39,746,284. It also included a projection that, similar to a provision in the November 7, 2000, agreement with Tribeca, provided for increasing percentages of return on Lyme's investment as the Necco Building project internal rate of return increased. According to Roby, this financial analysis reflected all the core terms of the business deal he and Solomon had been discussing. The cover letter accompanying the financial agreement set forth a revised capital structure and stated, "Within reason, we've tried to accommodate your comments since we believe that Lyme would be a good partner. However, this is our final position. Let's discuss." The financial analysis does not mention Tribeca.

On August 14, 2001, Solomon sent Roby a document entitled "Confidential Term Sheet for the Admission of LYME TIMBER Company to the Ownership of the Necco Building in Cambridge, Massachusetts" ("the Term Sheet"). The Term Sheet states:

The purpose of this Term Sheet is to (i) confirm our non-binding understanding of the basic business terms on which: (a) Lyme TIMBER Company ("the Lyme") would be admitted as a member of DSF Investors in connection with the interest of DSF in the Property (but without any rights or obligations
with respect to any other assets); and (b) DSF Investors would cause DSF Holdings, DSF Cambridge Holdings, and DSF Cambridge (collectively, the "DSF Entities") to: (y) carry out the transactions contemplated by the Purchase/Exchange Agreement; and (z) own, redevelop, lease, manage, finance and otherwise deal in and with the Property ((y) and (z), collectively, the "Project"); and (ii) set forth the binding obligations of Lyme with respect to the confidentiality obligations set forth in Section X below.

Section 11 of the Term Sheet states:

Except for the agreements contained in the Section above entitled "Confidentiality" (which are binding upon Lyme), neither DSF Investors, Lyme nor any of their respective affiliates has any legally binding obligation in connection with this Term Sheet or the transactions contemplated hereby, and no party will be legally bound in any manner unless and until, acting in its sole discretion, it executes and delivers definitive and legally binding written agreements. No negotiations, course of conduct or other circumstance shall create any legally binding obligations on the part of the parties hereto or their affiliates with respect to this Term Sheet or the transactions contemplated hereby, and any party may, in its sole discretion and for any reason or no reason, terminate this Term Sheet and all related discussions and negotiations at any time. This Term Sheet may be executed in any number of counterparts, each of which, when executed and delivered, will constitute a single agreement. This Term Sheet may be amended only by a written instrument signed by both Lyme and DSF Investors.

Lyme often used similar "non-binding" boilerplate language in its term sheets in connection with lease negotiations, particularly where several proposals were outstanding at the same time.

Roby made some modifications to the Term Sheet, but not to Section 11 quoted above. Roby then signed the Term Sheet on August 21, 2001, on behalf of Lyme by Woodland, and returned it to Solomon. In signing the Term Sheet, Roby was aware of the language stating that it was non-binding and that there was no deal until a definitive written agreement was executed. Roby understood this language and it was a correct manifestation of his intent in going forward with Solomon at that time.

On August 22, 2001, Solomon sent Roby a fax memorandum in which he accepted two of the changes to the Term Sheet made by Roby but also stated that DSF did not agree to the third. Solomon wrote a fairly detailed explanation of his position on that third point and of how he proposed to deal with the problem at hand—making up a shortfall in senior debt at a particular time—and stated, "[t]hus, we need to delete the third condition you added to the Investor Funding Condition and instead, add a separate sentence related to a possible shortfall in the senior debt at the time of the Exchange . . . Please give me a call if you need to discuss this further. Otherwise, I'll have our lawyer incorporate the term sheet with your point about needing Lyme's consent above $15 million into a definitive agreement." Solomon then left Roby a voice mail message to the same effect. Roby never called or otherwise contacted Solomon in response. Solomon executed the Term Sheet on August 23, 2001, after "whiting out" the condition he did not agree to and adding two sentences about DSF providing senior debt. Roby never received the executed Term Sheet back with Solomon's signature.

At some point in September 2001, Roby orally made a commitment to Solomon that Lyme would contribute $15 million of capital to the project. Roby informed the partners at Woodland of this commitment, but did not tell Lyme's controller. Lyme never set aside any money into a specific bank account that was isolated for DSF, but according to Roby, it had the $15 million available at all times.

The Term Sheet contains a provision stating: "Upon the execution and delivery of the definitive legal documents (which the parties anticipate to occur by September 14, 2001), Lyme shall provide DSF Investors with $3,500,000 (the "Initial Investor Contribution") ... (Term Sheet, Section IV(i),
Capitalization, p. 3). However, Solomon sent to Roby the first draft of the proposed operating agreement—the principal "definitive legal document"—on September 21, 2001. Around the time the draft was sent, and apparently in response to a question from Roby about the absence of a definitive operating agreement by September 14, Solomon told Roby:

Don't worry about that. The important thing is that we have a partnership, we have an agreement, that we are going forward together. What's important to me is that you tell me that there's $15 million available for the equity requirement for this deal. We'll get to the operating agreement and get those details figured out. Meanwhile let's go forward together. We've got a deal, we've got a partnership, we are going to make tons of money. (Roby deposition, pp. 147-48.)

Roby considered this an "oral handshake" and believed that DSF and Lyme had reached a binding agreement and that the partnership with DSF was a "done deal." Roby never viewed the Term Sheet as a binding definitive agreement memorializing the terms of the parties' deal; rather, he viewed the Term Sheet as the embodiment of the parties' core terms, with the Operating Agreement a mere formality addressing administrative details. However, Roby is not aware of any other real estate venture in which Lyme has proceeded as a partner without an executed operating agreement.

The September 21, 2001, draft "Limited Liability Company Operating Agreement" that Solomon sent to Roby detailed capital requirements, allocation of income and loss, distributions, powers and duties of the participants, transfer of partnership interests, and reporting, records and accounting matters. The draft contains a definition section (Article I) that includes the term "Term Sheet" which is defined as follows:

"Term Sheet" — means the Confidential Term Sheet for the Admission of Lyme Timber Company to the Ownership of the Necco Building in Cambridge, Massachusetts between the Company[6] and Lyme Timber Company dated August 14, 2001.

This definition is carried in every draft operating agreement that was prepared.

By the end of September 2001, DSF and Lyme had not yet reached final agreement on the issue of governance of the venture. On November 8, 2001, Solomon sent Roby another version of the Operating Agreement, with numerous proposed changes, particularly to the sections concerning dissolution, liquidation and termination. In mid-November, Solomon met with Clem and informed him that several things in Roby's mark-up of the draft, involving issues of control and governance, were "deal killers." On November 26, 2001, Roby wrote out a list of the pros and cons of the Necco Building venture for his file, in accordance with his practice of monitoring the pros and cons of every deal from beginning to end. Solomon and Roby had a meeting on November 30 at which they discussed Roby's concerns that the budget was increasing, that DSF's rent estimates were overly optimistic, and issues relating to forfeiture and return of Lyme's required investment of $5 million.

In December of 2001, Solomon and Roby were still negotiating the remedy for a failure by DSF to meet its capital obligations, with Roby proposing that DSF lose the credit for its deemed capital contribution ("Agreed Value" contribution) of $15 million. Solomon was concerned with the lack of language addressing the use of historic tax credit money, and did not intend to accept Roby's proposed term that Lyme receive its entire investment back under certain circumstances. On December 9, Roby sent Solomon a mark-up of the draft Operating Agreement addressing eighteen different points and Solomon responded with a memo on December 10 stating, "I'm not willing to accept additional changes to the Agreement at this time. Frankly, if you want to retrade what has already been agreed upon, I'll require the same right and the negotiations will become endless." On December 18, DSF attended its Article 19 hearing in front of the Cambridge Planning Board. Lyme did not oppose DSF in this process.
On December 20, 2001, Solomon sent Roby a memo which addressed the eighteen unresolved points and stated, "we need to restrict our discussions to the foregoing eighteen points." The points still being negotiated included whether Lyme had authority to trigger dissolution as a remedy for DSF's failure to meet its capital obligations, the issue of additional capital, and whether DSF could produce financial statements within 60 days after the end of the year. At one point, Roby characterized DSF's position that it could not do the latter as a "deal killer."

On January 4, 2002, Solomon sent Roby a memo stating: "We're getting close. I believe there really is only one remaining issue which is discussed in item 3 below." Item 3 involved the dissolution of the LLC and the winding down of the planned limited liability company that would constitute their joint venture to own and develop the Necco Building project ("joint venture LLC"). Roby and Solomon discussed Solomon's January 4 memo on January 11, after which Roby wrote a memo to Lyme's file, stating:

I agreed with Art today that the changes set forth in his January 4 memo are acceptable, but that we need to make it clear that we have consultation rights on sales of the property with the right to buy ourselves and that we need a remedy for the possibility (however remote) that DSF fails to discharge its obligation under § 3.2.1 to provide capital. I explained that dissolution was an acceptable remedy because it would cut the gordian knot and permit us to go forward. He acknowledged that we cannot be left in limbo on this issue but wants to consider other remedies.

On January 17, 2002, Solomon wrote to Roby setting forth a proposed solution to Lyme's concerns that DSF might default on its obligation to provide capital. Solomon then stated, "I trust that the foregoing is okay. Please advise as soon as possible so that I can send you copies of the Purchase and Exchange and Mezzanine Loan Agreements, and have our attorney finalize the Operating Agreement for your review and signature." On January 18, Roby handwrote on Solomon's letter "Good solution, — please proceed" and faxed it to Solomon. On January 22, Solomon sent Roby a copy of the purchase and exchange agreement with NECCO and the mezzanine loan agreement — documents he had not been willing to send while the terms of the Operating Agreement were still under negotiation — in a letter stating, "I've asked our attorney to incorporate the changes that we've agreed to into a final Operating Agreement for your review and signature." On February 4, 2002, Solomon sent Roby a red-lined draft of the Operating Agreement that he indicated showed the changes that they had agreed upon since the November 8, 2001, draft.

On February 6, 2002, Solomon sent Roby a clean copy of this same draft Operating Agreement (with a print date reflected on it of February 5, 2002) under cover of an e-mail that stated, "Please call once you've had an opportunity to review so that we can finalize the Agreement." Every page of this document states "DRAFT" in the upper right hand corner. Roby forwarded the February 5 draft agreement to Green and Clem for their review, but never received any comments back from them.

Around this time, Lyme formed Lyme/NC, LLC as a single purpose entity to execute the Operating Agreement and become DSF Equity, LLC's partner in DSF Investors, LLC, the name of the proposed joint venture LLC. Although Section 3.1.3 of the draft Operating Agreement stated, "[a]s of the date hereof, Lyme shall provide the company by wire transfer of federal funds with a capital contribution in the amount of $3,500,000," Lyme never wired the money to DSF in January or February of 2002 — because, according to Roby, DSF never requested that it do so. However, also according to Roby, Lyme was willing and able to make that investment at anytime, had Solomon so requested. Lyme never disclosed to its independent accountant, Price Waterhouse Coopers, that it had a partnership with DSF or Solomon, or that it had made a $15 million commitment to the Necco Building project, and no reference
to the project appears in Lyme's December 31, 2001, and December 31, 2002, consolidated financial statements.7

On March 4, 2002, DSF made a lease proposal to Novartis for the Necco Building. On March 14, Lyme Properties entered into a letter of intent to rent its 320 Bent Street property in Cambridge to Novartis.

Three days later, on March 17, 2002, Roby sent back to Solomon a new copy of the February 5 draft of the Operating Agreement with a cover letter stating, "Herewith a markup of 2/5/03 draft of the Operating Agreement + a copy of the 1st page of your memo of 1/4/02 (referred to in the markup). I trust you will find all to be in order." The version of the draft that Roby sent back contained a number of changes from the February 5 draft. According to Roby, when he reviewed the February 5 draft, he found several instances where he believed the draft Operating Agreement did not accurately reflect his understanding with Solomon. He therefore edited the language of the February 5 draft and sent those pages with his handwritten comments to Solomon. Roby's changes included, among others, an insertion that Lyme could be a purchaser of the property in the section concerning DSF "Sale Rights"; making changes to the section concerning Lyme's remedies, including the trigger for such remedies; inserting the phrase "exercising its good-faith business judgment" in several places in the "Member Consultation Rights" section; and changing the "Default Loan" provision from no recourse against DSF to full recourse.

In Roby's view, the changes he made did not alter the substance of the parties' agreement but rather, ensured that the written document reflected that agreement. However, Solomon viewed Roby's changes as attempts to erode DSF's control over the project, and no further communications about the Operating Agreement took place between Solomon (or any other DSF representative) on the one hand, and Roby (or any Lyme representative) on the other.8 On March 30, 2002, Solomon sent Roby an e-mail in which he congratulated Lyme on landing Novartis and then stated: "With respect to the NECCO building, since so much time has elapsed the risks/rewards of an investment have changed significantly. Thus, I feel obligated to review the proposed capital structure with my original investors. I plan to complete the review by the end of April and will contact you immediately thereafter." On April 1, 2002, Clem faxed Solomon a note stating, "the fact is that we have an agreement on the Necco building. We intend to honor the agreement. We expect you to do the same."

On June 28, 2002, Solomon sent Tribeca's Brodsky a letter stating that DSF's November 7, 2000, agreement with Tribeca did not apply to development of the Necco Building because it was a non-communications tenant, and because the agreement had expired by its terms. Solomon denied that Tribeca was entitled to any profit from the successful development of the Necco Building except for a referral fee.9

 Ultimately, Novartis entered into a deal with DSF to lease the Necco Building. In January of 2003, the exchange between DSF and Necco of the Necco Building and the Revere Property occurred, and Novartis began paying DSF rent for the Necco Building. The rent is an initial triple net rent of $5 million per year until January 1, 2006, when the rent increases to $10 million per year, with a ten percent increase every five years thereafter. In September of 2003, Novartis paid $20 million for an option to purchase the Necco Building for approximately $142 million.

**DISCUSSION**

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); Cassesso v.


1. Request for Declaration and Partnership Accounting

DSF contends that it is entitled to judgment as a matter of law on its request for a declaration that no binding agreement or relationship exists between itself and Lyme, and on Count I of Lyme's counterclaim seeking a partnership accounting. DSF argues that Lyme and DSF never entered into an enforceable partnership agreement because Section 11 of the Term Sheet requires an executed definitive agreement, and it is undisputed that the parties never executed such an agreement. Lyme contends that the Term Sheet never became a binding agreement, or in the alternative, that the parties either modified or waived the Term Sheet's requirement of an executed written agreement and the parties orally reached a binding agreement on all material terms of the partnership in September of 2001 or in any event by January of 2002.12


Here, the parties spoke very plainly: Section 11 of the Term Sheet is unequivocal and unambiguous that there will be no binding agreement with respect to the Necco Building project until the parties execute a definitive written agreement, that the parties' negotiations and course of conduct shall not create any legally binding obligations, and that either party may terminate the negotiations at any time for any reason.13 An unambiguous agreement is to be enforced according to its terms, Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706 (1992), and the language in Section 11 certainly qualifies as "the sort of express limiting provision which [the Appeals Court has] described... as affording a safe harbor to parties

Nonetheless, Lyme contends that Section 11 of the Term Sheet is not enforceable according to its terms. Lyme's first argument is that the Term Sheet was not "delivered" in accordance with its express terms, which in Lyme's view made delivery a condition precedent. 15 A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract. Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39, 45 (1991); Cheschi v. Boston Edison Co., 39 Mass.App.Ct. 133, 142, rev. den., 421 Mass. 1102 (1995). To determine whether there is a condition precedent, the court must ascertain the parties' intent by considering the words used by the parties, the agreement taken as a whole, and the surrounding facts and circumstances. Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. at 45-46. "Emphatic words" such as "if and when," "provided that" and "on condition that" are generally considered necessary to create a condition precedent. See Thomas v. Massachusetts Bay Transportation Auth., 39 Mass.App.Ct. 537, 543 (1995), rev. den., 422 Mass. 1104 (1996). Absent such emphatic words, a condition precedent will be found only where the parties' intent to create one is clearly manifested in the contract as a whole. Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. at 46.

The language in the Term Sheet on which Lyme relies for its argument is the penultimate sentence of Section 11, which reads: "This Term Sheet may be executed in any number of counterparts, each of which, when executed and delivered, will constitute a single agreement." The threshold difficulty with Lyme's reliance is that this sentence has no application in the present case because no "counterparts" of the Term Sheet were ever executed. A "counterpart" is "one of two or more copies or duplicates of a legal instrument." Black's Law Dictionary 354 (7d ed. 1999). Here, Roby signed a single copy of the Term Sheet and returned it to Solomon, who signed the same copy.

More fundamentally, the sentence in question simply does not create a condition precedent to the enforceability of the Term Sheet. No "emphatic words" are used, 16 and the sentence is reasonably understood to make the obvious point that if two (or more) copies of the Term Sheet are executed and delivered, there is still only one agreement. While it is true that even "[i]n the absence of the usual words, a condition precedent may nonetheless be found to exist if the intent of the parties to create one is clearly manifested in the contract as a whole[,]" Massachusetts Municipal Wholesale Electric Co. v. Danvers, 411 Mass. at 46, there is no such manifestation of intent in the Term Sheet read as a whole. Nor is there any evidence in the summary judgment record apart from the text of the Term Sheet to suggest that Lyme and DSF affirmatively intended that delivery of a copy of the fully executed Term Sheet to each party was a necessary condition to its effectiveness. See Id. at 46-47; 17 Thomas v. Massachusetts Bay Transportation Auth., 39 Mass.App.Ct. at 543. Absent a condition precedent, delivery of an executed written contract to the other party is not necessary for formation of a contract and may be viewed as a mere formality. See Hunt v. Rice, 25 Mass.App.Ct. 622, 629-30 (1988) (contract language stating "if an offer is acceptable ... the Purchase and Sale Agreement will be executed by us ... and mailed or delivered to the successful bidder no later than Tuesday, December 4, 1984 did not make delivery a condition precedent). Accordingly, the Term Sheet is not unenforceable due to failure of a condition precedent. 18

subjective belief by the other party that there has been a waiver is insufficient, and the evidence reflecting waiver must be strong. See Owen v. Kessler, 56 Mass.App.Ct. at 470-71 (no waiver found where evidence of waiver was not sufficiently "compelling"). See also Dunkin Donuts, Inc. v. Panagakos, 5 F.Sup.2d at 60 (Massachusetts standard for waiver "is an uncompromising one" [internal quotation omitted]; summary judgment allowed against the party claiming waiver). The burden of proving waiver is on the party asserting it, and the issue of waiver is ordinarily one for the fact finder. However, if the facts are undisputed, waiver is a question of law. See McCarthy v. Tobin, 429 Mass. at 88-89 n. 5.

Lyme contends that Solomon's failure to provide it with a draft of the Operating Agreement by September 14, 2001, the date stated in the Term Sheet, shows that Solomon waived the requirement of a definitive executed document. The argument fails. The Term Sheet mentions the date of September 14, 2001, essentially in passing, in setting out the proposed schedule for Lyme's contribution of capital contributions to the project. The specific sentence is this: "Upon the execution and delivery of the definitive legal documents (which the parties anticipate to occur by September 14, 2001), Lyme shall provide DSF Investors with $3,500,000 (the "Initial Investor Contribution")." (Term Sheet, Section IV(i), Capitalization, p. 3). There is nothing in the language of the Term Sheet that states or suggests that this "anticipated" date was intended to be definitive, or one that, if it were missed, would have any effect on any other provision of the Term Sheet or right of any party. Compare Owen v. Kessler, 56 Mass.App.Ct. at 466-67, 469-70 (discussion of "time is of the essence" clause). Accordingly, Solomon's letting the date go by without sending any draft of the Operating Agreement cannot reasonably be viewed as a waiver of anything.19 Nor is Solomon's statement, apparently made later in September, that there was no rush to execute the Operating Agreement provide the type of clear or decisive or unequivocal evidence (see Dunkin Donuts, Inc. v. Panagakos, 5 F.Sup.2d at 60, 61, and cases cited) that would be necessary to indicate that DSF was surrendering its right to insist that the parties not be bound until such a document was executed. Cf. McCarthy v. Tobin, 429 Mass. at 88-89 (seller waived "time is of the essence" clause in purchase and sale agreement by failing to produce draft agreement until after deadline had virtually passed, failing to object to passage of deadline, and continuing to deal with buyer in effort to close the deal).

Lyme further argues that Solomon's statements in September of 2001 to the effect that DSF and Lyme "had a partnership, had an agreement, were going forward together and were going to make tons of money" evidenced a waiver of the Term Sheet's requirement of a definitive executed agreement. These statements cannot be viewed as clear manifestations that DSF would not hold Lyme to Section 11 of the Term Sheet, given that both parties acknowledged there were still many important details to be hammered out before an Operating Agreement could be signed. See American Oil Co. v. Katsikas, 1 Mass.App.Ct. 437, 440 (1973) (evidence that despite bumps in the negotiations, parties acted as though deal was going forward did not support finding of provision requiring closing on certain date). Cf. Southern Colorado MRI, Ltd. v. Med-Alliance, Inc., 166 F.3d 1094, 1099 (10th Cir. 1999) (parties implicitly waived provision in letter of intent requiring execution of written asset purchase agreement as condition of closing, where parties had reached agreement on all material terms, indicated desire to be bound, and took steps consistent with already being bound).

Similarly, Solomon's memo in January of 2002 purporting to resolve the remaining issue between the parties and his conduct in sending Roby the previously withheld purchase and exchange and mezzanine loan agreements reasonably cannot be considered clear or decisive evidence indicating that DSF would not insist on adherence to the requirement that the parties not be bound until a definitive agreement was executed. Indeed, Solomon's January 22 letter forwarding the documents to Roby stated that his attorney was finalizing the Operating Agreement for Roby's review and signature, indicating that he still viewed formal execution as necessary.
In sum, when the summary judgment record is considered in the light most favorable to Lyme—as it must be—it shows at best that the parties had resolved the essential substantive terms of their agreement by January 22. But in light of the explicit "safe harbor" words used in Section 11 concerning the need for a definitive written document and its disavowal of words or conduct suggesting otherwise, this evidence suggesting the parties had resolved the essential terms of the Operating Agreement cannot reasonably be viewed as indicating or implying a surrender by DSF of its Section 11 right to insist that the parties execute a definitive written agreement before being contractually bound together. Accordingly, I conclude that Lyme has failed to raise a genuine issue of material fact with respect to waiver of Section 11 of the Term Sheet. Given that DSF never executed the Operating Agreement, Lyme cannot prevail on its claim that the parties reached a binding agreement with respect to the Necco Building project.

Accordingly, DSF is entitled to judgment as a matter of law on its complaint seeking a declaratory judgment that no binding agreement was created or existed between itself and Lyme with respect to development of the Necco Building project as partners or joint venturers. DSF is also entitled to summary judgment on Count I of Lyme's counterclaim seeking a partnership accounting.

2. Breach of Fiduciary Duty

Count II of Lyme's counterclaim alleges breach of fiduciary duty. It is well established that partners owe each other a fiduciary duty of the highest degree of good faith and fair dealing. See Starr v. Fordham, 420 Mass. 178, 183 (1995); Meehan v. Shaughnessy, 404 Mass. 419, 433 (1989). I have concluded, however, that no partnership arose between DSF and Lyme. There are other limited circumstances in which a fiduciary duty may arise. To establish that DSF owed Lyme the duties of a fiduciary, Lyme must show at least that the relationship was one of trust and confidence, that Lyme relied upon DSF's specialized knowledge or judgment, and that DSF was aware of Lyme's reliance upon it. See Davidson v. General Motors Corp., 57 Mass.App.Ct. 637, 642 (2003). The summary judgment record is devoid of any evidence that DSF and Lyme were involved in anything but an arms-length business relationship with respect to the Necco Building project. There is no evidence that Lyme relied on DSF's specialized knowledge and judgment or that DSF was aware of any such reliance. The mere fact that Lyme trusted DSF because of Solomon's prior acquaintance with Clem is insufficient to elevate the transaction of business between equally sophisticated businessmen to a fiduciary relationship. A business relationship is not transformed merely because trust was reposed by one party in the other. Davidson v. General Motors Corp., 57 Mass.App.Ct. at 643. Accordingly, Lyme has no reasonable expectation of demonstrating that DSF breached a fiduciary duty owed to it, and DSF is entitled to judgment as a matter of law on Count II of the counterclaim.

3. Promissory Estoppel

Count III of Lyme's counterclaim seeks recovery under a theory of promissory estoppel, alleging that Solomon made repeated promises over the course of several months that DSF and Lyme were partners in the Necco Building project and that Lyme would receive a one-third interest in DSF Investors. A promise may be enforceable by virtue of reliance under a traditional contract theory, with reliance substituting for consideration. See Cataldo Ambulance Service, Inc. v. Chelsea, 426 Mass. 383, 386 (1998); Rhode Island Hosp. Trust Nat'l Bank v. Varadian, 419 Mass. 841, 849-50 (1995). To recover under such a theory, the plaintiff must prove an unambiguous promise, which the promissor should reasonably expect to induce action or forbearance, and that the plaintiff reasonably relied on the promise to his detriment. Rhode Island Hosp. Trust Nat'l Bank v. Varadian, 419 Mass. at 848-49.

A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. Lyme cannot show that DSF made a promise in the contractual sense, given that Solomon's statements that they "had a partnership, had an agreement, were going forward together and were going to make tons of money" directly conflicted with the unambiguous intent
expressed in Section 11 of the Term Sheet that the parties would not be bound until execution of a definitive written agreement. (No promise in a contractual sense where oral promise of loan conflicted with parties' understanding that written agreement would govern the intricacies of their deal.) Because there was no promise in the contractual sense, no amount of reliance by Lyme would give rise to recovery under a theory of promissory estoppel. See *Rhode Island Hosp. Trust Nat'l Bank v. Varadian*, 419 Mass. at 850.21

Further, in light of the specific and explicit terms of Section 11 of the Term Sheet, any reliance by Lyme on Solomon's statements that they were partners and were going forward to make a ton of money was unreasonable as a matter of law.22 See *Kuwaiti Danish Computer Co. v. Digital Equip. Corp.*, 438 Mass. 459, 468 (2003) (businessman's reliance on other party's statement or conduct during the course of mutual congratulations at having reached a deal was unreasonable as a matter of law where it conflicted with documents stating that deal was not binding unless accepted by duly authorized representative of company); *Rhode Island Hosp. Trust Nat'l Bank v. Varadian*, 419 Mass. at 848-50 (where parties contemplated a written agreement for a $43 million loan, it was unreasonable as a matter of law for experienced businessman to rely on bank's oral promise to make the loan).

Finally, Lyme has no reasonable expectation of demonstrating that it substantially relied on Solomon's promise to its significant detriment. To work an estoppel, it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done, resulting in affirmative harm. See, e.g., *Royal-Globe Ins. Co. v. Craven*, 411 Mass. 629, 635 (1992). Here, although Lyme alleges that it provided valuable consulting services to DSF in reliance on Solomon's promises of a partnership, it appears that the bulk of those services were provided in the spring of 2001, prior to the execution of the Term Sheet and Solomon's September 2001 statements that the parties were going forward as partners. It is undisputed that Lyme never made any financial investment in the Necco Building project, and Lyme has been unable to identify any specific opportunity or deal that it passed up in reliance on Solomon's alleged promises.

DSF is entitled to judgment as a matter of law on Count III of Lyme's counterclaim for promissory estoppel.

...  

**ORDER**

For the foregoing reasons, the motion for summary judgment of the plaintiff DSF is allowed insofar as it seeks a declaration to the effect that the plaintiff and the defendants never entered into a binding agreement with respect to the development of the Necco Building, and that the Term Sheet dated August 14, 2001, between these parties is not a binding agreement.

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Notes:

1. Woodland Management Associates, LLC and Lyme/NC, LLC.
2. DSF argues that Lyme failed to comply with Rule 9A(b)(5) and urges the court to treat DSF's facts as admitted. See *Dziamba v. Warner & Stackpole, LLP*, 56 Mass.App.Ct. 397, 400-01 (2002). There have been issues on both sides concerning the Rule 9A(b)(5) statements. I decline to treat any facts admitted based on claimed noncompliance with Rule 9A(b)(5).
3. The agreement further provides that the operating agreement for any such "Newco" would contain a distribution schedule for its members that would allow the member (including Tribeca, if it chose to invest in the opportunity) to receive a larger share of the project profits as the internal rate of return on the project increased. (Brodsky, Little, tab 6, 146-47). A pro forma that Solomon sent to Brodsky in August 2001 estimated an internal rate of return for the Necco Building project of 41 percent. In Brodsky's view, if this were the rate of return achieved, it would have allowed Tribeca to receive 35 percent return on its investment in the project.

4. Solomon stated that if there were a shortfall in the amount of senior debt (identified by Solomon as the acquisition and construction loan) at the time of the property exchange involving the Necco Building, DSF would be required to provide the shortfall.

5. The record also contains an affidavit of David Roby. Some of it appears to repeat discussion of topics covered earlier in Roby's deposition, and I have considered the deposition testimony rather than the affidavit. In addition, to the extent that the affidavit seeks to characterize, as opposed to quote, what Solomon is alleged to have said to Roby, and states conclusions or opinions on the state of mind of Solomon, I have disregarded the affidavit.

6. "Company" is defined in the draft operating agreement to mean the limited liability company that would be established in accordance with the operating agreement to run and operate the Necco Building development project.

7. The 2002 financial statement was published after Solomon had told Lyme there was no deal, and Lyme felt it would be unwise to include the Necco Building deal, given the uncertainty as to the partnership with DSF.

8. In addition, Solomon never formed DSF Equity as an entity to enter into the Necco Building venture with Lyme.

9. Tribeca sued Solomon and ultimately, the parties settled for $5,375,000. (Ex. 82 to Little Aff.)

12. Although the parties argue in terms of whether they had entered into a partnership, their relationship is more aptly characterized as a joint venture, in which parties agree to invest or associate in a single, limited enterprise. In contrast, a partnership is usually formed for the transaction of a general business. See Shain Investment Co., Inc. v. Cohen, 15 Mass.App.Ct. 4, 7 (1982). The distinction is not material to the resolution of this summary judgment motion.

13. The specific language from Section 11 is the following: "Except for the [confidentiality agreements contained in Term Sheet] . . . neither DSF Investors, Lyme nor any of their respective affiliates has any legally binding obligation in connection with this Term Sheet or the transactions contemplated hereby, and no party will be legally bound in any manner unless and until, acting in its sole discretion, it executes and delivers definitive and legally binding written agreements. No negotiations, course of conduct or other circumstance shall create any legally binding obligations on the part of the parties hereto or their affiliates with respect to this Term Sheet or the transactions contemplated hereby, and any party may, in its sole discretion and for any reason or no reason, terminate this Term Sheet and all related discussions and negotiations at any time . . ." (Emphasis supplied).

14. The Appeals Court's decision in Schwanbeck v. Federal-Mogul Corp., 31 Mass.App.Ct. 390 (1991), was reviewed by the Supreme Judicial Court in Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703 (1992). The Supreme Judicial Court agreed with the Appeals Court's reversal of the trial court's judgment, but disagreed with some of the Appeals Court's reasoning. There is no disagreement expressed, however, with the language from the Appeals Court's decision that is quoted here in the text.

15. In the course of arguing that there was no effective delivery, Lyme refers to the fact that Solomon "whited out" one of Roby's handwritten additions to the Term Sheet but does not appear to rely on this "whiting-out" to show that the Term Sheet was not a binding document, perhaps because there is no evidence disputing Solomon's testimony that he notified Roby of his actions, requested a response if Roby disagreed, and Roby never responded to the invitation to object.

17. It is worth noting that in the Massachusetts Municipal Wholesale Electric Co. case, cited by Lyme, the court did not find a condition precedent to have been created, even though the contract language was clearly more "emphatic" than what appears in the Term Sheet at issue here. The contract in that case provided "This Agreement shall be effective upon execution and delivery of Power Sales Agreements by MMWEC and Participants whose Participants' Shares total 100.0%." Massachusetts Municipal Wholesale Electric Co. v. Danvers, 411 Mass. 39, 45-47 (1991).

18. Lyme may be arguing that delivery was necessary because in its absence, Lyme (through Roby) did not appreciate or understand that the Term Sheet was in effect. That argument fails as well. The record shows that the term "Term Sheet" was included and defined in every draft of the Operating Agreement that the parties reviewed and worked on, and that Roby referred to the Term Sheet's provisions on one or more occasion in his negotiations with Solomon between August 2001 and April 2002, in a manner suggesting he knew it was in effect. Furthermore, once the Term Sheet was executed by the parties, it was in effect, whether or not Roby had subjective knowledge or a subjective belief of this fact.

19. In this regard, the record shows that Solomon did send the first draft of the Operating Agreement to Roby only one week later, on September 21, 2001.

20. Even on the assumption that Solomon waived Section 11 of the Term Sheet, Lyme has no reasonable expectation of proving its claim that the parties entered into a binding oral partnership in or before January or February of 2002. As previously indicated, the question of whether there is a partnership is one of intent. See Fenton v. Bryan, 33 Mass.App.Ct. 688, 691 (1992); John Alden Transp. Co., Inc., 11 Mass.App.Ct. 920, 921 (1981). Lyme emphasizes Solomon's statements that DSF and Lyme were partners, were going forward, and were going to make a ton of money. Although one person's statement to another that they are partners is relevant as tending to prove such, it is only one piece of evidence to be considered. See Van Dyke v. Bixby, 388 Mass. 663, 668 (1985). To create an enforceable contract, there must be agreement between the parties on the material terms of the contract. Situation Management Systems, Inc. v. Malouf, Inc., 430 Mass. 875, 878 (2000). Failure of the parties to agree on material terms prevents any rights or obligations from arising on either side. See Rosenfield v. United States Trust Co., 290 Mass. 210, 216 (1935) (parties had engaged in only imperfect negotiations, despite one side's statements that "that is all settled" and "the deal was closed"). Here, it is apparent that there was no meeting of the minds sufficient to create a binding oral partnership with respect to the Necco Building project. Although Solomon expressed his view at the end of January of 2002 that the parties had resolved the last outstanding issue, when he sent Lyme the February draft reflecting the purported agreement, Roby marked up the draft and made a number of substantive changes, including altering the terms of the default loan from no recourse against DSF to full recourse. Thus, the undisputed evidence shows that DSF and Lyme had not reached a meeting of the minds on all material terms of the venture in January of 2002. Compare Loft v. Lapidus, 936 F.2d 633, 636 (1st Cir. 1991) (partnership formed where parties orally agreed to every essential point of the partnership relationship and only step left was to execute a formal document).

In light of this conclusion, I do not need to address in detail DSF's argument that any partnership agreement would be barred by the statute of frauds. Joint venture contracts for the division of profits and losses from transactions in land are generally not held to be within the statute of frauds, even though the contract requires one party to purchase or sell land for the parties' mutual benefit, so long as the party suing does not assert a property interest in the land at issue. See First Pennsylvania Mortgage Trust v. Dorchester Sav. Bank, 395 Mass. 614, 625 (1985); Fencer v. Wills, 259 Mass. 546, 549-50 (1927); Greenfield v. Pearlstein, 1995 Mass.App.Div. 30, 31.

21. Moreover, the alleged promise that DSF and Lyme were partners is simply too vague to be enforced, given that the parties had not yet negotiated the myriad details of the complex Necco Building venture. See Pappas Indus. Parks, Inc. v. Psarros, 24 Mass.App.Ct. 596, 599, rev. denied, 400 Mass. 1107 (1987) (oral promise to sell land was not enforceable by estoppel where negotiations were incohaote, significant details remained unresolved, and draft agreement was unsigned).

22. The question of whether a party's reliance on another's promise is reasonable is often a question of fact, but in an appropriate case can present an issue of law, particularly where the parties are of equal knowledge and sophistication. See Cataldo Ambulance Service, Inc. v. Chelsea, 426 Mass. 383, 387 (1998).
Transaction Schematic

Tribeca Associates, LLC
("Operating Partner")

Technology Real Estate Club
(Money Partner)

NECCO Real Estate Club
(Money Partner)

Other Investors
(Money Partner)

Woodland Management Associates, LLC
(General Partner)

Other Investors
(Money Partner)

DSF Investors, LLC
("Financial Partner")

Solomon

DSF Equity, LLC
(Proposed NECCO Ownership Entity)

Term Sheet

Lyme/NC, LLC
(Investor in DSF Equity, LLC)

DSF Investors, LLC
(Proposed NECCO Ownership Entity)

Lyme Timber Company

Roby, Clem, Green

Term Sheet

Settlement in Litigation for $5,375,000

Davis Solomon Tribeca Cambridge, LLC
("Newco")

Brodsky, Ingerman

Lyme Timber Company

Roby, Clem, Green
Historic Place

While the building’s interior has been transformed into a 21st century state-of-the-art laboratory, its exterior has been restored to reflect its proud industrial past. Great care was taken to ensure eligibility for listing the building on the National Register of Historic Places.

Properties listed on the National Register of Historic Places possess historic significance and integrity. Significance may be found in four aspects of American history recognized by the National Register Criteria:

• Association with historic events or activities,
• Association with important people,
• Distinctive design or physical characteristics, or
• Potential to provide important information about prehistory or history.

A property must meet at least one of the criteria for listing. Integrity must also be evident through historic qualities including location, design, setting, materials, workmanship, feeling, and association. Generally, properties must be 50 years of age or more to be considered historic places. Renovating the structure to maintain its historic character and appearance made Novartis eligible for a tax credit on renovation costs. The following measures were taken to obtain the listing as a Historic Place and retain the tax credit:

• Replace windows. The original windows were constructed of single panes separated and supported by solid mullions. To meet current codes and for energy savings, the new windows were constructed of large, double panes of plate glass filling the entire window space. The outside pane was heat strengthened. The mullions, placed on the surface of the glass, are purely decorative, but retain the look and dimensions of the original mullions.
• Set back ceilings. To maintain the historic look of the building’s façade, ceilings on each floor were set back four feet from the windows.
• Define rooftops. Modern buildings, especially laboratories, require sophisticated air-handling and electrical plant equipment to be installed. To retain the original appearance of the building, the number of exhaust stacks and other equipment had to be minimized. In addition, the dome of the skylight over the atrium could not be visible from the street.
• Re-use wood paneling. About 5,000 board feet of dense grained heart pine timbers were reclaimed and remilled for sale as antique wood.
• Retain water tower. The roof-top water tower had to be retained and restored.
• Restore masonry. Exterior masonry on the building’s façade was restored.
The plaintiff, Henry C. Suominen, Jr., was employed as the construction manager of defendant Goodman Industrial Equities Management Group, LLC (GIE), a small real estate development firm. In that position, he enjoyed an annual salary of $225,000. After he was fired in 2004, Suominen filed an action against GIE and its principal, defendant Steven E. Goodman, alleging that Goodman had broken a promise to pay him certain compensation in addition to his salary. Following a seven-day trial in Superior Court, the jury ruled in Suominen's favor on some of his claims, including one based on promissory estoppel. The trial judge entered judgment awarding him a total of $1,729,243.01 in damages, the overwhelming bulk of which rested on the promissory estoppel claim. On appeal, the defendants argue that the trial judge should not have allowed that claim to go to the jury, and that, in any event, the judge's instructions on the claim were erroneous. Defendant Goodman also argues that there was insufficient basis for his being held personally liable. By way of cross appeal, Suominen claims that the trial judge erred in granting a directed verdict as to one of his other claims. He also argues that the defendants' appeal is not properly before us because of their failure—to make timely payment of a docketing fee. We affirm in part and reverse in part. Specifically, we conclude that the judge correctly ruled on the directed verdict (and other) motions, but that a material omission in the jury instructions entitles the defendants to a new trial.

Background

1. The defendants' business. Goodman is a real estate developer who focused on the redevelopment of existing, run-down industrial properties. Each targeted property was acquired by a deal-specific limited liability company that Goodman created solely for that purpose (referred to at trial as a “deal company” or “deal entity”). Although the deal entity purchased the property, the actual redevelopment work there was done by GIE, the limited liability company that Goodman had set up as his over-all real estate management company. That work included rehabilitating the buildings for a new use, securing permits for that use, and the like. Some of the projects were sold after they were redeveloped, while others were retained.

2. Suominen's hiring. Suominen began working for Goodman as a consultant in February of 1999, and he became GIE's “construction manager” in June of that year. In that position, Suominen oversaw the day-to-day redevelopment work of many, but not all, of Goodman's projects. His initial starting salary at GIE was $100,000, which was $35,000 less than his most recent prior job. He was willing to accept the reduced salary because of the potential that he could share in the “upside” of the projects on which he worked. Before Suominen had been hired, Goodman had committed to working out some kind
of profit-sharing plan with him, although the details of such a scheme had not been resolved before Suominen started work.

3. The parties' negotiations. By the end of 1999, the parties were well along toward working out such profit-sharing details, with the discussions having evolved in the context of the specific development projects on which Suominen was working at the time. In fact, by January of 2000, the discussions had progressed to the point that Goodman directed his lawyer to draft “equity sharing agreements” for these projects. Under those drafts, Suominen and David Heller, GIE’s chief financial officer, were to receive a percentage of the “promote” that each of the projects realized (if any). As the testimony at trial revealed, “promote” (also known as a “promoted interest”) is a term of art used in the real estate development field. It refers to a species of profit that developers can enjoy—in addition to the return on any equity they invested—if their projects become extremely successful. What portion of profit, if any, is to go to the developer as a “promote” is determined by agreement between the developer and investors at the start of a development deal.4 Not every real estate development deal is structured so as to include a “promote”; in some cases, a developer's potential profit comes only from return on equity or the payment of a separate “development fee.”

In the January, 2000, drafts, the precise percentage of the promote that was to go to Suominen was left blank. Shortly thereafter, however, Goodman informed Suominen that he was willing to part with thirty-five percent of his promote, and that he did not care how Suominen and Heller split it. Suominen and Heller quickly agreed between themselves that Suominen should take two-thirds of their joint share, or a resulting 23.33% of the over-all promote. Suominen reported this back to Goodman, and they had what Suominen variously characterized as a “nod of the head,” a “handshake round,” and a “semi-congratulatory type of thing.” At this point (early 2000), Suominen believed he had reached a full agreement under which he would receive a 23.33% share of the promote that otherwise would have gone to Goodman. He viewed his promised share of the promote, and not his salary, as his “primary expectation of compensation,” and he testified that he “would have left” his employment had he learned that his understanding of what he was to receive was incorrect.

At the end of 2000, Suominen had the 23.33% figure inserted into the draft documents for two then-current projects. He also modified the documents in a few other respects. For example, he added his own signature line, and he inserted a provision clarifying that the agreement would survive his termination or death. Suominen in fact signed his modified drafts, and he presented them to Goodman for his signature in December of 2000. Goodman declined to sign the documents, claiming that his doing so would require him to amend certain financial disclosure documents he had just filed. He confirmed with Suominen, however, that their deal was still on.

In March of 2001, Goodman's attorney forwarded to the parties a draft generic version of an equity sharing agreement that could be tailored for any specific deal (or at least those that were structured to include a promote). Moreover, the following month, Goodman acknowledged at a deposition in a separate action that Suominen and Heller had “an expectation when [Goodman did] a deal they'll get a part of it,” and that they had an “interest” in thirty-five percent of the promote on particular projects.

Goodman never signed any equity sharing agreement with Suominen. In fact, his attorney testified that, at an unspecified time, Goodman informed him that he was no longer interested in pursuing such an agreement. According to the attorney, Goodman decided that such an arrangement was too constraining. However, Goodman never informed Suominen of his change in plan.

4. The Milford distributions. In April of 2001, Goodman refinanced property in Milford that one of his deal companies owned. This resulted in a large inflow of cash (presumably because the redevelopment work that had been done at the property added significant value). He had twenty-five percent of those proceeds invested in GIE, and in May of 2000, he had the remainder distributed to
himself, Suominen, and Heller. Suominen was given 23.33% of the money distributed. On several later occasions, Goodman had operating profits from the Milford project distributed to himself, Suominen, and Heller. On those occasions, Suominen again received 23.33% of the distributions.

5. The events of 2002 and 2003. As a result of the Milford distributions, Suominen in 2001 earned approximately $60,000 above his baseline salary of $100,000. In 2002, however, there were no projects that had reached the point of generating distributions. Feeling strapped for cash, Suominen asked Goodman to raise his salary to $225,000, and Goodman agreed. In 2003, various projects were at the point of completion, prompting Heller, who as previously noted served as GIE's chief financial officer, to ask Suominen if his profit-sharing arrangement with Goodman was still in place. Suominen understood that it was, but no compensation above his increased salary was forthcoming even as deals began closing.

6. Suominen's firing. On March 18, 2004, Suominen and Goodman finally met to discuss Suominen's compensation. They testified to markedly different versions of the meeting. In Goodman's version, the meeting was primarily focused on concerns he claims to have had at the time regarding Suominen's performance. In Suominen's version, the meeting was primarily focused on the compensation that Goodman owed, with Goodman testing out various arguments about how the money might not be due. Shortly thereafter, Goodman had Heller draft a history of the equity sharing issues, which he had Heller backdate to make it appear as if the document had been drafted on January 1, 2003.

On July 12, 2004, Goodman fired Suominen at a face-to-face meeting. At the meeting, they discussed a transition period in which Suominen could continue to work on some of the existing projects, although not as an employee. Suominen did in fact continue to work under the belief that he would be compensated for such work as a consultant at the rate of his most recent annual salary. By electronic mail message (e-mail) sent on August 5, 2004, Goodman directed Suominen not to do any additional work, and he refused to pay Suominen for the work that Suominen had done after the date he had been fired.

7. Suominen's claims and the jury's special verdict. Suominen brought an action in Superior Court seeking damages both for the period that he was a salaried employee and for the brief period he worked as a consultant after being fired. Only the claims covering the former period remain live, and among those, the only ones still in play relate to Goodman's promise to pay Suominen a 23.33% share of the promote. At trial, Suominen's principal theory of recovery was that he had entered into a binding contract for the promised compensation with both GIE and Goodman personally. The defendants argued to the jury that no such promise had ever been made, and that Goodman at most had led Suominen to believe that a discretionary bonus might come his way. The defendants also argued that, in any event, there was never a “meeting of the minds,” because any agreement would have to be on a deal-specific basis (given that the amount of the promote, or even whether a deal included any promote, varied by the deal). They further argued that Goodman would never have agreed to give Suominen a set percentage of profits on those deals that made money, without Suominen having to share in the losses of those deals that lost money. For whatever reason, the jury rejected Suominen's contract claims.

However, the jury ruled in Suominen's favor on his fall-back theory of promissory estoppel. Specifically, the jury answered “yes” to all of the following special verdict questions:

“Did Goodman promise or represent to Suominen that he would receive 23.33 percent of the ‘promote’ on any development projects?

“...
“Did he make this promise or representation with the intent of inducing Suominen to continue his employment at GIE or with the reasonable expectation that it would induce him to continue such employment?

“...

“Did Suominen rely on this promise or representation by continuing his employment at GIE?

“...

“Did Suominen act reasonably in relying on this promise or representation?"

Over the defendants' protest, the jury were not separately asked to determine whether Suominen suffered detriment from relying on Goodman's promise.

The jury found that Suominen was lawfully denied a share of the promote on eight projects, for total promissory estoppel damages of $1,216,623 (with prejudgment interest, $1,711,005.87). The trial judge eventually concluded that the defendants each should face joint and several liability for those damages, and he entered a judgment to that effect on September 25, 2008. How the judge came to this conclusion, and other facts relevant to the parties' particular claims, are developed further below as the issues arise.

Discussion

1. Jurisdiction over the defendants' appeal. Before reaching the merits of the defendants' arguments, we must decide whether those arguments are properly before us. The defendants filed a notice of appeal on October 9, 2008, and Suominen filed a cross appeal two weeks later. Once the parties received notice of the assembly of the record, Suominen, but not the defendants, timely paid a docketing fee. See Mass.R.A.P. 10(a)(1), as amended, 435 Mass. 1601 (2001) (generally requiring payment of docketing fee within ten days of receipt of notice of assembly of record). Some five days after the payment period had run, Suominen filed a motion to dismiss the defendants' appeal in Superior Court pursuant to Mass.R.A.P. 10(c), as amended, 417 Mass. 1602 (1994). In the defendants' opposition to the motion and at a hearing on the motion, the lawyer who was serving as the lead on the case at the time sought to explain his neglect. Specifically, he documented how his failure to pay the docketing fee was caused by a significant personal crisis that temporarily had rendered him unable to function and, in his words, "a catatonic zombie." Based on this showing, the motion judge (who was not the trial judge) found "excusable neglect," and she denied the motion to dismiss. Suominen challenges that ruling in his cross-appeal.

We see no good reason to repeat the details of the personal crisis that counsel faced. Instead, we find it sufficient to state that the appellate rules are not so unforgiving as to render the motion judge's conclusion that the neglect here was "excusable" an abuse of her discretion. We proceed then to a discussion of the defendants' claims.

The defendants claim two different sorts of errors related to detriment. First, they argue that the judge erred by not separately charging the jury on detriment and by not having them determine whether this element was present. Second, they argue that the evidence of detriment was insufficient as matter of law, and that the judge therefore erred in not granting their motion for directed verdict. We address these claims in that order.

(i) Jury instructions. The jury were specifically asked whether, and did find that, Suominen continued his employment at GIE in reliance on Goodman's promises. The judge had initially intended to charge the jury with answering an additional special question: whether Suominen had “suffered some detriment, that is, some financial injury as a result of relying on this promise or misrepresentation.” However, at the charge conference, the judge decided to eliminate that separate question, citing the potential for jury confusion that including the question might cause. In the judge's view, the question was unnecessary, because if the jury determined that Suominen continued his employment in reliance on the promise, this by itself established sufficient detriment as matter of law. After the charge was given, the defendants renewed their objection to the absence of an instruction or special question on detriment.

We disagree with the trial judge's conclusion that Suominen's continuing his employment was sufficient by itself to establish his detriment as matter of law. In our view, the judge erred by conflating continued employment—the action Suominen took in reliance on the promises—and detriment. That this was error is best illustrated by reference to the facts. Although Suominen began his employment at GIE in 1999 at a salary somewhat below the one at his most recent earlier employment, he earned compensation above that level in 2001 as a result of the Milford distributions. Then, in late 2002, Suominen requested and received a 125% raise, putting his base salary at a level at almost twice what he was making before joining GIE. He also never alleged that he forwent any other job opportunities or business ventures by staying with GIE. Under these particular circumstances, the jury could have found, had they been asked, that Suominen did not suffer any detriment from continuing to work at GIE without receiving the additional payments he had been promised. As a result, the defendants were found liable without any resolution by the jury of whether Suominen had proven an essential element of his cause of action. The judgment therefore cannot stand, and the defendants are entitled at least to a new trial.

(ii) Sufficiency of the evidence. We turn now to the defendants' argument that Suominen's proof of detriment was insufficient as a matter of law. The defendants argue essentially that an employee cannot prove detriment based solely on continued employment unless he provides evidence of specific job opportunities that he forwent, economic harm, or that he accepted additional duties or responsibilities in reliance. In their view, they rely in large part on this court's 1987 decision in Hall v. Horizon House Microwave, Inc., 24 Mass.App.Ct. 84, 506 N.E.2d 178 (1987) (Hall), a case they contend is dispositive.

In Hall, the plaintiff was promised an option to buy company stock. We held that any reliance on the promise was unreasonable as matter of law in light of the “inchoate” nature of the negotiations over the stock option plan. In lieu of resting solely on this ground, however, we also addressed the employee's assertion that he had detrimentally relied on the promise by staying in his position longer than he otherwise would have. We concluded that there was insufficient proof of detriment: “During the period of negotiations, [the plaintiff] received significant pay increases.... There is no evidence of how [the plaintiff] fared as an independent entrepreneur [the path that the plaintiff pursued upon leaving the company] and, therefore, whether he suffered any economic loss by postponing his own venture.”

The facts present here are distinguishable from those in Hall in various respects. First, the promise at issue in Hall was made nine years after the employee began working at the company.
contrast, Suominen began his employment based on an expectation that he would receive additional incentive compensation, and there was evidence that, at least until he received his raise in November of 2002, Suominen was working at a salary below his market rate. Moreover, Suominen testified that—because he had been promised a share of the promote—he worked considerably harder in his salaried position than he otherwise would have, something that the jury were entitled to credit. The possibility of this type of detriment was not discussed in Hall.

Without attempting to resolve the precise contours of what a plaintiff must show to prove detrimental reliance based on continued employment, we conclude that Suominen did present sufficient evidence of detriment here to send the case to the jury. In other words, just as the jury reasonably could have found no detriment based on the evidence presented, so too they reasonably could have found the opposite. We therefore conclude that the defendants are not entitled to judgment in their favor as matter of law, and that the judge did not err in denying the defendants' motion for judgment notwithstanding the verdict.

b. Personal liability. Goodman also argues that there was insufficient evidence for him to be held personally liable as matter of law. He highlights that Suominen was a salaried employee of GIE, that the promised compensation was for work Suominen performed in that capacity, and that Suominen never even asserted, much less proved, that GIE's corporate form could be disregarded through “piercing the veil.” Suominen does not rely on “veil piercing” as such. Instead, he argues that Goodman is directly, not derivatively, liable, because he made his promises of additional compensation while acting in a personal capacity. In order to determine our proper role in reviewing such issues, we must examine in some detail how these issues developed before the judge and jury.

Regarding Suominen's contract claim, the trial judge instructed the jury that “the question of who entered into the contract, whether it was Mr. Goodman personally or whether it was he on behalf of GIE, or both, is a question that you will need to consider.” Consistent with this instruction, the special verdict form asked the jury whether Goodman on his own behalf had entered into a contract with Suominen, and separately asked them whether he had done so on behalf of GIE. However, neither the jury instructions on promissory estoppel nor the special questions on that theory drew any such distinctions. Instead, the jury were asked simply whether “Goodman” made a promise or representation to Suominen, without asking the jury to consider (or resolve) on whose behalf Goodman had made such a promise. As a result, even after the jury ruled, there was an open question whether the liability would run to GIE, to Goodman personally, or to both.

After the jury's verdict, the defendants, who were jointly represented, initially took the position that the jury had in fact found promissory estoppel liability only against GIE. Suominen argued that the jury had in fact found Goodman personally liable. The issue of which defendant should be held liable came to a head at a postverdict hearing. Characterizing the question as “difficult and close,” the trial judge concluded that both defendants should be held liable on the promissory estoppel claim, and he eventually entered a judgment imposing joint and several liability for the damages related to that claim.

Although each side continues to make some suggestion that the jury in fact ruled in that side's favor on the issue, the reality is that the jury never resolved what “hat” Goodman was wearing when he made his promises. How to proceed in the face of such an omission is addressed by rule. Specifically, Mass.R.Civ.P. 49(a), 365 Mass. 812 (1974), states in pertinent part as follows:

“If in [charging the jury on special verdict questions], the court omits any issue of fact raised by the pleadings or the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on special verdict.”
The question of Goodman's personal liability thus fell to the trial judge to resolve, and he did do so. Although the judge did not make an express finding that Goodman made his promises in a personal capacity, by operation of rule 49, the judge “shall be deemed to have made a finding in accord with the judgment [he entered] on special verdict.” Therefore, properly conceptualized, the question we face is whether the judge's implicit finding that Goodman made his promises in a personal capacity was clearly erroneous.  

We discern no clear error in the judge's implicit finding that Goodman was acting in a personal capacity when he made his promises (although we also agree with the judge that the issue is “difficult and close”). While Suominen was nominally a salaried employee of GIE, given how Goodman structured his businesses, Suominen effectively worked for the whole enterprise. Moreover, the specific promise at issue was that Suominen share a portion of Goodman's own promote, not a share of any obligation owed to GIE. Under these circumstances, there was evidence to support the judge's implicit finding.

c. Suominen's Wage Act claim. Suominen initially sought a share of the promote on seventeen projects, but he reduced that number to nine by the time of trial. For five of those projects, Suominen claimed his share was “due and payable” to him by the day he was fired, and that the defendants' failure to make those payments on that day constituted a violation of the Massachusetts Wage Act, G.L. c. 149, §148. For these violations Suominen sought treble damages and attorney's fees pursuant to G.L. c. 149, §150. The judge refused to let this claim go to the jury, dismissing it through his partial allowance of the defendants' motion for a directed verdict. In his cross appeal, Suominen argues that this was error. The Wage Act requires that an employer expeditiously pay a terminated employee his full wages and similar compensation (with the precise deadline determined by the act's complicated provisions). The statute applies to wages, to holiday and vacation pay, and, “so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee.” G.L. c. 149, §148, as appearing in St.1956, c. 259. Suominen argues that the amounts he was owed as a share of the promote was a “commission” covered by the Wage Act, and that all he need show was that the amount of the money he was due as that commission was “arithmetically determinable” by the date he was fired. See Okerman v. VA Software Corp., 69 Mass.App.Ct. 771, 780, 871 N.E.2d 1117 (2007) (Wage Act applies to commissions that are “arithmetically determinable” by the relevant deadline). The parties contest the ease with which such calculations could have been made. We need not resolve this debate, because we conclude that the promote payments were not “commissions” within the meaning of the Wage Act, regardless of whether they were “due and payable” at the time that Suominen was fired.

The term “commission” is commonly understood to refer to compensation owed to those in the business of selling goods, services, or real estate, set typically as a percentage of the sales price. See, e.g., Webster's New Universal Unabridged Dictionary 364 (2d ed. 1983) (defining “commission” as “[a] percentage of the money taken in on sales, given as pay to a salesclerk or agent, usually in addition to salary or wages”). The compensation at issue here was of a different sort, a share of the overall profits generated by the development efforts. Whatever the precise boundary of the term “commission” as used in the Wage Act, we agree with the trial judge's conclusion that any money owed Suominen under such a profit-sharing arrangement was not a “commission” covered by the statute. The judge therefore correctly dismissed Suominen's Wage Act claim.

Conclusion

For the reasons set forth above, the judgment is vacated to the extent that it orders GIE and Goodman jointly and severally to pay $1,711,005.87 to Suominen. Retrial is necessary, however, only on the issue of whether Suominen's continuing his employment at GIE in reliance on Goodman's promises was to his detriment. See One to One Interactive, LLC v. Landrith, 76 Mass.App.Ct. 142, 153, 920 N.E.2d 303
Suominen v. Goodman Indus. Equities Mgmt. Group Llc, 78 Mass.App.Ct. 723, 941 N.E.2d 694 (Mass. App., 2011) (affirming in part and remanding for new trial on single issue). The judgment is affirmed in all other respects, and this matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

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Notes:

1. Steven E. Goodman was a codefendant. The following defendants were joined solely on reach and apply claims: AG/GFI Winston–Salem, LLC; GFI Commerce, LLC; GFI Merrimack, LLC; GFI Littleton, LLC; AG/GFI Hampstead, Inc.; AG/GFI Duncan, LLC; AG/GFI Bradford, LLC; GFI Westminster Square, LLC; GFI Ayer, LLC; GFI Milford, LLC; GFI Tyngsboro, LLC; GFI Telluride, LLC; GFI Bedford, LLC; CB/GFI Salem, LLC; CB/GFI Littleton, LLC; GFI Auburn, LLC; and AG/GFI Worcester, LLC.

2. By the time of trial, GIE, as such, no longer existed. By agreement, the judgment ran against GFI Management, LLC, GIE's successor, even though it was never formally joined as a party.

3. Suominen sued seventeen of these deal entities as reach and apply defendants. See note 1, supra.

4. The parties' Winston–Salem development, which involved an abandoned brewery that was converted into a distribution center and then sold, provides an illustrative example. The property was purchased by one of the deal entities that Goodman had established. Goodman provided a five percent share of the equity funding for the project, and a group of outside investors provided the remainder. The agreement under which the deal entity operated spelled out how any profits generated by the project would be distributed. Generally speaking, the profits were to be paid to the investors (including Goodman) based on their share of the equity. However, once all the investors had achieved a designated rate of return on their equity (fifteen percent), a specific share of the additional profits (twenty-five percent) was to go to Goodman as the developer of the project (on top of the amount he would receive as an investor). That portion was defined as the project's "promote."

5. On an unjust enrichment theory, the jury awarded Suominen $12,968 in damages for the work he performed after July 12, 2004 (with prejudgment interest, $18,237.14). The defendants do not challenge that portion of the judgment on appeal. The jury rejected Suominen's other claims related to his work as a consultant, as well as his claims for unreimbursed business expenses and unused vacation time while he was an employee.

6. Suominen alleged other fall-back theories as well, but those claims are no longer live.

7. As documented by affidavit, this counsel was at the relevant time “the sole attorney covering the matter.” Although a second lawyer (who had jointly tried the case) still had an appearance on file, that lawyer (and other lawyers at the firm) had no knowledge of his colleague's personal crisis and had no reason to doubt that the litigation deadlines would be met.

8. Maciuca v. Papit, 31 Mass.App.Ct. 540, 545–546, 581 N.E.2d 488 (1991), is not to the contrary. There, this court found no excusable neglect after concluding that the lawyer's excuse, his partial disability, had nothing to do with his failure to comply with the rules.

9. The Supreme Judicial Court long ago observed that “the expression 'promissory estoppel' ... tends to confusion rather than clarity.” Loranger Constr. Corp. v. E.F. Hauserman Co., 376 Mass. 757, 761, 384 N.E.2d 176 (1978). In light of this, the trial judge himself referred to Suominen's claim as one for
“detrimental reliance.” Although we see substantial merit in this suggestion, we will employ the more common term “promissory estoppel,” which the Supreme Judicial Court continues to use.

There is no merit to Suominen's suggestion that the failure to receive the promised payments itself can supply the requisite detriment. This would be equivalent to reading the element of detriment out of the cause of action completely.

Our cases do recognize that, with regard to an employee's claim based on ordinary contract, merely continuing one's employment can be sufficient consideration to accept what was effectively a standing offer about the terms of that employment, even where the employer did not intend to make such an offer. See O'Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 693, 664 N.E.2d 843 (1996) (personnel manuals can create enforceable rights). Given the similarity between such “unilateral contracts” and claims of promissory estoppel, it is not entirely clear why one, but not the other, would require more than continued employment to render a promise enforceable. However, absent clarification from the Supreme Judicial Court that continued employment alone is sufficient to establish detrimental reliance in a promissory estoppel claim, we feel compelled to conclude it is not.

To the extent that the animating principle behind the alternative holding in Hall was an assumption that one must prove quantifiable economic loss in order to make out a claim of promissory estoppel, subsequent case law raises some reason to question that assumption. Thus, for example, recent case law makes plain that forbearance of a colorable legal claim alone can make out “legal detriment” without having to demonstrate the ultimate viability of such a claim. See Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Ct., 448 Mass. at 27–28, 858 N.E.2d 699; Cannon v. Cannon, 69 Mass.App.Ct. 414, 422–423, 868 N.E.2d 636 (2007).

We recognize that when Suominen began as a salaried employee, his discussions with Goodman over his incentive-based compensation had not progressed to the point that they could have supported a claim of promissory estoppel. They fairly quickly developed to that point, however, and Suominen continued to work for his depressed salary.

Although the defendants principally focus on the absence of detriment, they also argue that Suominen's reliance on Goodman's promises was unreasonable as matter of law. For example, they suggest that Suominen ignored several obvious “red flags” that should have alerted him that he was not in fact going to receive a share of the promotes. We need not pause long on such arguments. Although cases do recognize that there are situations where any reliance would so obviously be unreasonable that the claim can be resolved as matter of law, see, e.g., Rhode Island Hosp. Trust Natl. Bank v. Varadian, 419 Mass. 841, 850, 647 N.E.2d 1174 (1995), whether reliance was reasonable is more typically treated as a question of fact to be resolved by the jury. See Cannon v. Cannon, 69 Mass.App.Ct. at 423, 868 N.E.2d 636; Nova Assignments, Inc. v. Kunian, 77 Mass.App.Ct. 34, 39, 928 N.E.2d 364 (2010). Suominen presented sufficient evidence of reasonable expectations and behavior to send the matter to the jury.

At this stage, both sides focused on whether Goodman was personally liable and showed less interest in GIE's liability. As Suominen acknowledged to the judge, his ability to reach and apply Goodman's shares of equity in the deal companies depended on Goodman's being found personally liable.

None of the parties cited to rule 49 in their briefs. We raised the potential applicability of the rule at oral argument, and the parties addressed the issue at that time.

This is not to say that the promised payments were to come to Suominen directly from Goodman. But whether the money due to Suominen would have been funneled through GIE (or been paid in a
different manner) appears to have depended entirely on Goodman's discretion. This supports the conclusion that the promises were not being made on behalf of GIE as a stand-alone enterprise.

18. At the time of the relevant violations, treble damages were discretionary, not mandatory. See G.L. c. 149, § 150, second par., as then in effect. Given how we rule, we need not address Suominen's argument that a subsequent statutory amendment (St.2008, c. 80, § 5) should be applied retroactively.

19. Suominen argues that while calculating the amount of the overall promote might be difficult, Suominen was owed 23.33% of whatever promote was paid, and the jury had before them the evidence of what promote payments Goodman had made to himself before Suominen was fired.


21. There is some doubt about whether one can even make out a Wage Act claim where there is no bilateral contract requiring the compensation at issue. We need not reach this issue.
After hearing on Plaintiff's Emergency Motion for Endorsement of Memorandum of Lis Pendens ("Motion") on April 30, 2012, at which both Plaintiffs and Defendant were represented by counsel and heard, the Court entered a temporary restraining order, as later extended by the parties. The Court also allowed further briefing. On May 15, 2012, the defendant, Harold Coxall ("Coxall") submitted his Memorandum in Opposition to Plaintiffs' Emergency Motion for Endorsement of Memorandum of Lis Pendens ("Memorandum"), which included a Special Motion to Dismiss. After review of all written and oral arguments and evidence, the Court ALLOWS the Motion and DENIES the Special Motion to Dismiss.

The Complaint in this case alleges that Coxall owns vacant undeveloped land shown as Lots 2 and 3 on the Plan of Land titled "Plan of Land in Sudbury, MA", prepared by Thomas Dipersio, P.L.S, recorded in the Middlesex South Registry of Deeds as Plan No. 66 of 2010 ("Property"). It also alleges that, through a series of emails, Coxall and the plaintiffs entered into an agreement for the plaintiffs to purchase the Property for $475,000. The parties dispute whether the emails attached to the complaint amount to a written agreement for the purchase of the Property. Coxall denies that the emails reflect an offer and acceptance sufficient to show a present intent to be bound to the purchase and sale. He also denies that the emails constitute a sufficient writing to satisfy the statute of frauds.

I.

The Lis Pendens statute, G. L. c. 194, §15(b), provides in relevant part:
(b) Any party seeking a memorandum of lis pendens under this section shall commence the underlying proceeding by means of a verified complaint or other complaint as is required under the rules of court to include a certification by the claimant made under the penalties of perjury that the complainant has read the complaint, that the facts stated therein are true and that no material facts have been omitted therefrom. The complaint shall name as defendants all owners of record and any party in occupation under a written lease. Upon motion of a party, if the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof or the buildings thereon, a justice of the court in which the action is pending shall make a finding to that effect and endorse the finding upon the memorandum. Notwithstanding the preceding sentence, the court on its own motion may decline to endorse the memorandum of lis pendens, if the court does order the temporary equitable relief as will preserve the status quo pending further proceedings.

The complaint in this case meets the procedural prerequisites of the first two sentences of this section. The plaintiffs have made the necessary motion. They have commenced this action by means of a verified complaint, signed under penalties of perjury by plaintiffs Ian Feldberg and Michael Rogers on April 30, 2012.

The Court finds that the subject matter of the action constitutes a claim of a right to title to real property. In particular, the complaint claims that Coxall must convey title to the Property to the plaintiffs. Despite the dispute over whether a binding, written contract for purchase and sale of the Property exists, there is no question that the "[p]laintiffs seek a declaratory judgment that Coxall is contractually bound to sell the Property to the Plaintiffs on the terms agreed upon." Complaint, ¶ 40.

That claim may or may not be valid and may be vulnerable on a motion to dismiss or motion for summary judgment, but those issues are not before the Court on a motion for endorsement of a memorandum of lis pendens.

We reject [defendant's] argument that, in deciding whether to endorse a memorandum of lis pendens so as to make it property recordable, a judge must determine that the complaint would survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6) . . .

Rather than stating that the judge must rule whether the complaint states a valid claim, §15 speaks of a finding (presumably of fact) and permits an aggrieved party to challenge any finding in the judge's order, if leave to record the memorandum was obtained ex parte. Section 15 does not state what "finding" a judge properly could make beyond the one the statute recites ("the subject matter of the action constitutes a claim of a right" to an interest in real property) . . . . The issues are what is 'the subject matter of the action," and does it consist of a claim of a right to title or use and occupation of real property. The question whether the complaint would survive a rule 12(b)(6) motion to dismiss, without leave to amend, and questions concerning the discharge of the memorandum of lis pendens come at a later stage in the proceedings.
With the mandate that the judge "shall" find and endorse, §15 gives little discretion to the judge once the judge determines that the subject matter of the action concerns an interest in real estate.


Coxall's Memorandum does not address this highly restrictive standard. His arguments about the alleged insufficiency of the parties’ email communications to meet the statute of frauds and to show an intent to be bound are substantial and may well prevail. But that is not the test by which the Court must measure the Motion.

While §15 appears to allow the Court discretion to decline to endorse the memorandum of lis pendens if it enters temporary equitable relief that will preserve the status quo, the Court declines to do so in this case. No one has requested that temporary relief extend beyond the time needed to rule on the Motion. As argued at the hearing, the real harm to Coxall would flow from an inability to convey the property to a third party. A temporary equitable order preserving the status quo would inflict at least as much harm upon Coxall as a *lis pendens* in these circumstances. At least with a *lis pendens*, Coxall would violate no court order by selling to a third party who decides to consummate the purchase after evaluating this litigation. Moreover, temporary relief would presumably require a finding of likelihood of success. At this stage of the proceedings, a memorandum of *lis pendens* is the simpler approach and appropriately allows postponing consideration of the merits, including the adequacy of the complaint or likelihood of success, to a later stage.

Accordingly, the Court has endorsed the Memorandum of Lis Pendens. Coxall's arguments must be decided on the merits at a later stage in this case.

II.

Coxall's Memorandum also contains a special motion to dismiss the plaintiffs' Verified Complaint pursuant to G. L. c. 184, §15(c), which states that the "special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." See generally McMann v. McGowan, 71 Mass. App. Ct. 513 (2008).

Coxall argues first that the complaint fails to include all material facts, in violation of the requirement of G. L. c. 184, §15(b) that the complaint include a certification that "no material facts have been omitted therefrom." "A party's failure to include all material facts may result in the dismissal of that party's claims where the omitted facts establish that those claims are devoid of reasonable factual support or arguable basis in law." McMann, 71 Mass. App. Ct. 719-720 (dismissing case where the complaint misleadingly failed to disclose that a crucial notice was not

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1 Because G. L. c. 184, §15(b) contains no requirement for a finding of good faith, I make no such finding and have deleted the "good faith" language from the draft Memorandum of Lis Pendens submitted by the plaintiffs.
placed "in hand" as required by the contract, but was left on a desk when no one was in the office); Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 81 (2005).

In this case, the allegedly omitted materials concern preliminary discussions that predated the email exchange claimed to constitute the binding agreement, as well as some later, relatively inconsequential emails that add nothing to the legal or factual analysis. Those documents may be relevant as evidence at trial, but they do not rise to the level of materiality that the statute requires before the Court may allow a special motion to dismiss on this basis. See McMann, 71 Mass. App. Ct. at 520 (A 'material fact' is one that is 'significant or essential to the issue or matter at hand.' Black's Law Dictionary 629 (8th ed. 2004). See Dagan v. Jewish Community Hous. For the Elderly, 45 Mass. App. Ct. 511, 513-514 (1998)(in summary judgment context, a material fact is one that is essential to an element in the plaintiffs case).

On the merits of the special motion to dismiss, Coxall falls short of proving that the plaintiffs' claims lack any arguable support and basis in fact or law or are subject to dismissal because of a valid defense such as statute of frauds.

The parties do not seriously dispute the legal test to be applied to the plaintiffs' affirmative case. The question is whether the parties intended to be bound. McCarthy v. Tobin, 429 Mass. 84, 87 (1999). "An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms." Targus Group Intl, Inc. v. Sherman, 76 Mass. App. Ct. 421, 428 (2010). "If . . . the parties have agreed upon all material terms [of the sale], it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." McCarthy, 429 Mass. at 87. The plaintiffs' legal arguments conform to these legal principles and therefore have an ample basis in law.

The parties do strenuously dispute whether the complaint "is devoid of any reasonable factual support." G. L. c. 184, §15(c) (emphasis added). For purposes of evaluating that question, the key exchanges are Attorney Vaughn's email to Coxall and Attorney Lallos dated April 19, 2012 at 8:53 P.M. ("April 19 email") and Coxall's response on Friday, April 20, 2012 ("April 20 email").

The April 19 email attached a "revised offer, with changes to reflect the conversations we have had today." It reserved the plaintiffs' "rights to comment on it." It also suggested that the attorneys work "to have the offer form finalized in time for my clients to sign it and get deposit checks to you before the end of the day tomorrow." Among other things, the draft attached to the April 19 email contained a purchase price, described the property and called for a closing on or before noon on June 1, 2012. In response, Coxall's April 20 email contained some initial information on an "fyi" basis, before concluding that: "[w]e must have a written approval letter

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1 In adopting this shorthand reference, and the April 20 email reference, the Court has not overlooked the other emails sent on those days.
from the bank today by 5pm and I think we are ready to go (I assume they will provide a closing date with the approval). We are almost there." Both emails end with what may be described as a standard e-mail "signature block," showing the author (either Donald E. Vaughan, Burns & Levinson LLP or N.E. Air, Inc., which was Coxall's company), followed by street address and phone numbers.

At 2:18 PM on April 20, the plaintiffs' attorney provided a copy of the commitment letter from the Village Bank. The letter had a number of conditions, including submission of 2011 tax returns, 2012 profit and loss statements and consulting contracts, and a satisfactory appraisal establishing an 80% loan to value ratio. For present purposes, those conditions appear sufficiently within the reasonable expectations of the parties for a commitment letter to be delivered by a bank within such a short time. That is important because of the emphasis Coxall now places upon the requirement in his April 20 email for a bank commitment letter, without specifying what would be acceptable in such a letter. Where the parties have agreed upon terms (such as a commitment letter) but have not defined those terms, the Court infers that they intended a "reasonable" construction of those terms. Cf. Town of Sudbury v. Scott, 439 Mass. 288, (2003) (discussing G. L. c. 61A and common law), citing Stone v. W.E Aubuchon Co., 29 Mass. App. Ct. 523, 526-7 (1990). The plaintiffs have a basis in fact and law to argue that they complied with the demand for a bank commitment letter, because it was reasonable to expect that any quickly-issued commitment letter would contain some conditions (such as documentation of the representations made in the application). They obtained and provided a letter that contained only reasonable and foreseeable conditions.

Coxall also claims that his April 20 email required a closing date. The email itself was much less definite on this point than Coxall's Memorandum claims. It contained only the parenthetical: "(I assume they will provide a closing date with the approval)." The plaintiffs have a basis in law and fact to argue that (1) this was a side observation, and not a condition and (2) Coxall's "assum[ption]" did not relate to a closing date for the sale (which was already included in the plaintiffs' April 19 draft document), but for the mortgage transaction to which Coxall was not a party.

Coxall claims that the "Appeals Court's ruling in Germagian v. Berrini, 60 Mass. App. Ct. 456, 459-60 (2004)) is directly on point and controlling." The Court disagrees. The facts here differ from Germagian in ways that may be material, including, in that case, the purchaser's post-agreement failure to apply for a mortgage and to seek zoning variances. Considering the parties' post-offer conduct, Germagian concluded that "the parties intended the offer to be merely a preliminary step," rather than "a valid, enforceable contract." Here, there is no such post-offer conduct as might lead a fact-finder to conclude that the parties never intended to be bound. There is only what a fact-finder might conclude was Coxall's repudiation of the deal. Coxall cites no other case to demonstrate “that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law . . .”)

That leaves the question whether the complaint "is frivolous because . . . (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." Clause (3) of G. L. c. 184, §15(c) does not contain language similar to the phrases, "devoid of any
reasonable . . . support" or "devoid of any arguable basis" in clauses (1) and (2). Different language often signifies a different meaning. See, e.g. Souza v. Board of Appeals of Motor Vehicle Liability Bonds & Policies, ___ Mass. ___, SJC No. 11123 (May 17, 2012). However, clause (3) follows the phrase "is frivolous" and therefore must be construed to address situations where the defense is so strong as to render the plaintiffs' claim frivolous. That construction effectuates the legislature's intent to provide notice of pending litigation that might result in a judgment for the plaintiff and thereby affect third parties dealing with a specific real estate parcel. See Wolfe v. Gormally, 440 Mass. 699, 702-703, 704 (2004). That purpose applies fully to claims that arguably may survive a defense. If notified of such a claim, "a prospective third-party transferee can, with the exercise of reasonable prudence, acquire information relevant to a decision whether to consummate the transaction." Id., 440 Mass. at 706, quoting Debral Realty, Inc. v. DiChiara, 383 Mass. 559, 562 (1981).

That raises the most difficult legal question in the case: whether an email exchange can satisfy the statute of frauds, G. L. c. 259, §1.3 Neither side cites conclusive authority on this point. That, by itself, may weigh in favor of denying the special motion to dismiss; the plaintiffs' response to the defense has an arguable basis as long as they can mount a good faith argument, which is not difficult on this issue of first impression.

Existing authority, such as it is, suggests that the plaintiffs have a plausible position. See Shattuck v. Klotzbach, 14 Mass. L. Rep. 360 (Super. Ct. 2001)(fact finder "could conclude that the e-mails sent by the defendant were 'signed' with the intent to authenticate the information contained therein as his act.") One Appeals Court case mentions the role of an email exchange in a plaintiff's successful opposition to a motion to dismiss based upon a statute of frauds defense in a related federal case, although the Court's acknowledgement falls well short of a holding (and perhaps falls short of dictum, as well). Munshani v. Signal Lake Venture Fund II LP, 60 Mass. App. Ct. 714, 715-716 (2004)("The federal judge concluded that the e-mail sufficed, at least for purposes of a motion to dismiss, to take the case out of the Statute of Frauds.").4 There is some authority treating, as open, the question whether e-mails, coupled with an unsigned draft agreement, can satisfy the UCC requirement of a signed writing, although the Court in that case found that the particular e-mails from the defendant evidenced no intent to be bound to a contract with the plaintiff. See May Trucking Co. v. Northwest Volvo Trucks, Inc., 238 Or. App. 21, 241 P.3d 727 (2010), review denied, 350 Or. 130, 250 P.3d 922 (2011). The fact that it takes two documents to create a complete contract — or even that the documents "indicated a dispute as to one of the terms of that contract" — is not fatal to a successful opposition to a statute of frauds defense. Waltham Truck Equipment Corp, v. Massachusetts Equipment Company, 7 Mass. App. Ct. 580, 583-584 (1979) (UCC case).

3 In relevant part, the statute provides: "No action shall be brought: . . . Fourth, Upon a contract for the sale of lands . . . or of any interest in or concerning them . . . Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."

4 The e-mail later proved fraudulent, which presented the "fraud on the court" issues addressed in Munshani.
In truth, the Courts have not yet set forth rules of the road for "the intersection between the seventeenth-century statute of frauds and twenty-first century electronic mail." May Trucking, 241 P.3d at 731. The Uniform Electronic Transactions Act, G. L. c. 110G, is one attempt to do so. It applies "to transactions between parties each of which has agreed to conduct transactions by electronic means." G. L. c. 110G, §5. Whether the parties have agreed "is determined from the context and surrounding circumstances, including the parties' conduct." The parties' conduct here in using e-mail to conduct the negotiations in this case arguably constitutes an agreement to conduct transactions by electronic means. It is also true that they contemplated a traditional signed, hard-copy offer at the end of their electronic negotiations. That may not be fatal because G. L. c. 110G recognizes that the parties may choose to conduct transactions by electronic means up to a certain point, thereafter switching to hard copy. See G. L. c. 110G, §5 (c) ("A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. . . ").

Under G. L. c. 110G, §7(d), "[i]f a law requires a signature, an electronic signature satisfies the law." An electronic signature is "an electronic . . . symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The parties' email "signature block" may well meet that test. So may the "from" portion of the email. See May Trucking, 238 Or. App. at 738 (noting the issue). All of these possible arguments provide a reasonable and supportable response to the defense of the statute of frauds in this case.

It follows that Coxall has not met his burden on the special motion to dismiss. The letter and purpose of the lis pendens statute dictate endorsement of the memorandum of lis pendens, to notify third parties of pending litigation in which the plaintiffs have a reasonable basis in fact and in law for their claim and a non-frivolous response to Coxall's defense. Any other conclusion would allow "a buyer without notice of the [pending] litigation" to "nonetheless [be] 'bound by the judgment.'" Wolfe, 440 Mass. at 702, quoting J.L. Bennett, Lis Pendens 65 (1887).

ORDER

For the above reasons, the Plaintiff's Emergency Motion for Endorsement of Memorandum of Lis Pendens is ALLOWED; the Defendant Harold Coxall's Special Motion to Dismiss (Docket No. 7) is DENIED.

Dated: May 22, 2012

Douglas H. Wilkins
Associate Justice, Superior Court
Notes: