

Sympathy/Prejudice

Neither sympathy nor prejudice, for or against the parties, or any other person involved with this case, should influence you in any manner in reaching your verdict. Your deliberations should be well reasoned and impartial.

Important Case

This is an important case to the parties and the Court. You should give it serious and fair consideration.

Corporations

As you know, the plaintiff and defendant are corporations. You should consider this case, however, as an action between persons. A corporation is entitled to the same treatment as a private individual. All persons, including corporations, stand equal before the law.

Evidence in the Case

The evidence in the case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulated facts. When the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved. You may give the stipulated fact, like any other evidence, the weight that you think it deserves.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded.

Arguments/Statements/Objections of the Attorneys

The opening statements and closing arguments of the attorneys, their questions and objections, and all other statements which they made during the course of the trial, are not evidence. The attorneys have a duty to object to evidence which they believe is not admissible. You may not hold it against either side if any attorney feels it is necessary to make an objection.

Evidence – Direct, Indirect, or Circumstantial

There are two types of evidence from which you may find the facts of this case: direct and circumstantial evidence. Direct evidence is the testimony of someone who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove or disprove an issue in the case.

For example, if a witness were to testify that he or she had seen cows in a field, that would be an example of direct evidence that there were cows in a field. On the other hand, if a witness were to testify that he or she had seen fresh cow tracks in the field, that would be an example of

circumstantial evidence that there had been cows in the field.

The law does not require a party to prove its claims or defenses by direct evidence alone, that is, by testimony of an eyewitness. One or more of the essential elements, or all of the essential elements, may be established by reasonable inference from other facts which are established by direct testimony. Circumstantial evidence alone may be sufficient proof.

The law makes no distinction between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should consider all the evidence in the case and give it such weight as you think it deserves.

Deposition Testimony

During the trial of this matter, certain testimony has been read to you by way of a deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more attorneys for the parties to the case. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

Credibility of Witnesses

You are the sole judges of the credibility of the witnesses, and the weight to give their testimony is up to you. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; his or her demeanor while testifying; any interest or bias he or she may have; and the reasonableness of his or her testimony, considered in light of all of the evidence in the case. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit a witness's testimony. Two or more persons witnessing an incident or transaction may see or hear it differently.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, you think it deserves. You may believe all of the testimony of any witness, you may believe it in part and disbelieve it in part, or you may reject it altogether. You do not have to accept the testimony of any witness, even if it is uncontradicted. It is for you to say what you will believe and what you will disbelieve.

Number of Witnesses

The fact that one side may have called more witnesses than the other side is of no significance. Your task is to evaluate the credibility of the witnesses, and to weigh all of the evidence.

Personal Knowledge and Experience of Jurors

In deliberating upon your verdict, you are not expected to put aside your common sense or your own observations or experience of the general affairs of life. However, a juror having special knowledge of a subject may neither state this knowledge to fellow jurors nor act upon it himself or herself in arriving at a verdict. You must not tell your fellow jurors about matters which are based on special knowledge concerning an issue in the case which did not come from the evidence received in the courtroom.

Burden of Proof/Preponderance of the Evidence

In this case, both the plaintiff and defendant have claims. Except for the claim of unilateral mistake which I will explain in a moment, the burden is on the party making the claim to prove every essential element of its claim by a preponderance of the evidence. To “establish by a preponderance of the evidence” means to prove that something is more likely than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds a belief that what is sought to be proved is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. In determining whether a fact, claim, or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Breach of Contract Claims

This is a dispute regarding the purchase and sale of a Bell 230 Helicopter. The parties have asserted competing breach of contract claims.

A party claiming breach of contract must prove the following elements by a preponderance of the evidence:

- 1) that a contract existed;
- 2) the terms of the contract;
- 3) that a material breach of the contract occurred; and
- 4) damages in a quantifiable amount as a result of the breach.

In this case, there is no dispute that Mansfield agreed to sell and Rolico agreed to buy the Bell 230 Helicopter. However, the parties dispute the terms of that agreement.

Contract Terms/Meeting of the Minds

_____ It is for you to decide what the terms of the parties' contract were and whether the material terms were breached. In order to create an agreement, there must be a meeting of the minds between the parties. A meeting of the minds occurs when two or more parties reach an agreement upon a particular issue under negotiation between them.

To determine whether a written contract exists, you must consider whether a written document or documents reflect the parties' meeting of the minds. The words of a contract are generally given their plain and ordinary meaning, unless it is apparent that the term was intended to have a technical meaning. You must also give effect to all material parts of the contract. The separate parts of a contract must be read together as a harmonious whole. That is, you should try to interpret the individual provisions in a way that prevents them from conflicting with each other.

The parties dispute certain terms of their agreement. These disputed terms include the agreed purchase price, closing date, the time for delivery of the Helicopter, whether Rolico had the right to inspect the Helicopter before closing, and whether the parties agreed to a set amount of damages, known as liquidated damages, in the event one party breached the agreement. You must determine these terms, if you can, based on the parties' other oral and written communications and course of conduct with respect to the transaction in dispute.

For example, a closing date may be determined by the express terms of the parties' agreement, or in the alternative, by what is reasonable in light of the parties' communications concerning when they expected to close. The purchase price may also be determined by the parties' oral and written communications and course of conduct.

If you find that there is no meeting of the minds as to a contract term which is essential to a party's breach of contract claim, you must find that particular breach of contract claim has not been established. Of course, this does not prevent you from finding that another disputed contract term has been established and from finding a breach of contract based on that contract term.

Unilateral Mistake

Mansfield claims that paragraph 21 modifies the parties' agreement. Rolico claims that it signed a version of the agreement containing paragraph 21 by mistake, believing that it was signing a prior version of the written contract.

A written agreement may be rescinded based upon one party's unilateral mistake where it is proved that: (1) the agreement was entered into under a mistake as to the facts upon which the agreement was based or as to the terms and stipulations of the agreement; and (2) the mistake did not arise through the fault of either party. The party claiming mistake as a defense to enforcement of a contract, in this case Rolico, has the burden of establishing the mistake by proof beyond a

reasonable doubt. Proof beyond a reasonable doubt is a stricter standard than proof by a preponderance of the evidence. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not speculation, suspicion or sympathy.

Where the mistake occurs as a result of the negligence or inattention of the party seeking to avoid the contract, and the other party is without fault, the defense of mistake will not apply absent unusual circumstances that would make enforcement manifestly unjust. On the other hand, if the mistaken party's negligence or inattention was induced by the other party's fraud, bad faith, or misrepresentation, the mistaken party's negligence or inattention does not preclude it from asserting the mistake defense.

A contracting party is under a duty to read and/or learn the contents of a written contract before signing it. Sophisticated business people are presumed to sign a contract only if they fully understand its terms and conditions. A party who signs a document and who cannot establish unilateral mistake is conclusively bound by its terms.

Determination of Breach

Once you have decided the terms of the parties' agreement, you must determine whether either party breached the agreement. A person or corporation breaches a contract when the conduct of that person or corporation does not comply with the terms of the contract as agreed to by the parties.

Rolico claims that Mansfield breached the agreement to sell the Helicopter to it because Mansfield sold the Helicopter to a third party after Rolico tendered the purchase price. If you find that Rolico has proved by the preponderance of the evidence that there was a contract with agreed upon terms and that Mansfield did not comply with those terms, you must return a verdict for Rolico.

Mansfield claims that it justifiably cancelled the agreement after Rolico breached the agreement. If a party justifiably cancels a contract, he has no further obligation to perform under the contract. If you find that Mansfield has established this claim by a preponderance of evidence, you must return a verdict in favor of Mansfield. However, if you find that Mansfield did not justifiably cancel the agreement, you must return a verdict in favor of Rolico.

In order to prove its claim of justifiable cancellation, Mansfield must prove by a preponderance of the evidence the following:

- (1) The parties had an agreement;
- (2) the terms of the agreement, taking into consideration the instructions previously given to you; and

(3) that Rolico breached the parties' agreement.

In this case, Mansfield asserts that Rolico breached the parties' agreement by failing to close on the Helicopter by the agreed deadline, failing to pay amounts due under their agreement, and by conditioning its release of funds for the purchase of the Helicopter upon new and material contract terms, thereby repudiating the parties' original agreement.

Failure to Timely Close

Mansfield claims that Rolico breached the parties' agreement by failing to timely close on the Helicopter. Parties to a contract may fix any time for performance, including the time for payment and/or delivery, by agreement so long as such time is not "manifestly unreasonable." An agreement to fix the time for performance need not be part of the parties' main agreement, but may occur separately.

The existence of an agreement for the time for performance may be established or shown to exist by an express contract term, as well as by the parties' conduct, the contractual circumstances, usage of trade, or course of dealing or performance.

Where the parties have not otherwise agreed to a time for delivery and a time for payment, delivery must occur within a "reasonable time" and payment is due at the time and place at which the buyer is to receive the goods. What constitutes a "reasonable time" for delivery depends upon "what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken."

Mansfield contends that Rolico agreed to close by December 10, 2006. It also contends that even if the December 10, 2006 date is not controlling, it was unreasonable for Rolico to delay closing until February 22, 2007 in light of the nature, purpose and circumstances of the transaction. Rolico claims that it did not delay the closing and that it acted diligently in moving towards closing once it received the written document from Mansfield. Rolico further claims that problems beyond Rolico's control emerged during the title search that prohibited Rolico from being able to close until February 22, 2007.

You must determine whether Rolico breached the terms of the parties' agreement by failing to timely close on the Helicopter.

Failure to Pay Carrying Costs

Mansfield asserts that Rolico breached the parties' agreement by failing to pay carrying costs due under paragraph 21. Rolico does not dispute that it failed to close on or before December 10, 2006. Accordingly, if you conclude that Rolico is bound by the terms of paragraph 21 and failed to timely pay carrying costs for the Helicopter when due under the terms of paragraph 21, you must conclude that Rolico breached the parties' agreement. Rolico claims that it is not bound by paragraph 21, and that even if it is, it only agreed that \$25,000 could be added to the purchase price.

If you find that paragraph 21 is not controlling, you must determine the terms of the parties' agreement concerning payment of carrying costs.

A contracting parties' failure to timely make payments due under a contract is generally deemed to constitute a material breach.

Repudiation of Agreement

As stated above, a party breaches a contract when its conduct does not comply with the terms of the contract as agreed. A party also breaches a contract by anticipatorily repudiating the contract.

A party repudiates a contract when that party expressly or implicitly represents an intention not to perform or to perform only on conditions that go beyond the original agreed upon contract terms, and such nonperformance substantially impairs the value of the contract.

Here, Mansfield claims that Rolico repudiated (and therefore breached) the parties' original agreement by conditioning its release of funds for the purchase of the Helicopter upon Mansfield's agreement to new and material contract terms. Rolico denies that it conditioned the release of funds on new contract terms and asserts that it attempted to negotiate new contract terms since Mansfield was not in a position to deliver the Helicopter at the time of closing. Rolico claims that Mansfield was the party that repudiated the agreement because Mansfield could not deliver the Helicopter prior to closing and did not permit inspection prior to closing on the Helicopter and, finally, sold the Helicopter to a third party. You must find whether Rolico or Mansfield repudiated the parties' agreement.

Excusal of Breach

A contracting party may be excused from performance under a contract if the other party commits a "material" breach of the contract. A material breach is one that goes to the root or essence of the agreement between the parties.

Here, Rolico claims that if it did default, its alleged default was excused because Mansfield breached the agreement by failing to: (a) deliver the Helicopter at the time of closing; (b) complete Rolico's requested modifications to the Helicopter in advance of closing; and (c) provide Rolico with the opportunity to inspect the Helicopter in advance of closing. Rolico has the burden of proving the elements of this claim by a preponderance of the evidence.

You must decide whether Rolico's default, if any, was excused by any material breach of the parties' agreement by Mansfield. In reaching this conclusion, you must decide: (i) whether Mansfield was required to deliver the modified Helicopter simultaneously with closing; (ii) whether, under the circumstances, Mansfield was required to complete Rolico's requested modifications in all material respects in advance of closing; or (iii) whether Mansfield's obligation to complete the requested modifications was suspended as a result of (a) Rolico's expressed intention that it would not timely close on the Helicopter and (b) Rolico's failure to

provide adequate assurances of its ability to close on the Helicopter in a timely fashion.

Cure of Breach

Rolico asserts that even if it breached the parties' agreement by not timely closing on the Helicopter or paying carrying costs, it cured the breach by depositing all funds due into escrow pursuant to Mansfield's February 14, 2007 notice of default letter. Mansfield claims that Rolico failed to cure its default because it did not timely authorize the release of funds held in escrow to Mansfield, but instead withheld its authorization for the release of funds and conditioned the release of funds upon Mansfield's agreement to materially new contract terms. If you find that Rolico breached the parties' agreement, you must determine whether Rolico cured its breach under the circumstances presented.

General Instructions on Awarding Damages

The fact that I am about to instruct you as to the proper measure of damages should not be considered as the Court's opinion that any party has established any of its claims or defenses.

If you find that Mansfield did not justifiably cancel the parties' agreement, Rolico is entitled to recover \$211,822 paid to Mansfield as deposits to secure the purchase of the Helicopter and to begin modifying the Helicopter prior to delivery. However, if Mansfield proves by a preponderance of the evidence that Rolico breached the parties' agreement, you will need to decide the amount of Mansfield's damages, if any.

Mansfield must prove by a preponderance of the evidence that it sustained damages and that its damages are a proximate cause of Rolico's conduct. This means Mansfield's damages were either a direct result or a reasonably probable consequence of Rolico's conduct.

Liquidated Damages

You must determine whether the parties had a meeting of the minds regarding liquidated damages. If you find that the parties agreed to liquidated damages, you must determine whether they are as set forth in paragraph 21 or as set forth in paragraph 16 of the agreement sent by Rolico.

Actual Damages

If you find that the parties did not agree to a liquidated damages provision, you may award Mansfield its actual damages, if proven. If you find that the parties did agree to a liquidated damages provision, you may also award Mansfield additional non-duplicative damages. This means damages not covered by the liquidated damages clause.

Mansfield is entitled to be placed in as good a position as it would occupy if Rolico had performed the parties' agreement in full.

Mansfield seeks to recover all incidental damages resulting from Rolico's breach of the agreement. Mansfield claims the following incidental damages: (a) the cost of modifying the Helicopter to meet the needs of Rolico and the subsequent buyer upon resale; (b) insurance on the Helicopter; (c) commissions paid in connection with the resale of the Helicopter; (d) storage costs; and (e) interest/finance charges resulting from Rolico's breach.

Mansfield has the burden of proving such damages with reasonable certainty and must demonstrate that they were commercially reasonable.

Speculative Damages Not Permitted

Because Mansfield's damages are economic, it must prove them to your satisfaction in dollars and cents. You may not award damages that are speculative in nature.

Duplication of Damages Must Be Avoided

You have been instructed on the two theories of damages asserted by Mansfield: liquidated damages and actual damages. You should be careful not to award damages for one item which duplicates an award for another item.

Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and all the reasonable inferences to be drawn from such evidence.

Mitigation of Damages

Under the law, a party seeking an award of damages must make reasonable attempts to minimize or eliminate those damages. If you find that either party has failed to mitigate its damages, your award must not include compensation for any such failure.

Court Costs, Attorney's Fees and Interest

If you find Mansfield and/or Rolico is entitled to any damages, you may not include in your award any sum for costs or attorney's fees. Furthermore, you are not to include any amount for interest. These are matters for the Court.

Jury Deliberations/Unanimous Verdict

The verdict must represent the considered judgment of each juror. In order to return a verdict you must all agree. Your verdict must be unanimous.

You must consult with one another. You must try to reach an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your views and change your opinions if you are convinced they are wrong. But do not surrender your honest opinion as to the weight or effect of evidence solely because of

the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

If you need to communicate with me, you should send a note through the Court Officer, signed by your foreperson. You should not tell anyone how the jury stands numerically or otherwise until after you have reached a unanimous verdict and you have been discharged. Even then you need not speak to anyone about this case unless you want to.

When you have reached a verdict, tell the Court Officer that you have reached a verdict, but do not tell the Officer what the verdict is. You will then be brought into the courtroom where I shall ask you if you have reached a verdict, and, if you have, what it is.

CONCLUDING INSTRUCTIONS

Juror Note Taking

During the trial, you have been provided with pencil and paper, and some of you have taken notes. As I have explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the proceedings be read back. If a difference still exists, the record must prevail over your notes. I will now describe the process for a read back.

Recollection of Evidence

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or part of these instructions, you may do the following:

- (1) Write out your question, and have the foreperson sign it;
- (2) Knock on the door of the jury room; and
- (3) Deliver your note to the Court Officer, to give to me.

After the attorneys have been consulted, and the record has been reviewed, I shall decide what action to take. And I shall tell you my ruling.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson acts as a chairperson or moderator. It is your duty to see that discussions are carried out in a sensible and orderly manner and to see that the issues submitted for the jury's decision are fully and fairly discussed, and that every juror has a chance to say what he or she thinks upon every question.

When ballots should be taken, you will see that it is done. You will act as the jury's spokesperson in the courtroom. In all other respects, the foreperson is the same as every other juror. His or her votes or opinions do not count more or less than those of his or her fellow jurors.

Ladies and gentlemen of the jury, you may now take the case and retire to begin your deliberations.

Dated at Burlington, Vermont this 19th day of March, 2010.

Christina Reiss
United States District Judge