QUAKE CONSTRUCTION, INC. v. AMERICAN AIRLINES, INC.

Illinois Supreme Court
141 Ill. 2d 281, 565 N.E.2d 990 (1990)

JUSTICE CALVO delivered the opinion of the court:

Plaintiff, Quake Construction, Inc. (Quake), filed a four-count, third-amended complaint against defendants, American Airlines, Inc. (American), and Jones Brothers Construction Corporation (Jones). In count I, plaintiff sought damages for breach of contract. Plaintiff based counts II, III and IV on detrimental reliance, waiver of condition precedent, and impossibility of contract, respectively. Upon defendants' motion, the circuit court of Cook County dismissed the complaint with prejudice, pursuant to section 2--615 of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2--615). On appeal, the Appellate Court, First District, with one justice dissenting, reversed the dismissal of counts I, II and III, affirmed the dismissal of count IV, and remanded the cause to the circuit court. (181 Ill. App. 3d 908.) We granted defendants' petition for leave to appeal (107 Ill. 2d R. 315).

Quake alleged in its complaint the following facts. In February 1985, American hired Jones to prepare bid specifications, accept bids, and award contracts for construction of the expansion of American's facilities at O'Hare International Airport. Quake received an invitation to bid on the employee facilities and automotive maintenance shop project (hereinafter referred to as the project), and in April 1985 submitted its bid to Jones. Jones orally notified Quake that Quake had been awarded the contract for the project. Jones then asked Quake to provide the license numbers of the subcontractors Quake intended to use on the project. Quake notified Jones that the subcontractors would not allow Quake to use their license numbers until Quake submitted a signed subcontract agreement to them. Jones informed Quake that Quake would shortly receive a written contract for the project prepared by Jones. To induce Quake to enter into agreements with its subcontractors and to induce the subcontractors to provide Quake and Jones with their license numbers, Jones sent Quake the following letter of intent dated April 18, 1985:

> "We have elected to award the contract for the subject project to your firm as we discussed on April 15, 1985. A contract agreement outlining the detailed terms and conditions is being prepared and will be available for your signature shortly.
>
> Your scope of work as the general contractor includes the complete installation of expanded lunchroom, restroom and locker facilities for American Airlines employees as well as an expansion of American Airlines existing Automotive Maintenance Shop. The project is located on the lower level of 'K' Concourse. A sixty (60) calendar day period shall be allowed for the construction of the locker room, lunchroom and restroom area beginning the week of April 22, 1985. The entire project shall be complete by August 15, 1985.
>
> Subject to negotiated modifications for exterior hollow metal doors and interior ceramic floor tile material as discussed, this notice of award authorizes the work set forth in the following documents at a lump sum price of $ 1,060,568.00.

a) Jones Brothers Invitation to Bid dated March 19, 1985.
b) Specifications as listed in the Invitation to Bid.
c) Drawings as listed in the Invitation to Bid.
d) Bid Addendum #1 dated March 29, 1985.

Quake Construction Inc. shall provide evidence of liability insurance in the amount of $ 5,000,000 umbrella coverage and 100% performance and payment bond to Jones Brothers Construction Corporation before commencement of the work. The contract shall include MBE, WBE and EEO goals as established by your bid proposal. Accomplishment of the City of Chicago's residency goals as cited in the Invitation to Bid is also required. As agreed, certificates of commitment from those MBE firms designated on your proposal modification submitted April 13, 1985, shall be provided to Jones Brothers Construction Corporation.

Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement."

Jones and Quake thereafter discussed and orally agreed to certain changes in the written form contract. Handwritten delineations were made to the form contract by Jones and Quake to reflect these changes. Jones advised Quake it would prepare and send the written contract to Quake for Quake's signature. No such formal written contract, however, was entered into by the parties.

At a preconstruction meeting on April 25, 1985, Jones told Quake, Quake's subcontractors, and governmental officials present that Quake was the general contractor for the project. On that same date, immediately after the meeting, American informed Quake that Quake's involvement with the project was terminated. Jones confirmed Quake's termination by a letter dated April 25, 1985. The damages Quake allegedly suffered included the money it spent in procuring the contract and preparing to perform under the contract, and its loss of anticipated profit from the contract.

The main issue is whether the letter of intent from Jones to Quake is an enforceable contract such that a cause of action may be brought by Quake. This court has previously set forth the principles of law concerning the enforceability of letters of intent:

"The fact that parties contemplate that a formal agreement will eventually be executed does not necessarily render prior agreements mere negotiations, where it is clear that the ultimate contract will be substantially based upon the same terms as the previous document. [Citation.] If the parties * * * intended that the * * * document be contractually binding, that intention would not be defeated by the mere recitation in the writing that a more formal agreement was yet to be drawn. However, parties may specifically provide that negotiations are not binding until a formal agreement is in fact executed. [Citation.] If the parties construe the execution of a formal agreement as a condition precedent, then no contract arises unless and until that formal agreement is executed." *Chicago Investment Corp. v. Dolins* (1985), 107 Ill. 2d 120, 126-27.

See *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.* (1986), 114 Ill. 2d 133, 143-44.…Thus, although letters of intent may be enforceable, such letters are not necessarily enforceable unless the parties intend them to be contractually binding. *Interway*, 85 Ill. App. 3d at 1098.

A circuit court must initially determine, as a question of law, whether the language of a purported contract is ambiguous as to the parties' intent. (*Interway*, 85 Ill. App. 3d at 1098.) If no ambiguity exists in the writing, the parties' intent must be derived by the circuit court, as a matter of law, solely from the writing itself. (*Interway*, 85 Ill. App. 3d at 1098; see *Schek v. Chicago Transit Authority* (1969), 42 Ill. 2d 362, 364.) If the terms of an alleged contract are ambiguous or capable of more than one interpretation, however, parol evidence is admissible to ascertain the parties' intent. (*Borg-Warner Corp. v. Anchor Coupling Co.* (1958), 16 Ill. 2d 234, 242; *Interway*, 85 Ill. App. 3d at 1098.) If the language of an alleged contract is ambiguous regarding the parties' intent, the interpretation of the language is a question of fact which a circuit court cannot properly determine on a motion to dismiss. *Interway*, 85 Ill. App. 3d at 1098.

In determining whether the parties intended to reduce their agreement to writing, the following factors may be considered: whether the type of agreement involved is one usually put into writing, whether the agreement contains many or few details, whether the agreement involves a large or small amount of money, whether the agreement requires a formal writing for the full expression of the covenants, and whether the negotiations indicated that a formal written document was contemplated at the completion of the negotiations. (*Ceres*, 114 Ill. 2d at 144; *Chicago*, 107 Ill. 2d at 124.) Other factors which may be considered are: "where in the negotiating process that process is abandoned, the reasons it is abandoned, the extent of the assurances previously given by the party which now disclaims any contract, and the other party's reliance upon the anticipated completed transaction." *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.* (N.D. Ill. 1988), 678 F. Supp. 193, 196, *aff'd*(7th Cir. 1989), 873 F.2d 155.

A motion to dismiss a complaint admits all well-pleaded facts, but does not admit conclusions of law or conclusions of fact not supported by allegations of specific facts. (*Pierce v. Carpentier* (1960), 20 Ill. 2d 526, 531.) Any reasonable inferences which may be drawn from such well-pleaded facts, however, must be taken as true for purposes of the motion. (*Interway*, 85 Ill. App. 3d at 1097.) "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover." (*Walker v. Rumer* (1978), 72 Ill. 2d 495, 502; *Interway*, 85 Ill. App. 3d at 1097.) On appeal from the dismissal of a complaint, "a reviewing court should interpret the facts alleged in the complaint in the light most favorable to the plaintiff." *Interway*, 85 Ill. App. 3d at 1097.

The circuit court in the case at bar dismissed Quake's complaint, relying principally on the following sentence in the letter: "Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement" (hereinafter referred to as the cancellation clause). The parties agreed during oral arguments that the subcontract agreement referred to in the cancellation clause concerned an agreement between Jones and Quake. Jones was the general contractor for the entire expansion project. Jones hired Quake as a subcontractor to handle only the work on the employee facilities and automotive shop. Quake, in turn, hired subcontractors to perform this work. The circuit court determined, based on

the cancellation clause, that the parties agreed not to be bound until they entered into a formal written contract. Consequently, the circuit court held that the letter was not an enforceable contract and accordingly dismissed the complaint.

The appellate court, however, found the letter ambiguous. The appellate court explained:

> "In the 'Letter of Intent,' Jones Brothers stated that it had 'elected to award the contract for the subject project to [plaintiff's] firm.' Jones Brothers then described the scope of work required of plaintiff as the general contractor for the Project. Jones Brothers gave the location of the Project and the time schedule for the Project. Jones Brothers also stated that 'this notice of award authorizes the work set forth in the following documents at a lump sum price of $ 1,060,568.00.' (The list of documents is omitted.) Jones Brothers also stated that plaintiff 'shall provide evidence of liability insurance' and certificates of commitment from MBE firms designated in plaintiff's proposal modification of April 13, 1985. These statements evince the intent of the parties to be bound by the 'Letter of Intent.' (*See Chicago Investment Corp.*, 93 Ill. App. 3d at 975 (court held that letter of intent did not 'unambiguously demonstrate that the parties to it did not intend to be bound thereby.' The letter contained a description of the properties, the total price, the earnest money amount and certain other terms.)) The schedule for completion of the Project supports this construction of the 'Letter of Intent.' The 'Letter of Intent' is dated April 18, 1985. However, Jones Brothers stated in the 'Letter of Intent' that work was to begin 'the week of April 22, 1985, and must be completed by August 15, 1985.' A reasonable inference from these facts is that the parties intended that work on the Project would begin prior to execution of a formal contract and would be governed by the terms of the 'Letter of Intent.'
>
> On the other hand, Jones Brothers stated in the 'Letter of Intent' that a 'contract agreement outlining the detailed terms and conditions is being prepared and will be available for [plaintiff's] signature shortly.' Jones Brothers also stated that the contract 'shall include MBE, WBE and EEO goals as established by [plaintiff's] bid proposal.' These statements support the construction that the parties did not intend to be bound by the 'Letter of Intent.'
>
> The 'Letter of Intent' then concludes with the statement that 'Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.' This statement is itself ambiguous and supports both constructions of the 'Letter of Intent.' The statement may be construed as a condition precedent which would prevent formation of a contract if the parties could not agree on the terms of the contract. However, there would be little need to provide for cancellation of the 'Letter of Intent' if the parties did not intend to be bound by it. Further, the statement implies that the parties could be bound by the 'Letter of Intent' in the absence of a fully executed subcontract agreement." (181 Ill. App. 3d at 913-14.)

Thus, the appellate court disagreed with the circuit court and held that a question of fact existed with regard to the parties' intent. (181 Ill. App. 3d at 914.) The appellate court held further that "a determination of the parties' intent could not have been made solely on the basis of the 'Letter of Intent.'" (181 Ill. App. 3d at 914.) The appellate court stated the circuit court "should have considered parol evidence in making its determination." (181 Ill. App. 3d at 914.) Therefore, the appellate court reversed the circuit court's dismissal of the complaint and remanded the cause to the circuit court. 181 Ill. App. 3d at 916.

Justice McNamara, in his dissent from the opinion of the appellate court majority, stated "the letter of intent unambiguously demonstrates the parties' intent to make the execution of a formal agreement a condition precedent to a binding contract." (181 Ill. App. 3d at 916 (McNamara, J., dissenting).) Therefore, Justice McNamara stated he would have affirmed the circuit court's dismissal of the complaint. Justice McNamara asserted the cancellation clause clearly and unambiguously demonstrated the parties' intent not to be bound by the letter, and he noted several courts have found such language unambiguous. According to Justice McNamara, the detailed terms of the agreement set forth in the letter "reveal nothing more than the tentative, inconclusive nature of the agreement." (181 Ill. App. 3d at 918 (McNamara, J., dissenting).) He asserted that such terms are usually included in any initial request for bids, and he pointed to several cases where courts found letters of intent unambiguous even though the letters included considerably detailed information regarding the terms of the agreements. 181 Ill. App. 3d at 918 (McNamara, J., dissenting)….

We agree with the appellate court majority's analysis and its conclusion that the letter was ambiguous. Consequently, we affirm the decision of the appellate court. The letter of intent included detailed terms of the parties' agreement. The letter stated that Jones awarded the contract for the project to Quake. The letter stated further "this notice of award authorizes the work." Moreover, the letter indicated the work was to commence approximately 4 to 11 days after the letter was written. This short period of time reveals the parties' intent to be bound by the letter so the work could begin on schedule. We also agree with the appellate court that the cancellation clause exhibited the parties' intent to be bound by the letter because no need would exist to provide for the cancellation of the letter unless the letter had some binding effect. The cancellation clause also implied the parties' intention to be bound by the letter at least until they entered into the formal contract. We agree with the appellate court that all of these factors evinced the parties' intent to be bound by the letter.

On the other hand, the letter referred several times to the execution of a formal contract by the parties, thus indicating the parties' intent not to be bound by the letter. The cancellation clause could be interpreted to mean that the parties did not intend to be bound until they entered into a formal agreement. Therefore, the appellate court correctly concluded that the letter was ambiguous regarding the parties' intent to be bound by it.

Defendants contend the letter of intent did not contain all of the terms necessary for the formation of a construction contract. Defendants assert construction contracts typically include terms regarding payment, damages and termination. Defendants argue the detail in the contract is usually extensive if the value and complexity of the construction project are great. Defendants also note the letter stated the contract would include the detailed terms and conditions of the parties'

agreement. The letter indicated *the contract* would include the MBE, WBE and EEO (Minority Business Enterprise, Women's Business Enterprise, and Equal Employment Opportunity, respectively) goals established by Quake's bid proposal. Defendants point out the letter stated certain terms of the agreement still had to be negotiated. Without the formal contract, defendants assert, the parties could not have continued toward the completion of the project because the letter excluded many terms of the agreement which would have been included in the contract. Defendants thus argue the absence in the letter of all the terms of the agreement reveals the parties' intent not to be bound by the letter.

The appellate court stated the number and extent of the terms in the letter can indicate the parties' intent to be bound by the letter. The final contract only need be *substantially based* on the terms in the letter as long as the parties intended the letter to be binding. (*Chicago*, 107 Ill. 2d at 126-27.) Many of the details regarding the project were included in the letter. The letter adopted by reference the contents of certain documents which included even further details concerning the project. We agree Jones accepted the MBE, WBE and EEO goals established by Quake. The letter merely indicated that those goals would be reiterated in the contract. We acknowledge that the absence of certain terms in the letter indicates the parties' intent not to be bound by the letter. This only confirms our holding that the letter is ambiguous as to the parties' intent….

Defendants contend even if the letter contained all of the essential terms of a contract, the cancellation clause negated any inference that the parties intended to be bound by the letter. The clause, according to defendants, clearly established the parties' intent not to be so bound. Defendants argue the letter only sets forth the provisions which would be included in the contract if one is ever executed. Defendants point out both the circuit court and the appellate court dissent found the cancellation clause unambiguously declared the parties' intent not to be bound until the parties entered into a formal contract.

We do not find defendants' argument persuasive. The appellate court stated that, in addition to the detailed terms of the parties' agreement, the letter also contained a sentence in which Jones said it awarded the contract for the project to Quake. Moreover, the letter stated "this notice of award *authorizes* the work." (Emphasis added.) Furthermore, the appellate court pointed out, the letter was dated April 18, while at the same time the letter indicated that Quake was to begin work the week of April 22 and complete the work by August 15. We agree with the appellate court's conclusion that a "reasonable inference from these facts is that the parties intended that work on the Project would begin prior to execution of a formal contract and would be governed by the terms of the 'Letter of Intent.'" (181 Ill. App. 3d at 914.) All of these factors indicate the negotiations were more than merely preliminary and the parties intended the letter to be binding. The factors muddle whatever otherwise "clear" intent may be derived from the cancellation clause.

Defendants acknowledge the letter was dated April 18 and it stated the work would commence the week of April 22. Defendants point out that the letter also indicated Jones would submit a formal contract to Quake "shortly." Defendants argue a contract could conceivably have been written and signed within that period of time. Defendants conclude the appellate court's assumption regarding the date of the letter and the commencement of the work was invalid. While defendants' interpretation of these facts is plausible, we believe it only lends credence to our

conclusion the letter is ambiguous concerning the parties' intent. Thus, the trier of fact should decide which interpretation is valid….

Defendants further contend that the cancellation clause is not ambiguous. Defendants assert parties may agree, in a letter of intent, to the course of, and discontinuance of, their negotiations. Defendants argue the letter of intent in the case at bar merely reflects the parties' agreement regarding the course of their negotiations.

We, like the appellate court, find the cancellation clause itself ambiguous as to the parties' intent. We do not agree with defendants' assertion that the cancellation clause so clearly indicates the parties' intent not to be bound by the letter that the clause negates other evidence in the letter of the parties' intent to be bound. The clause can be construed as a condition precedent to the formation of a contract. The clause, however, also states that Jones can "cancel" the letter. As the appellate court noted, if the parties did not intend to be bound by the letter, they had no need to provide for its cancellation. We also agree with the appellate court that the cancellation clause "implies that the parties could be bound by the 'Letter of Intent' in the absence of a fully executed subcontract agreement." (181 Ill. App. 3d at 914.) Thus, the ambiguity within the cancellation clause itself enhances the other ambiguities in the letter.…

Defendants allege that the appellate court's decision puts the continued viability of letters of intent at risk. Defendants contend if we uphold the appellate court's decision finding the cancellation clause ambiguous, negotiating parties will have difficulty finding limiting language which a court would unquestionably consider unambiguous. We disagree. Courts have found letters of intent unambiguous in several cases referred to in this opinion. (See *Interway*, 85 Ill. App. 3d 1094; *Terracom Development Group, Inc. v. Coleman Cable & Wire Co.* (1977), 50 Ill. App. 3d 739.) Furthermore, contract cases each turn on their own particular set of facts. (*Borg-Warner*, 16 Ill. 2d at 242.) Thus, the existence or absence of particular language or words will not ensure that a letter of intent is unambiguous. Our decision here follows the settled law in Illinois concerning letters of intent: The intent of the parties is controlling.

Neither we nor the appellate court have decided whether in fact a contract exists, that is, whether the parties intended to be bound by the letter. We merely hold that the parties' intent, based on the letter alone, is ambiguous. Therefore, upon remand, the circuit court must allow the parties to present other evidence of their intent. The trier of fact should then determine, based on the evidence and the letter, whether the parties intended to be bound by the letter….

For the foregoing reasons, we affirm the decision of the appellate court.

Affirmed.

JUSTICE STAMOS, specially concurring:

Because dismissal is unwarranted unless clearly no set of facts can be proved under the pleadings that will entitle a plaintiff to recover, I agree with the majority …. Thus, I concur in the judgment.

However, even though the Jones letter of intent is just ambiguous enough for Quake's complaint to survive a motion to dismiss, I consider that any interpretation of the letter's language as potentially establishing an underlying construction contract is far less plausible than the majority implies. It would be unfortunate if the court's affirmance and remand were construed as encouraging, on the basis of the letter's barely ambiguous text, any ultimate factual finding of intent to be bound to an underlying contract. Moreover, the misuse of letters of intent by parties seemingly wishing to have their contractual cake and eat it too, or wishing merely to fudge the contract issue, ought to evoke judicial disapproval. Therefore, I write separately.

Contrary to the majority's conclusion that "[t]he letter stated that Jones awarded the contract * * * to Quake" (141 Ill. 2d at 293), the letter stated simply that Jones had "elected to award" the underlying construction contract to Quake "as we discussed on April 15" (141 Ill. 2d at 286). Though Quake separately alleged (141 Ill. 2d at 285) an earlier oral statement by Jones that the contract had indeed been "awarded" to Quake, that allegation is not necessarily confirmed by the language of the letter.

Use of the word "elected," when combined both with the limiting reference to an earlier discussion of unspecified nature and with the other conditions set forth in the letter, may well be interpreted to mean simply that Jones had "decided" or "chosen" to award the construction contract to Quake--in much the same way as a homeseeker might decide to purchase a certain house he had toured, or a merchant to order products like those exhibited at a trade fair, or a homeowner to buy one brand of paint rather than others she had seen. In no such case is the mere act of decision, or election, equivalent to an actual offer or acceptance; neither of the latter occurs until the decision is translated into binding words or deeds. Before that occurs, the decision may need fortifying through further negotiation or investigation, and the prospective purchaser may ultimately decide against the transaction. See, *e.g.*, J. Calamari & J. Perillo, The Law of Contracts § 2--6, at 35 (3d ed. 1987) (hereinafter Calamari & Perillo) (offers distinguished from statements of intention); 1 S. Williston, A Treatise on the Law of Contracts §§ 26 through 28 (Jaeger 3d ed. 1957) (hereinafter Williston) (offers distinguished from expressions of intention, preliminary negotiations, and agreements preliminary to written contracts).

The question here, then, is whether the written recital that Jones had "elected" to award the construction contract could itself be considered as actually binding Jones to such a contract. The matter is not as clear as the majority appears to believe. Some terms of the letter may tend to support existence of a construction contract; other terms cast doubt on it; but the "election" term is so ambiguous as to do neither.

Moreover, the recital that work was to begin some 4 to 11 days after the date of the letter does not "reveal" an intent to be bound to a construction contract (141 Ill. 2d at 293-94), particularly since the letter's opening paragraph spoke of "shortly" preparing and tendering a "contract agreement." As defendants persuasively argue, it is quite possible to finish drafting and to present a formal contract in less time than four days. (*Cf.* Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217, 252 & n.138 (1987) (hereinafter *Precontractual Liability*) (citing "stop-gap agreements" permitting contractors to begin work while parties negotiate construction contracts).) At most, this work-schedule language and the election language *hint* at an intent to be bound to a construction contract,

but as evidence of such an intent I believe they are far less weighty than is the contrary evidence furnished by the letter's explicit and cautionary references to a forthcoming formal contract. Thus, I disagree with the majority's apparently evenhanded assessment of the evidence on this point, even though the trier of fact is correctly acknowledged to have the last word in the event that ambiguity in the letter's text prevents the court from ruling as a matter of law. 141 Ill. 2d at 297.

I am especially troubled by the majority's apparent view that, in regard to a construction contract, the letter's cancellation clause equally bespeaks an intent to be bound and an intent not to be bound. The parties are said to have had "no need to provide for its cancellation" if they did not intend to be bound by the letter, and the clause itself is said to imply that the parties could be bound by the letter if no "fully executed subcontract agreement" resulted. (141 Ill. 2d at 301.) This view of the cancellation clause seems to turn it on its head and to pervert any legitimate office of letters of intent.

Instead of weighing as heavily for as against a construction contract, in my judgment the cancellation clause powerfully militates against any finding of such contract. The very language of the clause treats such a contract ("a fully executed subcontract agreement") as future possibility rather than present reality. Yet the majority would allow transmuting this prospective bargain into current obligation, by confusing a hoped-for construction contract with a cancellable preliminary expression of intent. Much as word is a shadow of deed, or wish may be father to thought (Democritus frag. 145; W. Shakespeare, Henry IV, Pt. II, act IV, sc. v, l. 91), a letter of intent may lead to a contract, but it is not necessarily the contract itself.

The cancellation clause refers expressly to cancelling the *letter*, not to cancelling the construction contract that the letter anticipates. A construction contract certainly would bind the parties to that contract's terms, but upon acceptance by Quake the letter here would much more plausibly be viewed as, at most, only binding the parties to efforts at achieving a construction contract on the terms outlined. …

In formalistic contract parlance, there was mutual consideration for the letter. Consideration moving to Quake included (1) Jones' implied promise of efforts to negotiate and enter into an already partly defined construction contract with Quake and (2) Jones' conferral upon Quake of the ability to use the letter to obtain subcontractors' license numbers. Consideration moving to Jones included (1) Quake's own promise of efforts to contract with Jones and (2) Quake's additional promise of efforts to contract with subcontractors.

Hence, the letter itself, as distinguished from the anticipated construction contract, may be regarded as a contract in its own right: a contract to engage in negotiations. If so, it was this contract, not the anticipated construction contract, that might be cancelled by Jones pursuant to the cancellation clause. Indeed, the notion of cancelling a construction contract not yet entered into lacks meaning.

Conceivably, the letter's arguable status as a contract to negotiate might be attacked on grounds that, because only Jones was given the right to cancel, the cancellation clause defeated mutuality of obligation. However, if such an attack succeeded, it would prove too much. It would mean not only that the letter had lost its character as a negotiation contract but also that any view

of the letter as embodying the anticipated construction contract had become even more misguided. A telling point is that the majority's sympathy for reading the letter as establishing a construction contract fails to take account of this nonmutuality question.

… Yet, one might ask in reply: If the letter required only an effort to achieve a construction contract, and if failure of the effort would necessarily prevent any such contract from arising to bind the parties, how could the issue of cancelling a mere letter ever take on enough significance to explain inclusion of the cancellation clause? For an answer, the nature, and misuse, of letters of intent should be considered.

"A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." (Restatement (Second) of Contracts § 26 (1981).) In this connection, it is well recognized that "the use of promissory expressions or words of assent" in nonoffer manifestations of willingness may constitute merely "something to be shown to a third person to influence his action." (Restatement (Second) of Contracts § 26, comment *e* (1981); see Comment, *Devil's Advocate: Salvaging the Letter of Intent*, 37 Emory L.J. 139, 142 (1988).) This seems an apt description of the letter of intent in the present case, designed as it was in part to induce Quake's proposed subcontractors to furnish Quake and Jones with their license numbers.

If Quake had simply submitted a bid to Jones and if, after Jones had named Quake as subcontractor in Jones' own bid as general contractor, Quake had proceeded with the work pursuant to Jones' instructions, Quake might be able to establish a contract based on Jones' assent to Quake's bid as manifested by Jones' conduct, even if Jones contended that no contract with Quake existed. See *United States v. O. Frank Heinz Construction Co.* (S.D. Ill. 1969), 300 F. Supp. 396, cited in Restatement (Second) of Contracts § 22, illus. 1 (1981); 1 Corbin § 30, at 100-03 (1963 & Supp. 1990) (if terms are definite and complete enough, prime contractor's use of subcontractor's bid to secure prime contract may consummate subcontract even though not reduced to contemplated formal instrument) (citing, *inter alia, Frank Horton & Co. v. Cook Electric Co.* (7th Cir. 1966), 356 F.2d 485 (finding contract where prime contractor used subcontractor's bid to obtain prime contract, advised that subcontractor's bid would be accepted, issued two letters of intent regarding anticipated formal subcontract, asked subcontractor to start moving material to jobsites, but then rejected subcontractor's bid)). But see generally 1 Corbin § 24B (Supp. 1990).

However, this is not such a simple case. In this case, the letter of intent contained language arguably giving Quake reason to know that Jones did not intend to be bound until other terms were assented to. (See Restatement (Second) of Contracts § 27, comment *b* (1981); *cf. Borg-Warner Corp. v. Anchor Coupling Co.* (1958), 16 Ill. 2d 234, 238-39 (issuer of "letter of intent" assured recipient that it was offer and that open terms were minor details).) It also does not seem that Jones used Quake's bid in a bid by Jones to become general contractor; rather, Jones seems merely to have been American's prehired agent to review bids and award contracts to such parties as Quake. Moreover, though Quake alleges efforts to procure the contract and preparations to perform under it, Quake apparently proceeded with none of the actual work under its asserted construction contract.

It has been authoritatively said that, where a document contains limiting words signifying that a subsequent expression of assent is required, the limiting words "will in nearly all cases be held to show that an operative assent has not yet been given." (1 Corbin § 22, at 64.) Parties may express an intent to be bound without a formal document, but they can also "maintain complete immunity from all obligation, even though they have expressed agreement orally or informally upon every detail of a complex transaction." (1 Corbin § 30, at 98.) The matter is ordinarily a question of fact. Calamari & Perillo § 2--8; 1 Corbin § 30, at 97; see also Holmes, *The Freedom Not to Contract*, 60 Tul. L. Rev. 751 (1986) (arguing that freedom is limited by doctrines of reliance, fair dealing, and good faith but recognizing that issue of intent remains jurisprudentially paramount).

Businesspersons' letters of intent are "usually understood to be non-committal statements preliminary to a contract," but in some circumstances a commitment may have been made; in these fact-intensive cases the decisions have varied widely. (Calamari & Perillo §§ 2--6(c), (i); see *Precontractual Liability*, 87 Colum. L. Rev. at 258-62.) Because of their susceptibility to unexpected interpretations, it is easy to understand why letters of intent have been characterized by at least one practitioner as "an invention of the devil." See Comment, *Devil's Advocate: Salvaging the Letter of Intent*, 37 Emory L.J. 139, 139 n.1 (1988) (citing characterization).

Vexed questions frequently arise in determining whether parties' use of language amounts to contract or only to preliminary negotiation. (See, *e.g.*, 1 Corbin § 30; 1 Williston §§ 27 through 28A.) "It would be difficult to find a less predictable area of contract law." (*Precontractual Liability*, 87 Colum. L. Rev. at 259-60.) Accordingly, practitioners should take care not to allow the value of predictability in obligation to be outweighed by zeal for influencing third, or even second, parties through letters of intent.

In light of the foregoing, several hypotheses suggest themselves for explaining the present letter of intent's cancellation clause:

> Because the letter can be regarded as creating an obligation on Jones to attempt to achieve a construction contract, existence of the clause might be explained as a device by which Jones could put an end to its obligation to negotiate.
>
> The fact that this letter, like many others, was intended to induce action by third parties furnishes another possible explanation for including the cancellation clause: It would give Jones a way to put an end to any further inducement based on Jones' once-expressed intention.
>
> A third possible explanation lies in the possibility that, as a result of the parties' subsequent conduct (such as commencement of construction work by Quake), an uncancelled letter of intent might become a link in a chain leading to a finding of contract.
>
> Still another possible explanation lies in the fact that, commercially if not legally, letters of intent have a certain weight as trustworthy indicators of business

> decisions; accordingly, an issuer might wish to cancel a letter once a decision had changed, in order not to mislead those who might otherwise rely on it.

Any or all of these possibilities would adequately explain the clause, without any need whatever to conclude that the clause betokens an intent to be bound to a construction contract thought to be embodied in the letter. See also *Precontractual Liability*, 87 Colum. L. Rev. at 257-58 (discussing other possible rationales for clause).

If letters of intent are to be used, their drafters would be well advised to avoid ambiguity on the point of whether the issuers are bound. As ever, obscurantist language can produce desired practical effects in the short term, but can well lead eventually to litigation and undesired contractual obligations. Extreme examples exist. (See, *e.g.*, Note, *The $ 10.53 Billion Question--When Are the Parties Bound?: Pennzoil and the Use of Agreements in Principle in Mergers and Acquisitions*, 40 Vand. L. Rev. 1367 (1987).) Some counsel and clients may opt for ambiguity on grounds of expediency and may account for the probability of resultant litigation costs in the clients' overall business decision-making, but many others could benefit from more precision. In turn, counsel for recipients of such letters should remain alert to the likelihood that the instruments lack contractual force. …