[Excerpts from Texaco v. Pennzoil]

Court of Appeals of Texas,
Houston (1st Dist.).

TEXACO, INC., Appellant,
v.
PENNZOIL, CO., Appellee.

No. 01-86-0216-CV.

Feb. 12, 1987.
Rehearings Denied April 24 and May 26, 1987.

Before WARREN, JACK SMITH and SAM BASS, JJ.

OPINION

WARREN, Justice.

This is an appeal from a judgment awarding Pennzoil damages for Texaco's tortious interference with a contract between Pennzoil and the "Getty entities" (Getty Oil Company, the Sarah C. Getty Trust, and the J. Paul Getty Museum).

The jury found, among other things, that:

(1) At the end of a board meeting on January 3, 1984, the Getty entities intended to bind themselves to an agreement providing for the purchase of Getty Oil stock, whereby the Sarah C. Getty Trust would own 4/7 th of the stock and Pennzoil the remaining 3/7 th; and providing for a division of Getty Oil's assets, according to their respective ownership if the Trust and Pennzoil were unable to agree on a restructuring of Getty Oil by December 31, 1984;

(2) Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities;

(3) As a result of Texaco's interference, Pennzoil suffered damages of $7.53 billion;

(4) Texaco's actions were intentional, willful, and in wanton disregard of Pennzoil's rights; and,

(5) Pennzoil was entitled to punitive damages of $3 billion.

The main questions for our determination are: (1) whether the evidence supports the jury's finding that there was a binding contract between the Getty entities and Pennzoil, and that Texaco knowingly induced a breach of such contract; (2) whether the trial court properly instructed the jury on the law pertinent to the case; (3) whether the evidence supported the jury's damage awards; (4) whether the trial court committed reversible error in its admission and exclusion of certain evidence; (5) whether the conduct and posture of the trial judge denied Texaco a fair trial; and (6) whether the judgment violates certain articles of the United States Constitution.

Though many facts are disputed, the parties' main conflicts are over the inferences to be drawn from, and the legal significance of, these facts. There is evidence that for several months in late 1983, Pennzoil had followed with interest the well-publicized dissension between the board of directors of Getty Oil Company and Gordon Getty, who was a director of Getty Oil and also the owner, as trustee, of approximately 40.2% of the outstanding shares of Getty Oil. On December 28, 1983, Pennzoil announced an unsolicited, public tender offer for 16 million shares of Getty Oil at $100 each.

Soon afterwards, Pennzoil contacted both Gordon Getty and a representative of the J. Paul Getty Museum, which held approximately 11.8% of the shares of Getty Oil, to discuss the tender offer and the possible purchase of Getty Oil. In the first two days of January 1984, a "Memorandum of Agreement" was drafted to reflect the terms that had been reached in conversations between representatives of Pennzoil, Gordon Getty, and the Museum.

Under the plan set out in the Memorandum of Agreement, Pennzoil and the Trust (with Gordon Getty as trustee) were to become partners on a 3/7 ths to 4/7 ths basis respectively, in owning and operating Getty Oil. Gordon Getty was to become chairman of the board, and Hugh Liedtke, the chief executive officer of Pennzoil, was to become chief executive officer of the new company.

The Memorandum of Agreement further provided that the Museum was to receive $110 per share for its 11.8% ownership, and that all other outstanding public shares were to be cashed in by the company at $110 per share. Pennzoil was given an option to buy an additional 8 million shares to achieve the desired ownership ratio. The plan also provided that Pennzoil and the Trust were to try in good faith to agree upon a plan to restructure Getty Oil within a year, but if they could not reach an agreement, the assets of Getty Oil were to be divided between them, 3/7 ths to Pennzoil and 4/7 ths to the Trust.

The Memorandum of Agreement stated that it was subject to approval of the board of Getty Oil, and it was to expire by its own terms if not approved at the board meeting that was to begin on January 2. Pennzoil's CEO, Liedtke, and Gordon Getty, for the Trust, signed the Memorandum of Agreement before the Getty Oil board meeting on January 2, and Harold Williams, the president of the Museum, signed it shortly after the board meeting began. Thus, before it was submitted to the Getty Oil board, the Memorandum of Agreement had been executed by parties who together controlled a majority of the outstanding shares of Getty Oil.

The Memorandum of Agreement was then presented to the Getty Oil board, which had previously held discussions on how the company should respond to Pennzoil's public tender offer. A self-tender by the company to shareholders at $110 per share had been proposed to defeat Pennzoil's tender offer at $100 per share, but no consensus was reached.

The board voted to reject recommending Pennzoil's tender offer to Getty's shareholders, then later also rejected the Memorandum of Agreement price of $110 per share as too low. Before recessing at 3 a.m., the board decided to make a counter-proposal to Pennzoil of $110 per share plus a $10 debenture. Pennzoil's investment banker reacted to this price negatively. In the morning of January 3, Getty Oil's investment banker, Geoffrey Boisi, began calling other companies, seeking a higher bid than Pennzoil's for the Getty Oil shares.

When the board reconvened at 3 p.m. on January 3, a revised Pennzoil proposal was presented, offering $110 per share plus a $3 "stub" that was to be paid after the sale of a Getty Oil subsidiary ("ERC"), from the excess proceeds over $1 billion. Each shareholder was to receive a pro rata share of these excess proceeds, but in any case, a minimum of $3 per share at the end of five years. During the meeting, Boisi briefly informed the board of the status of his inquiries of other companies that might be interested in bidding for the company. He reported some preliminary indications of interest, but no definite bid yet.

The Museum's lawyer told the board that, based on his discussions with Pennzoil, he believed that if the board went back "firm" with an offer of $110 plus a $5 stub, Pennzoil would accept it. After a recess, the Museum's president (also a director of Getty Oil) moved that the Getty board should accept Pennzoil's proposal provided that the stub be raised to $5, and the board voted 15 to 1 to approve this counter-proposal to Pennzoil. The board then voted themselves and Getty's officers and advisors indemnity for any liability arising from the events of the past few months. Additionally, the board authorized its executive compensation committee to give "golden parachutes" (generous termination benefits) to the top executives whose positions "were likely to be affected" by the change in management. There was evidence that during another brief recess of the board meeting, the counter- offer of $110 plus a $5 stub was presented to and accepted by Pennzoil. After Pennzoil's acceptance was conveyed to the Getty board, the meeting was adjourned, and most board members left town for their respective homes.

That evening, the lawyers and public relations staff of Getty Oil and the Museum drafted a press release describing the transaction between Pennzoil and the Getty entities. The press release, announcing an agreement in principle on the terms of the Memorandum of Agreement but with a price of $110 plus a $5 stub, was issued on Getty Oil letterhead the next morning, January 4, and later that day, Pennzoil issued an identical press release.

On January 4, Boisi continued to contact other companies, looking for a higher price than Pennzoil had offered. After talking briefly with Boisi, Texaco management called several meetings with its in-house financial planning group, which over the course of the day studied and reported to management on the value of Getty Oil, the Pennzoil offer terms, and a feasible price range at which Getty might be acquired. Later in the day, Texaco hired an investment banker, First Boston, to represent it with respect to a possible acquisition of Getty Oil. Meanwhile, also on January 4, Pennzoil's lawyers were working on a draft of a formal "transaction agreement" that described the transaction in more detail than the outline of terms contained in the Memorandum of Agreement and press release.

On January 5, the Wall Street Journal reported on an agreement reached between Pennzoil and the Getty entities, describing essentially the terms contained in the Memorandum of Agreement. The Pennzoil board met to ratify the actions of its officers in negotiating an agreement with the Getty entities, and Pennzoil's attorneys periodically attempted to contact the other parties' advisors and attorneys to continue work on the transaction agreement.

The board of Texaco also met on January 5, authorizing its officers to make an offer for 100% of Getty Oil and to take any necessary action in connection therewith. Texaco first contacted the Museum's lawyer, Lipton, and arranged a meeting to discuss the sale of the Museum's shares of Getty Oil to Texaco. Lipton instructed his associate, on her way to the meeting in progress of the lawyers drafting merger documents for the Pennzoil/Getty transaction, to not attend that meeting, because he needed her at his meeting with Texaco. At the meeting with Texaco, the Museum outlined various issues it wanted resolved in any transaction with Texaco, and then agreed to sell its 11.8% ownership in Getty Oil.

That evening, Texaco met with Gordon Getty to discuss the sale of the Trust's shares. He was informed that the Museum had agreed to sell its shares to Texaco. Gordon Getty's advisors had previously warned him that the Trust shares might be "locked out" in a minority position if Texaco bought, in addition to the Museum's shares, enough of the public shares to achieve over 50% ownership of the company. Gordon Getty accepted Texaco's offer of $125 per share and signed a letter of his intent to sell his stock to Texaco, as soon as a California temporary restraining order against his actions as trustee was lifted.

At noon on January 6, Getty Oil held a telephone board meeting to discuss the Texaco offer. The board voted to withdraw its previous counter-proposal to Pennzoil and unanimously voted to accept Texaco's offer. Texaco immediately issued a press release announcing that Getty Oil and Texaco would merge.

Soon after the Texaco press release appeared, Pennzoil telexed the Getty entities, demanding that they honor their agreement with Pennzoil. Later that day, prompted by the telex, Getty Oil filed a suit in Delaware for declaratory judgment that it was not bound to any contract with Pennzoil. The merger agreement between Texaco and Getty Oil was signed on January 6; the stock purchase agreement with the Museum was signed on January 6; and the stock exchange agreement with the Trust was signed on January 8, 1984.

INSUFFICIENCY OF THE EVIDENCE

In Points of Error 46 through 56, Texaco contends that the evidence at trial was legally and factually insufficient to support the jury's answers to Special Issues 1 and 2.

The parties agree that in our review, we are required to apply the substantive law of New York and the procedural law of Texas.

There are two standards of review for questions attacking the sufficiency of the evidence: (1) legal insufficiency and (2) factual insufficiency review. In reviewing legal insufficiency points or "no evidence" points, we must consider only the evidence tending to support the finding, viewing it in the light most favorable to the finding, giving effect to all reasonable inferences that may properly be drawn from that evidence, and disregarding all contrary or conflicting evidence. *King v. Bauer,* 688 S.W.2d 845 (Tex.1985); *Garza v. Alviar,* 395 S.W.2d 821 (Tex.1965). A "no evidence" point must be sustained if we find a complete absence of evidence of probative force or only a scintilla of evidence to support the finding, or if the evidence tending to support the finding must be disregarded because it is legally incompetent. If there is more than a scintilla of probative evidence to support the finding, the point must be overruled. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Texas L.Rev. 361 (1960).

In reviewing factual insufficiency points, we must consider all of the evidence in the record that is relevant to the fact finding being challenged. *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951). We must sustain a "factual insufficiency" point if we determine that the finding of a vital fact is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. *Id.,* 150 Tex. at 664-65, 244 S.W.2d at 661; Calvert, 38 Tex.L.Rev. 361.

Texaco argues first that there was no evidence or there was insufficient evidence to support the jury's answers to Special Issue No. 1. The jury found that the Trust, the Museum, and Getty Oil Company intended to bind themselves to an agreement with Pennzoil containing certain enumerated terms at the end of the Getty Oil Company board meeting on January 3, 1984. Texaco claims that not only is there insufficient evidence of any intent to be bound but also that the "agreement" referred to in Special Issue No. 1 is too indefinite to be a legally enforceable contract.

Second, Texaco asserts that the evidence is legally and factually insufficient to support the jury's answer to Special Issue No. 2, which inquired whether Texaco knowingly interfered with any agreement that the jury had found between Pennzoil and the Getty entities. Texaco contends that there is insufficient evidence that it had actual knowledge of a legally enforceable contract, or that Texaco actively induced a breach of the alleged contract. Texaco further asserts that the alleged contract was not valid and enforceable, because it was based on a mutual mistake, because it would violate SEC Rule 10b-13 and the statute of frauds, and because it would be a breach by Gordon Getty and by the Getty Oil directors of their fiduciary duties; thus, Texaco argues, the alleged contract will not support a tort action for inducement of breach.

SPECIAL ISSUE NO. 1

Texaco contends that under controlling principles of New York law, there was insufficient evidence to support the jury's finding that at the end of the Getty Oil board meeting on January 3, the Getty entities intended to bind themselves to an agreement with Pennzoil.

Pennzoil responds that the question of the parties' intent is a fact question, and the jury was free to accept or reject Texaco's after-the-fact testimony of subjective intent. Pennzoil contends that the evidence showed that the parties intended to be bound to the terms in the Memorandum of Agreement plus a price terms of $110 plus a $5 stub, even though the parties may have contemplated a later, more formal document to memorialize the agreement already reached. Pennzoil also argues that the binding effect of the Memorandum of Agreement was conditioned only upon approval of the board, not also upon execution of the agreement by a Getty signator.

Under New York law, if parties do not intend to be bound to an agreement until it is reduced to writing and signed by both parties, then there is no contract until that event occurs. *Scheck v. Francis,* 26 N.Y.2d 466, 311 N.Y.S.2d 841, 260 N.E.2d 493 (1970). If there is no understanding that a signed writing is necessary before the parties will be bound, and the parties have agreed upon all substantial terms, then an informal agreement can be binding, even though the parties contemplate evidencing their agreement in a formal document later. *Municipal Consultants & Publishers, Inc. v. Town of Ramapo,* 47 N.Y.2d 144, 417 N.Y.S.2d 218, 220, 390 N.E.2d 1143, 1145 (1979); *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 74 (2d Cir.1984).

If the parties do intend to contract orally, the mere intention to commit the agreement to writing does not prevent contract formation before execution of that writing, *Winston v. Mediafare Entertainment Corp.,* 777 F.2d 78, 80 (2d Cir.1985), and even a failure to reduce their promises to writing is immaterial to whether they are bound. *Schwartz v. Greenberg,* 304 N.Y. 250, 107 N.E.2d 65 (1952).

However, if either party communicates the intent not to be bound before a final formal document is executed, then no oral expression of agreement to specific terms will constitute a binding contract. *Winston,* 777 F.2d at 80; *R.G. Group,* 751 F.2d at 74.

Thus, under New York law, the parties are given the power to obligate themselves informally or only by a formal signed writing, as they wish. *R.G. Group,* 751 F.2d at 74. The emphasis in deciding when a binding contract exists is on intent rather than on form. *Reprosystem, B.V. v. SCM Corp.,* 727 F.2d 257, 261 (2d Cir.), *cert. denied,* 469 U.S. 828, 105 S.Ct. 110, 83 L.Ed.2d 54 (1984).

It is the parties' expressed intent that controls which rule of contract formation applies. To determine intent, a court must examine the words and deeds of the parties, because these constitute the objective signs of such intent. *Winston,* 777 F.2d at 80; *R.G. Group,* 751 F.2d at 74. Only the outward expressions of intent are considered--secret or subjective intent is immaterial to the question of whether the parties were bound. *Porter v. Commercial Casualty Insurance Co.,* 292 N.Y. 176, 54 N.E.2d 353 (1944).

Several factors have been articulated to help determine whether the parties intended to be bound only by a formal, signed writing: (1) whether a party expressly reserved the right to be bound only when a written agreement is signed; (2) whether there was any partial performance by one party that the party disclaiming the contract accepted; (3) whether all essential terms of the alleged contract had been agreed upon; and (4) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected. *Winston,* 777 F.2d at 80; *R.G. Group,* 751 F.2d at 76.

Evaluating the first factor, Texaco contends that the evidence of expressed intent not to be bound establishes conclusively that there was no contract at the time of Texaco's alleged inducement of breach. Texaco argues that this expressed intent is contained in (1) the press releases issued by the Getty entities and Pennzoil, which stated that "the transaction is subject to execution of a definitive merger agreement"; (2) the phrasing of drafts of the transaction agreement, which Texaco alleges "carefully stated that the parties' obligations would become binding only 'after the execution and delivery of this Agreement' "; and (3) the deliberate reference by the press releases to the parties' understanding as an "agreement in principle."

[1] In its brief, Texaco asserts that, as a matter of

black letter New York law, the "subject to" language in the press release established that the parties were not then bound and intended to be bound only after signing a definitive agreement, citing *Banking & Trading Corp. v. Reconstruction Finance Corp.,* 147 F.Supp. 193, 204 (S.D.N.Y.1956), *aff'd,* 257 F.2d 765 (2d Cir.1958). The court in that case stated that "if the agreement is expressly subject to the execution of a formal contract, this intent must be respected and no contract found until then." However, the court went on to say that where intent is less sharply expressed, the trier of fact must determine it as best he can. *Id.* at 204-05. Although the intent to formalize an agreement is some evidence of an intent not to be bound before signing such a writing, it is not conclusive. *Id.* at 204. The issue of when the parties intended to be bound is a fact question to be decided from the parties' acts and communications. *Id.; see Chromalloy American Corp. v. Universal Housing Systems of America, Inc.,* 495 F.Supp. 544, 550 (S.D.N.Y.1980), *aff'd,* 697 F.2d 289 (2d Cir.1982).

The press release issued first by Getty, then by Pennzoil, on January 4, 1984, stated:

> Getty Oil Company, The J. Paul Getty Museum and Gordon Getty, as Trustee of the Sarah C. Getty Trust, announced today that they have agreed in principle with Pennzoil Company to a merger of Getty Oil and a newly formed entity owned by Pennzoil and the Trustee.
>
> In connection with the transaction, the shareholders of Getty Oil ... *will* receive $110 per share cash plus the right to receive a deferred cash consideration in a formula amount. The deferred consideration *will* be equal to a pro rata share of the ... proceeds, in excess of $1 billion, ... of ERC Corporation, ... and *will* be paid upon the disposition. In any event, under the formula, each shareholder *will* receive at least $5 per share within five years.
>
> Prior to the merger, Pennzoil *will* contribute approximately $2.6 billion in cash and the Trustee and Pennzoil *will* contribute the Getty Oil shares owned by them to the new entity. Upon execution of a definitive merger agreement, the ... tender offer by a Pennzoil subsidiary for shares of Getty Oil stock *will* be withdrawn.
>
> The agreement in principle also provides that Getty Oil *will* grant to Pennzoil an option to purchase eight million treasury shares for $110 per share.
>
> The transaction is *subject to* execution of a definitive merger agreement, approval by the stockholders of Getty Oil and completion of various governmental filing and waiting period requirements.
>
> Following consummation of the merger, the Trust *will* own 4/7 ths of the ... stock of Getty Oil and Pennzoil *will* own 3/7 ths. The Trust and Pennzoil have also agreed in principle that following consummation of the merger they *will* endeavor in good faith to agree upon a plan for restructuring Getty Oil [within a year] and that if they are unable to reach such an agreement then they *will* cause a division of assets of the company. (Emphasis added.)

Any intent of the parties not to be bound before signing a formal document is not so clearly expressed in the press release to establish, as a matter of law, that there was no contract at that time. The press release does refer to an agreement "in principle" and states that the "transaction" is subject to execution of a definitive merger agreement. But the release as a whole is worded in indicative terms, not in subjunctive or hypothetical ones. The press release describes what shareholders *will* receive, what Pennzoil *will* contribute, that Pennzoil *will* be granted an option, etc.

The description of the transaction as subject to a definitive merger agreement also includes the need for stockholder approval and the completion of various governmental filing and waiting requirements. There was evidence that this was a paragraph of routine details, that the referred to merger agreement was a standard formal document required in such a transaction under Delaware law, and that the parties considered these technical requirements of little consequence.

There is also an arguable difference between a "transaction" being subject to various requirements and the formation of the agreement itself being dependent upon completion of these matters. In *F.W. Berk & Co. v. Derecktor,* 301 N.Y. 110, 92 N.E.2d 914 (1950), cited in Texaco's brief, the defendant's very acceptance of the plaintiff's order was made subject to the occurrence of certain events. The court defined the phrase "subject to" as being the equivalent of "conditional upon or depending on" and held that making the acceptance of an offer subject to a condition was not the kind of assent required to make it a binding promise. However, making the acceptance of an offer conditional, or expressly making an agreement itself conditional, is a much clearer expression of an intent not to be bound than the use of the more ambiguous word "transaction."

Other cases cited by Texaco involved writings that specifically stated that no party would be committed until a written contract was executed. *See, e.g.,* *Reprosystem, B.V.,* 727 F.2d at 260 (draft agreements clearly stated that formal execution was required before the contract would have any binding effect); *Chromalloy American Corp.,* 495 F.Supp. at 547-48 (letter of intent stated that neither party would be committed until a contract was executed). Yet, despite the clear language of reservation in those cases, the parties' intent to be bound was still evaluated as a question of fact to be determined from all the circumstances of the case. *Reprosystem, B.V.,* 727 F.2d at 261- 62; *Chromalloy American Corp.,* 495 F.Supp. at 550.

So it is here. Regardless of what interpretation we give to the conditional language in the press release, we conclude that it did not so clearly express the intent of the parties not to be bound to conclusively resolve that issue, as Texaco asserts.

[2] Texaco also contends that explicit language of reservation in drafts of Pennzoil's transaction agreement indicates the parties' expressed intent not to be bound without a signed writing. Texaco asserts that "Pennzoil's lawyers carefully stated that the parties' obligations would become binding only 'after the execution and delivery of this Agreement.' "

That assertion is not accurate. In fact, "after the execution and delivery of this Agreement" was merely used as an introductory phrase before each party's obligations were described, e.g., after the execution and delivery of this Agreement, Pennzoil shall terminate the tender offer; ... Pennzoil and the Company shall terminate all legal proceedings; ... the Company shall purchase all shares held by the Museum; etc. Other clauses in the transaction agreement did not contain that phrase, e.g., the Company *hereby* grants to Pennzoil the option to purchase up to 8 million shares of treasury stock; *on or prior to the effective date,* Pennzoil and the Trustee shall form the merging company; etc.

A reasonable conclusion from reading the entire drafts is that the phrase "after the execution and delivery of this Agreement" was used chiefly to indicate the timing of various acts that were to occur, and not to impose an express precondition to the formation of a contract. *Compare* *Reprosystem, B.V.,* 727 F.2d at 262 ("when executed and delivered," the agreement would become "a valid and binding agreement"). Again, the language upon which Texaco relies does not so clearly express an intent not to be bound to resolve that issue or to remove the question from the ambit of the trier of fact.

Next, Texaco states that the use of the term "agreement in principle" in the press release was a conscious and deliberate choice of words to convey that there was not yet any binding agreement. Texaco refers to defense testimony that lawyers for Getty Oil and the Museum changed the initial wording of the press release from "agreement" to "agreement in principle" because they understood and intended that phrase to mean that there was no binding contract with Pennzoil.

Texaco cites *Mine Safety Appliance Co. v. Energetics Science, Inc.,* No. 75 Civ. 4925, slip op. at 3, n. 2 (S.D.N.Y., Feb. 5, 1980), an unreported case where the court in dicta characterized an agreement in principle as "a far cry from a final contract." However, the court in that case acknowledged that intent to be bound was a fact issue. A motion to declare an alleged agreement binding and enforceable was denied, because the court found that a question of material fact had been raised on whether the non-movants intended to be bound. In another of Texaco's cited cases, *Debreceni v. Outlet Co.,* 784 F.2d 13, 18 (1st Cir.1986), an *offer* was subject to the execution of definitive agreements of sale, and the agreement itself provided that it would become a binding obligation only after execution. Applying New York law, the court stated that the parties would not be bound until a written agreement was executed *if that was their intention.*

Pennzoil and Texaco presented conflicting evidence at trial on the common business usage and understanding of the term "agreement in principle." Texaco's witnesses testified that the term is used to convey an invitation to bid or that there is no binding contract. Pennzoil's witnesses testified that when business people use "agreement in principle," it means that the parties have reached a meeting of the minds with only details left to be resolved. There was testimony by Sidney Petersen, Getty Oil's chief executive officer, that an "agreement in principle" requires the parties to proceed to try to implement the details of the agreement in good faith, and that that was the case with the agreement in principle with Pennzoil.

[3][4] The jury was the sole judge of the credibility of the witnesses and was entitled to accept or reject any testimony it wished, as well as to decide what weight to give the testimony. *Rego Co. v. Brannon,* 682 S.W.2d 677, 680 (Tex.App.--Houston [1st Dist] 1984, writ ref'd n.r.e.). There was sufficient evidence at trial on the common business usage of the expression "agreement in principle" and on its meaning in this case for the jury reasonably to decide

that its use in the press release did not necessarily establish that the parties did not intend to be bound before signing a formal document.

A second factor that may indicate whether the parties intended to be bound only by a signed, formal writing is whether there was partial performance by one party that the party disclaiming the contract accepted. *Winston,* 777 F.2d at 80; *R.G. Group,* 751 F.2d at 76.

Texaco asserts that there was no partial performance that would indicate an intent to be bound, but conversely, that the conduct of the parties here was inconsistent with the existence of a binding contract.

Texaco points out that Pennzoil amended its tender offer statement with the SEC on January 4, stating its intent to withdraw the tender offer "if" a definitive merger agreement was executed. Pennzoil filed a copy of the press release to update its SEC statement. Texaco claims that Pennzoil would have been required to withdraw the tender offer under SEC rule 10b-13, 17 C.F.R. § 240.10b-13 (1985), if a binding contract had existed on that date. These contentions will be discussed later in this opinion. Texaco also argues that Getty Oil and the other Getty entities demonstrated a belief that no contract existed yet by actively soliciting other bids for the purchase of Getty Oil and by representing to Texaco that they were free to deal.

Pennzoil points out that Texaco's alleged interference with Pennzoil's agreement occurred scarcely 48 hours after the agreement came into existence, and there was very little time for any performance under the agreement to have occurred. Pennzoil asserts that there was affirmative partial performance nevertheless, in that representatives of Pennzoil and the Trust worked to coordinate the issuance of a joint press release, as provided by the Memorandum of Agreement upon approval of the plan, and also in that Pennzoil made arrangements to have $1 billion in cash available for the payment of the Museum's shares in escrow.

[5][6] Other than the preliminary financial arrangements made by Pennzoil, we find little relevant partial performance in this case that might show that the parties believed that they were bound by a contract. However, the absence of relevant part performance in this short period of time does not compel the conclusion that no contract existed. Texaco has pointed out that there was some conduct inconsistent with the existence of an intent to be bound to a contract. But partial performance, and on the other hand, conduct that is inconsistent with an intent to be bound, are again merely circumstances that the finder of fact could consider in reaching a decision on whether the parties intended to be bound. The evidence on the parties' conduct was presented to the jury, which could either accept or reject the inferences the parties asked it to draw from these facts.

The next factor showing intent to be bound is whether there was agreement on all essential terms of the alleged agreement. Texaco contends that numerous items of "obvious importance" were still being negotiated at the time Pennzoil claims a contract had been formed.

First, Texaco asserts that there was no agreement on which party would buy the Museum's stock. Pennzoil contends that its contract was formed on January 3, and that intent to be bound must be determined as of that date. The jury specifically found, in response to Special Issue No. 6, that at the end of the January 3 board meeting, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement that provided that Getty Oil would purchase the Museum's shares forthwith as provided in the Memorandum of Agreement. There is evidence in the record to support this finding.

The Copley notes of the Getty Oil board meeting (made by Ralph Copley, General Counsel, and Secretary of the Board of Getty Oil) reflect that at the board meeting on January 3, all but one of Getty's directors voted to accept "the Pennzoil proposal," provided that the price being paid per share was $110 plus a minimum $5 stub. The testimony is sharply conflicting on exactly what the "Pennzoil proposal" was that the board approved, as are the inferences that could be drawn from the record of that board meeting.

Texaco's witnesses testified that the Getty board approved only a price proposal by Pennzoil, a basis upon which to negotiate further, and not the other terms originally presented to the board in the Memorandum of Agreement, which Texaco contends was rejected by the board and never considered again after that first vote. Pennzoil's evidence showed that the only "Pennzoil proposal" before the board was the terms contained in the Memorandum of Agreement, which among other things provided that Getty Oil was to buy the Museum's shares. The Memorandum of Agreement was signed by representatives of Pennzoil and of the Museum and the Trust, holders of a majority of Getty's shares, and was subject only to approval of the board of Getty Oil. The terms described in the press release issued by the Getty entities and then by Pennzoil the next day correspond to those contained in the Memorandum of Agreement except for the higher price term.

[7] It was the jury's task to judge the credibility of the witnesses, to resolve conflicts in the factual evidence, and to decide which inferences to draw from the evidence presented. *LeMaster v. Fort Worth Transit Co.,* 138 Tex. 512, 160 S.W.2d 224 (1942). The reviewing court may not substitute its own opinion for that of the jury on these matters. We find that there was sufficient evidence to support the jury's finding that at the end of the Getty Oil board meeting on January 3, the parties had reached agreement on Getty's purchase of the Museum's shares.

There was evidence that the parties were made aware, on January 4, that Getty's purchase of the Museum's shares might trigger a tax penalty applicable to sales of stock between charitable trusts and related entities. It was agreed that this possibility had to be explored, and further discussions developed the alternative of having Pennzoil, rather than Getty Oil, buy the Museum's shares. The Museum's attorney drafted an escrow agreement to effect Pennzoil's purchase of those shares. There was testimony that Pennzoil also began making arrangements to have the necessary cash available in escrow.

There is sufficient evidence to refute Texaco's assertion that the question of who would buy the Museum's shares was a significant open issue that the parties had not agreed upon at the time Pennzoil contends, and the jury found, the parties intended to be bound. Nor does the conflicting evidence of events after January 3 compel the conclusion that the parties considered it a problem that Pennzoil, rather than Getty Oil, would be buying the Museum's shares.

There was evidence that the Museum's main concerns were price protection and that its shares would be purchased at once. The Museum's attorney suggested that any potential tax problem could be avoided by having Pennzoil buy its shares, and she drafted an escrow agreement for effecting this. Pennzoil's witnesses testified that Pennzoil did not object to this change of mechanics from the original agreement. Under the alleged agreement, Pennzoil was to purchase 24 million shares, and Pennzoil's CEO testified that it made no difference to Pennzoil *which* 24 million shares it bought. Although one of Getty's attorneys had expressed an objection to Pennzoil's buying the Museum shares, he also objected to Getty Oil itself buying those shares, as provided in the Memorandum of Agreement. There was concern, he said, that if Pennzoil and the Trust acquired control of Getty before buying all outstanding shares, the remaining public shares would not be bought at the same price. However, the Memorandum of Agreement and the press release both stated the same price to be paid to all selling shareholders. There was also testimony that the attorneys representing Getty Oil, the Museum, and the Trust agreed on January 5 that it was better to have Pennzoil rather than Getty buy the Museum's shares.

[8] Texaco lists the extent of the Museum's "top up" price protection as another open issue showing the lack of the parties' intent to be bound.

The "top up" provision in the Memorandum of Agreement guaranteed that the Museum would receive a higher price per share than specified if anyone buying at least 10 percent of the stock paid a higher price for those shares. This provision effectuated the Museum's requirement of price protection for the sale of its Getty shares, should Pennzoil or the company pay another shareholder a higher price. Pennzoil's president acknowledged that Pennzoil was bound to the "top up" clause in the Memorandum of Agreement, which was signed by Pennzoil and the Museum, and which Pennzoil alleges became a binding contract upon its approval, with a higher price term, by the Getty board on January 3. Though no "top up" clause appeared in the first draft of the transaction agreement, such provisions were contained in subsequent drafts. The evidence as a whole does not support Texaco's contention that the parties did not reach agreement on price protection for the Museum, or that it remained a significant open issue.

[9] Next, Texaco argues that the parties never resolved a number of questions relating to the payment of Getty's first quarter dividend and to the $5 stub that was to be part of the consideration for the Getty Oil shares. The stub represented the minimum payment shareholders were to receive within 5 years from the excess proceeds from the sale of ERC.

Getty's outside counsel, Winokur, testified that open issues remained on who would control the sale, who would guarantee payment of the stub in the event of liquidation, how "net proceeds" would be defined, and what ERC's dividend policy would be under the new ownership. Pennzoil points out that the Copley notes of the board meeting do not show that the Getty

Oil board expressed any concern over the mechanics of the ERC sale before it approved the Pennzoil proposal on January 3. Pennzoil's CEO testified that none of the parties ever brought up these matters at all before the agreement was made, and that Pennzoil was never told that resolution of such questions was essential to the agreement. There was evidence that the Getty entities' main concern was the price that shareholders would receive for their shares, and that questions over the exact mechanics of achieving that price were no obstacle to reaching agreement on the transaction.

Nor does the evidence show that Getty's first quarter dividend was an important unresolved issue. There was evidence that Pennzoil did not object to paying the dividend, and that there were customary ways of handling such questions in a merger situation. Pennzoil considered the amount involved insignificant in relation to the magnitude of the entire transaction. The jury was entitled to resolve the contradicting testimony on the significance of these matters and to decide the implications on the question of the parties' intent.

[10] Texaco also asserts, again based on the testimony of its witness Winokur, that the parties never reached agreement on whether the definitive agreement would ensure that once Pennzoil and the Trust acquired control, they could not avoid the commitment to purchase the remaining outstanding public shares.

Pennzoil's witnesses testified that Pennzoil considered itself bound to the terms of the Memorandum of Agreement after the Getty board approved the transaction on January 3. The Memorandum of Agreement was signed by representatives of Pennzoil, the Trust, and the Museum before it was presented to the Getty board. The terms of the Memorandum of Agreement provided for the purchase of all outstanding shares at the same price.

As stated above, there was conflicting evidence on whether the board approved the transaction contemplated by the Memorandum of Agreement with a higher price term, or whether, as Texaco contends, it approved only a price proposal that was to form the basis for further negotiations. The press release issued the morning after the board meeting listed essentially the same terms as the Memorandum of Agreement, with the exception of price per share, in describing the transaction agreed upon in principle by the parties. All selling shareholders were to receive the same price. There was evidence that the board was concerned chiefly with the price per shares it could achieve for all the shareholders of Getty, and not with the mechanics of the transaction.

There was sufficient evidence for the jury to believe that the board approved more than just a price proposal, i.e., the Memorandum of Agreement terms modified by a higher price term. The jury could reasonably infer that, by those terms, Pennzoil and the Trust had agreed to pay the same price for all outstanding shares. There was very little evidence, other than Winokur's conjecture, that Pennzoil sought any "out" to its obligations under the agreement conflicting with the interests expressed by Getty.

[11] Finally, Texaco contends that Pennzoil never agreed to honor Getty's employee benefit plans and provide adequate termination provisions.

There was testimony that Pennzoil did not anticipate terminating any employees, because Getty Oil was to continue in existence and would require all its employees under the new ownership of Pennzoil and the Trust. Given that scenario, there was no urgency in including provisions for employee termination benefits in the Memorandum of Agreement, press release, or transaction agreement drafts, according to Pennzoil's evidence. Pennzoil's CEO testified that, given that there were no plans to fire anyone, there was no necessity to include termination benefits in the agreement, and that it was a "non- problem." Standard provisions on employee benefits were in fact drafted by one of the Getty attorneys and were sent over to Pennzoil's lawyers for incorporation into the transaction agreement.

[12] There was sufficient evidence for the jury to conclude that the parties had reached agreement on all essential terms of the transaction with only the mechanics and details left to be supplied by the parties' attorneys. Although there may have been many specific items relating to the transaction agreement draft that had yet to be put in final form, there is sufficient evidence to support a conclusion by the jury that the parties did not consider any of Texaco's asserted "open items" significant obstacles precluding an intent to be bound.

The fourth factor that Texaco discusses as showing that the parties did not intend to be bound before executing a formal contract is the magnitude and complexity of the transaction. There is little question that the transaction by which Getty Oil was to be taken private by the Trust and Pennzoil involved an extremely large amount of money. It is unlikely that parties to such a transaction would not have expected a detailed written document, specifically setting out the parties' obligations and the exact mechanics of the transaction, whether it was to be executed before the parties intended to be bound or only to memorialize an agreement already reached.

We agree with Texaco that this factor tends to support its position that the transaction was such that a signed contract would ordinarily be expected before the parties would consider themselves bound. However, we cannot say, as a matter of law, that this factor alone is determinative of the question of the parties' intent.

The trial of this case lasted many weeks, with witnesses for both sides testifying extensively about the events of those first days of January 1984. Eyewitnesses and expert witnesses interpreted and explained various aspects of the negotiations and the alleged agreement, and the jury was repeatedly made aware of the value of Getty Oil's assets and how much money would be involved in the company's sale. There was testimony on how the sale of the company could be structured and on the considerations involved in buying and restructuring, or later liquidating, the company. But there was also testimony that there were companies that in the past had bound themselves to short two-page acquisition agreements involving a lot of money, and Getty's involvement banker testified that the Texaco transaction included "one page back-of-the-envelope kinds of agreements" that were formalized. The Memorandum of Agreement containing the essential terms of the Pennzoil/Getty agreement was only four pages long.

Although the magnitude of the transaction here was such that normally a signed writing would be expected, there was sufficient evidence to support an inference by the jury that that expectation was satisfied here initially by the Memorandum of Agreement, signed by a majority of shareholders of Getty Oil and approved by the board with a higher price, and by the transaction agreement in progress that had been intended to memorialize the agreement previously reached.

[13] The record as a whole demonstrates that there was legally and factually sufficient evidence to support the jury's finding in Special Issue No. 1 that the Trust, the Museum, and the Company intended to bind themselves to an agreement with Pennzoil at the end of the Getty Oil board meeting on January 3, 1984. Point of Error 46 is overruled.

[14] Texaco next claims that even if the parties intended to bind themselves before a definitive document was signed, no binding contract could result because the terms that they intended to include in their agreement were too vague and incomplete to be enforceable as a matter of law. Texaco attacks the terms, found by the jury, of the alleged agreement as being so uncertain as to render the alleged contract fatally indefinite.

Where a question of the parties' intent is determinable by written agreement, the question is one of law for the court. *Marinas of the Future, Inc. v. City of New York,* 87 A.D.2d 270, 450 N.Y.S.2d 839, 844 (App.Div.1982). As discussed above, however, the parties' intent here is not conclusively discernible from their writings alone; therefore, extrinsic evidence of relevant events is properly considered on the question of that intent. *St. Regis Paper Co. v. Hubbs & Hastings Paper Co.,* 235 N.Y. 30, 138 N.E. 495 (1923). Further, the case at bar is distinguishable from those cited by Texaco that involved writings stating specifically that certain essential terms were "to be agreed upon" in the future. *See, e.g., Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher,* 52 N.Y.2d 105, 436 N.Y.S.2d 247, 417 N.E.2d 541 (1981); *Willmott v. Giarraputo,* 5 N.Y.2d 250, 184 N.Y.S.2d 97, 157 N.E.2d 282 (1959).

For a contract to be enforceable, the terms of the agreement must be ascertainable to a reasonable degree of certainty. *Candid Productions, Inc. v. International Skating Union,* 530 F.Supp. 1330, 1333 (S.D.N.Y.1982). The question of whether the agreement is sufficiently definite to be enforceable is a difficult one. The facts of the individual case are decisively important. *Mason v. Rose,* 85 F.Supp. 300, 311 (S.D.N.Y.1948), *aff'd,* 176 F.2d 486 (2d Cir.1949). "The agreement need not be so definite that all the possibilities that might occur to a party in bad faith are explicitly provided for, but it must be sufficiently complete so that parties in good faith can find in the agreement words that will fairly define their respective duties and liabilities." *Id.* On review, the agreement must be sufficiently definite for the court to be able to recognize a breach and to fashion a remedy for that breach. *Candid Productions, Inc.,* 530 F.Supp. at 1333-34.

Texaco does not assert that a specific essential term was completely omitted from the agreement, but rather alleges very briefly why the terms of the agreement found by the jury are fatally incomplete. Texaco cites to the lack of description of the mechanics of various aspects of the transaction, e.g., how and when the determined price would be paid to shareholders, how the agreed stock ownership ratio was to be achieved, how a potential tax penalty on Getty's purchasing the Museum shares would be resolved, and what limitations, if any, existed on the option granted to Pennzoil to buy 8 million shares of Getty Oil stock.

Texaco's attempts to create additional "essential" terms from the mechanics of implementing the agreement's existing provisions are unpersuasive. The terms of the agreement found by the jury are supported by the evidence, and the promises of the parties are clear enough for a court to recognize a breach and to determine the damages resulting from that breach. Point of Error 47 is overruled.

*****