

# Oral Condition Precedent Not Barred by Statute of Frauds

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By Kathy Hooke

Just be glad that it wasn't on *your* final property exam: an action for specific performance of an eleven-year-old contract, an alleged oral condition precedent, partial performance, partial integration, and the relationship between the *parol* evidence rule and the Statute of Frauds. Even with only four justices considering the thicket, unanimity was out of reach.

Associate Supreme Court Justices Andrew Mead, Warren Silver, and Ellen Gorman voted to vacate the decision of Superior Court Justice Roland Cole, who awarded summary judgment to plaintiff on the ground that the Statute of Frauds barred consideration of the oral condition precedent on which defendant landowner relied. Associate Supreme Court Justice Donald Alexander filed a terse dissent on this issue.

The majority concluded that the 1997 contract for the sale of three parcels of land in Scarborough was only partially integrated. The alleged oral condition precedent was not repugnant to, or inconsistent with, the terms of the written agreement, the court said, and *parol* evidence of the oral condition should have been allowed. Justice Mead wrote for the court.

"It's an interesting case," observed Portland attorney Daniel Mitchell, who represents defendant Maureen Hemond, "but not a groundbreaking decision." In Mitchell's view, the decision was "a relatively narrow one that reaffirms well-established basic principles."

Mitchell emphasized that it was clear that the written documents in the case, which the Law Court called "extremely sparse in their language," did not constitute the entire agreement between the parties. Hemond also argued, he said, that the Statute of Frauds did not preclude oral evidence of a condition precedent, as opposed to a contractual term.

Mitchell practices with Bernstein Shur Sawyer & Nelson in Portland.

Jeffrey Bennett, who practices with the The Bennett Law Firm in Portland, represented plaintiff Brown Development Corp. Bennett said that while he and his client were disappointed, he respected the decision and understood its reasoning, calling it "a sound decision."

Bennett reported that the reaction from some attorneys he'd spoken to who'd read the decision thought it "gutted the Statute of Frauds." He disagreed. "Unless you have a fully integrated agreement," he said, "the Statute of Frauds does not apply."

Bennett agreed that the decision did not make new law, but "simply applied *parol* evidence and Statute of Fraud rules in the same way that those rules have been applied previously."

The decision remands the case for trial on the issue of whether the parties agreed to the alleged oral condition.

Codified in 33 M.R.S. § 51(4), the Statute of Frauds bars the maintenance of any action to enforce a contract to sell real estate or an interest in real estate: “ unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith. ...”

The parties' dispute traces back to April 1997, when Hemond and her husband Fernald, since deceased, entered into an agreement to sell Brown three lots in Scarborough in exchange for \$40,000, and Brown's services in surveying the property and putting in an access road.

Ten months later, the Hemonds signed an additional contract with Brown, which was captioned “AGREEMENT FOR SALE OF ADDITIONAL PARCEL OF REAL ESTATE.” Although the second agreement purported to deal with “the small parcel of land located between Lot 1, Lot 2 and the right-of-way ...,” there was no apparent disagreement that the “small parcel” identified in the second agreement was part of the April 1997 agreement, appearing as “lot # 3.”

A closing on lots #1 and #2 took place in March 1998. The parties apparently agreed not to transfer lot #3 at that time, however, in order to avoid precipitating subdivision review. The Law Court used that unwritten understanding as one basis for concluding that the agreement between the parties was only partially integrated.

When the five-year period applicable to subdivision regulation expired, Brown sought to close on lot #3. Hemond demurred on the ground that her obligation to convey lot #3 was conditioned on Brown's obtaining a lot owned by third parties, that was effectively surrounded by the Hemond lots. Brown then sued for specific performance.

Although Justice Cole found that the written agreements themselves met Statute of Frauds requirements, he concluded that the Statute barred evidence of the oral condition. Mitchell maintains, however, that under the Restatement (2d) of Contracts § 140, the Statute of Frauds does not apply to a condition precedent to performance, as opposed to an essential term of a contract.

The purpose of the Statute of Frauds is, as succinctly described by Justice Mead, “to prevent actions based on false claims.” The parties agreed that the two written agreements were sufficiently detailed to satisfy the Statute of Frauds, and the Law Court accepted this agreement with little comment.

The bulk of the opinion focuses on whether Brown and Hemond had an integrated contract and the possible applicability of the parol evidence rule, which bars “extrinsic evidence offered to vary, add to, or contradict the terms of an integrated written agreement.”

The Law Court easily concluded that the Brown-Hemond written agreements represented, at best, a partially integrated contract. Therefore, the court pointed out, under the parol evidence rule, “extrinsic evidence will be admissible if the additional terms are consistent with the written term.”

The alleged oral condition did not vary or alter the written terms, the property to be conveyed, the parties involved, or the amount and nature of the consideration to be paid, the court found,

and it had little difficulty in concluding therefore that the parol evidence rule did not bar Hemond from proving the existence of the oral precondition she relied on.

The more interesting question, however, is whether the decision does in fact, as some practitioners apparently fear, reflect a relaxation of Statute of Frauds requirements. The court's brief discussion of those requirements is notably more lenient than the description in some of the prior cases it cites, the 1997 case of *Gagne v. Stevens* in particular. That opinion incorporates a description dating back to 1898 that states that the Statute of Frauds requires the written document relied on to contain "within itself, or by some reference to other written evidence ... all the essential terms of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, (if any) without any aid from parol testimony." Under this standard, the key question in the Hemond case would be whether the alleged precondition was an "essential term of the contract."

By contrast, the recent decision states only: "While a contract must be in writing, almost any writing is sufficient for Statute of Frauds purposes."

Similarly, this decision states broadly: "Once a contract has satisfied the statute of frauds, parol evidence may then be considered." The footnote in *Gagne*, which is cited for this proposition, is more circumspect, stating: "Once it is determined that the written description satisfies the statute of frauds, parol evidence may be employed for limited purposes. ..." The footnote gives several examples of suitable limited purposes, none of which includes proof of an oral condition precedent.

Thus, the current decision could be read as undermining the power of the Statute of Frauds to prevent the introduction of oral testimony to prove the content of an agreement concerning the sale of land. Interestingly enough, of the four justices considering the case, only Justice Alexander, the dissenting Justice, was on the appellate bench when *Gagne* was decided.

Both Bennett and Mitchell viewed this case as narrow in impact, however. Mitchell observed: "There is a difference between using an alleged oral agreement as the basis for an action to force someone to convey land, and raising an oral agreement as a defense to such an action."

The decision *Brown Development Corp. v. Hemond*, MLR#324-08, is summarized in this issue at p. XX.

-Kathy Hooke, [kathyh@mainelawyersreview.com](mailto:kathyh@mainelawyersreview.com)