1972

Contracts I: Final Examination (January 1972)

William & Mary Law School
I. Weight: 35

Alfred J. Ohner is sixty-four years old and recently retired from his wholesale tobacco business. As part of the deal when he sold his business, he took a vacant lot on Woolsock Avenue and this lot he still owns. The idea of building a large and modern apartment house on his lot appeals to him. The fact that he is completely inexperienced in the real estate field bothers him not at all. His past business successes, modest though they have been, have convinced him that he can make a go of anything he undertakes. And the thought that he could move into the building and manage it himself adds to the project's appeal. "It'll give me something to do," says Ohner to himself.

From a financial standpoint, Alfred Ohner is not unreasonable in permitting himself to think in terms of apartment construction. He has accumulated a comfortable estate in his years of business, and by mortgaging the premises for about fifty percent of its cost—which he estimates will be $400,000 at the most—he figures that the investment is one that he can afford to make.

Despite his conviction that his apartment must and someday will rise, Ohner hesitates to take the plunge. Then, on August fourteenth, an event occurs which galvanizes him into action. This event is a totally unexpected offer by his old and wealthy friend Bill Welsh to provide mortgage financing on unusually favorable terms.

Welsh has good reason to be generous to Ohner. For when—over twenty years earlier—Welsh was struggling to perfect and market a cigarette vending machine of his invention and ran out of funds when success seemed within his grasp, it was Alfred Ohner who provided the $5,000 he needed to tide him over and who persuaded him not to abandon the struggle. And the business built on this machine made him the man of wealth he is today.

Welsh had moved his business to Chicago several years before and Ohner has seen him infrequently in recent years. It is a welcome surprise, therefore, when he gets a call from Welsh on the morning of the fourteenth and is invited to join him and two other old friends, Fred Gervaise and George Adams, at lunch at the Downtown Club that noon.

The lunch is barely under way when Ohner launches into the inevitable description of his plans for his apartment. Gervaise and Adams sigh resignedly; they have heard all of this many times before. But in Welsh, at last, Alfred Ohner finds a friend who is both enthusiastic and encouraging.

"Wonderful idea, Al," says Welsh. "Best investment you could possibly make. And don't let high prices worry you. Take my word for it, in a few years these prices everyone is yelling about will look dirt cheap. The dollar is on the way down. Get your money in property now and you can't go wrong."

With the conversation turned to costs and financing, Ohner explains that of course he expects to put a mortgage of approximately $200,000 on the
property. He asks Welsh for his advice on the best places to apply for such a loan, the maximum rate of interest he should pay, and the terms he should seek.

"Al, I'll tell you," says Welsh after a few moments of thought. "You can get a loan without trouble; I'm sure; probably twenty years at 3% interest will do it. But when you have that kind of a loan hanging over your head, you're never free from worry. You can't expect sympathy from a big lending institution; business is business with them. Now I'll tell you what I'll do. Twenty years ago you did me a favor I'll never forget, and I've been hoping that someday I'd have a chance to repay you. Let me lend you that $200,000 you need. I'll take your mortgage, but I'll make it for twenty-five years with no required annual payments and you can pay it off as you get the money. As for interest, I'd just as soon not get any, but just to make it look business-like, let's make it 1%. I mean it, Al, and don't say no."

Ohner, naturally enough, is overcome by this offer. The mortgage aspect of his deal has, in fact, been worrying him somewhat. But both the social niceties and his pride, especially with Gervaise and Adams present, prevent him from leaping at the offer as he would like to do. Hence he registers the customary protests: that he can't take advantage of Welsh's generosity, that this is a pure gift and much too large a one, and that what he did for Welsh twenty years ago was really nothing at all.

"Look Al" replies Welsh, "Don't be a fool. Believe me, I can afford it. And it isn't a gift; I expect you to repay it and I know you will. What's more, I'm getting security for the loan, and good security. Shake hands on it and get going on your building. The longer you delay, the more it's going to cost you."

"Believe me, Bill" says Gervaise, "you wouldn't have to make me an offer like that twice. But I know how you feel about Al."

Though Ohner realizes that Welsh is being very generous indeed, the more he thinks about it as he listens to Welsh, the more he feels that it is really no more than Welsh ought to do in the light of their past relations. He recalls his wife's frequent and barbed reminders to him that Helsh—a rich man—has never lifted his finger to show his appreciation for his past help. After all, he thinks, this $200,000 probably means less to Bill than that five thousand I let him have meant to me twenty years ago. And that was a pure gamble and we both knew it; here there's no gamble at all.

"Bill," says Ohner at last, "I shouldn't take advantage of you this way, but I'm going to take you up. With this help from you I can't miss. You're a real friend, Bill, and Edna and I will never forget it. I'll start tomorrow to get under way. Naturally I won't be needing any of your cash for awhile, but when I do, I'll count on you for up to $200,000 on a twenty-five year mortgage—of course I'll pay it off long before then—with interest at 1%.

"You can count on me, Al," says Welsh. "And don't talk about taking advantage of me. Call it deferred payment for past value received. Let's shake on it."

The next ten days are busy ones for Ohner. No longer does he merely leaf wishfully through housing and architectural magazines; now he pores purposefully over them by the hour. He writes for catalogues and descriptive brochures by the dozens on everything from insulation to incinerators. He confers with the building inspector on the zoning regulations for the area, such as those governing building heights, set-back lines and types of construction required. And he drives around to look at apartment houses and get ideas on building styles and lay-outs.

He has just arranged for the employment of a surveyor to make an exact plan of his lot when, on August twenty-fourth, the following letter puts a sudden end to his activities:
I'm afraid I have bad news for you. After checking my affairs on my return here the day before yesterday, I discovered that I was a bit too hasty in my offer to lend you $200,000 on a 25-year mortgage at 1% on your proposed apartment building. The fact is that I just don't see how I can free enough of my funds at this time to make this advance to you. I now find that I have to pour more money into my business, which has been under-capitalized these past few years anyway, and consequently I just don't see how I can scrape together the money I offered to let you have.

Believe me, I feel very badly at having to let you down this way, but I have no alternative. And, after all, it won't seriously affect your project, since I know you'll have no trouble getting a loan through regular sources, and your building as you described it to me should easily earn more than enough to take care of the higher interest which I realize you'll have to pay.

I'm sure you'll understand that I have no choice in this matter. Please drop me a line in the near future and let me know how your building is coming along. I'll be most interested to hear.

As ever,

Bill

P.S. My best to your wife.

Ohner re-reads this communication twice before he can believe that it says what it does. Then, in shocked silence, he hands it to his wife, whose immediate announcement that it is what she had expected from the first hardly serves to quiet him down. In a very few minutes, Alfred Ohner is fighting mad.

Alfred Ohner has consulted you concerning the legal aspects of his problem. Please advise him.
II. Height: 30 Time: 54 minutes

Industrial Land Development Corp (ILDC), a specialist concern in industrial plant site development and plant construction, desired to enter the shopping center development business. In order to do so, ILDC needed personnel familiar with shopping center operations. To this end it entered into an agreement with Shopping Center Management, Inc. (SCII), a specialist concern in shopping center space leasing and management, undertook to supply the necessary personnel to ILDC on credit, and to loan funds to ILDC to enable it to enter the shopping center business. The contract provided that SCII was to have "the exclusive option to act as agents for ILDC in the leasing of management of the centers constructed."

The agreement contemplated that SCII would exercise its option if and when it had firm leases from its customers for 90% of the available space in a particular center. In the event that SCII was unable to market the 90% of available space, it was to inform ILDC of the centers it did not intend to option. ILDC would then be free to lease that space through brokers or its own organization. SCII was to be, in effect, the exclusive agent for ILDC.

By the agreement SCII undertook "so far as possible, ... to provide [ILDC] with 90% occupancy of the shopping centers it constructed. All leases shall provide for a combination flat fee and percent of sales 'rental rate' and shall otherwise be satisfactory to [ILDC]." SCII was to be compensated with a "finders fee" and a percent of the net profits of center operations.

"Rental rate" was defined as a figure derived from a formula utilizing published figures on business rentals appearing in three trade publications. "Finders fee" was to be determined by another formula utilizing the rates of such fees customarily charged in the localities concerned.

The formulas thus set up became unworkable shortly after the contract was executed because some of the publications went out of business and local rates could not be determined accurately. This situation required the parties to ignore the formulas, neither party referring to them until after the dispute below arose.

Despite the failure of the formulas, the parties continued doing business. Their officials would from time to time discuss the condition of the shopping center and finders markets. After such discussions the parties would agree on the rates involved for the next center operations. The rates thus arrived at would hold for one or more transaction, until conditions indicated that a rate change was in order. The aim of the parties in settling rates, was, of course, to be competitive; the resultant figure was intended to be the actual going rate in each instance.

When the parties came to agreement, SCII would carry out its obligations, as would ILDC. Occasionally the parties disagreed on the state of the market and would not be able to reach mutually acceptable figures. When such irreconcilable deadlocks arose, SCII did not insist on exercising its option at the figures it thought appropriate; rather, it permitted the matter to drop.

This course of dealings ended on December 27, 1971, at which time ILDC notified SCII that it would no longer continue with the option. SCII, through its house counsel, has asked you to prepare to bring an action against ILDC for breach of contract, claiming damages from loss of future earnings under the contract, and from "outside arrangements" which ILDC had made with others without its permission before the repudiation.

Before commencing the action, he has asked that you prepare a memorandum on the case for his evaluation. He also wants your advice in the matter as his specialty is tax law. He is concerned to receive a complete treatment of the contract law in the matter.
The Sellmore Carpet and Tile Co. is a licensed specialty subcontractor. On October 2, 1971, it submitted by telephone to Charles A. Dana, Inc., a general contractor, a subcontract bid in the amount of $63,400 for the furnishing and installation of tile on a public construction job. Later that day C.A.D. submitted a bid for the prime contract to the Clarified Super Unified District Schools. As required by state statute, C.A.D. listed the subcontractors who would perform work on the project of a value in excess of one-half of one percent of the total bid. C.A.D. listed S.C.A.T. Co. as the tile subcontractor. C.A.D. was subsequently awarded the prime contract for construction of the facility and executed a written contract with S.U.D.S. on November 9, 1971. A local trade newspaper widely circulated among subcontractors reported that C.A.D. had been awarded the contract and included in its report the names of the subcontractors listed in C.A.D.'s bid. S.C.A.T. Co. read the report and, acting on the assumption that its bid had been accepted, refrained from bidding on other construction jobs in order to remain within its bonding limits.

Sometime between November 27, 1971, and December 10, 1971, C.A.D. requested permission from S.U.D.S. to substitute another subcontractor for S.C.A.T. Co., apparently on the ground that S.C.A.T. Co. had been inadvertently listed in the bid in place of the intended subcontractor. S.U.D.S. consented and the substitution was made.

S.C.A.T. Co. consulted your law partner in this matter and he sought a writ of mandamus to compel the school district to rescind its consent to the change in subcontractors. The trial court dismissed the proceeding and he determined that an appeal of that route would be of no avail. S.C.A.T. Co. wishes to pursue the matter further and they and your partner have consulted you as an expert in contracts.

Your preliminary research on the statute (above) has indicated that its purpose(s) is (are) either to protect public entities by making contractors on a job known to them, or to protect public entities by preventing bid shopping by general contractors and bid peddling by subcontractors, or both.

Advise S.C.A.T. Co. and your partner. Raise and answer all issues whether or not dispositive of the case.

IV. Weight: 12

Thomas Bell was born on August 2, 1949. He first became acquainted with Tom Pankas, a beauty parlor operator, in October 1968 when he talked briefly with Pankas at a hairdressing exhibition given by Pankas at the Hilton Hotel. Having attended a professional hairdressing school in Washington, Bell secured a beautician's license and, thereafter, worked for Pankas until May, 1969, in a non-professional capacity. Bell then worked for the Towne Modeling Agency for eight or nine months before returning to Pankas' employment.

On March 2, 1970, Thomas Bell entered into a written employment contract with Pankas. Bell read the contract at the time of its execution and understood the contract would bind him to work exclusively for Pankas.

The contract provided that Pankas would employ Bell for a period of two years, commencing March 1, 1970, as a beautician; that Bell would "devote 100% of his business time to the efforts and advancement of the owner's business"; that, if Bell should leave Pankas' employment, he would not "engage either directly or indirectly as an owner, employer or agent in the beauty or hair-styling business within a radius of fifty (50) miles from downtown Pittsburgh, Pennsylvania, for a period of two (2) years." The contract also provided that Pankas could terminate the agreement by giving two weeks' notice to Bell "for any cause that may prove detrimental to the business."

In September, 1971, Bell and another Pankas' employee became partners in a newly opened beauty salon situated within three blocks of Pankas' salon and advertised themselves as former employees of the Pankas establishment. Bell, while still in Pankas' employment, gave his card for the new establishment to at least one customer.

What are the rights and liabilities of the parties? Discuss all issues raised whether or not dispositive of the case.
Sally Smith was pregnant and unmarried. When she learned she could be expecting the birth of an illegitimate child, she made some discreet inquiries concerning maternity homes for unwed mothers and adoption agencies. She eventually selected the Mission Home in a large city in one of our southwestern states. Mission Home was a state licensed adoption agency and it is operated by the United Mission Church as a maternity home to provide "proper care for the girl or woman who finds herself faced with an out-of-wedlock pregnancy." The national United Mission Church is the principal source of financial support for the Home. In addition to board, lodging, and medical care, girls admitted to the Home receive the benefit of counselling by trained social workers who are members of the Home's counselling staff. This counselling concerns the girls' personal problems and vocational plans as well as "plans for the unborn child." Once each week, the residents participate in group counselling sessions, conducted by Rev. Don Tilljedahl, Director of counselling, assisted by Mrs. Sharon Burrows. In addition, each resident meets privately with her individual counsellor about once a week. Sally's individual counsellor was Mrs. Jo Ann Burns. It is the policy of the Home to encourage unwed mothers to release their children to the Home for placement for adoption. The Home's counselling staff attempted to persuade the residents to release their children for adoption.

When Sally became a resident of the Home, she intended to give up her child and, as long as the Home's staff believed that that was her intent, no effort was made by the counsellors to induce Sally to reconsider her decision. However, Sally did reconsider her decision and, in fact, changed her mind. She decided that she wished to keep the child and raise him, or her, herself. As a result of this decision, she arranged for her step-father and sister to journey 1800 miles to take her and her child home after the baby was born. After Sally, subsequent to the birth of her son, announced her decision to keep the child, Mrs. Burns initiated a series of interviews with Sally, extending over a period of about five days, as the result of which Sally consented to the placement of the baby for adoption.

Sally was shy and reluctant to discuss her personal problems. Immediately following Sally's announcement that, contrary to the expectations of Mrs. Burns, she intended to keep her son, she was subjected to an intensive campaign, extending over a five day period, designed (Sally thinks) to convince her to give up her baby, rather than to insure that her decision would be based on a consideration of all relevant factors. Sally was told, falsely, that she had no right to keep her child. She was accused of being selfish and told that if she was any kind of person she would consent to the adoption of her baby. Her parents, the only persons who were willing to accept Sally's decision to keep her child, were accused by Mrs. Burns, with no factual support, of acting out of improper motives and with the intention of "putting something over" on Sally. During the period between November 21 and November 28, when Sally signed the instruments consenting to the adoption, Sally was very weak and yet Mrs. Burns repeated her counselling sessions. Sally thinks the period was a "nightmare" during which she was able to sleep only about three hours a day. She felt "trapped" as a result of these sessions and on November 27, after Mrs. Burns had repeated everything that the counsellor had said before, she consented to the adoption of her child to avoid "harassment."

Sally has consulted your law firm concerning this problem. Your partner has asked for your advice on the case, considering your expert knowledge in the contract area. Please advise him. Raise and answer all issues whether or not dispositive of the case.