

2001

# Great Salt Lake Minerals and Chemical Corporation v. Arthur G. McKee and Company : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

GREAT SALT LAKE MINERALS  
& CHEMICALS CORPORATION,

*Plaintiff-Appellant,*

v.

ARTHUR G. McKEE &  
COMPANY,

a Delaware corporation,

*Defendant-Respondent.*

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APPEAL No. 1975  
13858

BRIGIAM YOUNG UNIVERSITY  
J Reuben Clark Law School

## BRIEF OF PLAINTIFF AND APPELLANT

Appeal from the District Court of Salt Lake County,  
Honorable Stewart M. Hanson, District Judge

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FILED

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Clerk, Supreme

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# IN THE SUPREME COURT OF THE STATE OF UTAH

GREAT SALT LAKE MINERALS  
& CHEMICALS CORPORATION,

*Plaintiff-Appellant,*

v.

ARTHUR G. McKEE &  
COMPANY,

a Delaware corporation,

*Defendant-Respondent.*

Appeal No.  
13858

## BRIEF OF PLAINTIFF AND APPELLANT

### NATURE OF THE CASE

This is an action by plaintiff and appellant, Great Salt Lake Minerals & Chemicals Corporation ("GSL"), against its agent, the defendant and respondent, Arthur G. McKee & Company ("McKee"), for damages in the sum of \$300,000.00, which is the amount of the performance bond which McKee failed to see that its vendor obtain as required in McKee's contract with the vendor for the design, fabrication and field erection of a conveyor system for the process plants which GSL was constructing. GSL proceeded under its first cause of action for breach of McKee's contractual obligations and alternatively under its second cause of action for liability in tort. (R. 2-4.)<sup>1</sup> McKee answered denying liability with

<sup>1</sup>Record references are to the numbered pages of the record on appeal.



respect to the bond and counterclaimed for the value of its services performed for GSL in 1970, for which it had not been paid. (R. 5-9.) GSL did not contest the counterclaim.

### DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury. Judgment was entered for McKee on GSL's claim and on McKee's counterclaim. (R. 96.) GSL's motion for a new trial (R. 97-99) was denied (R. 100) and this appeal followed (R. 101).

### RELIEF SOUGHT ON APPEAL

Appellant GSL seeks the reversal of the district court's judgment as to GSL's claim and the entry of judgment in its favor. GSL does not challenge the judgment so far as McKee's counterclaim is concerned.

### STATEMENT OF THE FACTS

In so far as possible, the material facts are presented in order as they developed in the dealings of the parties.

In 1968, GSL was about to undertake the construction of process plants on the shores of the Great Salt Lake as part of its project for the recovery of minerals from the lake. GSL sought bids from several engineer-contractor firms including McKee to perform the design and administrative engineering work for the project. (Tr. 7-9.)<sup>2</sup>

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<sup>2</sup>Transcript references are to the pages of the reporter's transcript of the testimony.

Testimony of Harold J. Andrews, who was manager of engineering and construction and later president of GSL during the period of time involved in this action. (Tr. 6.)

McKee is one of the four or five largest engineer-contractor firms in the country. Such companies are considered as experts in their field and provide the full range of services including procurement and a knowledge of equipment and manufacturers and subcontractors. (Tr. 65-68.)<sup>3</sup>

McKee responded to GSL's request for bids, through its Western Knapp Engineering Division in San Francisco, by presenting alternative proposals in writing, one of which was a proposal that McKee would provide engineering design and related services including, specifically, procurement services which were described by McKee as including the following (Ex. 1-P):<sup>4</sup>

- "1. Assistance in equipment selection and bid evaluation;
- "2. Procurement, expediting and inspection assistance as required by client;"

McKee's proposal also included the following representation in its cover letter (Ex. 1-P):

"We assure you that we have the qualified personnel immediately available to initiate your program and carry it through in an expeditious manner to satisfactory completion and start-up."

McKee's proposal for an engineering and procurement contract was accepted by GSL and they proceeded to

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<sup>3</sup>Testimony of Bernard Bernstrom, an experienced engineer and manager of the local office of Roberts & Shaeffer, a national engineer-contractor firm. Mr. Bernstrom testified as an expert witness for GSL. (Tr. 62.)

<sup>4</sup>Exhibit references are to the numbered exhibits received in evidence at the trial.

draft the agreement. (Ex. 6-P.) McKee's work was to include among other things, the development and staffing of an organization to carry out all phases of the engineering work, and, as agent for GSL, the procurement and delivery of all equipment and long lead-time materials. (Ex. 6-P, at pp. 2-3.) McKee was to provide the "standards of care, skill and diligence normally provided by a professional engineer in the performance of" its services. (Ex. 6-P, at p. 15.)

On January 9, 1969, GSL and McKee signed a "letter of intent" which stated their intent to execute the agreement and authorized McKee to commence its services in accordance with the terms of the proposed contract. (Tr. 13; Ex. 4-P.) Although the agreement was forwarded to McKee for execution in May, 1969 (Ex. 5-P), it was never signed (Tr. 27). McKee, however, advised GSL by letter in August, 1969, that McKee would continue to serve GSL on the same basis as before. (Ex. 7-P.) The unsigned agreement incorporated everything that was involved up to that time (Tr. 26) and both McKee's assistant general sales manager, Robert Hansen, and McKee's project manager for its task force on the GSL project, Harold McNeil, testified that the unsigned agreement, together with the letter of intent, was considered by the parties as the equivalent of a contract (Tr. 147, 150, 154, 274). McKee's billings to GSL made specific reference to the letter of intent in the following language (Ex. 52-D, at pp. 3, 5 and 6):

"To charge your account for Engineering and Procurement Services for the design and construction of process plants at the Great Salt Lake

site near Ogden, Utah, in accordance with the letter of intent dated January 9, 1969.”

McKee subsequently charged GSL (Tr. 154) and was paid for its services performed prior to January 26, 1970, in accordance with the terms of the unsigned agreement, approximately \$1,000,000.00 (Tr. 16).

It had been contemplated from the outset that some items needed for the process plants would be purchased as “contract packages” from contractors or “outside vendors” as discussed in McKee’s proposal for its services and in GSL’s Design Criteria Package. (Ex. 1-P, at pp. 3-4; Ex. 3-P, at p. 2) Since there were many vendors<sup>5</sup> for the project and their certified drawings were needed before McKee’s engineers could proceed accurately with their final design of the project, Mr. Andrews and Mr. Brinkmann, GSL’s manager of the project, testified that GSL offered the services of its purchasing agent, Mr. Fay Derricott, to speed up the process of getting the drawings. (Tr. 42, 54.) A meeting was held on August 20, 1969, to “confirm the expediting procedure to secure the outstanding engineering information that is essential to the project schedule.” According to McKee’s memorandum of the meeting, Mr. Derricott was to “perform the expediting, which is indicated in the minutes of weekly meetings and as supplemented by other communications from McKee Engineering.” (Ex. 27-P.)

One of the items to be purchased from vendors was the conveyor system. (Tr. 12; Ex. 3-P, at p. 2) For such

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<sup>5</sup>McKee issued fifty purchase orders in the procurement work for the GSL project. (Tr. 181.)

purchases McKee's purchasing and construction departments maintained a "list of qualified and acceptable bidders." (Ex. 24-P, part P-3 at p. 3.) After the lowest bidder for the conveyor system, Coastal Plains, Inc., refused to give certain warranties required by GSL, the parties turned to the next lowest bidder, Houben Industries, Inc. ("Houben"). (Tr. 214-215.) McKee's analysis of the bids for the conveyor system stated that Houben had a fairly high degree of experience in the materials handling field but its experience, facilities and financial capabilities were inferior to those of Coastal Plains. (Ex. 8-P, at p. 2.) Mr. McNeil testified that McKee had made an investigation of Houben including its financial situation and had concluded that Houben was capable of supplying the conveyor system. (Tr. 275.) Houben was not known to GSL's project manager, Mr. Brinkmann, who did not learn until later that Houben would have to subcontract the fabrication work for the conveyor system. (Tr. 236-237.)

McKee gave Houben a "letter of intent" on August 21, 1969, expressing McKee's intent to purchase from Houben the design, supply of materials, fabrication and field erection of the conveyor system and authorizing Houben to proceed immediately with engineering and design. (Ex. 9-P.) Mr. Andrews testified that GSL had ordered that Houben be bonded (Tr. 102, 105), and McKee, in its letter of intent, asked Houben the cost of furnishing a \$300,000.00 performance bond (Ex. 9-P). Houben responded the following day by returning a signed copy of McKee's letter of intent and stating that the cost of a bond would be 1% or \$3,000.00. (Ex. 10-P.)

Later, on September 18, 1969, McKee sent its purchase order for the conveyor system to Houben. (Ex. 11-P.) According to the purchase order, the contract for the conveyor system was between McKee as the purchaser and Houben as vendor while GSL was referred to as the owner of the project. (Ex. 11-P, at p. 1.) The purchase order called for the design, supply of materials, fabrication and field erection of the conveyor system for a fixed price of \$597,556.00. A performance bond in the amount of \$300,000.00 was to be obtained by Houben. (Ex. 11-P, at p. 6.) McKee reserved the right to approve the form of the bond and the issuer. (Ex. 11-P, at p. 16.) The bond was not a condition precedent to Houben's commencement of its work, since McKee's letter of intent had directed Houben to "proceed immediately with engineering and design" (Ex. 10-P), but Houben was required to furnish copies of the bond to McKee "without delay" (Ex. 11-P, at p. 5). The certificates for liability insurance, on the other hand, were to be obtained by Houben "prior to commencement of construction activities". (Ex. 11-P, at p. 6.)

Mr. Bernstrom testified that the conveyor system was an essential part of the process plants and that the design and engineering of the conveyor system was important to the project time schedule. (Tr. 76, 90-91.) McKee admitted in answers (R. 23) to interrogatories (R. 13-14), that GSL had not authorized any delay on Houben's part in obtaining the bond or notified McKee at any time that the bond was no longer required.<sup>6</sup> The

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<sup>6</sup>McKee's answers to questions 20 and 22 in GSL's first set of interrogatories. The interrogatories and the answers were received in evidence as part of the trial record. (Tr. 106-107, 262-263.)

acting head of McKee's purchasing department, Kenneth Ferguson, who also served with an assistant as the purchasing agent for the GSL project (Tr. 174, 192, 266), testified that he knew the bond was important and was to be obtained without delay (Tr. 183). Mr. Ferguson had full responsibility for the fifty purchase orders issued by McKee for GSL's project and was accountable only to McKee's project manager, Mr. McNeil. (Tr. 181-182, 191.) Mr. McNeil testified that the purchasing agent's duties included following up on purchase orders, obtaining insurance certificates<sup>7</sup> and bonds. (Tr. 275.) Mr. Bernstrom, testifying from his experience in engineering work, explained why a person with Derricott's assignment with respect to drawings and the flow of the work as directed by McKee's engineers would have nothing to do with getting bonds. (Tr. 80-81.) He also testified that the purchasing agent or his immediate superior would be the person responsible for getting the bond. (Tr. 81-82.)

Despite the urgency for the bond, as expressed in McKee's purchase order, Mr. Ferguson testified that he waited seven weeks until November 6, 1969, to telephone Houben about the bond and learned then that the bond had not been obtained. He talked to a Mr. Niepelt of Houben who told him that the matter was in hand and the bond would be provided shortly. (Tr. 177.)

On November 18, 1969, Mr. Brinkmann sent a memorandum regarding the bond to Mr. Derricott, who passed it on with a memorandum of his own to Mr. Fer-

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<sup>7</sup>The reporter typed "tickets".

guson. (Ex. 22-D; Tr. 120, 227.) Mr. Brinkmann testified that he sent the memorandum for the purpose of seeing that the increased cost of Houben's job and the work of Houben's subcontractors was covered. (Tr. 49, 52, 224-226, 236-241.)

Although Houben's failure to have obtained the bond by November 6 was a "red flag" to Mr. Ferguson, he waited another 2 weeks until November 20 to telephone Houben again about the bond. This time he suggested the name of a bonding company but took no further action. (Tr. 175, 177, 184-185.)

Afterwards, in a deposition before the trial, Mr. Derricott was asked with reference to Mr. Brinkmann's memorandum of November 18, whether Mr. Derricott believed or knew at that time or afterwards that a bond had not been provided because Mr. Brinkmann had made no reference in his memorandum to having received a copy of the bond. (Tr. 126-128.) Derricott said that he "did not know that a bond had not been provided or that it had been provided." He also said that it was his assumption or state of mind that a bond had not been provided. (Tr. 125-127.) At the trial he testified that he did not learn that Houben had not obtained a bond until construction of the conveyor system was about to commence near the end of March, 1970. (Tr. 111, 43.) He said he felt there was no conflict with his testimony in the deposition, that it was "all assumptions" at the time his deposition was being taken and that he doubted that the question whether Houben had obtained a bond had entered his mind in 1969. (Tr. 132-133.)



Mr. Ferguson maintained a "tickle file" for important documents and sent GSL copies of his follow-up letters to vendors when such documents were missing. (Exs. 53-P, 54-P, 55-P, 56-P.) There was no evidence that he followed that practice with respect to Houben's performance bond. When Mr. Ferguson was asked if he had reported the subject to his telephone conversations with Houben to GSL, he would only say that he had no recollection of doing so but "probably" he did or that it was a "possibility" that he did. (Tr. 178, 184-185.) He also acknowledged that Mr. Brinkmann and Mr. Derricott could have assumed that there was a bond and that "it may not have been unreasonable" for them to do so; but "it may have been unwise". (Tr. 188, 189.) No evidence was offered that Mr. McNeil, who knew that Houben did not have the bond (Tr. 276), asked for further instructions from GSL in light of Houben's delay. Mr. McNeil testified that he did not discuss the bond with Houben, but spoke to Mr. Ferguson about it. (Tr. 276.) Mr. McNeil and Mr. Ferguson participated with counsel for McKee in the preparation of McKee's answers to interrogatories (Tr. 195, 260) where it was expressly stated that GSL was not told that a bond had not been obtained. (Question No. 9 (R. 12) and the answer (R. 21).)

When GSL received Houben's first progress billing (Exs. 41-D, 42-D) it was sent on to Mr. McNeil for approval. The billing was for man hours spent by Houben on the project and contained no amount for the bond premium. Mr. McNeil approved the billing and testified at the trial that there was nothing about the billing to cause him concern. (Tr. 275-276.)

Mr. Lawrence Parker, a lawyer who had represented a bonding company that had bonded a subsidiary of Houben, was called as a witness for McKee. He had been in the "underwriting aspect" of the bonding business, had represented surety companies and was involved in defending them. (Tr. 156, 172.) He testified as to his efforts in November 1969 to obtain funds for his client from Houben. Mr. Parker telephoned on November 14 to ask if GSL would honor an assignment by Houben to his client, a bonding company, of the money due Houben on Houben's first progress billing. He was told that GSL would not. (Tr. 162-163.) Then, without telling GSL of their "arrangement", Mr. Parker and Houben decided that GSL would be asked to forward its payment of the progress billing to Houben in care of Mr. Parker's law firm and that Houben, without GSL's knowledge, would execute an assignment of the funds to Mr. Parker's client. (Tr. 164, 172.) Houben's request was received in a letter on November 20 (Ex. 29-D) and the payment was made as requested on December 1, 1969 (Ex. 36-D).

Mr. Parker also testified that after October 1969 and on November 14, when he called GSL, Houben, due to financial troubles, could not have obtained a bond. (Tr. 168, 172-173.) Mr. Parker did not say that he told GSL of Houben's situation. McKee offered no evidence that Houben could have obtained a bond after October 1969.

Mr. Christensen, GSL's secretary and treasurer, who did not know that the McKee purchase order required a bond of Houben (Tr. 199, 200), testified that he considered the possibility that Houben might be in financial

difficulty along with other possible reasons for requesting that the payment be sent to the law firm (Tr. 203, 205-206) and authorized the request because of the amount involved and because they were beginning on the Houben contract (Tr. 211). He testified that there were no similar requests as to later progress payments and that the later payments were made directly to Houben. Mr. Leland Irvine, a businessman, who testified as an expert witness for GSL, gave his opinion and stated at length the reasons why the telephone call from Parker and Houben's request to sent the payment of the first progress billing to Houben in care of a law firm would not have caused a reasonable businessman to suspect that Houben was in financial difficulties. (Tr. 282, 290.) GSL did not tell McKee of Mr. Parker's telephone call or of sending the payment of Houben's first progress billing in care of the law firm.

On December 19, 1969, Mr. Brinkmann wrote to Mr. McNeil regarding a reduction of McKee's activities and stated, among other things, that purchasing and expediting would be taken over by GSL on January 2, 1970. (Ex. 12-P.) On December 29, 1969, Mr. Ferguson wrote to Houben saying that responsibility for the project would be assumed by GSL. (Ex. 13-P.) Nothing was said to GSL at that time about the bond. McKee continued to perform services for GSL after that time under the letter of intent and the unsigned agreement which services were the basis of McKee's counterclaim. (Ex. 52-D.)

Near the end of March, 1970, as the time for construction of the conveyor system approached, GSL per-

sonnel were looking in the Houben file for the certificates of liability insurance needed for the construction work, and found that the file contained neither insurance certificates nor the bond. Mr. Brinkmann then telephoned the McKee officers in San Francisco, because he thought that McKee would have the bond, and was informed that McKee did not have it. (Tr. 43-45.) GSL then turned to Houben (Tr. 111-112; Ex. 26-P), but the bond was never obtained (Tr. 22).

On May 13, 1970, while the construction of the conveyor system was underway, Houben notified GSL by letter that due to Houben's financial condition, it would have to discontinue its construction activities. (Ex. 14-P.) When McKee declined GSL's request to finish Houben's work (Tr. 24), GSL concluded the engineering work with some help from McKee (Tr. 23), and contracted with Jelco, Inc., another contractor on the project, to complete the construction of the conveyor system on the basis of cost plus a fee (Tr. 24). The conveyor system was finally completed at a cost to GSL of \$446,480.25 in excess of the Houben contract price. (Tr. 24; Ex. 15-P.)

McKee did not deny, through the course of the trial, that if Houben had obtained the performance bond as required, a bonding company would have been obligated to GSL in the amount of \$300,000.00 for the completion of the conveyor system. Both Mr. Ferguson and Mr. McNeil testified that the bond, if obtained, would have been available to assist GSL when Houben left the job. (Tr. 275, 183.)

McKee did not challenge Jelco's costs in constructing the conveyor system although McKee had opportunities to do so when it examined Jelco's records before the trial. (Tr. 277-279.) Instead, testimony was presented through Mr. McNeil that if McKee had learned in November of Houben's financial troubles, several alternatives would have been available including giving the work to McKee (who later refused it) or to one of the other earlier bidders for the conveyor system such as Coastal Plains. (Tr. 249.) Mr. McNeil testified as to what he thought it would have cost to have Houben's work finished by other contractors that had bid on the conveyor system contract. (Tr. 250-258; Ex. 50-D.)

Although time was of the essence in Houben's work (Ex. 11-P, at p. 13) and time had already been lost when Coastal Plains declined a contract for the conveyor system (Tr. 215), Mr. McNeil's testimony showed that it would have taken an additional two to three weeks for a new contractor just to obtain needed engineering information from Houben's office (Tr. 257). His calculations did not include the cost to GSL of any further delays. (Ex. 50-D.) No evidence was offered by McKee that the original bidders would have taken over Houben's work at their earlier bid prices, that Coastal Plains, Inc. would have given the guarantees it had refused to give before, and that Houben, who was actively pursuing its work under the McKee purchase order, would have stepped aside and made its work product and facilities available to a new contractor. Mr. McNeil acknowledged that no one at McKee had made contact with the earlier bidders prior to the trial to determine whether in fact

any one of them would have taken over the Houben work on the basis of their earlier bids. (Tr. 279-280.) Neither Mr. McNeil nor any other witness testified that, all things considered, Houben should have been removed from the project.

Mr. Bernstrom, an expert witness for GSL, testified that an owner would try very hard to avoid taking a contractor off the job. He gave the reasons for his opinion based upon his experience, namely the attendant delay, even without Houben's opposition, of five to six weeks in getting a new contractor on the job, the likelihood of Houben's opposition to removal and its reluctance to turn over its drawings to a new contractor, the reluctance of a new contractor to rely upon the work product of the old contractor and the probability that a new contractor would insist upon more money. (Tr. 291-294, 298-299.)

Mr. Bernstrom also testified that McKee should have seen that the bond was obtained by Houben in not more than two weeks. (Tr. 72.) In Mr. Bernstrom's opinion, McKee should not have waited until November 6 to call Houben about the bond. It was very poor practice to wait until November 22 to call Houben the second time. (Tr. 96.) It was Mr. Bernstrom's opinion that McKee's performance with respect to the bond was not in accordance with the care, skill and diligence of a professional engineer. (Tr. 71, 77, 84, 87, 89, 96.) No evidence was offered by McKee to show that it had acted properly with respect to the bond.

At the conclusion of the trial, the trial court wrote a memorandum decision stating that GSL was barred, under doctrines of contributory negligence and waiver, from recovering against Houben because the trial court thought Mr. Derriott knew and Mr. Brinkmann knew or should have known of the bond's absence and because GSL paid Houben's progress billings when it knew or should have known of Houben's financial troubles. (R. 86.) Findings of fact, conclusions of law and judgment were requested in accordance with the decision. (R. 88, 91.) The findings of fact and conclusions of law which were entered raise additional issues not raised in the trial court's memorandum decision. All of the material issues raised will be treated in our argument.

## ARGUMENT

### I

#### McKEE IS LIABLE TO GSL IN THE AMOUNT OF THE PERFORMANCE BOND WHICH WAS REQUIRED OF HOUBEN

A. *McKee's duties as GSL's procurement agent included the duty to see that Houben was bonded:* — It was acknowledged by McKee in its answers to the first and third questions in GSL's first interrogatory that McKee acted as GSL's agent in the procurement of Houben's services to provide the conveyor system for GSL. (R. 12, 21.) The evidence at the trial shows that this agency relationship was founded in contract. The witnesses who testified on the subject, Mr. Andrews for GSL and Mr. Hansen and Mr. McNeil for McKee, were agreed that the parties considered the Letter of Intent,

dated January 9, 1969, together with the unsigned Engineering Agreement, to be the equivalent of a contract. (Exs. 4-P, 6-P; Tr. 24, 26, 147, 150, 154, 274.) McKee billed GSL for its services and was paid for those services prior to 1970 pursuant to those instruments. (Tr. 154.)

It was an expressed condition of the contract between GSL and McKee that the latter would act as agent for the procurement and delivery of all equipment and long lead time materials (Ex. 6-P, Par. G, pp. 2-3) as McKee had offered to do in its response to GSL's bid (Ex. 1-P). In accordance with McKee's representation as to the quality of the services offered (Ex. 1-P), the contract, as another expressed condition, provided that McKee would perform in accordance with the care, skill and diligence of a professional engineer (Ex. 6-P, p. 15).

One of McKee's duties as GSL's procurement agent, was to purchase a conveyor system for GSL's project and another duty was to see that the vendor would be bonded. The evidence of these duties is found in McKee's undertaking to purchase the conveyor system (Ex. 11-P), in Mr. Andrews' order that Houben be bonded (Tr. 104), in his and Mr. Brinkmann's assumption this had been done (Tr. 243, 43), in McKee's admission in its answer to the complaint that a performance bond was required of Houben (par. 5 of the Answer, R. 6), in the acknowledgment in McKee's answers to interrogatories that GSL did not notify McKee at any time that the bond was not required and did not authorize any delay in obtaining the bond (R. 13-14, 23), in McKee's direction to Houben that McKee be furnished copies of the bond



without delay (Ex. 11-P, at p. 5), in McKee's reserved authority to approve the form and the issuer of the bond (Ex. 11-P, at p. 16), in Mr. McNeil's follow-up with Mr. Ferguson about the bond (Tr. 276), and in Mr. Ferguson's subsequent follow-up telephone conversations with Houben to get the bond (Tr. 43-44).

No witness who appeared at the trial on McKee's behalf testified that McKee was not responsible to see that the bond was obtained by Houben.

McKee's duty to see that Houben was bonded was as much a part of the contract as were the expressed conditions. The principle of law involved is discussed in *Selections from Williston on Contracts*, § 1293, as follows:

"It is not only for breach of express promises that a contractor is liable but of implied promises as well; and the most serious difficulty in this matter is to determine what promises are fairly to be implied in a given contract. The principle to be adopted, however, is plain; the difficulty lies in its application. Since the governing principle in the formation of contract is the justifiable assumption by one party of a certain intention on the part of the other, the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

"Whenever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

In view of Mr. Andrews' order that the vendor be bonded, followed by McKee's express directions to that effect in its purchase order issued to Houben, GSL was justified in assuming that McKee intended to see that Houben was bonded. A promise on McKee's part to see to the bonding of Houben must be implied. Mr. McNeil's subsequent discussion with Mr. Ferguson about the bond and Mr. Ferguson's efforts in his telephone conversations with Houben should refute any argument that McKee did not undertake to see that Houben was bonded.

B. *McKee's duties as GSL's procurement agent included the duty of prompt action including notice with respect to the performance bond required of Houben:* — When an agency relationship is created there is also implied a duty of care by the agent for the principal's interest. This duty, fiduciary in character, has been expressed in Mecham, *Outlines of Agency*, § 500, in the following words:

“It is the duty of the agent to conduct himself with the utmost loyalty and fidelity to the interests of his principal, \* \* \* .

“When the principal employs an agent, the law presumes that he does so in order to secure to himself the benefits of the agent's skill, experience or discretion, and to reap the fruits of the performance of the undertaking. The law presumes that he expects — and it gives him the right to expect — that the agent so employed will endeavor to further the principal's interests, and will use his powers for the principal's benefit; \* \* \* .”

This duty of care was further explained in this court's opinion in *State Automobile & Casualty Under. v. Salisbury*, 27 U.2d 229, 494 P.2d 529, 531-532 (1972), as follows:

"It is true that the rights and duties of principal and agent inter se are primarily fixed by the contract between them. But also to be considered in connection therewith are the mutual responsibilities the parties have to each other which are implied from the operation of law applicable to such relationship. Arising from what is commonly known and accepted as to the customs and experience in the everyday affairs of life, the parties each has the right to assume that the other will perform the duties he agrees to with reasonable care, competence, diligence and good faith, even though such terms are not expressly spelled out in the contract; and if failure to so perform those duties results in damage to the other party he is entitled to recover for breach of the contractual duties."

In that case the principal recovered from its agent the money paid out under a policy of insurance which was issued contrary to the principal's instructions.

The duty of care includes the duty to act promptly and to notify the principal of material facts. This duty is discussed in Mecham, *Outlines of Agency*, § 541, as follows:

" \* \* \* It is the duty of the agent to give the principal timely notice of all facts coming to the agent's knowledge, relating to the subject matter of the agency, which it is material for the principal to know for the protection of his interests, and which the agent can and may communicate to him. \* \* \* "

"If he has undertaken to care for, protect or represent the principal's property or interests, and such property or interests are attacked or threatened or imperiled by hostile forces or impending dangers or wrongful acts, it would ordinarily be the agent's duty to inform the principal, so that he may take such steps as he desires to protect his interests. If the agent finds himself unable or unwilling to carry out undertakings for which the principal depends upon him, he should give the principal timely notice, that he may make other arrangements. \* \* \* "

The agent's obligation of prompt action including notice to the principal has been recognized in the cases where the agent failed to procure insurance for the principal's protection. The insurance cases are instructive and helpful because they show the application of the duty of prompt action and notice in situations where the principal's protection through insurance is part of the agent's obligation. In the annotation, *Duty and Liability of Insurance Broker as Agent to Insured with Respect to Procurement, Continuance, Terms, and Coverage of Insurance Policies*, 29 ALR2d 165, § 9, the principle is stated in the following language (at p. 184):

"An insurance agent or broker who undertakes to procure insurance in accordance with instructions must notify his principal if he cannot obtain the insurance seasonably or upon the terms and conditions requested. \* \* \* "

Again, in 43 Am. Jur. 2d, Insurance, § 175, it is stated (footnotes omitted):

"An agent or broker who undertakes to procure insurance in accordance with instructions impliedly undertakes to give notice to his client

in the event of his failure to procure such insurance. Unless there is an agreement to the contrary, he is bound to act promptly to obtain the insurance on the terms and conditions directed, and if he cannot obtain the insurance seasonably or upon such terms or conditions, he must notify his principal of such fact within a reasonable time, and if he fails to do so he makes himself liable for damages suffered by his client from lack of insurance."

"Where the agent fails to procure insurance in accordance with his instructions, the person employing him for that purpose is not contributorily negligent because of not seeking to obtain insurance through other means where he has not been notified that a policy of insurance has not been issued."

The special urgency for prompt action and notice where insurance is involved was expressed by the United States Court of Appeals for the Ninth Circuit in *Coffey v. Polimeni*, 188 F.2d 539 (1951), where an insurance broker failed to act on an application for fire insurance. Counsel for the defendant had argued that no action would lie for an agent's delay where there was no breach of a legal duty to obtain insurance. The court responded to the argument in the following words (188 F.2d at 542-543 (footnotes omitted):

"Counsel argue that, assuming negligence, the correct rule is that no action will lie against an insurance agent for delay in acting on an application where no breach of legal duty to obtain insurance appears. They concede that this view is at variance with the general trend of authority and with the great bulk of the decisions dealing immediately with the subject. A few commen-

tators and an occasional judge have criticized this line of decisions as unorthodox or unsupported by reason, but they appear to us to announce a salutary rule. The thought they stand for is that the agent or company owes the applicant for insurance what amounts to a legal obligation to act with reasonable promptness on his application, either by providing the desired coverage or by notifying the applicant of the rejection of the risk so that he may not be lulled into a feeling of security or put to prejudicial delay in seeking protection elsewhere. Implicit in the cases is a recognition that these transactions are fundamentally unlike ordinary commercial or business dealings where mere profit is the stake, so prone is the failure of insurance protection to result in irretrievable disaster to the individual. Those engaged in the insurance business understand perfectly the peculiar urgency of the need for prompt attention in these matters."

Although McKee is not engaged in the insurance business, as the defendant in the *Coffey* case was, McKee did undertake to protect GSL's interests where insurance was involved. The need for the bond and for prompt action in this case was perfectly understood. This is evident in the provisions of McKee's purchase order calling for the bond to be obtained without delay, in McKee's reserved authority to approve the issuer and the form of the bond and in Mr. Ferguson's testimony that he knew the bond was important and was to be obtained without delay. (Tr. 183.)

C. *GSL was damaged by McKee's failure to act promptly and is entitled to recover from McKee the amount of the bond:* — Both Mr. Ferguson and Mr.

McNeil testified that if the bond had been obtained it would have been available to assist GSL when Houben left the job. (Tr. 183, 275.) Mr. Bernstrom testified that McKee was not justified in waiting seven weeks until November 6 and again until November 20 to telephone Houben about the bond. (Tr. 72, 77, 84, 87, 89, 96.) Mr. Parker, a lawyer experienced with bonding companies and familiar with Houben's circumstances at the time, gave his opinion that the opportunity for Houben to obtain a bond had passed after October 1969 and, when asked by the trial court, stated that this was so on November 14, 1969, when he called GSL about an assignment of funds by Houben for Mr. Parker's client. (Tr. 168, 172-173.) McKee's personnel, after investigation, had concluded that Houben was a "qualified and acceptable bidder" (Ex. 24-P, part P-3 at p. 3; Tr. 275) and gave Houben the contract in the form of McKee's purchase order. No attempt was made at the trial to challenge Houben's qualifications for the work. No evidence was offered that Houben, if McKee had acted promptly in its supervision of its purchase order, could not have obtained the required performance bond. Nor was any evidence offered to contradict Mr. Parker's testimony that after October 1969 it was too late for Houben to obtain a bond.

Under the provisions of a performance bond of the kind required of Houben,<sup>8</sup> GSL would have been obligated first of all to pay the contract price for the conveyor system. Then the surety would have been obli-

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<sup>8</sup>An example of the type of bond that should have been obtained was received in evidence, without objection, as Ex. 16-P. (Tr. 5.)

gated either to complete Houben's contract or to make funds available for its completion up to but not exceeding the amount of the bond, \$300,000.00. And, finally, GSL would have had to pay the balance, if any, for the completion of the work, in this case \$146,480.00. Instead, since there was no bond, GSL was obligated to pay the total of the contract price plus the overrun of \$446,480.00. (Tr. 24, Ex. 15-P.) GSL's evidence in this respect was not contradicted by McKee.

The measure of damages where the protection of insurance has been lost is expressed in the ALR2d Annotation referred to *supra*, p. 21, as follows (29 ALR2d, § 29, at p. 203):

"The measure of the liability of an insurance agent or broker for his failure to procure insurance is the amount that would have been due under the insurance policy if it had been obtained."

In *Couch On Insurance*, vol. 2d, at § 25:32, the principle is stated as follows:

"An agent or broker who in any respect violates his duties to the insured is personally liable to him for the damages caused by his default, that is, for the amount which could have been recovered from the insurer had the proper insurance been obtained."

We submit that McKee's conduct in waiting seven weeks to contact Houben about the bond and in failing to notify GSL of the delay was a breach of McKee's duty as GSL's agent, whether that conduct is judged by the standard of reasonableness expressed in *State Automobile & Casualty Under.*, *supra*, p. 20, or by the contract's standard — the care, skill and diligence of a



professional engineer — which Mr. Bernstrom testified McKee failed to meet. (Tr. 77, 81-82, 84, 87, 89, 96.) We further submit that the measure of GSL's damage in this case, which it is entitled to recover from McKee, is the amount of the performance bond.

## II

### THE TRIAL COURT ERRED IN CONCLUDING THAT GSL IS BARRED BY WAIVER OR CONTRIBUTORY NEGLIGENCE OR IS ESTOPPED FROM RECOVERING FROM MCKEE

A defendant who relies upon waiver, contributory negligence or estoppel in order to avoid liability assumes a burden of proof which McKee has failed to meet. The elements of these defenses are simply not present in this case.

A. *GSL did not waive its rights as against McKee with respect to the bond:* — In this court's opinion in *Schwab Safe & Lock Co. v. Snow*, 47 Ut. 199, 152 Pac. 171, 176 (1915), waiver was defined in the following language:

"But what is a 'waiver'? It is defined as being the 'voluntary and intentional relinquishment of a known legal right and implies an election to dispense with something of value or forego some advantage which the party waiving it might at his option, have demanded or insisted upon.' 4 Words and Phrases (2d Ser.) 1226, 1227. A waiver may or may not rest in contract. If it does, it, like all other contracts, requires some consideration. \* \* \* "

The *Schwab* case involved the question whether the defendant had waived its cause of action for defendant's failure to deliver goods as contracted. The Court found the casual correspondence between the parties insufficient to establish an intentional relinquishment of a known legal right.

The requirement of consideration referred to in the *Schwab* case, where a waiver of contractual obligations is alleged, is discussed in *Selections from Williston on Contracts*, § 680, as follows:

"Either prior to the time for performing a contract, or after its breach, the parties may agree that one or both of them shall do something different from the performance which the original contract specified. If the agreement is made after breach, it is in accord, and when executed it is an accord and satisfaction. The new contract may be like the old except for the single particular of the time of performance. Thus, where, after failure to carry out a marriage contract at the agreed time, negotiations are begun to arrange for a subsequent date, whatever rights may have accrued from such failure are thereby discharged. If the new agreement is made when there has as yet been no breach of the original contract, it is not technically an accord but the principles involved are the same, being merely those involved in the formation of any contract. Whether the agreement is made before or after breach, therefore, there must be consideration to support it."

In 28 Am. Jur. 2d, *Estoppel and Waiver*, § 159, it is stated that where substantial rights are involved and in the absence of an estoppel, a waiver of rights based upon contract requires consideration.

In a later case, *Phoenix Insurance Co. v. Heath*, 90 Ut. 187, 61 P.2d 308 (1936), an agent was held liable for delay in cancelling a policy of insurance. The agent had argued that his principal had waived a provision in the agency contract by which defendant was required to immediately reduce the coverage of a policy of insurance when instructed by plaintiff. The claim of waiver was based on the fact that plaintiff had replied to defendant's initial letter seeking a reconsideration of the ordered reduction. The Court, in holding there was no waiver in the facts of the case, said that waiver is the "intentional relinquishment of a known right" and went on to stress the importance of a distinct intentional relinquishment in the following language (61 P.2d at 311):

" \* \* \* To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be expressed or implied. \* \* \* "

From the foregoing decisions, it is clear that before a party may be held to have waived its rights with respect to another party, the latter must establish the following points with respect to the party against whom waiver is claimed:

1. the party asserting his rights must know of them,
2. he must have relinquished his rights intentionally,
3. the waiver must have been distinctly made, and
4. where the rights rest in contract, consideration is required.

It is also necessary that the party claiming the benefits of waiver establish his own position as one who understood and accepted the alleged waiver. This point is expressed in the following quotation from 28 Am. Jur. 2d, *Estoppel and Waiver*, § 158 (footnotes omitted):

“As in other situations, the question whether waiver will be found in any particular case depends not upon the secret intention of the party against whom it is asserted, but upon the effect which his conduct has had upon the other party. There is no waiver unless the waiver is so intended by one party and so understood and accepted by the other. \* \* \*

Finally, it is necessary that the party claiming the benefits of waiver establish that the alleged waiver was timely. This point is discussed in 28 Am. Jur. 2d, *Estoppel and Waiver*, § 157 as follows (footnotes omitted):

“The term ‘waiver’ implies a choice or an election to dispense with something of present value or to forego some present advantage. Therefore, to constitute a waiver, the right or privilege claimed to have been waived must generally have been in existence at the time of the purported waiver. \* \* \*

Turning to the facts of this case and looking first to GSL's conduct, there is evidence of a distinct expressed intent that Houben's work be bonded. First of all, GSL ordered that Houben be bonded. Later, on November 18, 1969, the memoranda of Mr. Brinkmann and Mr. Derricott regarding the coverage and amount of the bond were sent to McKee. And still later, in March 1970, Mr. Brinkmann telephoned McKee for the bond.

This conduct is entirely inconsistent with the idea that GSL was not concerned about the bond or did not look to McKee to see that the bond was obtained. There was no evidence that GSL ever expressed an intent to waive its rights with respect to the bond.

The trial court evidently thought that an intent on GSL's part to waive its rights with respect to the bond can be implied from the payment of Houben's progress billings. (R. 86-87.) We fail to see any connection between the payment of a progress billing for services rendered and an intentional relinquishment of GSL's rights with respect to the bond. The trial court offered no explanation of such a connection and none was offered by any witness at the trial. If there was a connection it surely would have been seen by Mr. McNeil and Mr. Ferguson, McKee's project manager and purchasing agent, but they saw none. They discussed with each other Houben's delay in obtaining the bond and Mr. McNeil approved GSL's payment of the progress billing while Mr. Ferguson telephoned Houben about the bond. (Tr. 175, 177, 184-185, 275-276.)

The method of disbursing funds to Houben under the first progress billing, where the money was sent to Houben in care of a law firm, resulted from the undisclosed arrangement between Mr. Parker and Houben. Again, we are at a loss to see any connection between the method of disbursing Houben's funds and a distinct intentional relinquishment of GSL's rights with respect to the bond. No connection was offered by any witness.

So far as any evidence of consideration for GSL's waiver of contractual rights against McKee is concerned, none was offered.

Turning to McKee's position, there is no evidence that it understood or accepted a waiver by GSL of the bond. As we have noted, the evidence is that Mr. Ferguson and Mr. McNeil acted as though they thought the bond was required. Although both men had the opportunity to do so at the trial, neither said he thought GSL had waived the requirement of the bond or that McKee was not accountable for the bond's absence.

Turning to the time element, the uncontradicted evidence is that the payment of Houben's progress billings occurred after it was no longer possible for Houben to be bonded.

B. *The defense of contributory negligence is not available to McKee in this case:* — In the first place, negligence on GSL's part would not relieve McKee of liability under GSL's first cause of action for breach of McKee's contract with GSL. As stated in *Williston On Contracts*, § 1012 C, at pp. 40-41 (footnotes omitted):

"One who holds himself out as exercising a profession, occupation, or business thereby represents that he is competent to perform services incident to that profession, occupation, or business; and is bound to exercise the skill which is reasonable in view of that representation.

"The employee is none the less liable though the principal was negligent, for the basis of lia-

bility is not tort but contract, and the employer is under no duty to the employee to be careful about his own affairs. \* \* \* ”

Even if GSL had no cause of action for breach of contract and was limited to its second cause of action for negligence, its payment of Houben's progress billings was not contributory negligence on GSL's part. The elements of contributory negligence, as set forth in *Larson v. Evans*, 12 U.2d 245, 364 P.2d 1088, 1091 (1961), are “(1) Negligence for which plaintiff is responsible \* \* \*. (2) Causal connection between such negligence and the injury complained of. \* \* \*” No evidence was offered to show in what way GSL's payment of Houben's progress billings and the continuation of Houben on the project was negligent. No evidence was offered of any advantage to GSL from nonpayment of the progress billings or from Houben's removal from the project. And no evidence was offered of any connection between what GSL did and the injury GSL sustained by reason of McKee's failure to act promptly to see that Houben was bonded.

What GSL did in continuing with Houben on the project in 1970 was done in reliance upon McKee's implied promise to act promptly in its supervision of its purchase order issued to Houben and, in the absence of notice to the contrary, in the belief that the bond had been obtained.

As Professor Prosser has stated in *The Law of Torts*, 4th ed., pp. 416-417, 420, the standard of conduct for the plaintiff and the defendant is not the same. The

plaintiff can be justified in relying upon the defendant to protect him. We have shown (*supra*, p. 19) that in a case such as this one, where a principal employs an agent to look after the principal's interests, "the law presumes that" the principal "expects — and it gives him the right to expect — that the agent so employed will endeavor to further the principal's interests, and will use his powers to his [the principal's] benefit". The point is stated in *State Automobile & Casualty Under. v. Salisbury, supra*, p. 20, in these words, referring to the parties in an agency relationship, "each has the right to assume that the other will perform the duties he agreed to with reasonable care, competence, diligence and good faith \* \* \* ."

Mr. Brinkmann and Mr. Andrews testified that they assumed that the bond had been obtained. (Tr. 243, 44-45.) Clearly it was not negligence for GSL to do what the law expected and gave it the right to do in this case. It is for this reason that the courts, in insurance cases, have held that where there is a total failure to procure insurance, the principal, in the absence of notice, is not contributorily negligent for failing to obtain other insurance. Even in cases where there was a partial failure of performance, in that a policy with the wrong terms was obtained, it has been held that failure of the insured to read the policy was not contributory negligence. See the Annotation cited at p. 21, *supra*, 29 ALR2d at p. 186.

As noted above, no evidence was offered of a causal connection between what GSL did and the injury sustained by reason of the bond's absence. One of the very



risks for which the bond was to have provided protection — an unbonded vendor with financial problems — had become a reality before Mr. Parker's telephone call or Houben's letter concerning the method of payment was received and before the payment of any of Houben's progress billings.

If the parties had not been ignorant of the circumstances which made it impossible for Houben to obtain a bond in November and thereafter, all that could then have been required of GSL at that point in time was that it act reasonably under the circumstances so as not to enhance unduly the financial loss that GSL would suffer should Houben fail to complete the conveyor system. GSL could not have been asked to incur risks or to sacrifice its substantial right to timely completion of the conveyor system by changing contractors in order to minimize McKee's liability for failure to see that Houben obtained the bond. 22 Am. Jur. 2d, *Damages* at §§ 30, 32-33.

No one testified for McKee that in their opinion Houben should have been removed from the job and replaced by another contractor in November or at any later time. The trial court did not find that there would have been advantage to GSL in removing Houben from the job or in refusing to pay Houben for work performed. Such a move is fraught with problems of time and cost, as Mr. Bernstrom testified. (Tr. 291-294, 298-299.) In his opinion as an expert, and the only witness to testify as to what should have been done, the reasonable course to pursue would have been the course that was followed

by the parties in ignorance of the true situation, namely to continue with Houben on the job.

When Houben left the job, GSL proceeded on the most economical basis open to it by completing, with McKee's help, the remaining engineering and by employing, on a cost basis, another contractor which was already at the job site, to complete the remaining construction work which McKee had refused to do. (Tr. 23-24.)

C. *This is not a case for the application of the doctrine of estoppel:* — Although the trial court did not mention estoppel in its decision, it did state in its conclusion of law No. 6 that GSL was estopped from recovering from McKee. (R. 92.) We believe that the application of the doctrine of estoppel in this case is entirely misplaced. Estoppel has to do with preventing a party from denying some material fact, as explained in *Migliaccio v. Davis*, 120 Ut. 1, 232 P.2d 195, 198 (1951):

“ \* \* \* Equitable estoppel or estoppel in pais is the principal by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying or asserting the contrary of, any material fact, which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.”

The trial court's findings of fact and conclusions of law do not disclose what material fact it thought GSL should be precluded from contradicting. No one testified that McKee changed its position to its injury because of anything done or said by GSL.

### III

#### THE TRIAL COURT'S FINDINGS OF FACT ARE CONTRARY TO THE EVIDENCE

In challenging the trial court's findings of fact we do not ask this court to substitute its judgment for the judgment of the trial court on issues of fact where the evidence is in conflict or where reasonable minds might differ in their interpretation of the evidence. We assume the burden of showing error in respect to material questions of fact in that (1) the facts as found are without sufficient evidentiary support in the record and (2) the trial court failed to find facts for which there was credible uncontradicted evidence. *Martin v. Martin*, 29 U.2d 413, 510 P.2d 1102, 1103 (1973); *DeVas v. Noble*, 13 U.2d 133, 369 P.2d 290, 293 (1962); *Charlton v. Hackett*, 11 U.2d 389, 360 P.2d 176 (1961).

A. *It was error to fail to find that there was a contract of employment between GSL and McKee pursuant to which McKee acted as GSL's agent in the procurement of the conveyor system for GSL's process plants: —* Witnesses for both parties testified that the Letter of Intent and the unsigned Engineering Agreement were considered by the parties as the equivalent of a contract

pursuant to which McKee performed as GSL's agent and was paid for its services. (Tr. 16, 147, 154, 274). No evidence was offered to the contrary.

B. *It was error to fail to find that McKee was the contracting party with Houben for the conveyor system and had all the powers reserved to McKee in its purchase order including full authority to act in GSL's best interest with respect to the bonding of Houben: — See the purchase order McKee issued to Houben. (Ex. 11-P.)*

C. *It was error to find (Fdg. No. 6 (R. 89)) that GSL assumed "the duty or obligation to inquire of Houben as to the status of the performance bond, to see that the bond was procured, to inquire of Houben or others as to Houben's ability to provide said performance bond, or to advise GSL of these matters": — No such finding was intimated in the trial court's memorandum decision. The finding contradicts the trial court's conclusions of law which necessarily presume a duty on McKee's part to see that Houben was bonded. No witness who testified for McKee ever said that GSL assumed such responsibility. The evidence is all one way in pointing to McKee as the party with the duty as to the bond. The date of GSL's purported assumption to responsibility for the bond is stated in the finding to be August 21, 1969. McKee's purchase order, issued five weeks later, clearly directed that copies of the bond be sent not to GSL but to McKee and reserved to McKee approval of the form and the issuer of the bond. (Ex. 11-P, at pp. 5, 16.) Mr. Ferguson, who was*

acting head of McKee's purchasing department and over all of McKee's jobs, had assigned himself with an assistant to the GSL project. (Tr. 192, 266, 174.) He had responsibility for the fifty purchase orders issued by McKee and was accountable only to Mr. McNeil, the project manager. (Tr. 181-182, 191.) Mr. Ferguson followed up on important non-engineering documents from vendors (Exs. 53-P, 54-P, 55-P, 56-P) and was the person who telephoned Houben about the bond on November 6 and again on November 20, 1969, evidently after his superior, McNeil, had spoken to him about it (Tr. 175, 177, 184-185, 276). Mr. McNeil testified that the purchasing agent's duties included following up on bonds (Tr. 275) as did Mr. Bernstrom (Tr. 80-81). Mr. McNeil also testified that the responsibility and duties of McKee on the work that it was doing for GSL's project did not change. (Tr. 274.)

GSL lent its assistance to McKee's engineering department in the form of Mr. Derricott to act under the direction of that department in securing engineering information from vendors. A meeting was held on August 200, and a memorandum was made of the meeting by McKee to confirm Mr. Derricott's duties. (Ex. 27-P.) The memorandum states that the subject of the meeting was the securing of "outstanding engineering information that is critical to the project schedule" and that Mr. Derricott was to perform expediting as "indicated in the minutes of weekly meetings and as supplemented by other communications from McKee Engineering." The decision of the parties, as expressed in the memorandum, was in accord with the testimony of Mr. Andrews and

Mr. Brinkmann that GSL had offered the services of Mr. Derricott to speed up the process of getting certified drawings from vendors because there were so many vendors and their certified drawings were needed by McKee's engineers so that they could tie the pieces of equipment to be supplied by vendors into the overall design of the project and prepare the construction drawings to be used by the contractor for building purposes. (R. 42, 54.) Mr. Derricott's duties were clearly fixed by the testimony of Mr. Andrews and Mr. Brinkmann and by McKee's memorandum of the meeting. Mr. Derricott's testimony and the testimony of Mr. Bernstrom, speaking as an experienced engineer, was to the same effect. (Tr. 113, 115-118, 80-81.) McKee offered no witness to contradict its memorandum or the testimony of GSL's witnesses. No evidence was offered that anyone from GSL was ever asked by McKee, in the minutes of weekly meetings or otherwise, to follow up on the bond.

D. *It was error to fail to find that had McKee acted promptly with respect to the bonding of Houben, a bond would have been issued and a surety company would have been obligated to GSL, to the extent of \$300,000.00, for the completion of the conveyor system:*—McKee had investigated Houben, including its financial situation, and concluded that it was qualified as a bidder for the conveyor system and capable of doing the work. (Tr. 275; Ex. 24-P, part P-3 at p. 3.) McKee never denied that Houben could have obtained a bond before November 1969. Mr. Ferguson and Mr. McNeil both testified that a bond, if obtained, would have been avail-

able to assist GSL. (Tr. 183, 275.) GSL's evidence with respect to the bond (Ex. 16-P) went unchallenged.

E. *It was error to fail to find that McKee waited seven ~~eight~~ weeks after its purchase order to Houben was issued, at which time Houben no longer could obtain a bond to contact Houben the first time about the bond, that McKee waited another two weeks to telephone Houben a second time and then waited without taking further action with respect to the bonding of Houben: — See the testimony of Mr. Ferguson. (Tr. 175, 177, 184-185.)*

F. *It was error to find (Fdg. No. 8 (R. 90) that Mr. Derricott and Mr. Brinkmann knew at all times that Houben had not obtained a bond: — There is no evidence that Mr. Brinkmann learned of the bond's absence before he telephoned McKee in March 1970. The only evidence with respect to Mr. Derricott's "knowledge", which he denied, is the excerpt from his deposition which was read into the record and which was limited by McKee's counsel to November 18, 1969, and thereafter. (Tr. 126-128, 132-133.) Finding No. 8 is contradicted by Finding No. 11 which says that GSL was not told until after November 20 of the bond's absence. (R. 90.)*

G. *It was error to fail to find that GSL expressed a continued intent that Houben be bonded: — The evidence in this respect is the order that Houben be bonded, the memoranda sent to McKee in November 1969 on the subject of the amount and coverage of the bond and the telephone call to McKee for the bond in March 1970. (Tr. 104, 120, 227, 43-44; Ex. 22-D.)*

H. *It was error to find (Fdg. No. 9 (R. 90)) that GSL knew or should have known on November 14 of Houben's financial difficulties and that Houben "probably" would not have been able to secure a bond at that time: —* No one testified to that effect. Mr. Parker's testimony shows that when he telephoned GSL on that date he said nothing of financial troubles on Houben's part. (Tr. 162-163.) Mr. Irvine testified that there was nothing in the telephone call to cause a reasonable business man to believe that Houben was in trouble. (Tr. 282-290.) Mr. Parker's opinion as to Houben's ability to get a bond on November 14 was not qualified. He did not say "probably"; he said Houben could not get a bond then. (Tr. 168-169, 172-173.) McKee never called anyone to testify that there was any possibility of Houben's getting a bond on November 14 or afterwards.

I. *It was error to find (Fdg. No. 11, R. 90)) that shortly after Mr. Ferguson's telephone calls of November 6 and 20 to Houben, the information was relayed to GSL that Houben was still working on the bond and it was error to fail to find that McKee did not tell GSL that the bond was delayed and did not seek instructions of GSL when McKee learned of Houben's delay: —* The only possible basis in the record for Finding No. 11 is Mr. Ferguson's testimony that probably or possibly he told someone at GSL of his telephone calls. (Tr. 178, 184-185.) This testimony doesn't even rise to the level of contradicting McKee's sworn answers to interrogatories, which were received in evidence (Tr. 106-107, 262-263), where it was expressly stated that GSL was not told that a bond had not been obtained (Question No. 9 (R. 12) and the answer (R. 21)).



J. *It was error to find (Fdg. No. 12 (R. 90)) that on November 14, when Mr. Parker telephoned GSL, his client then had an assignment from Houben, that he asked GSL to agree to the terms of that assignment and that GSL did agree: —* This is certainly not Mr. Parker's testimony. He testified that there was no assignment until after GSL had told him it would not honor an assignment and he and Houben had decided upon their "arrangement", which they concealed from GSL, for getting funds to Parker's client. (Tr. 162-164, 172.)

K. *It was error to find (Fdg. No. 13 (R. 91)) that McKee's engineering and procurement services were terminated on January 2, 1970: —* What was effected on that date was a reduction in forces. McKee continued to perform engineering and procurement services for GSL, in the case of "purchasing" to March 22, and in the case of "engineering" to April 19, 1970, as McKee's billings to GSL show. (Ex. 52-D at pp. 4 and 6.)

L. *It was error to fail to find that no benefit would have accrued to GSL from refusing to pay Houben after November 1969 or in removing Houben from the job:—* Mr. Bernstrom, an experienced engineer, testified at length as to the reasons why the parties, if they had known of Houben's situation, would not have removed Houben from the job. (Tr. 291-294, 298-299.) No attempt was made by McKee to contradict this evidence and no witness called by McKee said that it would have been to GSL's benefit to refuse to pay Houben for services performed or to remove Houben. Clearly, McKee, as the

contracting party with Houben and knowing there was no bond, thought it appropriate for GSL to pay Houben. (Tr. 276.)

We submit that there is not much similarity between the case tried to the court below and the case presented in the findings of fact. In material respects the findings are prejudicial to GSL in that they do not resolve the fact issues in accordance with the evidence.

### CONCLUSION

For the foregoing reasons the judgment entered by the trial court should be reversed and the case remained to the trial court with directions to enter judgment for GSL on its claim against McKee. Since the evidence is not in conflict, so far as the material issues of facts are concerned, a retrial of the case is not required. *Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n*, 94 Ut. 97, 75 P.2d 669, 681 (1938).

Respectfully submitted,

SENIOR & SENIOR

Claron C. Spencer

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January 1975

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