

CONTRACTS--ISSUE OF BREACH BY NON-PERFORMANCE.

The *(state number)* issue reads:

"Did the defendant breach the contract (by non-performance)¹?"

(You will answer this issue only if you have answered the *(state number)*² issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the time had come for the defendant to [perform] [abide by] a material term of the contract. This means that, at the time of the alleged breach (*here select as appropriate*):

[the plaintiff and the defendant were to perform their respective obligations at the same time and the plaintiff was ready, willing and able to perform *his* obligation(s)]³

[there were no conditions precedent to the defendant's obligation to perform]

¹Specify that the basis for breach is non-performance when the jury is also instructed on breach by repudiation (N.C.P.I.--Civil 502.05) or by prevention (N.C.P.I.--Civil 502.10).

²See N.C.P.I.--Civil 501.01 (Contracts--Issue of Formation).

³*McCurry v. Purgason*, 170 N.C. 463, 468, 87 S.E. 244, 246 (1915).

CONTRACTS--ISSUE OF BREACH BY NON-PERFORMANCE. (Continued).

[each condition precedent to the defendant's obligation to perform was satisfied]

[[the defendant] [defendant's agent] had prevented the plaintiff from performing a condition precedent to the defendant's obligation to perform]⁴

[state any other condition which affects the defendant's obligation to perform as supported by the evidence, e.g., condition subsequent⁵]

(A condition precedent is a requirement that some act or event occur or not occur before a party to a contract becomes obligated to perform. A condition precedent may be [written] [oral] [implied from the circumstances].)

Second, that the defendant failed to [perform] [abide by] a material term of the contract.⁶ (A material term is one that is

⁴*Nance v. Western Union Telegraph Co.*, 177 N.C. 313, 316, 98 S.E. 838, 839 (1919).

⁵"[A] 'condition subsequent is any event the existence of which, by agreement of the parties, operates to discharge a duty of performance that has arisen.'" *Henderson & Corbin, Inc. v. West Carteret Water Corp., Inc.*, 107 N.C. App. 740, 743-44, 421 S.E.2d 792, 794 (1992) (quoting John D. Calamari & Joseph M. Perillo, *Contracts* § 11-7 (3d ed. 1987)). The existence of a condition subsequent depends upon the intention of the parties in light of the circumstances of the case, the nature of the contract, the relation of the parties, and other admissible evidence that aids the court in determining the intention of the parties. *Wade v. Lutterloh*, 196 N.C. 116, 120, 144 S.E.2d 694, 696 (1928) (quoting Page on The Law of Contracts, vol. 5 (2d Ed.) § 2948). Although conditions subsequent do not require technical words, they must be clearly expressed, as they are not favored in law. *Hinton v. Vinson*, 180 N.C. 393, 397, 104 S.E.2d 897, 899 (1920).

CONTRACTS--ISSUE OF BREACH BY NON-PERFORMANCE. (Continued).

essential to the transaction, that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material. A party's failure to [perform] [abide by] a term that is not material is not a breach of contract. In determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[state other factors supported by the evidence].

In this case the plaintiff contends, and the defendant denies, that *(here select as appropriate)*:

[the plaintiff was ready, willing and able to perform *his* obligations]

**Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 217, 141 S.E.2d 292, 294 (1965).

CONTRACTS--ISSUE OF BREACH BY NON-PERFORMANCE. (Continued).

[there were no conditions precedent to the defendant's obligation to perform]

[[the condition precedent] [each condition precedent] to the defendant's obligation to perform was satisfied] [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been satisfied*)].

[[the defendant] [defendant's agent] had prevented the plaintiff from performing a condition precedent to the defendant's obligation to perform] [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been thwarted*)].

[[the defendant] [defendant's agent] had it within *his* power or control to perform a condition precedent to the defendant's obligation to perform but failed to do so [without reasonable excuse] [in bad faith] [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been sabotaged*)].

CONTRACTS--ISSUE OF BREACH BY NON-PERFORMANCE. (Continued).

[state contention regarding satisfaction of any other condition to the defendant's obligation to perform, e.g., condition subsequent].

The plaintiff further contends, and the defendant denies, that the defendant failed to [perform] [abide by] a material term of the contract [as follows] [in one or more of the following ways]: *(Give the plaintiff's contention(s) by identifying each material term which the plaintiff alleges has been breached).*

Finally, as to the *(state number)* issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract (by non-performance), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

