

# Indefinite and Illusory Promises

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This module explores scenarios where both parties have exchanged mutual promises yet still fail to enter a binding contract. This failure arises for one of two reasons: the promises may not be detailed enough, referred to in contract law as “indefinite promises,” or they may be too open-ended, known as “illusory promises.” We will examine them in order.

## A. Indefinite Promises

Negotiating contracts can be an expensive and complex endeavor. Often, parties decide not to delineate every detail—particularly those concerning low-probability events—typically in anticipation that they can negotiate a resolution should such events occur or, if necessary, resolve the matter through litigation and rely on the court to address any gaps.

While courts are generally prepared to intervene and fill contractual gaps (as we will explore more thoroughly in a module on gap filling) they are reluctant to do so when a contract is deemed indefinite because the parties failed to agree on a critical aspect of their transaction. Consequently, if such an essential term of a contract remains open, courts typically decline to enforce the agreement. *See, e.g., Dows v. Nike, Inc.*, 846 So.2d 595, 602 (Fla. 4th DCA 2003); *King v. Bray*, 867 So.2d 1224, 1226 (Fla. 5th DCA 2004).

### **Sun Printing & Pub’g Ass’n v. Remington Paper & Power Co.**

235 N.Y. 338 (New York Court of Appeals 1923)

CARDOZO, J.

Plaintiff agreed to buy and defendant to sell 1,000 tons of paper per month during the months of September, 1919, to December, 1920, inclusive, 16,000 tons in all. Sizes and quality were adequately described. Payment was to be made on the 20th of each month for all paper shipped the previous month. The price for shipments in September, 1919, was to be \$3.73¾ per 100 pounds, and for shipments in October, November and December, 1919, \$4 per 100 pounds. “For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon, said price in no event to be higher than the contract price for newsprint charged

by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates.”

Between September 1919, and December of that year, inclusive, shipments were made and paid for as required by the contract. The time then arrived when there was to be an agreement upon a new price and upon the term of its duration. The defendant in advance of that time gave notice that the contract was imperfect, and disclaimed for the future an obligation to deliver. Upon this, the plaintiff took the ground that the price was to be ascertained by resort to an established standard. It made demand that during each month of 1920 the defendant deliver 1,000 tons of paper at the contract price for newsprint charged by the Canadian Export Paper Company to the large consumers, the defendant to receive the benefit of any differentials in freight rates. The demand was renewed month by month till the expiration of the year. This action has been brought to recover the ensuing damage.

Seller and buyer left two subjects to be settled in the middle of December and at unstated intervals thereafter. One was the price to be paid. The other was the length of time during which such price was to govern. Agreement as to the one was insufficient without agreement as to the other. If price and nothing more had been left open for adjustment, there might be force in the contention that the buyer would be viewed, in the light of later provisions, as the holder of an option. This would mean that in default of an agreement for a lower price, the plaintiff would have the privilege of calling for delivery in accordance with a price established as a maximum. The price to be agreed upon might be less, but could not be more than “the contract price for newsprint charged by the Canadian Export Paper Company to the large consumers.” The difficulty is, however, that ascertainment of this price does not dispense with the necessity for agreement in respect of the term during which the price is to apply. Agreement upon a maximum payable this month or to-day is not the same as an agreement that it shall continue to be payable next month or tomorrow. Seller and buyer understood that the price to be fixed in December for a term to be agreed upon, would not be more than the price then charged by the Canadian Export Paper Company to the large consumers. They did not understand that if during the term so established the price charged by the Canadian Export Paper Company was changed, the price payable to the seller would fluctuate accordingly. This was conceded by plaintiff's counsel on the argument before us. The seller was to receive no more during the running of the prescribed term, though the Canadian maximum was raised. The buyer was to pay no less during that term, though the maximum was lowered. In brief,

the standard was to be applied at the beginning of the successive terms, but once applied was to be maintained until the term should have expired. While the term was unknown, the contract was inchoate.

The argument is made that there was no need of an agreement as to time unless the price to be paid was lower than the maximum. We find no evidence of this intention in the language of the contract. The result would then be that the defendant would never know where it stood. The plaintiff was under no duty to accept the Canadian standard. It does not assert that it was. What it asserts is that the contract amounted to the concession of an option. Without an agreement as to time, however, there would be not one option, but a dozen. The Canadian price to-day might be less than the Canadian price tomorrow. Election by the buyer to proceed with performance at the price prevailing in one month would not bind it to proceed at the price prevailing in another. Successive options to be exercised every month would thus be read into the contract. Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer. Even if, however, we were to interpolate the restriction that the option, if exercised at all, must be exercised only once, and for the entire quantity permitted, the difficulty would not be ended. Market prices in 1920 happened to rise. The importance of the time element becomes apparent when we ask ourselves what the seller's position would be if they had happened to fall. Without an agreement as to time, the maximum would be lowered from one shipment to another with every reduction of the standard. With such an agreement, on the other hand, there would be stability and certainty. The parties attempted to guard against the contingency of failing to come together as to price. They did not guard against the contingency of failing to come together as to time. Very likely they thought the latter contingency so remote that it could safely be disregarded. In any event, whether through design or through inadvertence, they left the gap unfilled. The result was nothing more than 'an agreement to agree.' Defendant 'exercised its legal right' when it insisted that there was need of something more (1 Williston Contracts, § 45) . . .

We are told that the defendant was under a duty, in default of an agreement, to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business. To hold it to such a standard is to make the contract over. The defendant reserved the privilege of doing its business in its own way, and did not undertake to conform to the practice and beliefs of others. We are told again that there was a duty, in default of other agreement, to act as if the successive terms were to expire every month. The contract says they are to expire at such intervals as the agreement

may prescribe. There is need, it is true, of no high degree of ingenuity to show how the parties, with little change of language, could have framed a form of contract to which obligation would attach. The difficulty is that they framed another. We are not at liberty to revise while professing to construe.

We do not ignore the allegation of the complaint that the contract price charged by the Canadian Export Paper Company to the large consumers “constituted a definite and well defined standard of price that was readily ascertainable.” The suggestion is made by members of the court that the price so charged may have been known to be one established for the year, so that fluctuation would be impossible. If that was its character, the complaint should so allege. The writing signed by the parties calls for an agreement as to time. The complaint concedes that no such agreement has been made. The result, *prima facie*, is the failure of the contract. In that situation, the pleader has the burden of setting forth the extrinsic circumstances, if there are any, that make agreement unimportant . . . No point is made in brief or in argument that the Canadian price, when once established, is constant through the year. On the contrary, there is at least a tacit assumption that it varies with the market. The buyer acted on the same assumption when it renewed the demand from month to month, making tender of performance at the prices then prevailing . . . The complaint as it comes before us leaves no escape from the conclusion that agreement in respect of time is as essential to a completed contract as agreement in respect of price. The agreement was not reached, and the defendant is not bound...

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in the Appellate Division and in this court, and the question certified answered in the negative.

CRANE, J. (dissenting)

I cannot take the view of this contract that has been adopted by the majority. The parties to this transaction beyond question thought they were making a contract for the purchase and sale of 16,000 tons rolls news print. The contract was upon a form used by the defendant in its business, and we must suppose that it was intended to be what it states to be, and not a trick or device to defraud merchants....

[The dissent describes the contract at length and explains the set of events that led to litigation]

Surely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 tons rolls of paper, and that the instrument contained all the elements necessary to make a binding contract. It is a strain upon reason to imagine the paper house, the Remington Paper and Power Company, Incorporated, and the Sun Printing and Publishing Association, formally executing a contract drawn up upon the defendant's prepared form which was useless and amounted to nothing. We must, at least, start the examination of this agreement by believing that these intelligent parties intended to make a binding contract. If this be so, the court should spell out a binding contract, if it be possible.

I not only think it possible, but think the paper itself clearly states a contract recognized under all the rules at law. It is said that the one essential element of price is lacking; that the provision above quoted is an agreement to agree to a price, and that the defendant had the privilege of agreeing or not, as it pleased; that if it failed to agree to a price there was no standard by which to measure the amount the plaintiff would have to pay. The contract does state, however, just this very thing. Fifteen days before the first of January, 1920, the parties were to agree upon the price of the paper to be delivered thereafter, and the length of the period for which such price should apply. However, the price to be fixed was not 'to be higher than the contract price for newsprint charged by the Canadian Export Paper Company to large consumers. Here surely was something definite. The 15th day of December arrived. The defendant refused to deliver. At that time there was a price for newsprint charged by the Canadian Export Paper Company. If the plaintiff offered to pay this price, which was the highest price the defendant could demand, the defendant was bound to deliver. This seems to be very clear.

But while all agree that the price on the 15th day of December could be fixed, the further objection is made that the period during which that price should continue was not agreed upon. There are many answers to this.

We have reason to believe that the parties supposed they were making a binding contract; that they had fixed the terms by which one was required to take and the other to deliver; that the Canadian Export Paper Company price was to be the highest that could be charged in any event. These things being so, the court should be very reluctant to permit a defendant to avoid its contract.

On the 15th of the fourth month, the time when the price was to be fixed for subsequent deliveries, there was a price charged by the Canadian Export Paper Company to large consumers. As the defendant failed to agree upon a price, made no attempt to agree upon a price and deliberately broke its contract, it could readily be held to deliver the rest of the paper, a thousand rolls a month, at this Canadian price. There is nothing in the complaint which indicates that this is a fluctuating price, or that the price of paper as it was on December 15th was not the same for the remaining twelve months.

Or we can deal with this contract, month by month. The deliveries were to be made 1,000 tons per month. On December 15th 1,000 tons could have been demanded. The price charged by the Canadian Export Paper Company on the 15th of each month on and after December 15th, 1919, would be the price for the thousand ton delivery for that month.

... Contract implies a term or period and if the evidence should show that the Canadian contract price was for a certain period of weeks or months, then this period could be applied to the contract in question.

Failing any other alternative, the law should do here what it has done in so many other cases, apply the rule of reason and compel parties to contract in the light of fair dealing. It could hold this defendant to deliver its paper as it agreed to do, and take for a price the Canadian Export Paper Company contract price for a period which is reasonable under all the circumstances and conditions as applied in the paper trade.

To let this defendant escape from its formal obligations when any one of these rulings as applied to this contract would give a practical and just result is to give the sanction of law to a deliberate breach. (*Wood v. Duff-Gordon*, 222 N. Y. 88)

For these reasons I am for the affirmance of the courts below.

HISCOCK, Ch. J., POUND, MCLAUGHLIN and ANDREWS, JJ., concur with CARDOZO, J.; CRANE, J., reads dissenting opinion with which HOGAN, J., concurs.

### Notes and Questions

The disagreement between the judges seems to be not just about the application of a legal rule. It seems to be grounded in differences in judicial philosophy. Do you see why? What is the role of the judicial system under each such philosophy? Which role

do you think is more suitable? Consider things like fairness, certainty, efficiency, equality, long-term incentives, and transaction cost. They all play a role here.

Despite the move to relax the consequences of indefiniteness, courts continue to find indefinite contracts unenforceable. *See, e.g., Merle Wood & Associates, Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294 (S.D. Fla. 2012). So why do parties continue to leave contracts indefinite and risk a refusal to enforce? Richard Posner posits that parties minimize transaction costs when they leave some terms ambiguous, planning or at least hoping that if an unspecified problem arises, they can resolve it with future negotiation. Barring that, perhaps a court will fill the gap for them. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1587 (2005). Indeed, it is likely impossible to negotiate every potential provision of a contract fully. One cannot anticipate all potential contingencies. Additionally, parties might rationally fail to negotiate over a low-probability event because the cost of negotiating might outweigh the benefit of covering the event with a specific contract term. *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 543-44 (1998). Can any of those theories explain why the parties in *Sun Printing* chose to leave the gaps in their contract? How can you explain why the parties left those gaps?

The dissent suggests that “[s]urely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 tons rolls of paper, and that the instrument contained all the elements necessary to make a binding contract.” Do you agree? And should courts focus on the parties’ actual intent to be bound? Here is the Restatement’s position:

- (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain  
...
- (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

Restatement (Second) of Contracts § 33. The Seventh Circuit, in a famous opinion, suggested that “[c]ontract law gives effect to the parties’ wishes, but they must express these openly. Put differently, ‘intent’ in contract law is

objective rather than subjective.” *Empro Mfg. v. Ball-Co Mfg.*, 870 F.2d 423, 425 (7th Cir. 1989). Therefore, it might be reasonable not to focus on what the parties “had in mind,” but on their expression of their intent. How would you apply that objective approach in this case? Didn’t the parties have an expressed intent for a 16-month contract? Why didn’t that suffice for the majority?

The Massachusetts Supreme Court provided another explanation for the notion of indefiniteness:

It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement . . . It is not required that all terms of the agreement be precisely specified, and the presence of undefined or unspecified terms will not necessarily preclude the formation of a binding contract. The parties must, however, have progressed beyond the stage of ‘imperfect negotiation.’

*Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000). Were the gaps that the parties in *Sun Printing* left with respect to the last 12 months of their agreement “material terms”?

Make sure you understand all the suggestions that the plaintiff (and the dissent) makes in filling the gaps in the contract and why the majority rejects them. How does each of those suggestions allocate (or maybe reallocate) the risk of price changes between the parties?

In a series of lectures given shortly after his decision in *Sun Printing*, Cardozo defended his position as follows:

Here was a case where advantage had been taken of the strict letter of a contract to avoid an onerous engagement. Not inconceivably a sensitive conscience would have rejected such an outlet of escape. We thought this immaterial. The court subordinated the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life. The end to be attained in the development of the law of contract is the supremacy, not of some hypothetical, imaginary will, apart from external manifestations, but of will outwardly



revealed in the spoken or the written word. The loss to business would in the long run be greater than the gain if judges were clothed with power to revise as well as to interpret ... In this department of activity, the current axiology still places stability and certainty in the forefront of the virtues.

BENJAMIN CARDOZO, GROWTH OF THE LAW 110-111 (1924).

Do you agree with this reasoning?

The UCC was not in effect when *Sun Printing* was decided. UCC § 2-305, however, directly relevant to facts of the case, and demonstrates how the legislator can provide default rules and change the indefiniteness determination.

### **§ 2-305. Open Price Term.**

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

What would have been the result in Sun Printing if the UCC has been in effect?

## **B. Illusory Promises**

Illusory promises often stem from disparities in the parties' bargaining power, meaning their capacity during negotiations to significantly influence or dictate the terms and outcomes. This power is derived from factors such as relative strength, resources, alternatives, or leverage that one side possesses over the other. Typically, parties with greater bargaining power can negotiate more favorable terms, while those with less power may need to make more concessions.

Contract law usually enforces agreements that result from unequal bargaining power, even if they allow one party greater control over how the obligations are performed (although the module on unconscionability considers a few relatively-rare exceptions to this rule). However, in extreme cases, a party might reserve the right not to perform at all. The issue here is that such a promise—deemed illusory in contract law—does not limit the promisor's legal freedom and, therefore, cannot serve as valid consideration for the other party's promises. Consequently, these promises may lack consideration, rendering them unenforceable under contract law.

Keep this principle in mind as you read the following case.

### **Vohs v. Donovan**

322 Wis. 2d 721 (Court of Appeals of Wisconsin 2009)

VERGERONT, J.

This dispute arises out of a residential offer to purchase that contained the phrase “offer is subject to sellers obtaining home of their choice on or before February 20, 2007,” a date two days after both the buyers and the sellers signed the offer. The circuit court granted the buyers' motion for summary judgment on the ground that this phrase made the contract indefinite and illusory and therefore the buyers were not obligated to purchase the sellers' home. The sellers appeal.

We conclude there are material factual disputes that prevent summary judgment on both the ground of indefiniteness and the ground of illusoriness. With respect to indefiniteness, when the contingency language is considered along with the extrinsic evidence submitted by the sellers, there is a reasonable inference that both parties understood that the contingency referred to a particular pending transaction, and that

understanding makes the contingency sufficiently definite. With respect to illusoriness, there is a reasonable inference that fulfilling the contingency was not wholly within the sellers' control, and therefore the contingency did not make the sellers' promise illusory. Accordingly, we reverse and remand for further proceedings.

### **Background**

On February 18, 2007, Paul and Teresa Donovan signed an offer to purchase the home of Terry and Vicki Vohs for the sum of \$550,000. The offer included a contingency providing that the "offer is subject to sellers obtaining home of their choice on or before Feb. 20, 2007." The Vohses accepted the offer to purchase on the same date.

According to the Vohses' unrebutted submissions, as of February 18, 2007, they had a pending counteroffer to purchase another home. That counteroffer contained a provision that it had to be accepted on or before February 19, 2007. On February 19, the counteroffer was accepted and the Vohses' broker communicated this to the Donovans. For reasons not disclosed in the record, the Donovans did not follow through with the purchase of the Vohses' home. The Vohses subsequently sold this home to another buyer for less money.

The Vohses filed this lawsuit alleging the Donovans had breached their contract and requesting judgment in the amount of \$50,000, plus costs and attorney fees. The Donovans' filed a motion for summary judgment on the grounds that the contingency made the contract indefinite and illusory and therefore unenforceable. The Vohses opposed the motion. The circuit court granted summary judgment in favor of the Donovans, apparently concluding that the contingency made the contract unenforceable.

### **Discussion**

On appeal the Vohses contend the circuit court erred in granting summary judgment because the evidence of the surrounding circumstances makes the contingency definite and prevents their promise from being illusory. The Donovans respond that the language "obtaining" and "home of their choice" makes the contingency indefinite and renders the contract illusory.

We review de novo the grant and denial of summary judgment....

We begin by summarizing the case law on indefinite contract terms and illusory promises and explaining the distinction between the two concepts. A contract is not enforceable if an essential term is indefinite. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 178, 557 N.W.2d 67 (1996). Definiteness requires that there be a mutual assent by the parties, which we determine according to an objective standard. *Id.* This means that we “examine[ ] both the wording of the contract as well as the surrounding circumstances” to determine if there was mutual assent to a sufficiently definite meaning of the term. *Metropolitan Ventures*, 291 Wis.2d 393, ¶ 24, 717 N.W.2d 58. When there is evidence that two parties intended to enter into a contract, “the [court or] trier of fact should not frustrate their intentions, but rather should attach a ‘sufficiently definite meaning’ to the contract language if possible.” *Id.*, ¶ 25 (quoting *Management Computer Servs.*, 206 Wis.2d at 179, 557 N.W.2d 67).

Like a contract with an indefinite essential term, an illusory promise is unenforceable, but for different reasons. An illusory promise—“one that its maker can keep without subjecting him[self] or herself to any detriment or restriction”—does not constitute consideration. *Devine v. Notter*, 2008 WI App 87, ¶ 4, 312 Wis.2d 521, 753 N.W.2d 557. When performance by a promisor is “conditional on some fact or event that is wholly under the promisor’s control and his [or her] bringing it about is left wholly to his [or her] own will and discretion,” then the promise to perform is illusory. *Metropolitan Ventures*, 291 Wis.2d 393, ¶ 33, 717 N.W.2d 58 (quoting *Nodolf v. Nelson*, 103 Wis.2d 656, 660, 309 N.W.2d 397 (Ct.App.1981)). In such a situation, assuming no other consideration is given for a return promise, there is no contract. See *Devine*, 312 Wis.2d 521, ¶ 4, 753 N.W.2d 557; 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin On Contracts* § 5.28 at 142–143 (rev. ed.1995).

In summary, while both indefiniteness and illusoriness affect the enforceability of a contract, they are distinct concepts. If an essential term is indefinite, thereby rendering the contract unenforceable, the analysis ends there. If, on the other hand, the challenged contract term is determined to be definite and the party attacking the contract also asserts the term constitutes an illusory promise, the issue of illusoriness must then be resolved using a distinct analysis. In other words, a contract term may be definite but nonetheless constitute an illusory promise.

Turning to the arguments in this case, we consider first the question whether the contingency that the “offer is subject to sellers obtaining home of their choice on or before Feb. 20, 2007” is indefinite.

This clause creates a condition precedent to the sellers' performance. A significant aspect of the clause is that the condition must occur *two days* from the date on which both parties signed the document. Viewed objectively, this extremely short time period implies that the Vohses are already involved in a transaction to purchase a particular house and they expect a resolution within two days. It is illogical to infer that the Vohses are asking for two days to find a house of their choice and complete the transaction to "obtain" it.

While the specific transaction is not referred to in the clause, the Vohses have submitted an affidavit with attached documents showing they were engaged in negotiations to purchase a particular house. The submission shows that February 19, 2007, is the date by which the owners of the other house had to respond to the Vohses' counteroffer. Thus, the Vohses were agreeing that, if their counteroffer was accepted by February 20, they would be obligated under the contract with the Donovans. The Donovans have not submitted any factual materials disputing that this was the transaction upon which the contingency was based. On these facts, it is reasonable to infer that the Donovans agreed to the two-day contingency, knowing its purpose.

We recognize that the Vohses' knowledge of the pending transaction is not in itself sufficient to make the contingency clause definite. See *Gerruth Realty Co. v. Pire*, 17 Wis.2d 89, 92–94, 115 N.W.2d 557 (1962) (contingency based "upon the purchaser obtaining the proper amount of financing" was indefinite where there was no evidence the purchaser communicated his views on what the proper amount was, no evidence of the seller's understanding, and no evidence providing a reasonable inference that the parties contracted in light of current practices in the community). But, as we have explained, the undisputed facts support a reasonable inference that the Donovans did know of the pending transaction.

The Donovans argue that the word "obtain" is "unclear on its face" because the acceptance of the Vohses' counteroffer to purchase contained conditions and therefore the other house was not "conclusively obtained." The Donovans suggest that the word "obtain" could also mean either after the closing or after physical occupancy. This is an argument that the language is ambiguous—that is, reasonably susceptible to more than one construction. See *Management Computer Servs.*, 206 Wis.2d at 177, 557 N.W.2d 67. Ambiguity is not the same as indefiniteness. *Id.* at 178, 557 N.W.2d 67. An indefinite term is one that is not susceptible to any reasonable construction, even after considering the surrounding circumstances. See *id.* at 178–182, 557 N.W.2d 67. Thus,

the fact that “obtain” is ambiguous—and we agree that it is—does not make the clause indefinite and therefore unenforceable.<sup>4</sup>

The Donovans also argue that the phrase “home of their choice” is indefinite because it can mean whatever the Vohses want it to mean. They find support for this position in *Nodolf*, in which we concluded that a financing clause making the buyers obligation to perform contingent on obtaining financing by [a certain date] lacked sufficient definiteness for a court to be able to determine the terms of financing and therefore rendered the entire contract unenforceable. *Nodolf*, 103 Wis.2d at 658–59, 309 N.W.2d 397.

*Nodolf* does not support the Donovans’ position. Although the clause there contained a date by which financing had to be obtained, we did not address whether that date, in context, implied a reference to circumstances further defining the condition; and we cannot read from the opinion any suggestion that the date did have that meaning. In addition, in *Nodolf* there was no extrinsic evidence supporting a reasonable inference that the parties shared the same definite understanding of the contingency. Instead, in *Nodolf* the buyer’s position was that the fact that he subsequently obtained financing, by itself, made the terms more definite, and that is the proposition we rejected. *Id.* at 659, 309 N.W.2d 397.<sup>5</sup>

We conclude there is a reasonable inference from the record that the Donovans were aware of the Vohses’ pending transaction to purchase another house. That transaction provides definiteness to the meaning of the condition that the Vohses “obtain[ ] [a] home of their choice by February 20, 2007.” Accordingly, the Donovans are not entitled to summary judgment on their defense that this clause is indefinite and makes the contract unenforceable.

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<sup>4</sup> While indefiniteness and ambiguity are distinct concepts, they are closely related. If an ambiguity is capable of being resolved through principles of contract construction, it necessarily means that the term is sufficiently definite and does not render the contract unenforceable. See *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 182, 557 N.W.2d 67 (1996). Similarly, the determination that a term is sufficiently definite may also resolve an ambiguity in the term. As an example, if the extrinsic evidence in this case establishes that the contingency is sufficiently definite, that same evidence would appear to resolve the ambiguity in the meaning of “obtain.”

<sup>5</sup> The Donovans argue that, because the contract was void as illusory and indefinite, we may not consider extrinsic evidence or equitable theories but only the contract itself. To the extent the Donovans mean that, in addressing an indefiniteness challenge, a court may not consider extrinsic evidence, this is an incorrect statement of the law....

Because the contingency clause is sufficiently definite under a reasonable view of the record, we turn to the issue whether that clause makes the Vohses' promise to perform illusory. The Donovans' argument that the Vohses' promise is illusory, like their argument on the indefiniteness of the "home of their choice" language, is based on *Nodolf*. In *Nodolf*, we rejected the buyer's argument that he made the financing contingency definite by obtaining financing by the prescribed date, explaining:

If the buyer could breathe enforceability into the contract by claiming that the financing condition has been met, the buyer would have an unfettered right to decide whether the condition has been fulfilled. This is true because only the buyer and no court [because of the indefiniteness of the clause] can determine the terms of the financing. That right would render [the] buyer's promise to purchase illusory.

*Nodolf*, 103 Wis.2d at 659, 309 N.W.2d 397.

The Donovans' reliance on *Nodolf* for their argument on illusoriness has the same deficiency as does their *Nodolf* argument on indefiniteness. They ignore the February 20, 2007, date and the extrinsic evidence of the pending transaction with an acceptance date of February 19, 2007. When the extrinsic evidence is considered, there is a reasonable inference that whether the Vohses' counteroffer will be accepted by the deadline is not "wholly under [their] control" or "left wholly to [their] own will and discretion." *Metropolitan Ventures*, 291 Wis.2d 393, ¶ 33, 717 N.W.2d 58 (citing *Nodolf*, 103 Wis.2d at 660, 309 N.W.2d 397). The Donovans do not provide an argument to the contrary.

We conclude, therefore, that the Donovans are not entitled to summary judgment on their defense that the Vohses' promise to perform is illusory.

### Conclusion

The Donovans are not entitled to summary judgment on the ground of either indefiniteness or illusoriness. We therefore reverse and remand for further proceedings.

Order reversed and cause remanded.

### Notes and Questions

1. What does *Vohs* teach about the relationship between an indefinite contract and an illusory contract?
2. Assume that on the evening of February 18, after the offer was signed, communicated, and accepted, the Donovans would have decided they did not wish to sell their home to the Vohses. Couldn't they have retracted their offer to buy the other house and thus guaranteed that the condition for their deal with Vohses was never met? If so, why wasn't their promise illusory?
3. The Restatement explains the notion of illusory promises in the following way:

A promise . . . is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for; or

Restatement (Second) of Contracts § 77(a).

4. The threshold to find a promise non-illusory is relatively low. It is enough that the promisor is unable to avoid any limitation, even a small one, on their legal freedom to make the promise non-illusory. Moreover, parties to a contract must perform their obligations in good faith. That doctrine can, and often does, limit the freedom of parties to do as they please, thus making their promises non-illusory. We further explore this principle in the module on gap filling and good faith.