

United States Court of Appeals,
Ninth Circuit.
NANAKULI PAVING AND ROCK COMPANY
v.
SHELL OIL COMPANY.

664 F.2d 772
Argued and Submitted Sept. 9, 1980.
Decided Dec. 21, 1981.

Before BROWNING, Chief Judge, and KENNEDY,
Circuit Judge, and HOFFMAN, District Judge.

HOFFMAN, District Judge:

I.

History Of Nanakuli-Shell Relations Before 1973

[Nanakuli is the smaller of the two major paving contractors on the island of Oahu, the larger of the two being Hawaiian Bitumuls (H.B.). Until 1964 or so, Nanakuli only got small paving jobs; it was not in a position to compete with H.B. for government contracts for major roads, airports, and other large jobs. In the early sixties Nanakuli owner Walter Grace began to negotiate a mutually advantageous arrangement with Shell whereby Shell, which had a small market percentage and no asphalt terminals in Hawaii, would sign a long-term supply contract with Nanakuli that would commit Nanakuli to buy its asphalt requirements from Shell. On the other hand, Nanakuli would be helped to expand its paving business on Oahu through a guaranteed supply and a discount on its asphalt prices. Nanakuli's growth would expand the market for Shell's asphalt on the island, which would justify Shell's capital investment of a half a million dollars on Oahu.

[Shell signed a five-year supply contract in 1963 with Nanakuli. In 1969 a new contract was signed, to last until December 31, 1975, at which point each would have the option to cancel on six-months' notice, with a minimum duration of over seven years, April 1, 1969, to July 1, 1976. Such long-term contracts were certainly unusual for Shell and this one was probably unique among Shell's customers, at least by 1974.

[In 1976, Nanakuli sued Shell for breach of the 1969 contract. The dispute was over the price. The contract required Nanakuli to purchase its requirements at price that equals "Shell's posted price at the time of delivery," which is the price that Shell actually charged. Nanakuli argued, however, that it was entitled to "price protection"—that Shell would not increase prices without advance notice and would

hold the price on work bid for enough time to allow Nanakuli to use up the tonnage bid at the old price. Nanakuli based its argument that it is entitled to "price protection" both on trade usage and course of performance.]

II

Trade Usage Before And After 1969

The key to price protection being so prevalent in 1969 that both parties would intend to incorporate it into their contract is found in one reality of the Oahu asphaltic paving market: the largest paving contracts were let by government agencies and none of the three levels of government—local, state, or federal—allowed escalation clauses for paving materials. If a paver bid at one price and another went into effect before the award was made, the paving company would lose a great deal of money, since it could not pass on increases to any government agency or to most general contractors. Extensive evidence was presented that, as a consequence, aggregate suppliers routinely price protected paving contractors in the 1960's and 1970's, as did the largest asphaltic supplier in Oahu, Chevron. Nanakuli presented documentary evidence of routine price protection by aggregate suppliers as well as two witnesses: Grosjean, Vice-President for Marketing of Ameron H.C. & D., and Nihei, Division Manager of Lone Star Industries for Pacific Cement and Aggregate (P.C. & A.). Both testified that price protection to their knowledge had always been practiced: at H.C. & D. for many years prior to Grosjean's arrival in 1962 and at P.C.&A. routinely since Nihei's arrival in 1960. Such protection consisted of advance notices of increases, coupled with charging the old price for work committed at that price or for enough time to order the tonnage committed. The smallness of the Oahu market led to complete trust among suppliers and pavers. H.C. & D. did not demand that Nanakuli or other pavers issue purchase orders or sign contracts for aggregate before incorporating its aggregate prices into bids. Nanakuli would merely give H.C. & D. a list of projects it had bid at the time H.C. & D. raised its prices, without documentation. "Their word and letter is good enough for us," Grosjean testified. Nihei said P.C. & A. at the time of price increases would get a list of either particular projects bid by a paver or simply total tonnage bid at the old price. "We take either one. We take their word for it." None of the aggregate companies had a contract with Nanakuli expressly stating price protection would be given; Nanakuli's contract with P.C. & A. merely set out that it would not charge Nanakuli more than it charged its other customers.

The evidence about Chevron's practice of price protection came in the form of an affidavit by Bery Jameyson, Chevron's Division Manager-Asphalt in California. He stated that Chevron had routinely price protected H.B. on work bid for many years, the last occasion prior to the signing of the 1969 contracts between Nanakuli and Shell being a price increase put into effect on March 7, 1969, with the understanding that H.B. would be protected on work bid, which amounted to 12,000 tons. In answer to Shell's protest that such evidence was not relevant without the contract itself, Nanakuli introduced the contract into evidence. Much like the contract at issue here, it provided that the price to H.B. would be a given percentage of the price Chevron set for a specified crude oil in California. No mention was made of price protection in the written contract between H.B. and Chevron.

In addition to evidence of trade usages existing in 1969 when the contract at issue was signed, the District Judge let in evidence of the continuation of that trade usage after 1969, over Shell's protest. He stated that, giving a liberal reading to Section 1-205, he felt that later evidence was relevant to show that the expectation of the parties that a given usage would be observed was justified. The basis for incorporating a trade usage into a contract under the U.C.C. is the justifiable expectation of the parties that it will be observed. That later evidence consisted here of more price protection by the aggregate companies on Oahu, as well as continued asphalt price protection. Chevron after 1969 continued price protecting H.B. on Oahu and, on raising prices in 1979, price protected Nanakuli on the island of Molokai, where Nanakuli purchased its asphalt from Chevron. Additionally, Shell price protected Nanakuli in 1977 and 1978 on Oahu.

III

Shell's Course Of Performance of the 1969 Contract

The Code considers actual performance of a contract as the most relevant evidence of how the parties interpreted the terms of that contract. In 1970 and 1971, the only points at which Shell raised prices between 1969 and 1974, it price protected Nanakuli by holding its old price for four and three months, respectively, after announcing a price increase. In the late summer of 1970, Shell had announced a price increase from \$35 to \$40 a ton effective September 1, 1970. When Nanakuli protested to Bohner that it should be price protected on work already committed, Blee wrote Bohner an in-house memo that, if Bohner could not "convince" Nanakuli to go

along with the price increase on September 1, he should try to "bargain" to get Nanakuli to accept the price raise by at least the first of the year, which was what was finally agreed upon. During that four-month period, Nanakuli bought 3,300 tons. Shell announced a second increase in October, 1970, from \$40 to \$42 effective December 31st. Before that increase went into effect, on November 25 Shell increased the raise to \$4, making the price \$44 as of the first of the year. Shell again agreed to price protect Nanakuli by holding the price at \$40, which had been the official price since September 1, for three months from January to March, 1971. Shell did not actually raise prices again until January, 1974, but at several points it believed that increases would be necessary and gave several months' advance notice of those possible increases. Those actions were in accord with Shell's own policy, as professed by Bohner, and that of other asphalt and aggregate suppliers: to give at least several months' advance notice of price increases. On January 14, 1971, Shell wrote its asphalt customers that the maximum 1971 increase would be to \$46. On July 9, 1971, another letter promised the price would not go over \$50 in 1972. In addition, Bohner volunteered on direct information that Shell price protected Nanakuli on the only two occasions of price increases after 1974 by giving 6 months' advance notice in 1977 and 3 or 4 months' advance notice in 1978, a practice he described as "in effect carryover pricing," his term for price protection. By its actions, Bohner testified, Shell allowed Nanakuli time to make arrangements to buy up tonnage committed at the old price, that is, to "chew up" tonnage bid or contracted. Shell apparently offered this testimony to impress the jury with its subsequent good faith toward Nanakuli. In fact, it also may have reinforced the impression of the universality of price protection in the asphalt paving trade on Oahu and, by *786 showing Shell's adherence to that practice on every relevant occasion except 1974, have highlighted for the jury what was the commercially reasonable standard of fair dealing in effect on Oahu in 1974.

IV

Shell-Nanakuli Relations, 1973-74

Two important factors form the backdrop for the 1974 failure by Shell to price protect Nanakuli: the Arab oil embargo and a complete change of command and policy in Shell's asphalt management. The jury was read a page or so from the World Book about the events and effect of the partial oil embargo, which shortened supplies and increased the price of petroleum, of which asphalt is a byproduct. The federal government imposed direct price controls on

petroleum, but not on asphalt. Despite the international importance of those events, the jury may have viewed the second factor as of more direct significance to this case. The structural changes at Shell offered a possible explanation for why Shell in 1974 acted out of step with, not only the trade usage and commercially reasonable practices of all suppliers to the asphaltic paving trade on Oahu, but also with its previous agreement with, or at least treatment of, Nanakuli. [...]

V Scope Of Trade Usage

The validity of the jury verdict in this case depends on four legal questions. First, how broad was the trade to whose usages Shell was bound under its 1969 agreement *790 with Nanakuli: did it extend to the Hawaiian asphaltic paving trade or was it limited merely to the purchase and sale of asphalt, which would only include evidence of practices by Shell and Chevron? Second, were the two instances of price protection of Nanakuli by Shell in 1970 and 1971 waivers of the 1969 contract as a matter of law or was the jury entitled to find that they constituted a course of performance of the contract? Third, could the jury have construed an express contract term of Shell's posted price at delivery as reasonably consistent with a trade usage and Shell's course of performance of the 1969 contract of price protection, which consisted of charging the old price at times of price increases, either for a period of time or for specific tonnage committed at a fixed price in non-escalating contracts? [...]

We approach the first issue in this case mindful that an underlying purpose of the U.C.C. as enacted in Hawaii is to allow for liberal interpretation of commercial usages. [...] The drafters of the Code explain:

This Act is drawn to provide flexibility so that, since it is intended to be a semipermanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices....

.... The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

....In this connection, Section 1-205 incorporating

into the agreement prior course of dealing and usages of trade is of particular importance.

Id., Comments 1 & 2 (emphasis supplied). We read that to mean that courts should not stand in the way of new commercial practices and usages by insisting on maintaining the narrow and inflexible old rules of interpretation.

The Code defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Id. s 490:1-205(2) (emphasis supplied). We understand the use of the word "or" to mean that parties can be bound by a usage common to the place they are in business, even if it is not the usage of their particular vocation or trade. That reading is borne out by the repetition of the disjunctive "or" in subsection 3, which provides that usages "in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." Id. s 490:1-205(3). The drafters' Comments say that trade usage is to be used to reach the "... commercial meaning of the agreement..." by interpreting the language "as meaning what it may fairly be expected to mean to parties involved in the particular transaction in a given locality or in a given vocation or trade." Id., Comment 4 (emphasis supplied). The inference of the two subsections and the Comment, read together, is that a usage need not necessarily be one practiced by members of the party's own trade or vocation to be binding if it is so commonly practiced in a locality that a party should be aware of it. Subsection 5 also shows the importance of the place where the usage is practiced: "An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance." [...] This language indicates that Shell would be bound not only by usages of sellers of asphalt but by more general usages on Oahu, as long as those usages were so regular in their observance that Shell should have been aware of them. This reading of the Code, in our opinion, achieves an equitable result. A party is always held to conduct generally observed by members of his chosen trade because the other party is justified in so assuming unless he indicates otherwise. He is held to more general business practices to the extent of his actual knowledge of those practices or to the degree his ignorance of those practices is not excusable: they were so generally practiced he should have been aware of them.

Shell argued not only that the definition of trade was

too broad, but also that the practice itself was not sufficiently regular to reach the level of a usage and that Nanakuli failed to show with enough precision how the usage was carried out in order for a jury to calculate damages. The extent of a usage is ultimately a jury question. The Code provides, "The existence and scope of such a usage are to be proved as facts." [Haw.Rev.Stat. s 490:1-205\(2\)](#). The practice must have "such regularity of observance ... as to justify an expectation that it will be observed..." Id. The Comment explains:

The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial," "universal" or the like (F)ull recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.

Id., Comment 5. The Comment's demand that "not universality but only the described 'regularity of observance' " is required reinforces the provision only giving "effect to usages of which the parties 'are or should be aware'" Id., Comment 7. A "regularly observed" practice of protection, of which Shell "should have been aware," was enough to constitute a usage that Nanakuli had reason to believe was incorporated into the agreement.

Nanakuli went beyond proof of a regular observance. It proved and offered to prove that price protection was probably a universal practice by suppliers to the asphaltic paving trade in 1969. It had been practiced by H.C. & D. since at least 1962, by P.C. & A. since well before 1960, and by Chevron routinely for years, with the last specific instance before the contract being March, 1969, as shown by documentary evidence. The only usage evidence missing was the behavior by Shell, the only other asphalt supplier in Hawaii, prior to 1969. That was because its only major customer was Nanakuli and the judge ruled prior course of dealings between Shell and Nanakuli inadmissible. Shell did not point in rebuttal to one instance of failure to price protect by any supplier to an asphalt paver in Hawaii before its own 1974 refusal to price protect Nanakuli. Thus, there clearly was enough proof for a jury to find that the practice of price protection in the asphaltic paving trade existed in Hawaii in 1969 and was regular enough in its observance to rise to the level of a usage that would be binding on Nanakuli and Shell.[...]

VI

Waiver Or Course Of Performance

Course of performance under the Code is the action of the parties in carrying out the contract at issue, whereas course of dealing consists of relations between the parties prior to signing that contract. Evidence of the latter was excluded by the District Judge; evidence of the former consisted of Shell's price protection of Nanakuli in 1970 and 1971. Shell protested that the jury could not have found that those two instances of price protection amounted to a course of performance of its 1969 contract, relying on two Code comments. First, one instance does not constitute a course of performance. "A single occasion of conduct does not fall within the language of this section...." [Haw.Rev.Stat. s 490:2-208](#), Comment 4. Although the Comment rules out one instance, it does not further delineate how many acts are needed to form a course of performance. The prior occasions here were only two, but they constituted the only occasions before 1974 that would call for such conduct. In addition, the language used by a top asphalt official of Shell in connection with the first price protection of Nanakuli indicated that Shell felt that Nanakuli was entitled to some form of price protection. On that occasion in 1970 Blee, who had negotiated the contract with Nanakuli and was familiar with exactly what terms Shell was bound to by that agreement, wrote of the need to "bargain" with Nanakuli over the extent of price protection to be given, indicating that some price protection was a legal right of Nanakuli's under the 1969 agreement.

Shell's second defense is that the Comment expresses a preference for an interpretation of waiver.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived ..., is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

Id., Comment 3. The preference for waiver only applies, however, where acts are ambiguous. It was within the province of the jury to determine whether those acts were ambiguous, and if not, whether they constituted waivers or a course of performance of the contract. The jury's interpretation of those acts as a course of performance was bolstered by evidence offered by Shell that it again price protected Nanakuli on the only two occasions of post-1974 price increases, in 1977 and 1978.

VII

Express Terms As Reasonably Consistent With Usage In Course of Performance

Perhaps one of the most fundamental departures of the Code from prior contract law is found in the parol evidence rule and the definition of an agreement between two parties. Under the U.C.C., an agreement goes beyond the written words on a piece of paper. " 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter ([sections 490:1-205](#) and [490:2- 208](#))." Id. s 490:1-201(3). Express terms, then, do not constitute the entire agreement, which must be sought also in evidence of usages, dealings, and performance of the contract itself. The purpose of evidence of usages, which are defined in the previous section, is to help to understand the entire agreement.

(Usages are) a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade.... Part of the agreement of the parties ... is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

Id. [s 490:1-205](#), Comment 4. Course of dealings is more important than usages of the trade, being specific usages between the two parties to the contract. "(C)ourse of dealing controls usage of trade." Id. [s 490:1- 205\(4\)](#). It "is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Id. [s 490:1-205\(1\)](#). Much of the evidence of prior dealings between Shell and Nanakuli in negotiating the 1963 contract and in carrying out similar earlier contracts was excluded by the court.

A commercial agreement, then, is broader than the written paper and its meaning is to be determined not just by the language used by them in the written contract but "by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing." Id., Comment 1. Performance, usages, and prior dealings are important enough to be admitted always, even for a final and complete agreement;

only if they cannot be reasonably reconciled with the express terms of the contract are they not binding on the parties. "The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade." Id. [s 490:1-205\(4\)](#).

Of these three, then, the most important evidence of the agreement of the parties is their actual performance of the contract. Id. The operative definition of course of performance is as follows: "Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." Id. [s 490:2- 208\(1\)](#). "Course of dealing ... is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning (Section 2-208)." Id. 490:1-205, Comment 2. The importance of evidence of course of performance is explained: "The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the 'agreement' ..." Id. [s 490:2-208](#), Comment 1. "Under this section a course of performance is always relevant to determine *796 the meaning of the agreement." Id., Comment 2.

Our study of the Code provisions and Comments, then, form the first basis of our holding that a trade usage to price protect pavers at times of price increases for work committed on nonescalating contracts could reasonably be construed as consistent with an express term of seller's posted price at delivery. Since the agreement of the parties is broader than the express terms and includes usages, which may even add terms to the agreement, and since the commercial background provided by those usages is vital to an understanding of the agreement, we follow the Code's mandate to proceed on the assumption that the parties have included those usages unless they cannot reasonably be construed as consistent with the express terms.

Federal courts usually have been lenient in not ruling

out consistent additional terms or trade usage for apparent inconsistency with express terms. The leading case on the subject is [Columbia Nitrogen Corp. v. Royster Co.](#), 451 F.2d 3 (4th Cir. 1971). Columbia, the buyer, had in the past primarily produced and sold nitrogen to Royster. When Royster opened a new plant that produced more phosphate than it needed, the parties reversed roles and signed a sales contract for Royster to sell excess phosphate to Columbia. The contract terms set out the price that would be charged by Royster and the amount to be sold. It provided for the price to go up if certain events occurred but did not provide for price declines. When the price of nitrogen fell precipitously, Columbia refused to accept the full amount of nitrogen specified in the contract after Royster refused to renegotiate the contract price. The District Judge's exclusion of usage of the trade and course of dealing to explain the express quantity term in the contract was reversed. Columbia had offered to prove that the quantity set out in the contract was a mere projection to be adjusted according to market forces. Ambiguity was not necessary for the admission of evidence of usage and prior dealings. Even though the lengthy contract was the result of long and careful negotiations and apparently covered every contingency, the appellate court ruled that "the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement." [Id. at 9](#). The express quantity term could be reasonably construed as consistent with a usage that such terms would be mere projections for several reasons: [\[FN36\]](#) *797 (1) the contract did not expressly state that usage and dealings evidence would be excluded; (2) the contract was silent on the adjustment of price or quantities in a declining market; (3) the minimum tonnage was expressed in the contract as Products Supplied, not Products Purchased; (4) the default clause of the contract did not state a penalty for failure to take delivery; and (5) apparently most important in the court's view, the parties had deviated from similar express terms in earlier contracts in times of declining market. [Id. at 9-10](#). As here, the contract's merger clause said that there were no oral agreements. The court explained that its ruling "reflects the reality of the marketplace and avoids the overly legalistic interpretations which the Code seeks to abolish." [Id. at 10](#). The Code assigns dealing and usage evidence "unique and important roles" and therefore "overly simplistic and overly legalistic interpretation of a contract should be shunned." [Id. at 11](#).

Usage and an oral understanding led to much the same interpretation of a quantity term specifying delivery of 500 tons of stainless-steel solids in [Michael Schiavone & Sons, Inc. v. Securalloy Co.](#), 312 F.Supp. 801 (Conn. 1970). In denying summary judgment for plaintiff-buyer, the court ruled that defendant-seller could attempt to prove that the quantity term was modified by an oral understanding, in line with a trade usage, that seller would only supply as many tons as he could, with 500 tons the upper limit. The court reasoned that an additional term with a lesser effect than total contradiction or negation of a contract term can be a consistent term and "(e)vidence that the quantity to be supplied by defendant was orally understood to be up to 500 tons cannot be said to be inconsistent with the terms of the written contract which specified the quantity as '500 Gross Ton.'" [Id. at 804](#).

Probably the two leading cases that have rejected usage evidence as inconsistent with express terms are [Southern Concrete Services, Inc. v. Mableton Contractors, Inc.](#), 407 F.Supp. 581 (N.D.Ga.1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978) (unpublished opinion), and [Division of Triple T Service, Inc. v. Mobil Oil Corp.](#), 60 Misc.2d 720, 304 N.Y.S.2d 191 (Sup.Ct.1969). In *Southern Concrete* the District Court, distinguishing its facts from those in *Columbia Nitrogen*, *supra*, held that evidence of a trade usage and an agreement to additional terms was not admissible. The usage allegedly was that contract quantity specifications were not mandatory on either buyer or seller. The court acknowledged that [U.C.C. s 2-202](#) "was meant to liberalize the common law parol evidence rule to allow evidence of agreements outside the contract, without a prerequisite finding that the contract was ambiguous" and "requires that contracts be interpreted in light of the commercial context in which they were written and not by the rules on legal construction." *Southern Concrete*, *supra*, at 582-83. Nevertheless, the court held, the express quantity term in the contract and the usage could not be construed as reasonably consistent. "A construction which negates the express terms of the contract by allowing unilateral abandonment of its specifications is patently unreasonable." *Id.* at 585. The court's attempt to differentiate its facts from those in *Columbia Nitrogen* was unsuccessful; the distinctions discussed were very minor. The difference between the two results should depend less on such subtle variations in contract language and more on the strength of the usage evidence and whether the parties are or should be aware of the usage and thus should be bound by it. The court in *Southern Concrete* acknowledged that *Columbia Nitrogen* is not the only case at odds with its holding

that a usage that quantities are projections cannot modify a seemingly unambiguous quantity term. Southern Concrete, supra, at 585-86.

The other leading case cited by Shell is a New York case, Triple T, supra. Because the express term of the franchise agreement gave either party the right to terminate 90-days' notice, the court refused to find as reasonably consistent with that term a usage of the trade that a gasoline franchisor could only terminate a dealer for "cause". "(T)he express terms of the contract cover the entire area of termination and negate plaintiff's argument that the custom or usage in the trade implicitly adds the words 'with cause' in the termination clause. The contract is unambiguous and no sufficient basis appears for a construction which would insert words to limit the effect of the termination clause." Id. at 203. The court then held that only consistent usages are admissible, which is an incorrect reading of the Code. Usage is always admissible, even though the express term controls in the event of inconsistency, which is a jury question.

Higher New York courts have not been as quick to reject evidence of additional terms for inconsistency as was the Supreme Court in Triple T in rejecting usage evidence. In [Hunt Foods & Industries, Inc. v. Doliner, 26 App.Div.2d 41, 270 N.Y.S.2d 937 \(1966\)](#), the inconsistency with the express term was no greater. When the buyer sued for specific performance of an unconditional option to purchase the stock of the seller corporation, the seller persuaded the court that, despite the unconditional nature of the option, there was an additional understanding that the option would be used only if the seller solicited an outside offer. Negotiations for the acquisition of the corporation's assets recessed for several weeks after the price was agreed upon but other terms were not; the option was given, the seller testified, because of the buyer's concern that he would use the offer to solicit a higher bid from a third party. The Appellate Division said, "To be inconsistent, the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable." [Id. at 940](#). "It is not sufficient that the existence of the condition is implausible. It must be impossible." Id. The jury then determines whether or not it is reasonably consistent with express terms. [...]

Here the evidence was overwhelming that all suppliers to the asphaltic paving trade price protected customers under the same types of circumstances. Chevron's contract with H.B. was a similar long-term supply contract between a buyer *805 and seller with very close relations, on a form supplied by the seller,

covering sales of asphalt, and setting the price at seller's posted price, with no mention of price protection. The same commentator offers a second guideline:

Because the stock printed forms cannot always reflect the changing methods of business, members of the trade may do business with a standard clause in the forms that they ignore in practice. If the trade consistently ignores obsolete clauses at variance with actual trade practices, a litigant can maintain that it is reasonable that the courts also ignore the clauses. Similarly, members of a trade may handle a particular subset of commercial transactions in a manner consistent with written terms because the writing cannot provide for all variations or contingencies. Thus, if the trade regards an express term and a trade usage as consistent because the usage is not a complete contradiction but only an occasional but definite exception to a written term, the courts should interpret the contract according to the usage.

Kirst, supra, at 824. Levie, supra, at 1112, writes, "Astonishing as it will seem to most practicing attorneys, under the Code it will be possible in some cases to use custom to contradict the written agreement... Therefore usage may be used to 'qualify' the agreement, which presumably means to 'cut down' express terms although not to negate them entirely." Here, the express price term was "Shell's Posted Price at time of delivery." A total negation of that term would be that the buyer was to set the price. It is a less than complete negation of the term that an unstated exception exists at times of price increases, at which times the old price is to be charged, for a certain period or for a specified tonnage, on work already committed at the lower price on nonescalating contracts. Such a usage forms a broad and important exception to the express term, but does not swallow it entirely. Therefore, we hold that, under these particular facts, a reasonable jury could have found that price protection was incorporated into the 1969 agreement between Nanakuli and Shell and that price protection was reasonably consistent with the express term of seller's posted price at delivery.

[...] Because the jury could have found for Nanakuli on its price protection claim under either theory, we reverse the judgment of the District Court and reinstate the jury verdict for Nanakuli in the amount of \$220,800, plus interest according to law.

REVERSED AND REMANDED WITH DIRECTIONS TO ENTER FINAL JUDGMENT.