Affirmed and Opinion filed June 22, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00619-CV

ENERGY DEVELOPMENT CORP., Appellant

V.

LOWMAR EXPLORATION CO.; LOWRY OIL & GAS, INC.; AND
PAT BAKER, INDIVIDUALLY AND D/B/A BAKER EXPLORATION CO., Appellees

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 95-30161

O P I N I O N

This is a breach of contract case. Energy Development Corp. appeals from a judgment notwithstanding the verdict granted in favor of Lowmar Exploration Co., Lowry Oil & Gas, Inc. and Pat Baker, individually and doing business as Baker Exploration Co. Because we hold Energy Development breached the contract at issue and that such breach abrogated appellees' duty to perform, we affirm the trial court's judgment.

I.

The Gas Balancing Agreement

The material facts are not in dispute. Energy Development was formed during the natural gas shortages of the 1970s as a subsidiary of Public Service Electric & Gas Co., a New Jersey utility company, to develop a natural gas supply for Public Service. In 1974, Energy Development entered into a Gas Purchase Contract with its parent, agreeing to sell to its parent the natural gas produced by certain fields, including the field at issue, the West Austwell Field in Refugio County, Texas. The evidence shows that Energy Development sold all its natural gas to its parent.

The two dual-completion wells at issue – Friday #1T and #1C and the SBF #1T and #1C – initially had fourteen working-interest owners, among them Lowry, Baker, and Lowmar, who also was the well operator. The wells were covered by a Gas Balancing Agreement. Such agreements can be used in natural gas production to ensure relative parity among the owners over the life of the production covered by the agreement. When natural gas wells are jointly owned, the owners enter into such agreements to resolve any problems that may arise when certain owners are unable to sell their share of the production. Under the terms of this Gas Balancing Agreement, if a well owner cannot sell its share of the production, that owner, called an "underproduced" owner, is entitled to be credited with natural gas remaining in the ground, referred to as gas in storage, equal to its share of the gas produced.[1] The other owners, called "overproduced" owners, are then allowed to take and sell more than their share. When the underproduced owner is again able to sell its natural gas, that underproduced owner may begin drawing against its credit by selling not only its normal contract share of production but an additional 25% of each overproduced owner's share. If the well production ceases before the parties attain balance, the parties would achieve balance with a monetary settlement. The settlement would be based on a weighted average price that each overproduced owner received for its share.

As noted above, Energy Development sold natural gas to its parent, Public Service, pursuant to a pair of sales-purchase agreements. The first agreement, the Gas Purchase Contract, was entered into

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[1] The gas belonging to the underproduced owner is not technically stored anywhere. Thus, the underproduced owner's stored gas represents a call on future production.

on February 22, 1974. This 1974 Gas Purchase Contract was superseded by a Gas Purchase and Sales Agreement on January 4, 1988, effective October 1, 1987.

A.

Energy Development's Performance Under the Balancing Agreement

Beginning in May 1985, Energy Development took not only its full share of natural gas from the two wells but purchased all the remaining shares from other owners. From July 1987 through December 1987, however, Energy Development did not sell its share to its parent, and a gas imbalance was created. After Energy Development stopped buying all of the other owners' production, those owners began selling their production to another buyer, Bishop Pipeline. Although well-operator Lowmar offered to sell Energy Development's share to Bishop, Energy Development declined. Thus, Energy Development became an underproduced owner.

During the months of January, February, and March 1988, Energy Development actually sold all of its share — 32,922 Mcf[2] —but due to operator error did not receive the proceeds from the sale of its share of the gas. Instead, appellees retained the proceeds and the operator, Lowmar, gave Energy Development additional underproduction credit. Energy Development received even more underproduction (gas in storage) credit in March 1988 when it purchased 83,021 Mcf of underproduction from three other underproduced owners.

During April and May 1988, the wells were shut down, and no natural gas was produced. In June, July, and August 1988, Energy Development recovered some of its underproduction when it took its full share, plus an additional 25% of the share of the overproduced owners. In September and October 1988, Energy Development again did not sell its share.

The testimony showed that Energy Development did not sell its production to its parent during the months in question because its parent had transportation restrictions due to regulatory difficulties.

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[2] Natural gas can be measured in cubic feet. When large quantities are involved, references to that quantity are simplified by referring to the quantity in units of 1,000 cubic feet. The term "Mcf" refers to one thousand cubic feet, and thus 32,922,000 cubic feet can be simply referred to as 32,922 Mcf.

From November 1988 until the wells ceased production in October 1992, Energy Development continuously worked off its underproduction credit by taking its full share plus an additional 25% of the share of the overproduced owners. When well production ceased in October 1992, however, Energy Development was underproduced on the Friday wells by 135,295 Mcf and on the SBF wells by 29,144 Mcf. Baker was overproduced on the Friday wells by 61,110 Mcf and on the SBF wells by 9,223 Mcf. Lowmar was overproduced on the Friday wells by 132,175 Mcf and on the SBF wells by 33,415 Mcf. Lowry was overproduced on the Friday wells by 7,805 Mcf and on the SBF wells by 2,056 Mcf.

After production ceased and Energy Development sought monetary balancing, appellees refused to settle. Energy Development filed suit. The jury found that Energy Development fulfilled all conditions precedent to balancing, that Appellees breached the Gas Balancing Agreement, and that such breach was not justified. The jury awarded Energy Development $126,667 in damages from Lowmar, $7,543 from Lowry, and $53,801 from Baker. Appellees moved for judgment notwithstanding the verdict on three grounds: (1) there was no evidence that Energy Development satisfied the conditions precedent under the Gas Balancing Agreement, (2) the evidence is conclusive that Energy Development committed a prior material breach of the Gas Balancing Agreement, and (3) there is no evidence of the proper measure of damages as to appellees. The trial court granted Appellees' motions for judgment notwithstanding the verdict.

B.

The Dispute

The heart of the parties' dispute is the proper interpretation of the Gas Balancing Agreement. The agreement provides that the parties intend to use the agreement to bring the parties' accounts into balance as soon as possible and not to use the agreement as a storage arrangement or as a device to delay marketing the gas or to unduly withhold the gas from the market. Energy Development argues that its failure to take its share of natural gas was due to certain pipeline transportation problems that its parent was experiencing. Energy Development contends that it was contractually bound to sell its gas to its parent and that Energy Development's failure to take the gas was beyond its control. Because Energy Development's failure to take the gas was beyond its control, the company argues, its use of the balancing agreement was thus permitted. Appellees contend, however, that even though Energy Development was unable to deliver its share of the natural gas to its parent, Energy Development was contractually permitted by its sales-purchase agreements to sell its share elsewhere. Thus, when Energy Development did not take or deliver its share of the natural gas, Energy Development was using the balancing agreement as a storage arrangement or as a device to delay marketing or a device to unduly withhold the gas from the market. Appellees, therefore, conclude that the clause in which the parties stated their intent not to use the agreement as a storage arrangement is a type of mutual covenant and that Energy Development's failure to perform bars the company from seeking monetary balancing.

In five appellate issues, Energy Development complains that the verdict was supported by sufficient evidence and that as prevailing party it was entitled to attorney's fees pursuant to Chapter 38 of the Civil Practices and Remedies Code.

II.
Discussion

In its first appellate issue, Energy Development complains that the trial court erred in granting judgment notwithstanding the verdict to appellees because there exists substantial and credible probative evidence to support the jury's finding on question No. 1, that Energy Development satisfied all conditions precedent under the Gas Balancing Agreement. In its second issue, Energy Development complains there exists substantial and credible probative evidence to support the jury's finding on question No. 2, that defendants failed to comply with the Gas Balancing Agreement. In its third appellate issue, Energy Development complains that there exists substantial and credible probative evidence to support the jury's finding on question No. 3, that defendants' failure was not excused. In its fourth appellate issue, Energy

Development complains that there exists substantial and credible evidence to support the jury's finding on question No. 4, concerning Energy Development's damages for defendants' failure to provide monetary balancing. In its fifth appellate issue, Energy Development contends it is entitled to reasonable attorney's fees. We construe the first four appellate issues as complaints that the trial court erred in granting judgment notwithstanding the verdict because the answers to the four jury questions were supported by legally and factually sufficient evidence. In this Part II of the opinion, we will address these four appellate issues together. In Part III, we will address appellant's fifth appellate issue and appellees' cross points brought pursuant to Texas Rule of Civil Procedure 324(c).

Our analysis in Part II is divided into two sub-parts. First, we address whether the judgment NOV was proper since issues involving breach of contract are questions of law for the court, not questions of fact for the jury. Second, we address whether, as a matter of law, Energy Development breached the Gas Balancing Agreement and, if so, whether such breach abrogated appellees' duty to perform.

A.

JNOV Proper When Jury Answers Immaterial

A judgment notwithstanding verdict is proper only when a directed verdict would have been proper. *See* TEX. R. CIV. P. 301; *Bracton Corp. v. Evans Const. Co.*, 784 S.W.2d 708, 710 (Tex. App.—Houston [14th Dist.] 1990, no writ). A trial court may disregard a jury's findings and grant a motion for judgment notwithstanding the verdict where there is no evidence upon which the jury could have made its findings. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226,227 (Tex. 1990). A trial court also may disregard a jury finding and enter judgment where the finding is immaterial. *See McDaniel v. Continental Apartments Joint Venture*, 887 S.W.2d 167, 170 (Tex. App.—Dallas 1994, no writ). A finding is immaterial when the trial court should not have submitted the question to the jury, and the jury's finding does not apply to the case. *See id.* A jury question is immaterial when it calls for a finding beyond the province of the jury, such as a question of law. *See Southeastern Pipeline Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999). Where a trial court decides such a question of law and applies the law to undisputed facts, we review the trial court's decision de novo. *See Cartlidge v. Hernandez*, 9 S.W.3d 341, 346 (Tex. App.—Houston [14th Dist.] 1999, n. pet .h.) (where personal jurisdiction issues presented a question of law and where special appearance based on undisputed or established facts, appellate court conducts de novo review).

The question of whether a party has breached a contract is generally a question of law for the court, not a question of fact for the jury. *See Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App.–Houston [14th Dist.] 1996, writ denied). In interpreting a contract, the court determines as a matter of law what conduct is required by the parties, and, insofar as there is a fact dispute concerning the failure of a party perform the contract, the court submits the disputed fact questions to the jury. *See id*. Where, however, as here, the facts are not disputed or are conclusively established, the trial court need not submit the issues to the jury. *See Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex.1971); *Meek*, 919 S.W.2d at 808.

Both appellants and appellees agree, as do we, that the Gas Balancing Agreement is not ambiguous.[3] Where a contract is not ambiguous, the interpretation of that contract is a question of law for the court. *See Edwards v. Lone Star Gas Co.*, 782 S.W.2d 840, 841 (Tex. 1990). Because the parties do not dispute the material facts, there were no fact disputes for the jury to resolve. The trial court, therefore, should not have submitted the four questions involving the agreement to the jury, but should have resolved the breach-of-contract issue itself as a matter of law. Hence, appellants' first four appellate issues, addressing sufficiency of the evidence to support the jury's verdict, are not relevant. Because the trial concerned the interpretation of an admittedly unambiguous contract and because the facts related to the parties' performance or nonperformance under the contract are not disputed, the trial court should have answered the question regarding Energy Development' breach of contract as a matter of law and should not have submitted any questions to the jury regarding the Balancing Agreement. Moreover, where a contract is not ambiguous, a party's construction of that contract is immaterial. *See Associates, Ltd. v.*

[3] In its Reply Brief, Energy Development argues in the alternative that even if the contract was ambiguous, appellees' performance under the contract was in accordance with Energy Development's interpretation. Nevertheless, in that same brief, Energy Development asks this court to hold that the agreement is unambiguous. We do not construe appellant's reply brief to present an appellate issue regarding an ambiguity in the Gas Balancing Agreement.

Sunwest N.O.P., Inc., 1 S.W.3d 355, 360 (Tex. App.–Waco 1999, no pet. h.) (citing *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 727-28 (Tex. 1981)). Therefore, much of the trial evidence cited by appellants relating to the parties' construction of the Gas Balancing Agreement is inadmissible parole evidence.

It would have been proper for the trial court to have initially determined as a matter of law what conduct was required of the parties and to have applied the unambiguous contract to the undisputed facts to determine whether a breach occurred. *See Meek*, 919 S.W.2d at 808. The jury's answers to the questions are immaterial because the issues involved are issues of law, not issues of fact. *See Tichacek*, 997 S.W.2d at 172. Because a directed verdict would have been proper, a judgment notwithstanding the verdict also was proper. *See* TEX. R. CIV. P. 301; *Bracton Corp.*, 784 S.W.2d at 710.

B.

Did Energy Development's Conduct Constitute a Breach?

Having determined that the trial court should not have submitted contract interpretation questions to the jury but should have determined such questions as a matter of law, we now determine whether Energy Development's conduct constituted a material breach of the agreement, and if so, whether that breach excused appellees' withholding of gas balance payments from Energy Development.

In construing a written contract, courts should examine and consider the entire writing to harmonize and give effect to all of the contract provisions so that no provision will be rendered meaningless. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *See id*. The meaning of the contract is determined by the language used therein. *See Tower Contracting Co. v. Flores*, 157 Tex. 297, 302, 302 S.W.2d 396, 399 (1957); *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360, 366 (Tex. Civ. App.–Amarillo 1977), *aff'd*, 569 S.W.2d 480 (Tex. 1978). The terms the parties used are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows the terms are used in a different sense. *See Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 564, 261 S.W.2d 554, 557 (1953); *Stahl Petroleum*, 550 S.W.2d at 366.

A breach of contract occurs when a party fails or refuses to do something he has promised to do. *See Townewest Homeowners Ass'n, Inc. v. Warner Communication Inc.*, 826 S.W.2d 638, 640 (Tex. App.–Houston [14th Dist.] 1992, no writ). A party who is in default or breach cannot maintain a suit for breach of a contract. *See D.E.W., Inc. v. Depco Forms, Inc.*, 827 S.W.2d 379, 382 (Tex. App.–San Antonio 1992, no writ); *Joseph v. PPG Indust. Inc.*, 674 S.W.2d 862, 867 (Tex. App.–Austin 1984, writ ref'd. n.r.e.). A breach of reciprocal promises in a contract by one party excuses performance by the other parties. *See Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 247 (Tex. App.–Amarillo 1994, no writ).

When we interpret the unambiguous contract, we determine that each party to the Gas Balancing Agreement, including Energy Development, had a duty to "insofar as is reasonably possible, commence taking or delivering gas simultaneously." Each party also had a duty after commencing receipt or delivery of the gas, to "thereafter continuously take or deliver its full share of the gas produced" from the wells. We also hold Energy Development breached the agreement by using the agreement as a "gas storage arrangement" or as a "device to delay marketing of gas or to unduly withhold gas from the market" and that this breach excused the appellees' duty to settle after the gas wells ceased production.

In the first and second paragraphs of the Gas Balancing Agreement, the parties agreed that the terms of the agreement became effective only when one of the parties did not take or market its full share of the gas or if a party contracted to sell its share to a purchaser that did not take the full share attributable to the party. The first two paragraphs provide, in part, as follows:

> In the event any party hereto is not at any time taking or marketing its full share of gas or has contracted to sell its share of gas produced from the Area [including the West Austwell Field] to a purchaser which does not at any time while this agreement is in effect take the full share of gas attributable to the interest of such party, the terms of this agreement shall automatically become effective.
>
> During the period or periods when any party hereto has no market for, or its purchaser is unable to take or if any party fails to take its share of gas, the other parties shall be entitled to produce, take and deliver each month one hundred percent of the gas which may be legally and efficiently produced by the wells in the Area, and each of such parties shall take its prorata [sic] share.

Of prime importance is the eighth paragraph of the Gas Balancing Agreement, which provides that the agreement was not to be used as a storage arrangement or a device to delay marketing or to unduly withhold gas from the market. Energy Development and appellees dispute the legal significance of this paragraph, which provides as follows:

> It is the intent that all of the parties hereto, insofar as is reasonably possible, commence taking or delivering gas simultaneously, and that each party thereafter continuously take or deliver its full share of the gas produced from the Area. It is, however, recognized that due to conditions beyond the control of the parties there may be occasions where there will be temporary delays in commencement of takes or deliveries and temporary reductions in takes or deliveries below a party's full share. Accordingly, this agreement is intended for use as an operating procedure to assist in bringing the gas accounts of the parties into balance as soon as possible and to assist in maintaining such accounts in balance. *It is not the intent that this agreement be used as a gas storage arrangement nor as a device to delay marketing of gas or to unduly withhold gas from the market.* (emphasis added)

Energy Development argues that pursuant to its sales-purchase agreements with its corporate parent, Public Service, the natural gas from the West Austwell Field was dedicated to its parent. It argues that its parent's failure to take that natural gas was a condition beyond Energy Development's control. Energy Development contends that it was, therefore, entitled to credit pursuant to the balancing agreement. The initial Gas Purchase Contract, however, allowed Energy Development to sell to third parties the natural gas that its parent did not take "because of a pipeline's limitation on the quantities agreed to be transported or the like." The contract, entered into February 22, 1974, provides, in part, as follows:

> 8.1 Subject to the provisions of this Agreement, Seller [Energy Development] agrees to sell and deliver to Buyer [the parent] and Buyer agrees to purchase and receive such quantities of natural gas as are made available from Seller's interest and rights in the fields denoted in Exhibit "D" hereto [including the West Austwell Field], which exhibit is made a part hereof by reference and may be amended from time to time by mutual agreement in writing.
>
> 8.2 Should the volume of gas made available exceed the quantity of gas capable of being transported to Buyer's market because of a pipeline's limitation on the quantities agreed to be transported or the like, Seller then has the right to separately dispose of the excess gas not available for transportation.

The Gas Purchase Agreement was superseded by the Gas Purchase and Sales Agreement, entered into January 4, 1988, effective October 1, 1987. In this latter agreement, Energy Development agreed to sell to its parent certain quantities of natural gas and did not specifically require the gas to come from any specific field. The contract, Article IV (Quantify of Gas), provides, in part, as follows:

> 1. Seller [Energy Development] agrees to sell and Buyer [the parent] agrees to purchase for the first three annual periods commencing October 1, 1987 the following approximate volumes of gas or such other quantities as may be mutually agreed to:
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> | | |
> |---|---|
> | 1987-88 | 22.9 Bcf [billion cubic feet] |
> | 1988-89 | 25.5 Bcf |
> | 1989-90 | 27.4 Bcf |
>
> 2. For the next five annual periods subsequent to September 20, 1990, Seller agrees to sell and Buyer agrees to purchase volumes of gas approximately equal to the 1989-90 volume.
>
> 3. Seller agrees for the life of this agreement that Buyer will not be required to purchase volumes of gas when Buyer's ability to take gas is restricted by capacity or other limitations on the pipeline system providing transportation for Buyer.

After the parties entered into this latter agreement, David A. Rochester, general manager of Energy Development, issued a memorandum of understanding regarding the gas supply contract between Energy Development and the parent. Paragraph 4 of the memorandum reads as follows:

> 4.) DEDICATIONS: The Exhibit A "DELIVERY POINTS" was only included to evidence transportation requirements and in no way does it imply or suggest that any specific reserves are dedicated to this contract. All parties agree that this supply contract is a warranty-type and not a dedication-type of agreement.

Exhibit A to the memorandum listed Energy Development production points and pipeline receipt points, including the West Austwell Field.

Energy Development first failed to take its share beginning in July through December 1987. Thus, the first few months of underproduction occurred while the natural gas sales were governed by the earlier

1974 Gas Purchase Contract. Beginning in October 1987, the sales were governed by the later Gas Purchase and Sales Agreement.

According to the plain language of the two gas sales-purchase agreements, the natural gas that Energy Development took from the West Austwell Field was not dedicated to its parent. In the initial 1974 Gas Purchase Contract, Energy Development and its parent agreed that the parent would buy and Energy Development would sell the natural gas from certain fields, including the West Austwell Field. The agreement, nevertheless, gave Energy Development the right to dispose of any excess natural gas that was not available for transportation to the parent due to the "pipeline's limitation of the quantities agreed to be transported or the like." The successor to the Gas Purchase Contract, the Gas Purchase and Sales Agreement, is a volume contract, requiring Energy Development to supply specified quantities of natural gas to the parent. However, the natural gas need not come from the West Austwell Field because gas from that field was not dedicated to the contract. If Energy Development could not supply natural gas from the West Austwell Field to its parent, Energy Development could supply natural gas to satisfy the volume requirements of the contract from other sources.

Energy Development was not required by either sales-purchase agreement to sell only to its parent. When the parent could not transport certain quantities of natural gas from the West Austwell Field due to pipeline transportation difficulties, Energy Development was free to sell its share of production to other buyers. Although Energy Development offered testimony that under the initial Gas Purchase Contract, Energy Development would have been required to obtain permission from its parent to market such excess natural gas, the plain language of the contract gave Energy Development the right to dispose of such gas and imposes no such limitation. The two gas purchase and sale agreements are not ambiguous, and a court may not use parol evidence to create an ambiguity. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).

In this case, another ready buyer was available, Bishop Pipeline. Lowmar offered to sell Energy Development's natural gas to Bishop. Energy Development instead chose not to sell its share of production but chose to go into "underproduced" status. We do not suggest that Energy Development had a duty to sell to Bishop Pipeline or that Energy Development was obligated to sell its gas at whatever price was offered. However, Energy Development has not shown how it was unable to market its share of the gas produced. Indeed, Energy Development has offered no evidence that it did anything other than go into underproduced status when its parent failed to take its share of the West Austwell natural gas. By failing to take steps to take or deliver its full share of gas produced from the area, Energy Development breached the Gas Balancing Agreement.

Energy Development's conduct constituted a breach of the agreement because, in contravention of paragraph eight of the agreement, Energy Development was using the balancing agreement "as a gas storage arrangement [or] as a device to delay marketing of gas or to unduly withhold gas from the market." Although Energy Development argues it could not control the actions of its parent, the subsidiary could control its own actions and could have taken steps to take or deliver its full share of the gas. Energy Development owed duties to its parent under its natural-gas purchase-sale agreements, but owed other duties to the other working interest owners under the balancing agreement. It was these latter responsibilities that Energy Development failed to meet.

Energy Development advances four arguments in support of its actions. First, Energy Development contends that it offered legally and factually sufficient evidence that it could not have sold the natural gas to anyone other than its parent. The evidence cited, however, was the testimony of officials of Energy Development and of its parent detailing what they believed to be Energy Development's duties under the Gas Balancing Agreement. This testimony was irrelevant. *See Associates*, 1 S.W.3d at 360. The court must determine what conduct was required by the balancing agreement. *See Meek*, 919 S.W.2d at 808. Energy Development also does not argue that its natural-gas sales-purchase agreements are ambiguous. Thus, testimony offered regarding the intent of Energy Development and its parent is also irrelevant. Whether the parties' actions satisfied the terms of an agreement is a matter of law for the court. *See id.*

Second, Energy Development argues that it had no duty under the Gas Balancing Agreement to market its share of the natural gas. We disagree. Under the balancing agreement, the company had a duty "insofar as reasonably possible, [to] commence taking or delivering the gas simultaneously" with its co-owners and to "continuously take or deliver the gas produced from the Area." Energy Development's failure was that it took no such steps.

Third, Energy Development argues that if it were required to market to third parties, the balancing agreement would be meaningless. We disagree, however, because the procedures in the balancing agreement would be required whenever a party was unable to take or deliver its share of gas because it encountered conditions beyond its control. The Gas Balancing Agreement is not, therefore, meaningless.

Fourth, Energy Development argues that the eighth paragraph of the Gas Balancing Agreement applies a reasonableness standard to its actions and that questions about the reasonableness of actions are fact questions for the jury. We agree that in a contract case, a question about the reasonableness of an action is ordinarily a fact question. *See Valencia v. Garza*, 765 S.W.2d 893, 897 (Tex. App.–San Antonio 1989, no writ)(question of "reasonable time" fact question); *El Paso & S.W.R. Co. v. Eichel & Weikel*, 130 S.W. 922, 943-44 (Tex. Civ. App. 1910, writ dism'd w.o.j.) (question of whether water furnished plaintiffs was of quality reasonably adapted and suitable to use for which it was contracted by defendant was a question of fact). We also recognize that the eighth paragraph states that "insofar as is reasonably possible," it was the parties' intent to "commence taking or delivering gas simultaneously." We do not agree, however, with Energy Development's assertion that its actions were subject to a reasonableness test and that questions about such actions were issues for the jury. Had Energy Development taken steps to "continuously take or deliver its full share of the gas" after its parent failed to take its share, the question about reasonableness of those steps may have been a jury question. The evidence shows, however, that Energy Development failed to "continuously take or deliver" the natural gas because Energy Development believed the gas in question was dedicated to its parent. David Rochester, of Energy Development, testified as follows:

> [PLAINTIFF'S ATTORNEY] Okay. And why did [Energy Development] elect not to sell to Bishop back in April of '87?
>
> [ROCHESTER] Well, we couldn't because our acreage was dedicated to Public Service Electric Gas Company under that contract. It's dedicated to them. It was their gas. We couldn't just take it and sell to somebody else.
>
> *******
>
> [PLAINTIFF'S ATTORNEY] Now, could you have sold that gas at any time during July of '87 to December of '87 to the same people that Lowmar Exploration Company and those working interest owners were selling their gas?

> [ROCHESTER] No. It didn't belong to us. The gas was owned and dedicated to Public Service Electric and Gas Company by contract and they would have been unhappy if we would have sold their gas to somebody else.

We have held that Energy Development was not obligated by either of its gas sales agreements to make sales only to its parent. The uncontroverted evidence shows that Energy Development took no steps to take or deliver the gas during those periods when its parent was not taking the gas subject to the Gas Balancing Agreement. We do not construe the balancing agreement's use of the word "reasonable" to create a jury question as to the reasonableness of no action by Energy Development to market its gas when the gas was not flowing to its parent.

Appellees in response argue that the language of paragraph eight acts as a condition precedent. Conditions precedent are disfavored by the courts because of the harshness of their operation. *See Criswell v. European Crossroads Shopping Ctr.*, 792 S.W.2d 945, 952 (Tex. 1992). Where the intent of the parties is doubtful, we will interpret the agreement as creating a covenant rather than a condition. *See Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). While we prefer to construe the language as establishing mutual covenants, were we to interpret the language in question as a condition precedent, the result would be the same. By using the balancing agreement as a storage arrangement, Energy Development failed to satisfy the condition precedent and thus was not entitled to a monetary settlement.

Accordingly, we hold that the trial court did not err in granting judgment notwithstanding the verdict in favor of appellees because, as a matter of law, Energy Development's prior material breach abrogated appellees' duty to perform. Because these issues were matters of law beyond the province of the jury, the jury's answers to the four contract based questions were immaterial. We overrule Energy Development's first four appellate issues addressing the evidence supporting those four improper jury questions.

III.

Other Issues

A. Attorney's Fees

In its fifth appellate issue, Energy Development complains that it is entitled to attorney's fees. In order to recover attorney's fees under Chapter 38 of the Civil Practices and Remedies Code, a party must be the prevailing party in the case. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001, 38.004 (Vernon 1997); *F.D.I.C. v. Graham*, 882 S.W.2d 890, 900 (Tex. App.–Houston [14th Dist.] 1994, no writ). Because we affirm the trial court's judgment in favor of appellees, Energy Development is not the prevailing party and is, therefore, not entitled to attorney's fees.

B. Appellees' Cross-Points

Appellees raise three cross-points complaining of the factual sufficiency of the evidence in connection with the jury's answers to question Nos. 1, 3, and 4. Because we hold the trial court did not err in granting judgment notwithstanding the verdict in favor of appellees, we need not address appellees' cross-points. *See* TEX. R. APP. P. 47.1 (appellate court must address only issues necessary to final disposition of the appeal).

IV.

Conclusion

Because we have overruled Energy Development's five appellate issues, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed June 22, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).