**Opinion issued August 31, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-00396-CV**

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**TPG (POST OAK) ACQUISITION, LLC, TPG (POST OAK) MEZZANINE, LLC, THE PICERNE GROUP, INC., TPG, INC., ALLIED REALTY ADVISORS, LLC, ALLIED REALTY PARTNERS, LLC, ALLIED ORION GROUP, LLC D/B/A ALLIED REALTY, ACS RESTORATION GC, LLC D/B/A ALLIED CONSTRUCTION SERVICES, AND TPG 2011-4 (POST OAK), LLC, Appellants/Cross-Appellees**

**V.**

**GREYSTONE MULTI-FAMILY BUILDERS, INC., GREYSTONE (POST OAK), LLC, AND WALTER B. EEDS, Appellees/Cross-Appellants**

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**On Appeal from the 334th District Court**
**Harris County, Texas**
**Trial Court Case No. 2015-25232**

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## CONCURRING AND DISSENTING OPINION

The appellants argue that the notice-and-cure requirement contained in the ninth and final subpart of the Construction Contract's default provision applies solely to the ninth subpart itself, which concerns the contractor's failure "to observe any other term, provision, condition, covenant or agreement," not the specific circumstances of default enumerated in the preceding eight subparts of the default provision. In other words, the appellants argue that the notice-and-cure requirement applies to subpart (i) of the default provision alone, not subparts (a) through (h).

Based largely on the default provision's grammar and punctuation, the majority agrees with the appellants. Thus, the majority reverses this aspect of the trial court's decision and remands both sides' claims under the Construction Contract for a new trial. I respectfully dissent from this part of the majority's judgment because, properly interpreted, the notice-and-cure requirement contained in the ninth subpart of the Construction Contract's default provision applies to all nine subparts of this provision. I concur in the remainder of the judgment.

## BACKGROUND

The appellees argue that they were entitled to notice and an opportunity to cure the defaults complained of by the appellants under the Construction Contract. On the stand, Jon Demorest, the senior managing director of The Picerne Group, acknowledged that he previously had testified during his deposition that he thought the appellees were entitled to notice of defaults and a chance to cure. But at trial the

parties disagreed as to whether the contract actually required notice of defaults and a chance to cure as a legal matter, and they continue to disagree on appeal.

The Construction Contract's default and termination provisions provide:

> § 2.4. CONTRACTOR'S DEFAULT
>
> Contractor shall be in default of this Contract if:
>
> (a) Contractor becomes insolvent, is adjudged a bankrupt, makes a general assignment for the benefit of its creditors, or becomes a subject of any proceeding commenced under any statute or law for the relief of debtors which is not dismissed within thirty (30) days after commencement;
>
> (b) A receiver, trustee or liquidator of any of the property or income of Contractor shall be appointed;
>
> (c) Contractor fails to make proper payment to a Subcontractor or for materials or labor unless Contractor's nonpayment is due to Owner's direct payment to Subcontractor or Owner's default in its obligations under this Contract to pay Contractor for such portion of the Work or by reason of any good faith dispute with such Subcontractor or material supplier;
>
> (d) Contractor disregards applicable governmental laws, ordinances, rules and regulations or violates any order of any public authority claiming jurisdiction over the Work;
>
> (e) Contractor fails to comply with the scheduling requirements set forth in the Construction Schedule attached as Exhibit "C" to the Agreement;
>
> (f) Contractor fails to promptly replace rejected materials or correct rejected workmanship as herein provided;
>
> (g) Contractor refuses or fails to prosecute the Work or any separate part thereof with such diligence as will insure Substantial Completion on or before the Scheduled Completion Date;
>
> (h) The Project is not constructed in compliance with all applicable federal, state and local laws, ordinances and regulations (provided, however, that to the extent the Project has been constructed in accordance with the Contract Documents, but the Contract Documents are not in compliance and Contractor should not have known of such lack of compliance, Contractor shall not be in default hereunder); or

> (i) Contractor fails to observe any other term, provision, condition, covenant or agreement contained in this Contract, or reasonably required by Lender, or to be observed and performed by Contractor, and Contractor fails to promptly cure such default within three (3) days following notice thereof to Contractor by Owner. If such default is not capable of being cured within such 3-day period, Contractor shall not be in default provided it has commenced to cure such default within such 3-day period and thereafter diligently and continuously prosecuted such cure to completion within thirty (30) days following the expiration of such 3-day period.
>
> § 2.5 TERMINATION FOR DEFAULT
> § 2.5.1 If Contractor is in default of this Contract after applicable notice and cure periods, Owner may, upon written notice to Contractor, terminate Contractor's right under this Contract to proceed or continue the Work or any part thereof. . . .

## DISCUSSION

### Standard of Review and Applicable Law

Interpreting an unambiguous contract is a matter of law, which we review de novo. *BlueStone Nat. Res. II v. Randle*, 620 S.W.3d 380, 387 (Tex. 2021).

A contract's meaning turns on the words the parties chose to express their intent. *Exxon Mobil Corp. v. Ins. Co. of State*, 568 S.W.3d 650, 656–57 (Tex. 2019). We give the words of a contract their plain, ordinary, and generally accepted meaning unless the contract shows the parties used them in a different sense. *Farmers Grp. v. Geter*, 620 S.W.3d 702, 709 (Tex. 2020). In addition, we interpret the words of the contract in context, harmonizing the contract's language so that none of it is rendered meaningless. *Pathfinder Oil & Gas. v. Great W. Drilling*, 574 S.W.3d 882, 889 (Tex. 2019). Context may include not only the surrounding text of

the contract itself, but also the circumstances present when the parties entered into the contract. *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764 (Tex. 2018). These circumstances can encompass the customary purposes of contracts typically employed within an industry or business. *E.g.*, *Tawes v. Barnes*, 340 S.W.3d 419, 426 (Tex. 2011) (relying on oil and gas industry's customary purpose for joint operating agreements in addition to plain language in interpreting unambiguous contract because those agreements are typically used in industry for that purpose).

In interpreting the words of a contract, we are mindful of grammar and usage. *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). However, we should resort to grammatical niceties—fine distinctions and technical rules—only as a last resort. *Sears v. Bayoud*, 786 S.W.2d 248, 251 n.5 (Tex. 1990) (saying so as to constitutions and statutes); *Lemp v. Armengol*, 26 S.W.2d 941, 942 (Tex. 1894) (saying this is even truer of commercial contracts than constitutions and statutes). Similarly, while we may take into account a contract's punctuation, the contract's words, rather than its punctuation, are the controlling guide in interpreting it. *Criswell v. European Crossroads Shopping Ctr.*, 792 S.W.2d 945, 948 (Tex. 1990).

We shy away from grammatical niceties for two reasons. First, as our work product attests, judges and lawyers are not grammarians. No one looks to the bench and bar for grammatical guidance. *See Sears*, 786 S.W.2d at 251 n.5 (courts decide legal issues, not rules of syntax). We are as likely to err in technical grammatical

matters as anyone else who lacks expertise. Second, grammarians often disagree with one another. *See id.* The rules of grammar sometimes are not rules at all. *See id.* (noting that grammarians are aligned "in several schools of thought"). Nor are the rules of grammar static, a circumstance that can pose interpretive challenges for a profession like ours, in which forms and usages may endure long after they appear. *E.g.*, *Burlington Res. Oil & Gas Co. v. Tex. Crude Energy*, 573 S.W.3d 198, 210 n.10 (Tex. 2019) (commenting on quandary posed by use of "industry jargon and outdated legalese" in contract and noting that literal reading would be absurd).

**Analysis**

The majority cabins the scope of the notice-and-cure requirement contained in the Construction Contract's default provision to its final subpart largely based on the provision's grammar and punctuation. In the main, the majority relies on the:

- existence of separately lettered subparts;
- indentation of each subpart;
- separation of each subpart by a line break; and
- use of semicolons after each subpart but the final one.

I am unpersuaded by the majority's analysis, which is unsupported by unambiguous rules of grammar and punctuation, overly technical in approach, and contrary to contractual customs within the construction industry. Based on the structure, plain language, and context of the notice-and-cure requirement, I conclude that it applies to all the subparts of the Construction Contract's default provision.

Though the default provision is divided into nine subparts, each is part of a larger whole. The first eight subparts identify particular circumstances that constitute default, while the ninth is a catch-all for any other possible default. Thus, all of the subparts address the same general subject matter: contractual defaults.

Each subpart is linked to the others by semicolons. In general, a semicolon "separates sentence parts that need a more distinct break than a comma can signal, but that are too closely connected to be made into separate sentences." BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 681 (3d ed. 2009). In contracts in particular, items in a series are often stated in separately numbered or lettered paragraphs connected by semicolons. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 1.18 (2d ed. 2006). One significant purpose of drafting contracts in this way is to make them readable. *See id.* Thus, the format and punctuation indicate that the subparts are interconnected and do not stand alone.

In short, none of the grammar or punctuation the majority relies on—subparts, indentations, line breaks, or semicolons—compel its interpretation. Nor is the majority's interpretation compelled by the decisions it cites, a fact that is obscured by its serial citation of decisions for general principles, accompanied at most by a parenthetical explanation or quotation, without delving into the details of those decisions. Consider, for example, *Jama v. Immigration & Customs Enforcement*.

The majority cites *Jama*, and Scalia and Garner's discussion of this decision in *Reading Law: The Interpretation of Legal Texts*, as instructive with respect to the interpretation of the contract. In *Jama*, the Court had to decide whether the final clause contained in a separately numbered subpart of a statutory provision applied to each of the preceding subparts within that provision. 543 U.S. 335, 337–41 (2005).

The provision at issue in *Jama*—with the operative clause italicized—read:

> (E) Additional removal countries
>
> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> > (i) The country from which the alien was admitted to the United States.
> >
> > (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
> >
> > (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
> >
> > (iv) The country in which the alien was born.
> >
> > (v) The country that had sovereignty over the alien's birthplace when the alien was born.
> >
> > (vi) The country in which the alien's birthplace is located when the alien is ordered removed.
> >
> > (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, *another country whose government will accept the alien into that country*.

8 U.S.C. § 1231(b)(2)(E). Based on the italicized language, the petitioner, an alien subject to removal from the United States, contended that ICE must show that a country to which it intends to remove an alien under any subpart, not just under subpart (vii), consents to accept the alien. *Jama*, 543 U.S. at 337–41.

The Court held that the italicized language applies solely to subpart (vii). In doing so, the Court relied in part on the grammatical rule of the last antecedent, under which a limiting clause ordinarily is understood to modify only the phrase that immediately precedes it. *Id.* at 343. Because subparts (i) through (vii) were distinct from one another and each one ended with a period, "suggesting that each may be understood completely without reading any further," the Court reasoned that the structure of the statutory provision did not refute the inference raised by the rule of the last antecedent that the italicized language applied to subpart (vii) alone. *Id.* at 343–44; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: INTERPRETING LEGAL TEXTS 157–58 (2012) (endorsing *Jama*'s analysis).

In *Jama*, four justices dissented on the basis that several indicia contradicted any inference raised by the last antecedent rule. 543 U.S. at 355–56 (Souter, J., dissenting). While I do not intend to relitigate the merits of *Jama*, the closely divided nature of the decision underscores the limitations of grammar and punctuation as interpretive guides. For all the praise the last antecedent rule receives, its application

is uneven in practice. *See id.* at 355 (Souter, J., dissenting) (noting that Court had declined to apply rule "at least as many times as we have relied on it").

At any rate, section 1231(b)(2)(E) and *Jama*'s analysis of it are inapposite. While both that statute and the contract before us contain multiple subparts, their likeness ends there. Each subpart of the statute is set off by a period, not a semicolon. A period "ends all sentences that are not questions or exclamations," thus indicating complete separation, whereas a semicolon is essentially a "supercomma." MODERN AMERICAN USAGE, *supra*, at 680–81. In addition, Congress emphasized the separateness of each subpart of the statute by not only placing a line break after each one, but also separating them from one another with a full space. In contrast, the default provision of the Construction Contract neither concludes each subpart with a period nor separates each subpart with a full space. Finally, while both provisions contain indented subparts, they are indented differently. The subparts of the statute are fully indented so as to emphasize their separateness. But in the contract's default provision, only the first line of each subpart is indented; the remainder of their text is not indented, emphasizing that each subpart is part of the larger whole.

While the contract is not a model of clarity, the most natural reading of the default provision is that the notice-and-cure requirement applies to all of its subparts. Context reinforces this interpretation of the provision. To interpret the provision otherwise makes at least some of the particular circumstances identified as defaults

incurable solely by implication. But such an implication flies in the face of the very next section of the contract, the termination provision, which allows termination only when the contractor "is in default" *and* "after applicable notice and cure periods." In interpreting the contract, we "cannot, by implication, find terms in opposition to the express language that the parties themselves have written into" it. *Dallas Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 311 (Tex. 1981). But that is what the majority does by holding that several types of defaults are incurable.

The majority reasons that the termination provision's reference to "applicable notice and cure periods" indicates that sometimes no notice-and-cure period applies. But nothing in the provision says so. Under the termination provision, "applicable notice and cure periods" simply refers back to the two possible types of cure periods stated in the immediately preceding default provision: those that can be cured "within three (3) days following notice" and those "not capable of being cured within such 3-day period." Contrary to the majority's reasoning, nothing about the language of this termination provision suggests the possibility of incurable defaults.

The absence of any suggestion of the possibility of incurable defaults is significant because the right to notice of default and the chance to cure is deeply ingrained in construction law, so much so that most form contracts "expressly provide for the giving of a cure notice by the nonbreaching party as a condition to termination" and "the right to cure is implied in every contract as a matter of law"

unless it is expressly waived. 5 PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 18:15 (2002). Absent waiver, a cure notice is not necessary only when the default is genuinely incurable, the defaulting party has abandoned or repudiated the contract, or the default cannot be cured within the time allowed for completion. *Id.*

The majority does not rely on an express waiver of the right to cure or circumstances that moot the right to do so. Instead, it holds that the plain text of the default provision, and context supplied by the termination provision, show that no notice of default or opportunity to cure is required as to most types of default. I think it's quite plain that these provisions of the Construction Contract do not say that.

## CONCLUSION

I would hold that the notice-and-cure requirement of the Construction Contract applies to each subpart of the default provision and affirm this aspect of the trial court's decision. I respectfully disagree with the majority's contrary opinion and dissent from the part of its judgment that turns on its erroneous interpretation of the contract's default provision. I concur in the remainder of the judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Hightower, and Countiss.

Justice Goodman, concurring and dissenting.