FLYNN, J. concurring in part and dissenting in part. Two cardinal principles of law inform our review of contracts. One is that courts will not rewrite a contractual provision unwisely made by a party. *Crews* v. *Crews*, 295 Conn. 153, 173, 989 A.2d 1060 (2010). The other is that effect must be given, to the extent possible, to all provisions of an agreement. *Honulik* v. *Greenwich*, 293 Conn. 698, 711, 980 A.2d 880 (2009); *Detels* v. *Detels*, 79 Conn. App. 467, 472, 830 A.2d 381 (2003). I agree with the majority's opinion affirming the denial of the plaintiff's claim for $9600 in extras for the more expensive kind of piling required to be installed. I do so because the plaintiff did not comply with the contractual condition precedent to receiving such an extra payment because it failed to make a written claim for contract adjustment. Such a result, though harsh, is consistent with both cardinal principles and with § 7 (b) of the contract.

I respectfully disagree with the majority's refusal to review the plaintiff's claim on appeal that the defendant improperly failed to comply with a contractual condition precedent when it withheld a $16,435.50 backcharge from the plaintiff's compensation. The trial court's decision to enter judgment on that issue for the defendant is contrary to both cardinal principles of contract interpretation and to the plain language of § 7 (f) of the agreement of the parties which provided that as a condition precedent to the defendant's undertaking any work that it claimed was the plaintiff subcontractor's responsibility forty-eight hour prior notice had to be given to the plaintiff subcontractor. The effect of the majority opinion is to apply a condition precedent to prevent the plaintiff's recovery for extras but to ignore another unfulfilled condition precedent to permit the defendant's backcharge. This result is unjust. Although the president of the defendant acknowledged that the plaintiff had performed satisfactorily, yet forty percent of the contract price has been withheld from the plaintiff in a $16,435.50 backcharge. This has been withheld on the theory that the defendant was entitled to deduct this amount because it contracted with Torello for work that was the plaintiff's responsibility under its subcontract with the defendant. Yet, the record is devoid of any evidence that the defendant complied with the contractual provision requiring forty-eight hours prior notice to the plaintiff before doing so. "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence." (Internal quotation marks omitted.) *Gianetti* v. *Health Net of Connecticut, Inc.*, 116 Conn. App. 459, 467–68,

976 A.2d 23 (2009). Practice Book § 60-5, in the words of Professor Tait and Judge Prescott in their treatise Connecticut Appellate Practice and Procedure, allows "a Connecticut appellate court to consider almost any new issue on appeal." C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 8.5, p. 299. This " 'exceptional circumstances' " exception "was developed independently of the post-1979 exception for 'plain error' contained in the second sentence" of the second paragraph of Practice Book § 60-5. "The independence of these two exceptions is also manifested by their language and theoretical bases, that is, 'exceptional circumstances' may not present 'plain error,' and 'plain error' need not coexist with 'exceptional circumstances.' " Id. While not bound to consider claims of error not distinctly raised, our Supreme Court under the first sentence of the second paragraph of Practice Book § 60-5 providing that "[t]he court shall not be bound to consider a claim unless it was distinctly raised at trial . . . ." has considered such questions when in its opinion "in the interests of . . . justice between individuals, it ought to be done." *Leary* v. *Citizens & Manufacturers National Bank*, 128 Conn. 475, 478–79, 23 A.2d 863 (1942); *Persico* v. *Maher*, 191 Conn. 384, 403, 465 A.2d 308 (1983). This is such a case of " 'exceptional circumstances.' " The question is not whether the plaintiff has a right to review of this issue but whether it is right that we review this issue in the interests of justice.

The plaintiff has briefed its claim that the actions of the defendant in withholding the $16,435.50 were "unilateral." As pointed out in the plaintiff's brief, our review of contractual disputes arising out of definitive contract language is plenary. *Embalmers' Supply Co.* v. *Giannitti*, 103 Conn. App. 20, 43, 929 A.2d 729, cert. denied, 284 Conn. 931, 934 A.2d 246 (2007). Plenary review does not permit us to ignore any pertinent definitive provision of a contract. The plaintiff briefed on appeal that the fact finder had ignored § 7 (f) of the contract requiring forty-eight hours prior notice to the plaintiff before contracting to undertake a task to which the defendant claimed that the plaintiff was obligated to perform.[1] The fact finder's only finding regarding notice to the plaintiff was that change order two, the vehicle the court used to impose the $16,435.50 backcharge on the plaintiff, was submitted to the plaintiff on August 3, 2004, approximately five months after the defendant engaged Torello for services that it now claims were the obligation of the plaintiff. Accordingly, I would reverse and remand the case for further proceedings as to that portion of the judgment relating to the backcharge with direction to render judgment in the plaintiff's favor for an additional $16,435.50.

[1] There could be no surprise to the trial court or the defendant by virtue of the plaintiff's failure to brief this provision at trial that § 7 (f) requiring forty-eight hours notice was pertinent. The trial court was to consider all definitive provisions of the contract as a whole, whether the plaintiff did

or did not brief them at trial. *Lar-Rob Bus Corp.* v. *Fairfield*, 170 Conn. 397, 407, 365 A.2d 1086 (1976) ("[a] contract is to be construed as a whole and all relevant provisions will be considered together"); *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 684, 6 A.3d 141 (2010) ("[i]t is axiomatic that '[w]hen interpreting a contract, [the reviewing court] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result' "). Furthermore, the defendant had pleaded a special defense and tried the case on the theory that both the plaintiff and the defendant were parties to the Torello contract. Had the defendant succeeded in proving this, the plaintiff would have needed no forty-eight hour notice that the defendant sought to charge him with responsibility for a contract to which he was a party. The fact finder found that only the defendant was a party to the Torello contract for which it sought to hold the plaintiff liable as a party, and, thus, the defendant failed to prove its special defense.