

2000

# Glenn C. Shaw v. Ashley L. Robison : Reply Brief

Utah Supreme Court

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05 DEC 1975

GLENN C. SHAW,

Plaintiff-Appellant,

vs.

ASHLEY L. ROBISON,

Defendant-Appellant,

KOVO, INC., a Utah  
corporation,

No. 13823

Defendant,

vs.

FIRST MEDIA CORPORATION,  
a Delaware corporation,

Intervenor-Respondent.

---

REPLY BRIEF OF APPELLANTS

---

Appeal from the District Court of Utah County,  
the Honorable Allen B. Sorensen, Judge.

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GLENN C. SHAW,

Plaintiff-Appellant,

vs.

ASHLEY L. ROBISON,

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KOVO, INC., a Utah  
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Defendant,

vs.

FIRST MEDIA CORPORATION,  
a Delaware corporation,

Intervenor-Respondent.

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---

INTRODUCTION AND STATEMENT OF FACTS

In view of the license taken by respondent in its  
brief with respect to the facts, it is fortunate that  
respondent does not dispute that this is an equity

proceeding.. The court thus has an opportunity to review both the law and the facts to avoid any misimpressions. Reiman v. Baum, 115 Utah 147, 203 P.2d 387 (1949).

Respondent's brief is replete with inaccuracies, omissions, mis-statements, and exaggerations which result in the respondent falling far short of its stated objective to "set forth a complete statement of facts." (Respondent's Brief, p. 2)

For example, appellants have never disputed the fact that the trial court appointed a receiver in September, 1973, for the stated purpose of selling and liquidating the assets of the corporation as is indicated on page 6 of Respondent's Brief. Such order, however, was in addition to the court's specific directive to the appellants, at the same time the receiver was appointed, that if the appellants could resolve the corporate deadlock the court would immediately dissolve the receivership. (T. September 6, 1973, p. 76) Also, the court at the same time directed that the owners remained free to sell the KOVO stock to one another or to third parties.

(T. September 6, 1973, p. 75) By conveniently overlooking these facts the respondent has sought to create the impression that the owners were not authorized to continue to attempt to resolve their differences after a receiver was appointed -- a fact which is simply not true as the record demonstrates and is also demonstrated by the owners' continued negotiations and good faith which ultimately resulted in a settlement of all differences.

First Media Corporation's counsel makes repeated reference to the fact that neither of the owners appealed various intermediate orders and attempts to ascribe to this fact some sort of significance. (e.g. Respondent's Brief, pp. 6, 14, 18) Since counsel has not objected to this court considering the matters embraced in the various orders, it can only be assumed that the issues posed by such orders are properly before the court but that the respondent is more comfortable destroying straw men than confronting the merits of the appeal.

First Media Corporation's initial offer is characterized by its counsel as a "detailed four-page, single

space offer (containing) essential contract terms."  
(Respondent's Brief, p. 8) An examination of this document (FMC Exhibit 1, June 28, 1974) will reveal, that not all of the "four-detailed pages" directly concern the terms of the offer nor does it contain all essential contract terms as the differences between this letter and the later contract demonstrate.

The captioned material on page 8 of Respondent's Brief indicates that First Media Corporation submitted the "highest and best offer" within the time deadline set by the receiver. Once again, by failing to acknowledge the other offers considered by the court and submitted after this time, respondent purposefully ignores the fact that the respondent's offer was actually not the highest or best offer, but that the offer submitted by appellant Shaw had "an inherent advantage" (R. 170), and that the receiver ultimately favored respondent's proposal for "Solomon like" reasons.  
(R. 170-172)

Respondent takes considerable effort to point out in its "complete statement of facts" the effort and expense it went through after the February hearing, and



substantiates its position in part with exhibits which were accepted by the court over the objections of appellant's counsel for a limited purpose totally unrelated to the proposition for which the respondent now attempts to utilize them. (T. June 28, 1974, P.43)

Contrary to the respondent's representations, the question of reliance is not actually relevant to this appeal. If a contract were actually created at the time respondent alleges, the lower court's action can be upheld without considering this issue. But if a contract was not consummated, as the appellants strongly urge, any change in respondent's position would make no difference since respondent is charged with notice of the receiver's limited authority. Utilization by the respondent of such an ill-conceived legal position illustrates the respondent's willingness to assume any possibly conceivable position in order to prevail.

In the note at page 44 of respondent's brief, First Media Corporation's counsel contends that the onerous \$75,000 indemnification escrow is "neither unreasonable or inconsistent with paragraph 2 of the

(purportedly) accepted offer. The amount involved is precisely the same, and the mechanical process of payment is the '. . . flesh on the bones'." (Emphasis added.)

Once again the license respondent has taken with the facts is demonstrated by comparison to paragraph 2 of First Media's letter offer (FMC Exhibit #1, June 28, 1974) which states:

Upon acceptance of this offer, FMC and/or Richard E. Marriott and/or other principal stockholders of FMC shall cause to be deposited in an escrow account to be mutually agreed upon the principal sum of Twenty-Five Thousand Dollars (\$25,000). The application of this Escrow Deposit toward payment of the net purchase price as described in paragraph 1 shall be governed by the terms and conditions of the Escrow Agreement.

The agreement ultimately approved by the court (R. 189-218) provides in paragraph 4 for a \$25,000 escrow. (R. 195) It further provides in paragraph 4(b)(2) (R. 196) for a \$75,000 indemnification escrow, the onerous terms of which are found at R. 390.

After a review of these provisions, it is difficult to determine how respondent's counsel can represent that "the amount involved is precisely the same"

or that all that is involved is "flesh on the bones". (Respondent's Brief, p. 44). This is a new, highly significant, and onerous term not found in respondent's letter offer. Through a careful choice of words, that the indemnification escrow is not "inconsistent" with paragraph 2 of the letter offer, respondent has created a serious misimpression. Such sophistry has no place before an appellate court.

The misleading nature of First Media Corporation's factual recital is illustrated best of all by the representations at page 13 of its brief that by order dated February 22, 1974, the court accepted its offer. In making this statement respondent apparently feels it has divined a fact not discernible by the receiver, by the receiver's counsel, by the owners of the radio station, or even by the court, as later proceedings indicate. In May, 1974, the receiver recognized that a binding contract had not been made, the receiver, in making motion for approval of a contract, requested "that the court enter its order approving the execution of the document by the receiver in a manner which is binding upon KOVO, Inc." (R. 186-187)

Receiver's counsel also testified in June that he understood a contract had not been consummated:

[W]hat I intended to do as counsel for the receiver was to negotiate, complete the negotiations of the contract along the lines of the FMC offer, and I understand procedurally it would be re-submitted to the court for final approval.

THE COURT: I suppose you thought you were carrying out the Order of February 22?

MR. ROBERTS: That is what I thought I was doing . . . procedurally I understand there would have to be further approval by the court.

(T. June 28, 1974, p. 137)

The court itself, as indicated in the proffered Affidavit of Gary Stott, advised the parties on March 15, 1974, that it had not approved any sale to First Media Corporation, but had only granted respondent the exclusive and limited right to negotiate with the receiver. (R. 311)

## ARGUMENT

### POINT I.

THE LOWER COURT ERRED IN GRANTING THE RECEIVER'S MOTION TO AUTHORIZE EXECUTION OF SALES CONTRACT.

A. In order for the proposed contract of sale to be in any respect binding or effective it required the further specific approval of the lower court.

Throughout respondent's brief there is a basic failure to understand that the reason for the difficult position in which respondent finds itself is its elementary failure to recognize and acknowledge that judicial acceptance of a report and recommendation of a receiver is not tantamount to acceptance of an offer to purchase the underlying property.

Respondent does not seriously dispute the analysis and explanation of judicial sales applicable to this proceeding as explained in appellants' brief. (Respondent's Brief, p. 21-22) Where a judicial sale is not regulated by statute, a court essentially makes its own law subject to the use of sound discretion. Chapman v. Schiller, 95 Utah 514, 83 P.2d 249, 251 (1938). A bidder at a judicial sale bids at his peril, and any bid

remains an offer to purchase until it is accepted and confirmed by the court. 47 Am. Jur.2d, Judicial Sales, § 136 p. 407.

Respondent apparently further concedes that any bidder at a judicial sale bids with notice that the sale is subject to judicial confirmation, and that confirmation may be withheld to protect the rights of the property owner or those having an interest in it. 47 Am. Jur. 2d Judicial Sales, § 136 p. 407.

Respondent, apparently not being able to locate any authority contrary to that cited by appellants, suggests that the cases of Freebill v. Greenfield, 204 F.2d 907 (2nd Cir. 1953) and Morris v. Burnett, 154 F. 617 (8th Cir. 1907) (cited at pages 21-22 of Respondent's Brief) actually stand for the proposition that separate acts of acceptance and confirmation are only necessary when an offer is first accepted by an officer other than the court itself, such as by a receiver. Such a simplistic solution is not helpful. Obviously since a judicial sale involves a contract between the court and a separate entity, the court must confirm any arrangements made by an agent of the

court on its behalf. Equally obvious, the fact that an offer must only be confirmed once by the court does not mean that the receiver or other agent of the court is precluded from receiving authorization or instruction from the court as often as necessary during the course of the receivership.

As indicated in Chapman v. Schiller, supra, where, as here, the procedure to be followed in a judicial sale is not regulated by statute, the court has wide discretion in formulating a procedure appropriate for the particular situation. Once, however, the court has determined to follow a particular procedure in making a judicial sale, the court is obliged to adhere to the self imposed rules. Here, the court devised an alternate approach to resolution of the stockholder dispute. Contrary to respondent's assertion that such an alternative approach is "wholly unsupported by the record" and "would clearly constitute a fraud upon bona fide third-party purchasers" (Respondent's Brief, p. 23) the record is very clear that this is the manner in which the court chose to proceed.

As noted in 2 Clark on Receivers, § 519 at 835:

It has been held that a bidder at a receiver's sale acquires no enforceable rights until his bid is accepted by the court. . . .

And because the court has wide latitude to establish rules for proceeding on a judicial sale which are appropriate to the particular situation the respondent's contention that such a procedure would "constitute a fraud upon bona fide third party purchasers" is absurd since respondent had notice of the court's procedure. Joseph Nelson Plumbing & Heating Supply Co. v. McCrea, 64 Utah 484, 231 P. 823 (1924). Despite respondent's attempt to obfuscate its meaning (compare p. 40 of Respondent's Brief with pp. 43-44 of Appellants' Brief) this case stands for the proposition that the court retains this wide latitude at all times. As Joseph Nelson Plumbing indicates, the court has wide discretion to set aside a judicial sale.

The court appointed a receiver in September, 1973, for the purpose of selling and liquidating the assets and business of the corporation. (R. 106, 108) At



the same time, the court directed that the owners of the business should continue to attempt to reach a solution between themselves, and that if such a solution were reached the court would dissolve the receivership. (T. September 6, 1973, p. 76) Significantly, the court also explicitly directed that the owners should remain free to sell and transfer their stock in the business to whomever they pleased. (T. September 6, 1973, p. 75) The court did not subsequently limit in any manner the right of the owners to continue to seek a solution to the deadlock. Indeed, the absence of any indication to the contrary in the record following the specific authorization to continue to negotiate fully supports the owners' position and understanding.

Respondent's attempt to fabricate support for its position suggesting that the court assigned related financial disputes between the owners to a separate judge is not, even by respondent's standards, competent evidence to refute the specific references in the record that the court did in fact approve of a dual approach.

(Respondent's Brief, p. 24, note.)

Respondent spends much time in its brief attempting to demonstrate that, according to basic principles of contract law, it is not unusual for a basic agreement to be reached between separate parties and later to have this agreement translated into a more detailed document. Obviously, this occurs. Such a demonstration, however, adds very little to a resolution of whether or not a contract in fact existed as respondent maintains. The facts as amply cited in this brief are otherwise.

On January 31, 1974, the receiver sought an order of the court respecting the sale of the corporate assets and asked that a hearing be held to consider the offers received as of the date of the hearing. The receiver further sought, following the hearing, to have the court issue an order ". . . authorizing the receiver to negotiate and execute an appropriate contract of sale of the corporate assets. (Emphasis added.)" (R. 51) Obviously, the receiver's intent in making a motion to the court prior to the February hearing, was not to have a contract approved. At the February 6, 1974, hearing, the

receiver's counsel represented that the purpose of the hearing was ". . . (to have) the court determine which of these constitutes highest and best offer, and then request(ing) the court to authorize the receiver to proceed to negotiate a firm and binding contract of sale with the offeror who has presented the highest and best offer" (emphasis added). (T. February 6, 1974, p. 2)

After considering the offers of the owners and First Media Corporation, the court entered its order on February 22, 1974. This order is in the record (R. 173) and has been frequently quoted in the parties' briefs. As the order indicates, it was not the court's intention to form a contract with First Media Corporation, but merely to direct that the report and recommendation of the receiver be accepted. That this is clear from the facts and the order itself is evident. Respondent's counsel implicitly acknowledges the clarity of this position when their position is ultimately reduced to the argument that this entire matter can only be understood and resolved as a result of determining what was meant by the placing of a comma after "FMC, Inc." Respondent's position at

best is an indication that the order is somewhat unclear, and that the surrounding facts must be closely examined. An examination of the facts indicates a contract was not consummated.

Because the March 15, 1974 hearing was not reported it was necessary for the Court to consider any evidence offered by the parties as to what had transpired at the time the order was formulated.

On June 28, 1974 a hearing was held at which time Mr. Martineau, counsel for Shaw, indicated the following concerning his recollection:

". . . And I would just point out one thing: At the hearing of the objection made by Mr. Stott on behalf of Robison to the Court's order of February 22nd, we had a hearing, and although it's indicated in the Court record it was reported, apparently it was not. But at that hearing the Court was very explicit in saying that this was merely an offer to negotiate and the basis for a negotiation and not an acceptance of an offer or sale as such. The contract was entered by the Court and approved by the Court. I am sure we all proceeded on that basis.

"THE COURT: Your position simply I take it is analogous to a probate proceeding where the sale of the property is not final until it is approved by the Court, is that right?

"MR. MARTINEAU: That is right."  
(T. June 28, 1974, p.6. Emphasis added.)

Similarly, on July 3, 1974 the affidavit of Gary Stott, counsel for Robison, was offered into evidence by Mr. Martineau as a further explanation of what had occurred during the March 15th meeting. Mr. Stott in his affidavit stated the following:

"4. On or about March 6, 1974, your affiant had submitted to the Court on behalf of Robison, an Objection to the Court's order Approving any Sale of KOVO to FMC. That hearing which I believe was heard on March 15, 1974, The Honorable Allen B. Sorensen advised your affiant and those present at that hearing that he had not approved any sale to FMC; that he was only approving the right of the Receiver to negotiate with FMC for the purpose of seeing if a sale of KOVO could be arrived at. Your affiant does not recall whether that hearing was reported, but does recall specifically that my objection was heard by the Court and that pursuant to my objection the Court advised those present at that hearing that no sale was being approved at that time." (R. 310-311. Emphasis added.)

The trial court, however, refused to accept this affidavit on the grounds that it was hearsay but did allow it to be proffered as proof. This rejection of the affidavit was made despite the acceptance into evidence of newspaper articles offered by Mr. Greene, counsel for FMC, which reported the various hearings which had occurred. (T. July 3, 1974, p. 3-5).

The failure of the Court to allow the affidavit of Gary Stott into evidence was clearly error since appellants were entitled to submit affidavits in proceedings involving a determination of a Motion. The July 3, 1974 hearing together with the preceding hearings were held pursuant to the Receiver's Motion to authorize execution of the sale contract. (R. 186-188). This is made abundantly clear by the Court's order referring to the Motion and reciting the various hearings which were held between May and July of 1974. (R. 400-410).

Thus, the proceedings at which the affidavit was introduced was not that of a trial in which the Court was a trier of facts but was proceedings to determine the outcome of a Motion. Rule 43(e) of the Utah Rules of Civil Procedure unquestionably allows the introduction of affidavits into evidence. This rule states:

"When a Motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or depositions."

As has been stated:

"In general practice, affidavits may be used to start in motion the process of the court and are generally received as evidence upon the hearing of Motions, irrespective of the vital influence the latter may have upon the final outcome of the suit." 3 Am. Jur. 2d, § 29, p.404.

Likewise:

"Where a Motion is based on facts not appearing of record, the Court may, generally, in its discretion, either hear the matter on affidavits presented by the respective parties or direct the matter be heard wholly or partially on oral testimony or depositions. Generally, the admission of oral testimony or depositions in addition to affidavits is within the discretion of the Court." 56 Am. Jur. 2d, § 26, p.21.

Therefore, the rule definitely allows the use of affidavits into evidence for the purpose of establishing facts at a Motion unless the Court, in its discretion, orders oral testimony or depositions to be used in their place. If this occurs, however, the Court should allow the parties sufficient time to obtain the witnesses or depositions if the affidavits are refused since a party, as a normal course, presumes that the affidavits are admissible in support of his Motion. Cf. 5 Moore's on Federal Practice, ¶ 43.13, p.1385-1387.

The use of affidavits in a proceeding confirming a sale is clearly proper as demonstrated in the case of Sheel v. Rinard, 430 P.2d 482 (Idaho 1967).

In that case respondents moved for an order approving the sale of a ranch which had been the subject of an injunction by the District Court. Respondents relied upon the files and records of the action and upon representations of fact recited in respondents' Motions. The appellants opposed the Motion by an affidavit in which they alleged that the sale was at a price lower than the agreed sale between the respondents and the appellants. The affidavits were admitted into evidence by the District Court. In discussing the use of affidavits in such a hearing the Supreme Court of Idaho stated the following:

"[T]he District Court at the hearing on respondents' Motion was not confined to any particular method of receiving evidence. The Court may require all evidence in support of the Motion to be presented by affidavit, but in its discretion the Court may also permit other written or oral proof." Id. at 45.

Likewise in Beckett v. Kaynar Manufacturing Co., 321 P.2d 749 (Cal. 1958), the Supreme Court of California approved the use of affidavits during a



Motion for court confirmation of an arbitration award. The Court specifically held that findings of fact and conclusions of law were not necessary in the determination of a Motion. Similarly, the findings of fact and conclusions of law entered by the trial court in this case (R. 403-410) were unnecessary in that they did not relate to an action "tried upon the facts without a jury." (Rule 52, Utah Rules of Civil Procedure). Likewise, the Court's ruling that the affidavit could be admitted as a proffer of proof was also erroneous since the proceeding in which the affidavit was offered was not "an action tried without a jury" and the evidentiary requirements of hearsay are not present. (Rule 43(c), U.R.C.P.).

Obviously, any affidavit is necessarily hearsay but the Rules specifically allow the admission of affidavits to establish facts at hearings on Motions. Were this not the case the courts would be overrun with evidentiary hearings where witnesses would have to be present to testify to procedural matters. Of course, as noted previously, the Court can require more than affidavits presuming that counsel are given notice that

affidavits will not be accepted. This was clearly not done by the Court in any other proceedings and it was therefore error to exclude the affidavits without such notification that the actual witness himself would have to be present.

The effect of this exclusion was that there is little evidence introduced into the record on behalf of appellants to support their position that the March 15, 1974 hearing did not result in a sale of KOVO assets but merely resulted in the approval of the Court for the Receiver to negotiate the sale.

Since this appeal is primarily concerned with whether a binding contract was or was not consummated, the understanding of what transpired at this hearing and the exclusion of this evidence was patently prejudicial to the appellants. This Court must reverse the lower court's determination so that the affidavit may be examined for its probative value in establishing what transpired at this crucial hearing. A review of this competent evidence will demonstrate there was no contract.

B. Intervenor had notice of the Receiver's limited authority and acquired no vested rights.

Respondent suggests that it acquired vested rights by analogy to "fundamental principles of contract law". (Respondent's Brief, p. 24) Throughout its entire argument on this point respondent again ignores the basic point, that "fundamental principles of contract law" are modified and must yield to the procedure necessary to foster orderly judicial sales.

Respondent does not deny that all persons dealing with a receiver are chargeable with knowledge of the limitations on the receiver's authority to act or contract. 2 Clark on Receivers, § 433, p. 277. Respondent further does not deny that it had notice of the limitations on the receiver's authority.

Knowing of the limitations on the receiver's authority, and being present at the hearings held on the receiver's report, respondent cannot seriously urge that they misunderstood, were misled, or acquired any vested rights.

If, as respondent alleges, it acquired vested

rights, when were the owners' rights divested? The primary purpose of the receivership was to protect the rights of the shareholders and the corporation, yet the respondent would have us believe that, without notice, the owners rights were divested and bestowed upon an unrelated third party. Such a position is neither reasonable nor in accordance with well understood equitable principles applicable to this case.

#### POINT II.

THE CONTRACT OF SALE PROPOSED BY THE INTERVENOR WAS MATERIALLY DIFFERENT FROM ITS BID AND SHOULD NOT HAVE BEEN APPROVED BY THE LOWER COURT.

As indicated in Appellants' initial Brief, a comparison of the initial letter offer of FMC (R. 141-144) and the lengthy contract submitted to the court for approval (R. 189-259), reveals not only numerous, but substantial changes. Respondent is correct in suggesting that a difference in the length of the documents does not necessarily reveal inconsistency. (Respondent's Brief, p. 43) However, as has earlier been pointed out in this reply brief, there are many onerous and unfair differences in favor of the intervenor in the longer document. This is amply demonstrated

by the inclusion of a \$75,000 indemnity escrow, which respondent's counsel suggests is "not inconsistent" and mere "flesh on the bones". It can only be remarked that with a few "fleshing provisions" such as this the remainder would not even be fit carrion.

Implicitly recognizing the numerous and substantial differences, respondent attempts to somehow place responsibility on the owners for the unfair changes. (Respondent's Brief, p. 45) Such suggestion cannot be taken seriously. As indicated in Appellants' initial Brief at page 45, the owners were not supplied with certain pertinent documents until they specifically requested them, and so had little to do with the negotiations.

There is no dispute that there were many unfair changes made. As indicated in respondent's brief, respondent was hard-pressed to explain many of the discrepancies pointed out by appellants, and ultimately attempted to ignore many of them when efforts to account for certain major changes failed. (See Respondent's Brief, Note, p. 44, for an example of this.)

It is self-evident that even if in fact a binding contract had been made on February 22, 1974,

the contract approved by the court should be disapproved and rejected because of the many substantial and unfair changes which were made.

#### CONCLUSION

In conducting a judicial sale, the court has wide latitude in establishing the judicial procedure to be employed. Such flexibility is necessary to account for the many exigent circumstances which may be present. Here the court permitted an alternative approach to settlement because it was not an insolvency proceeding. Accordingly, when the owners resolved these differences before a binding contract was made and confirmed, the receivership should have been terminated. Intervenor First Media Corporation had knowledge of the limitations on the receiver's authority and proceeded with a clear understanding that the receivership would be terminated if the owners resolved these differences.

The motion of the receiver for approval of the agreement, as to which the receiver and its counsel took no position, should have been denied and the motion of

the parties for dismissal of the receivership action, subject of course to proper safeguards and conditions, should have been granted.

In the alternative this court should at the very minimum remand this case to the lower court with instructions that it scrutinize with care all provisions of any contract which it may hereafter approve to insure not only fair consistency with the initial FMC offer but adequate protection for the rights and interests of the owners and KOVO as well.

Respectfully submitted,

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