2000

# Carl L. Pingree, James W. Pingree, Wallace B. Pingree, and Joyce P. Sparrow v. The Continental Group of Utah and Leslie W. Van Antwerp : Brief of Respondent

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

CARL L. PINGREE, JAMES W. PINGREE, WALLACE B. PINGREE and JOYCE P. SPARROW, trustees,

Plaintiffs, Respondents, and Cross-Appellants,

vs.

Case No. 14484

THE CONTINENTAL GROUP OF UTAH, INC., a Utah corporation, and LESLIE W. VAN ANTWERP, JR., doing business as VAN'S BLUE OX,

Defendants, Appellants, and Cross-Respondents.

---

# BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

---

Appeal from the Judgment of the Second District Court for Weber County
Honorable John F. Wahlquist, District Judge

---

CHRISTENSEN, GARDINER, JENSEN & EVANS
Elwood P. Powell
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs, Respondents, and Cross-Appellants

FLORENCE AND HUTCHISON
Brian R. Florence
818-26th Street
Ogden, Utah 84401
Attorney for Defendant, Appellant, and Cross-Respondent, Leslie W. Van Antwerp, Jr.

IN THE SUPREME COURT

OF THE STATE OF UTAH

---

CARL L. PINGREE, JAMES W. PINGREE, WALLACE B. PINGREE and JOYCE P. SPARROW, trustees,

Plaintiffs, Respondents, and Cross-Appellants,

vs. Case No. 14484

THE CONTINENTAL GROUP OF UTAH, INC., a Utah corporation, and LESLIE W. VAN ANTWERP, JR., doing business as VAN'S BLUE OX,

Defendants, Appellants, and Cross-Respondents.

---

# BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

---

Appeal from the Judgment of the Second District Court for Weber County
Honorable John F. Wahlquist, District Judge

---

CHRISTENSEN, GARDINER, JENSEN & EVANS
Elwood P. Powell
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs, Respondents, and Cross-Appellants

FLORENCE AND HUTCHISON
Brian R. Florence
818-26th Street
Ogden, Utah 84401
Attorney for Defendant, Appellant, and Cross-Respondent, Leslie W. Van Antwerp, Jr.

## TABLE OF CONTENTS



## AUTHORITIES CITED

### CASES

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)



STATUTES

IN THE SUPREME COURT

OF THE STATE OF UTAH

---

CARL L. PINGREE, JAMES W. PINGREE, WALLACE B. PINGREE and JOYCE P. SPARROW, trustees,

Plaintiffs, Respondents, and Cross-Appellants,

vs. Case No. 14484

THE CONTINENTAL GROUP OF UTAH, INC., a Utah corporation, and LESLIE W. VAN ANTWERP, JR., doing business as VAN'S BLUE OX,

Defendants, Appellants, and Cross-Respondents.

---

# BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

---

## STATEMENT OF THE NATURE OF CASE

This case includes claims for declaratory judgment, unlawful detainer, damages and accounting.

## DISPOSITION IN LOWER COURT

The Honorable John F. Wahlquist, sitting without a jury, entered Findings of Fact, Conclusions of Law, and Judgment and Decree which set the rental for the first renewal term of the lease at $900 per month, found that the

appellant was in unlawful detention of the premises for breach of lease covenants, awarded damages, ordered that an accounting be made and that appellant vacate the premises as of January 15, 1976. Appellant's Motion for Reconsideration of Judgment was denied. The Judgment and Decree was appealed by defendant, and plaintiffs cross-appealed.

RELIEF SOUGHT ON APPEAL AND CROSS-APPEAL

Plaintiffs, respondents, and cross-appellants request this Court to reverse, modify or affirm the trial court's Findings of Fact, Conclusions of Law, and Judgment and Decree as follows:

1. Reverse and delete Finding of Fact No. 59, which reads, "The uncertain lease situation is not the type that the legislature had in mind in fixing treble damages for unlawful holdover."

2. Modify Findings of Fact Nos. 60 and 64 to permit respondents to recover treble damages for unlawful holdover of the premises from and after March 4, 1975, to and including January 15, 1976, pursuant to Utah Code Annotated 1953, §78-36-1, et seq.

3. Reverse part of Conclusion of Law No. 16 and all of Conclusion of Law No. 18(k) so as to permit the

recovery of treble damages from and after March 4, 1975, to and including January 15, 1976, for unlawful holdover of the premises.

4. Modify part of Conclusion of Law No. 14 and all of Conclusion of Law No. 18(g) so as to award respondents treble damages for unlawful holdover of the premises from and after March 4, 1975, to January 15, 1976.

5. Modify paragraphs No. 2 and No. 5 of the Judgment and Decree so as to award respondents and cross-appellants judgment for treble damages as a result of the unlawful holdover.

6. Reverse and delete paragraph No. 6 of the Judgment and Decree.

7. Affirm the Findings of Fact, Conclusions of Law, and Judgment and Decree in all other respects.

## STATEMENT OF FACTS

The plaintiffs, respondents, and cross-appellants (hereinafter referred to as "respondents") disagree with defendant, appellant, and cross-respondent's (hereinafter referred to as "appellant") Statement of Facts in several material respects. The controlling facts in the view of the respondents are set forth below.

The respondents are the owners of a restaurant located at 5418 South 1900 West, Roy, Utah (T.190, Complaint para. 1-4, Answer para. 1-4). This property is located within the main Roy City shopping district (T.191). Respondents' predecessor-in-interest, Ma's & Pa's Place, a Utah corporation ("Ma's & Pa's"), operated this restaurant until sometime during 1967 or 1968 (T.174, 205).

The restaurant building was erected in 1948 (T.205) on a lot 225 feet deep and 158 feet wide fronting on the east side of 1900 West (T.208, Plaintiffs' Exhibit A). This street is the main north-south thoroughfare in Roy, Utah (T.355). Within a block to the north of the premises is the Riverdale Road junction, and to the south is the Roy I-15 exit (T.190, 355).

To the south is located a Denny's restaurant, Roy Lumber Company, Taco Time, the Rainbow Bar, a gas station and a motel. On the north side is D & B Garage and at the Riverdale Road junction, Roy Auto (T.217, 218). Up until the time Ma's & Pa's ceased operating the restaurant, it was the only restaurant in the immediate vicinity on the east side of the street (T.218).

The premises were subsequently leased to the Hicks to operate a Tampico restaurant (T.175, 205, 372). This

lease was for a five year term with rentals of $1,000 per month (T.175, 205, 206). After the business had been operating approximately seven months, the Hicks took out bankruptcy (T.206).

The Continental Group of Utah, Inc. ("Continental"), had obtained a national "Paul Bunyan" restaurant franchise (T.191, 192, 274). On September 12, 1969, the respondents entered into an Earnest Money Lease Agreement with Continental to lease the premises for a five year term, plus two five-year renewal options (T.177, 239). The Earnest Money Agreement provided for rentals of $500 per month, plus 3 percent of the gross sales over $10,000 per month for the initial five year period. In succeeding renewal periods, the base rent was left at $500 per month while the percentage rental was increased to 4 percent of gross sales over $10,000 per month (Defendant's Exhibit 1).

After the Earnest Money Agreement had been executed, Continental revised the Hicks-Tampico lease (T.175-177), and this revised lease was executed by the parties on September 24, 1969 (Plaintiffs' Exhibit A). Contrary to the terms of the Earnest Money Agreement, this lease called for the renegotiation of the rentals for each successive renewal term

with the proviso that the maximum monthly rent be fixed at $900 per month. In addition, Continental negotiated for and obtained the right to terminate the lease upon 90 days notice (T.211, para. 4 of Exhibit C to Plaintiffs' Exhibit A) in the event it was unable to make more than $10,000 per month (T.211). In fact, Continental represented to Ma's & Pa's that it would vacate the premises if gross sales dropped below $10,000 per month (T.211) since the corporation would be losing money at that sales level. This was agreeable to Ma's & Pa's since it was losing money by renting the premises for less than $900 per month (T.212).

At the time Continental obtained possession of the premises, they were in good condition (T.199, 244, 269-270, 277-278). Although the building had been constructed in 1948 (T.205), the exterior had recently been repainted and the building interior had been completely remodeled and repainted by the Hicks (T.198). During the Hicks occupancy, there had been a small fire in the kitchen (T.199). Following the Hicks occupancy, the building was completely cleaned and scrubbed down (T.199-200). The floors and the paint were in good condition and repair (T.200, 277), and the restrooms were in good repair and in operation (T.200, 243-245).

The interior decor of the building did not suit Continental. It undertook at its own cost (T.202) to remodel the main dining room and the coffee shop, remove the upstairs dance floor, relocate the public restrooms, and add a walk-in box (T.201-202, 240-242).

Continental was to do the necessary remodeling and maintain all things in the restaurant. "[W]e would take care of everything. If there was [sic] any repairs to be done, or anything like that we would take care of them, and we did." (T.240)

The original lease between Continental and Ma's & Pa's did not include glassware, silverware and other items. Continental anticipated receiving these items as part of the franchise package. When it was determined that these items were not part of the franchise, Continental arranged to lease these items, which had an original cost in excess of $10,000 (T.222), from Ma's & Pa's for $25 per month (T.193, 248-49, Plaintiffs' Exhibit M). As a part of the leases, the sum of $1,500 was placed on deposit in the Bank of Utah to cover breakage, loss, damage and the last month's rent (T.223-224, 249, 270-272, 380).

During the time Continental operated a restaurant on the premises, the Roy City Fire Department notified them

that exterior fire exits needed to be installed on the second floor (T.252-253, 325, Plaintiffs' Exhibits N and W). Although the premises had been inspected by the Roy City Fire Department on several prior occasions, no mention had ever been made of the need for second floor fire exits (T.251-253, 325). Roy City had adopted a new fire code in 1965 (T.324); however, since the building had been built prior to 1965, no new fire exits were required (T.327) until the fire chief concluded the existing conditions constituted a distinct hazard to life and property (T.328).

This change occurred in 1972 due to the fact the second floor was being used by a new business for a new and different use (T.324, 328, 331, 332). At trial, Mrs. Rizzuto, the secretary-treasurer of Continental, testified that Ma's & Pa's was never notified of this problem since "we figured that was our responsibility to put it up there." (T.251)

In May, 1972, Continental sold their business to appellant (T.249), who assumed all of their leasehold and other obligations (T.249, 254, Plaintiffs' Exhibits U and V, Defendant's Exhibit 2).

Prior to the sale, appellant inspected the premises and reviewed the operations with Mr. and Mrs. Rizzuto on

several different occasions (T.250-251). Appellant was informed of the obligation to pay the monthly bills after June 1, 1972, rental on the glassware and dishes (T.265), and to repair and keep up the premises (T.254). It was specifically pointed out to him that the kitchen floor (T.256) needed to be repaired and that the fire escapes (T.251) had to be installed. And, as the Weber County Health Inspectors testified, there were other items which needed to be corrected about the time appellant took over the lease (T.310-312). Prior to that time, the inspectors had noted only that the floors were in bad shape and a lavatory sink was in poor repair (T.311). And, as Mrs. Rizzuto indicated, it was the kitchen floors that needed repair (T.256).

During the time Continental operated the restaurant, their monthly gross sales had been seasonally improving. In fact, during the 20 month period of time for which records were available, they failed to pay percentage rental only twice. Their monthly sales (T.259-262) were:

| Month | Gross Sales |
|---|---|
| October, 1970 | $ 13,216 |
| November, 1970 | 13,241 |
| December, 1970 | 13,000 |
| January, 1971 | 12,616 |

| | |
|---|---|
| February, 1971 | 12,870 |
| March, 1971 | 15,231 |
| April, 1971 | 13,522 |
| May, 1971 | 15,051 |
| June 1 to 20, 1971 | 7,355 |
| July 6 to 31, 1971 | 8,096 |
| August, 1971 | 11,200 |
| September, 1971 | 11,233 |
| October, 1971 | 12,800 |
| November, 1971 | 13,044 |
| December, 1971 | 15,211 |
| January, 1972 | 11,821 |
| February, 1972 | 13,044 |
| March, 1972 | 17,242 |
| April, 1972 | 16,425 |
| May, 1972 | 15,529 |

Prior to October, 1970, Continental had experienced a few months in which gross sales were less than $10,000 per month (T.257). Throughout this period, Continental had periodically increased its food prices to offset rising food costs due to inflation (T.266-268).

In this context, Ma's & Pa's consented and permitted Continental to assign their leasehold and other obligations to appellant (Plaintiffs' Exhibit B). Although appellant took over a going business, his monthly gross sales started an immediate decline. If appellant's monthly gross sales are compared with Continental's monthly gross sales for the corresponding months of each prior year for which records are available, his monthly gross sales exceed

those of Continental only in the months of June, 1973, and June, 1974. And, he did not pay any percentage rental. His records indicate the following monthly gross sales pattern (T.284-288):

| Month | Sales |
|---|---|
| June, 1972 | $ 11,221.31 |
| July, 1972 | 7,540.01 |
| August, 1972 | 10,805.78 |
| September, 1972 | 9,074.00 |
| October, 1972 | 9,100.00 |
| November, 1972 | 9,033.00 |
| December, 1972 | 11,100.00 |
| January, 1973 | 6,837.00 |
| February, 1973 | 9,004.00 |
| March, 1973 | 9,755.00 |
| April, 1973 | 8,933.00 |
| May, 1973 | 11,705.00 |
| June, 1973 | 7,433.00 |
| July, 1973 | 6,078.00 |
| August, 1973 | 8,202.00 |
| September, 1973 | 7,320.00 |
| October, 1973 | 10,458.00 |
| November, 1973 | 10,116.00 |
| December, 1973 | 12,174.00 |
| January, 1974 | 7,327.00 |
| February, 1974 | 8,514.00 |
| March, 1974 | 10,507.00 |
| April, 1974 | 10,193.00 |
| May, 1974 | 11,608.00 |
| June, 1974 | 7,890.00 |
| July, 1974 | 7,229.00 |
| August, 1974 | 8,240.00 |
| September, 1974 | 7,725.00 |

During this time, appellant also experienced an 81 percent rise in food costs (T.289, Plaintiffs' Exhibit Y).

He offset this by increasing his prices or by using smaller portions of food (T.290-292, 441-442). This is readily shown by the relatively stable ratio of cost of goods sold to gross sales (T.442).

An examination of appellant's books and records by respondents' accountant disclosed that the restaurant operated at a net loss during 1973 and 1974 (T.438-439). Since appellant's tax returns for 1972 showed major adjustments for accounts receivable and accounts payable not otherwise reflected in their books and records, it was impossible to determine whether the restaurant operated at a net profit or loss during the period (T.437,440). Appellant attributed his immediate decline in monthly gross sales to the ending of the Vietnam War during the latter part of 1972 (T.384).

During appellant's occupancy, more repair items were noted on the health inspectors' reports (T.304-309, 312, 315-318, Plaintiffs' Exhibits AA and BB). As the lease neared an end, an inspection of the premises by the respondents revealed the exterior paint on the building had deteriorated to the point bare wood was exposed (T.180, 345, 354), the furnace room plaster had fallen or been knocked off where the air conditioner had been removed (T.180,

338-340, Plaintiffs' Exhibit C), several broken windows had not been replaced (T.180, 340), the front door had no handle and hadn't been painted (T.181, 354, 393-394), the lights in the entrance hall did not work (T.181), the interior paint was in poor condition (T.181, 345-346), the floor behind the living room staircase and along the serving table was in disrepair (T.181), wallpaper and tile were loose in the former coffee shop room (T.181), the kitchen freezer compartment walls were falling apart (T.181, 339. 386-387, Plaintiffs' Exhibits E and G), the bathroom basins and fixtures needed to be cleaned and repaired (T.181, 315, 389, Plaintiffs' Exhibit F), the kitchen dishwashing area floor needed repair (T.182, 307, 315, 339, 341, 354, 390), the kitchen walls needed to be cleaned and painted (T.182, 345-346), the dumbwaiter did not operate and the dumbwaiter had a 2' x 3' hole in the wall (T.182), the public restroom floor tile was in bad shape and there were holes in the walls (T.182-183, 315-316, Plaintiffs' Exhibit D), the shrubbery was dying for lack of care (T.185), the basement drain needed to be fixed (T.185), and the walls, ceiling and fixtures in the blocked off restrooms were broken or knocked out (T.185).

Appellant testified he was finished with the business (T.398) and intended to get out of the business by

selling it back to the respondents (T.399) or subleasing it with an option to buy to a new operator (T.422). It was in this context that appellant intended to renew the lease for a subsequent term (T.177) and that respondent informed the appellant that commencing October 1, 1974, his monthly rent would be $900 per month (T.178, Defendant's Exhibit 3).

During the months of March through September, 1974, the respondents and appellant met together several times to renegotiate the rent (T.178, 179). Among the factors respondents discussed were the rising costs of living and the fact they were realizing little or no profit from their investment (T.178, 375). Appellant claimed he wasn't making enough money to pay any increased rent and he wouldn't pay more rent (T.179, 376). During their discussions as the lease neared the end, the respondents pointed out to appellant that he had not been maintaining the building in a good state of repair (T.179-180) and served upon him their demand (T.184, 185, Plaintiffs' Exhibit I) that the maintenance and repairs therein specified be completed within 30 days or the lease would be terminated and forfeited pursuant to paragraph 20 of the lease (T.186, Plaintiffs' Exhibit A).

Appellant responded to the demand by letter dated October 15, 1974, denying for the most part that any repairs

or maintenance was needed. During a meeting between the parties in the office of Mr. King in early November, 1974, the appellant replied that he would make the repairs he thought were needed when he felt like it (T.187). He later stated he had no obligation to spend a large amount of money to keep the premises in good repair until the monthly rental had been renegotiated (T.388, 397).

The lease rent for each renewal period was to be renegotiated based on "[f]actors of tax increases, cost of business increases or decreases, business volume and success, and insurance costs and other reasonable allowances." (Exhibit D to Plaintiffs' Exhibit A)

At this point no agreement had been reached fixing a new monthly rental. Further correspondence was exchanged regarding the factors each party thought should control in arriving at a new monthly rental. The appellant pointed out that no increased rent was warranted because:

(a) real property taxes had declined 6 percent over the past three years;

(b) personal property taxes had remained the same;

(c) the cost of doing business had risen 81 percent; and

(d) business volume had declined 24 percent (Plaintiffs' Exhibits K, Y and Z).

At trial, appellant pointed out that the leased machinery and equipment was in constant need of repairs and he had unceasing expenses (T.385, 388). This, however, is not borne out by his books and records (Plaintiffs' Exhibits FF, GG, HH and II).

The respondents replied saying they sought a fair rate of return on their investment and that, all factors considered, it should be over $900 per month. They believed this was warranted based on

(a) the annual depreciation assuming the building was replaced at current costs;

(b) the current rental per square foot of the space paid by similar businesses; and

(c) the annual return one would receive if the property were sold and the proceeds invested in interest bearing accounts (Plaintiffs' Exhibit C).

Although further correspondence was exchanged (Plaintiffs' Exhibits L, P and Q and Defendant's Exhibit 5), no agreement was reached. During this period of time, Roy City informed appellant that fire exits had to be installed

in the second floor before his business license would be renewed in March, 1975, for use of the second floor (Plaintiffs' Exhibit N). Appellant in turn demanded that respondents undertake to install and pay for the fire exits (Defendant's Exhibit 5), which they refused to do (Plaintiffs' Exhibit O). Appellant estimated loss of business from being unable to use the second floor was 10 to 20 percent (T.386). However, starting in April, 1975, appellant's business records are unavailable (T.426).

On February 14, 1976, it appeared to respondents that no resolution of the matter could be reached, and they served notice on appellant's counsel that the lease was terminated and forfeited for failure to make repairs and directed that the premises be vacated within five days (Plaintiffs' Exhibit Q). Appellant was also personally served with the same notice to vacate the premises on February 26, 1976 (Plaintiffs' Exhibit R). The respondents instituted suit on February 26, 1976, to obtain judicial resolution of the matter (Complaint).

On May 10, 1975, respondents filed a Motion for Judgment on the pleadings contending that the renewal option was void for vagueness, and oral argument was held on May 20,

1975. On May 29, 1975, Judge Hyde ruled that the renewal option was sufficiently certain that it was not void as a matter of law. Respondents subsequently filed an Amended Complaint realleging the original allegations and adding allegations for unlawful detainer, damages, and accounting (Amended Complaint).

As the trial date neared, appellant covered up the holes in the kitchen and restroom walls with formica and, in the process, lowered the restroom ceiling (T.387-388, 414). However, there is no evidence indicating that sheetrock was first installed as required by the Roy City fire code (T.341).

At trial, a real estate broker testified that a fair rental for the premises, assuming the maintenance and repairs had been made and the tenant was paying the taxes and insurance, was between $800 and $1,000 per month (T.362). In fixing the monthly rent, the lessee would be seeking to fix his costs over a period of time (T.367) and the lessors would be gambling on the fact the rental property value and so on would not increase to the point they would be losing money (T.367). In determining what to accept as a monthly rent, the lessors would set the base monthly rent at the very minimum they could get by with to help the person

establish himself in the business (T.369). In so doing, the lessors would consider the value of their investment in the property, the rate of return they would be getting from the monthly income, who would take care of the maintenance, who would be paying the taxes and insurance, and the fair rental value of the property (T.369-371). Respondents felt that such a monthly minimum base rent should be $1,000, but they were limited by the lease to a maximum of $900 per month (T.190).

The lease calls for the respondents to pay the general property taxes and maintain fire and hazard insurance covering the building (Plaintiffs' Exhibit A). The respondents paid the following general property taxes: 1969, $2,046.94; 1970, $2,549.14; 1971, $2,083.63; 1972, $2,163.06; 1973, $2,085.23; and 1974, $2,030.80. The property was reappraised on or about March 27, 1974 (T.335), and, based on the reappraisal, taxes for 1975 were fixed at $2,212.51 (T.297). As a result of the reappraisal, the building assessed value increased from $14,040 to $15,740 (T.299), the real property assessed value increased from $5,720 to $15,540 (T.299), and the personal property increased from $1,000 in 1969 to $1,300 in 1975 (T.300). In Utah, all

property is assessed at 20 percent of fair market value (T.336). During 1975, the annual insurance premium was $828 (T.233).

The estimated cost to repair and correct the maintenance deficiencies was $4,564, $1,940 estimated by the painter (T.347) and $2,624 estimated by the general contractor (T.339).

The matter was tried before the Honorable John F. Wahlquist on December 16, 1975. Judge Wahlquist rendered a Memorandum Decision December 30, 1975, and directed that Findings of Fact, Conclusions of Law, and a Judgment and Decree be prepared for entry which reflected the unlawful holdover of appellant, fixed delayed maintenance at $4,000, set the monthly rental at $900 per month, and awarded damages in the sum of $900 per month from and after October 1, 1974, to January 15, 1976. The Court refused to award treble damages for unlawful detainer, but ordered appellant to vacate the premises on or before January 15, 1976. No judgment was rendered against Continental.

## ARGUMENT

### POINT I

THE LOWER COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE LEASE RENEWAL OPTIONS WERE NOT VOID.

A lease is both a grant of an estate in land and a contract for the possession and use thereof by the lessee in return for payment to the lessor of compensation or rent. State v. Rawson, 210 Ore. 593, 312 P.2d 849, 853 (1957). If a contract is not definite and certain with respect to all essential terms, it is void for lack of certainty and cannot be specifically enforced. D. H. Overmyer Co. v. Brown, 439 F.2d 926, 929 (10 Cir. 1969); Valcarce v. Bitters, 12 U.2d 61, 362 P.2d 427, 428-29 (1961).

The lease provides that rents for each renewal term will be renegotiated based on factors of tax increases, cost of business increases and decreases, business volume and success, and insurance costs and other reasonable allowances. Where the renewal option leaves for future negotiation the formula and the factors making up the formula, which is the situation presently before the Court, such a renewal option has been declared unenforceable for lack of certainty and definiteness. Schlusselberg v. Rubin, 465 S.W.2d 226, 227-28 (Tex. Civ. App. 1971); Walker v. Keith, 382 S.W.2d 198 (Ky. 1966); and Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669, 670 (1966). See also, Slayter v. Pasley, 199 Ore. 616, 264 P.2d 444, 449 (1953).

This view is not followed universally. Some jurisdictions follow the minority view that uncertainty notwithstanding, the parties will be deemed to have agreed upon a "reasonable rental" since the renewal option was part of the consideration which induced the lessee to execute the lease. Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, 285 (1927); and Young v. Nelson, 121 Wash. 285, 209 P. 515, 517 (1922). This view overlooks the fact that "a party must have an enforceable contract before he has a right to enforce it." Walker v. Keith, supra at 201; Russell v. Valentine, 14 U.2d 26, 376 P.2d 548, 549 (1962); and Valcarce v. Bitters, supra. Cf., EFCO Distributing, Inc., v. Perrin, 17 U.2d 375, 412 P.2d 615, 616 (1966).

Appellant has not demonstrated that he had a valid enforceable lease renewal option. Appellant's predecessor-in-interest, Continental, prepared the lease (T.175-177). In so doing, it deleted the fixed renewal rent of $500 per month plus 4 percent of gross sales on $10,000 per month and substituted a clause that called for the mere renegotiation of rentals with the proviso that the amount could not exceed $900 per month.

If Continental had intended to commit the respon-

dents to a fixed predetermined rent for each renewal term, it should have retained the formula set forth in the Earnest Money Agreement. This it did not do, and appellant is precluded at this late date from seeking a reformation of the agreement so to do (Para. 34 of Plaintiffs' Exhibit A). The parties have engaged in extensive negotiations which have not resulted in an agreement on the renewal term rents. The parties have been unable to agree on the factors to be considered in making up a renewal rent formula, much less agree on the weight each factor should receive. In view of the uncertainty, vagueness, and lack of any specific renewal rental formula, the renewal option should be declared void as a matter of law.

## POINT II

THE LOWER COURT WAS CORRECT IN FINDING APPELLANT LIABLE FOR THE DELAYED MAINTENANCE DAMAGES.

As appellant pointed out in his Brief at 3-4, upon assignment, he assumed the lease together with its responsibilities and obligations. There is no evidence affirmatively indicating that appellant did not assume the entire responsibility to repair the items not corrected by Continental during its possession of the premises, together

with the obligation to repair and maintain the premises after he took possession. The trial court's finding that appellant was responsible for the maintenance and repair of the premises should be upheld. Radley v. Smith, 6 U.2d 314, 313 P.2d 465, 466-67 (1957).

Appellant's Brief points out his testimony denying for the most part any need for repairs and maintenance with respect to the premises (Brief at 10-11, T.389-395). The respondents introduced considerable testimony indicating quite the contrary (Statement of Facts, supra).

After listening to witnesses, including appellant, and observing their demeanor for two full days, the trial court sifted through the conflicting evidence and concluded that appellant had not maintained or repaired the premises in accordance with his lease obligations and had failed to comply with respondents' notice dated September 24, 1974. Under such circumstances, this Court should not disturb the trial court's findings unless a review of the evidence clearly preponderates against such a finding. Millard v. Parry, 2 U.2d 217, 271 P.2d 852, 855 (1954). This can only be accomplished if the appellant's testimony is believed in every respect, totally disregarding the testimony of respon-

dents and of other disinterested witnesses. Respondents believe the record when viewed in its entirety will support and sustain the trial court's findings in this regard.

In addition to these items, second floor fire escapes needed to be installed. The evidence shows, and the trial court correctly found, that this obligation belonged to Continental (T.251) and was assumed by the appellant. Appellant attempts to shift this burden to the respondents by reference to paragraph 15 of the lease (Plaintiffs' Exhibit A). This paragraph reads as follows:

> Lessor covenants that he has good and marketable title to the demised premises in fee simple absolute, subject only to existing mortgage thereon, and that the same is subject to no leases, tenancies, agreements, restrictions and defects in title affecting the demised premises or the rights granted Lessee in this Lease; and that there are no restrictive covenants, zoning or other ordinances or regulations applicable to the demised premises which will prevent Lessee from conducting its business.

When the lease was executed, this covenant had been complied with in every respect. The building was constructed in 1948 (T.205) and remodeled following a fire prior to the effective date of the Roy City Fire Code adopted in 1965 (T.326, 327). Buildings then in existence did not have to comply with this fire code until the particular use made of the building by the occupant caused the fire chief

to certify that this use constituted a safety hazard (T.328). Even though Continental remodeled the second floor for patron eating facilities by removing the dance floor and installing public restroom facilities, no safety hazard existed by virtue of occupant's use of the building during 1969, 1970 or 1971 (T.329). During this period of time, the building and the use thereof had been investigated and inspected by the fire department (T.329, 330). The fire department made no mention of the need for second floor fire escapes in its reports. However, during the early part of 1972, the situation changed. The fire department again investigated and inspected the building and the manner it was being used and concluded that second floor fire escapes were warranted and directed their installation (T.252-253, 325, Plaintiffs' Exhibits N and W).

At trial, Continental's secretary-treasurer testified it was their duty to install the second floor fire escapes and that appellant had been specifically informed of this necessity prior to the date he assumed the lease (T.251). In such circumstances, the burden of installing fire escapes properly belongs to the lessee. Lodge Room Co. v. Pacific Bond & Investment Co., 84 Wash. 150, 146 P. 376, 377 (1915);

Pross v. Excelsior Cleaning & Dyeing Co., 110 Misc. 195, 179 NYS 176 (1910); Taylor v. Finnigan, 189 Mass. 568, 76 N.E. 203, 205 (1905); and Johnson v. Snow, 102 Mo. App. 233, 76 S.W. 675 (1903), Aff'd 201 Mo. 450, 100 S.W. 5 (1907). Cf., ELL and L. Investment Co. v. International Trust Co., 132 Colo. 137, 286 P.2d 338 (1955).

The lessor's covenants contained in paragraph 15 of the lease are not couched in language designed to impose a continuing obligation on lessor. It speaks of conditions existing only at the time the lease was executed. This is not a lease prepared by the respondents (T.175-177). Quite to the contrary, it was prepared by Continental and should be construed against appellant. Russell v. Valentine, supra at 549. The only continuing obligation imposed on respondents and Ma's & Pa's so far as this action is concerned is their duty to comply with the law as set forth in paragraph 22 of the lease. This they have done at all times throughout the term of this lease. The trial court correctly included the installation of second floor fire escapes as a maintenance deficiency.

The appellant offered no evidence indicating that the repairs could be made for less than $1,940 for the

painter and $2,624 for the general contractor. The trial court concluded that such repairs would place the premises in better shape than they were at the time they were rented to Continental, but not grossly so, and reduced respondents damages to $4,000.

Respondents believe the clear weight of the evidence supports the trial court's findings, and the damage award of $4,000 against appellant should be affirmed.

POINT III

THE LOWER COURT WAS CORRECT IN AWARDING FURTHER DAMAGES BASED ON A RENTAL RATE OF $900 PER MONTH.

Following the expiration of the original term of the lease, an option was granted to the lessee to renew the lease for two consecutive five year periods upon the same terms and conditions

> " . . . except that the rental amount of the lease will be renegotiated; however, maximum total monthly rental shall not exceed $900.00 per month. Factors of tax increases, cost of business increases or decreases, business volume and success, insurance costs and other reasonable allowances will be the basis for terms of negotiation."

Appellant has omitted reference to "costs of business increases and decreases" in the factors cited on p. 13 of his Brief.

In fixing the renewal term rental at $900 per month and awarding damages based on this figure, the court had before it a fairly complete history of the business which had been conducted on the premises. The respondents have summarized this history in its Statement of Facts, supra.

Appellant has directed the Court's attention to those factors he believes to be controlling in reversing the trial court's determination to fix the rent at $900 per month (Brief of Appellant at 12-13). The respondents will show that all of the specified factors in the lease do not favor appellant.

The real estate taxes have increased. This increase, averaged over the period 1969-1974, is $112.86. The real property was reappraised on March 27, 1974 (T.335). The fair market value used by the appraisers in fixing the appraisal value of the property for 1975 was $162,900 (T.299, 300, 336). Based on this reappraisal, taxes for 1975 were fixed at $2,212.51 (T.297). Under the terms of the lease, respondents paid the taxes, and the insurance which had increased from $795 (T.234) in 1974 to $828 (T.233) in 1975.

There is no dispute that appellant's business

volume decreased (Statement of Facts, supra at 11) when compared to Continental's business volume (Statement of Facts, supra at 9). Out of the 28 months appellant operated the premises, only ten of those months showed gross sales in excess of $10,000 per month. The average gross sales for these ten months is $10,988.80. The average gross sales for the entire 28 months is $9,111.50. For the 20 month period reported by Continental, its average monthly gross sales were $13,087.35. Only two of those months were below the $10,000 mark and, in both of those months, Continental had closed its doors for employee vacations.

Appellant's decline in volume has resulted in a considerable monthly rental loss to respondents, when compared with Continental's volume. Continental paid percentage rent 18 out of 20 months (90%), while appellant paid on 10 out of 28 months (35.7%). This drastic decline is compounded by the fact that appellant paid percentage rent on the average monthly sum of $998.80, while Continental paid percentage rent on the average monthly sum of $3,087.35.

One must bear in mind that both Continental and appellant increased their food prices during the lease term to offset the rising costs of doing business attributed to

inflation. Appellant testified that his products had increased 81 percent during the time he operated the restaurant. This increase was passed on to appellant's patrons (T.290-292, 441-442). Respondents, while watching their monthly rental income drop, had no means by which to offset the inflationary effect on their monthly rental income. Using appellant's 81 percent inflation figure and applying that to the $500 monthly base rental, respondents would be justified in demanding and holding out for $900 per month rental.

During the period of negotiation with appellant, respondents have sought to obtain a fair and reasonable return on their investment by increasing rentals from $500 to $900 per month. Respondents testified that they were losing money by renting the premises to Continental for less than $900 per month (T.212). They were willing to take a fixed monthly rental of $500 per month and gamble on making up the difference on the monthly percentage rent since Continental represented it would give up the lease if its monthly gross sales were $10,000 or less. This gamble has not paid off in their favor, and they now seek not to be made completely whole, but to offset the effect of inflation, pass on their increased fixed expenses, and receive a fair

return on their investment by increasing the monthly base rent.

As with any business or investment, the true measure of its success is the monetary return one receives on the time and money one has invested. Appellant's business has not been a success. He has lost money in 1973 and 1974. However, his misfortune should not be shifted to respondents. This is particularly true when one considers that the respondents are trustees managing the property for several unspecified beneficiaries. They have a fiduciary obligation to preserve the capital investment and obtain a fair return for the beneficiaries.

The total monthly rent paid by appellant for September, 1972, through September, 1974, is contained in Plaintiffs' Exhibits FF, GG and HH. After reducing the amount by $25 for the monthly glassware rental, appellant paid $6,033.13 rent from October, 1972, to September, 1973, and $6,157.04 rent from October, 1973, to September, 1974. From these amounts, respondents paid $2,085.23 in taxes for 1973 and an unknown amount for insurance, and they paid $2,030.80 for taxes in 1974 and $795 for insurance. This is a net investment return of $3,331.24 in 1974. Using the tax

assessor's fair market value of the premises of $162,900 for 1974, this amounts to an annual return on invested capital of 2.04 percent.

Raising the rents to $900 per month from October, 1974, to September, 1975, would result in the receipt of $10,800 rent. After payment of 1975 taxes in the sum of $2,212.51 and insurance in the sum of $828, this would leave respondents with a net investment return of $3,042.51, or an annual return on invested capital of 4.76 percent.

The trial court found, and appellant has not contested the findings, that:

> Mr. Van Antwerp invested approximately $15,000 for the purchase of Continental's lease. He has not been as skilled an operator as Continental. He has seen a steady decline in gross sales and the number of patrons served. He has become discouraged. His books and records have never disclosed any profit or any possibility on the sales history up to date of paying him a reasonable wage for conducting the business. He desires to be free of the leasehold obligation. He searches for an opportunity to recoup part of his original investment (Finding of Fact No. 51 and Memorandum Decision at 5).
>
> Mr. Van Antwerp's desire to recoup part of his original investment in the Sublease has caused him to take the following position:
>
> > (a) He believes that the only way he can achieve this is to remain in possession and thereby withhold from the plaintiffs a reasonable return on the ownership of the premises until he is paid a sum of money to leave.

(b) He insists that he is entitled to a renegotiated lease and cites the present sad state of gross sales to imply that the monthly rental for the first renewal term under the lease should be an even lower figure than he was paying at the time the lease expired (Finding of Fact No. 52 and Memorandum Opinion at 5, 6).

By the time the first renewal term of the lease commenced, the restaurant business of Mr. Van Antwerp on the premises had failed, and he hoped to force the plaintiffs to buy out his interest in the lease (Finding of Fact No. 53 and Memorandum Opinion at 6).

It was never anticipated that the lease would be used for such a deceitful purpose (Finding of Fact No. 54 and Memorandum Opinion at 6).

All factors considered, the trial court correctly concluded that it was appellant who failed to renegotiate the monthly lease rental, not respondents.

The respondents believe that the trial court gave consideration to all of the factors cited by appellant as a basis for fixing damages in terms of monthly rent and properly resolved the matter in favor of respondents.

The cases cited by appellant are not in opposition to this conclusion. In Graseck v. Bankers Trust Company, 315 Mich. 650, 24 N.W.2d 426 (1946), the trial court fixed the renewal term rentals at $275 per month. The plaintiff contended it should have been fixed at $125 per month, while

the defendant sought $350 per month. Both parties appealed. The trial court's finding was affirmed.

At trial, testimony was introduced by defendant that "the then current rate of rentals in the vicinity of like properties . . . [was] considerably higher, [and] might seem presently to justify the fixing of a higher rate of rental."

The appellate court did not increase the rental from $275 per month to $350 per month in favor of defendant, nor did it reduce the rental from $275 per month to $125 in favor of plaintiff. The court concluded that

> . . . the trial judge might well have been somewhat impressed by the testimony showing that in 1941 there were negotiations relative to reduction of the $100 monthly rental provided in the lease under which plaintiff then occupied the premises; and also that the rental of a former tenant was reduced "because his business was such that he couldn't stand to pay $200.00 per month;" and further by the fact that the fair rental value in a prospective five year lease is not necessarily controlled by presently prevailing high rentals.

There is no indication in the opinion that testimony regarding the "current rate of rentals in the vicinity" for like property was inadmissible. The trial court judge may well have relied on such testimony, but relied on other factors pointed out by the appellate court in reducing said sum to arrive at the monthly rental.

Appellant has not introduced any evidence indicating negotiations to further reduce the rental at the outset of this lease, or that the Hicks' monthly rent was reduced, or that a fair rental for the renewal term of the lease was other than what the trial court awarded.

In Diettrich v. J. J. Newberry Co., 172 Wash. 18, 19 P.2d 115, 117 (1933), the lessee had two leases on a single building. The ground and basement floors were leased pursuant to a five year lease, and the balance of the building was leased on a 25 year lease. It was the determination of a fair rental for the renewal option of the five year lease that concerned the court. The court concluded that the fair rental for the ground and basement floors of the building could not be determined by reference to the fair rental value of the entire building. The test for determining the renewal rent upon an extension of the five year lease

> is the reasonable rental value of the ground floor and basement taken alone for that specified period. . . . The amount of rent, therefore, was to be determined from competition that might arise between exclusively responsible bidders in a fair and open market - that is, by the market value of the premises at the time of renewal. Id. at 117.

The rental could not exceed the highest rental market value of the leased premises.

The respondents have not leased contiguous property to the appellant and are not seeking to fix the rental value of one property based on a fair rental value of both properties. Consistent with the theory in both Graseck and Diettrich, they have introduced testimony of a real estate broker to show what other responsible restaurant owners are paying in terms of rent and to show what the other "responsible bidders" would pay to rent this property "in a fair and open market." The broker testified that this would be somewhere between $800 and $1,000 per month, with the lessee paying all the taxes and insurance.

In Parsons v. Ball, 205 Ky. 793, 266 S.W. 649 (1924), the lessee allowed the premises to fall into disrepair during the original lease term. The lessor would not recognize the lessee's renewal of the lease since the lessee had not kept the premises in good repair. The court recognized the renewal option because "[t]he contract does not provide in terms for forfeiture of the leased premises, or the lessee's rights under the lease, in case he fails to keep the houses in proper repair. . . ." Id. at 650.

The lease before the court in Parsons does not even remotely resemble the lease before this Court. Not

only does appellant's lease have a forfeiture clause, but in event of breach of the repair covenants, it states "any such default shall, at the option of the Lessor, constitute a forfeiture . . ." (Para. 20 of Plaintiffs' Exhibit A).

In compliance with this paragraph, respondents served notice on appellant by letter dated September 24, 1974, to correct the repair and maintenance deficiencies within 30 days after notice or the lease would be forfeited. No major repairs were undertaken by appellant, and by notice dated February 12, 1975, respondents declared a forfeiture of appellant's lease and gave him five days to vacate the premises, which he failed to do (Plaintiffs' Exhibits Q and R).

Appellant contends that respondents' notice is defective and does not comply with Utah Code Ann. 1953, §78-36-3. The Court's attention is directed to the form of forfeiture notices which were approved in Beneficial Life Insurance Company v. Dennett, 24 U.2d 310, 470 P.2d 406, 407-08 (1970). Although those forfeiture notices were served to comply with paragraph 16(A) of a Uniform Real Estate Contract, the respondents believe the same form of notices is applicable to a forfeiture declared pursuant to

paragraph 20 of the lease presently before the Court. These notices informed the appellant that the respondents elected to declare a forfeiture of the lease upon the failure of appellant to cure the defects and that appellant would, in the event of such a failure, become a tenant at will. They should be approved and confirmed in all respects.

POINT IV

THE LOWER COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE RESPONDENTS WERE NOT ENTITLED TO TREBLE DAMAGES PURSUANT TO UTAH CODE ANNOTATED 1953, §78-36-10.

The appellant admitted service of respondents' letter dated September 24, 1974, directing that certain repairs be undertaken within 30 days or the lease would be forfeited (Amended Complaint para. 18 and Amended Answer para. 17); admitted service of respondents' notice dated February 12, 1975 (Amended Complaint para. 21 and 22, Amended Answer para. 20 and 21); and admitted his refusal to vacate the premises pursuant to said notice (Amended Complaint para. 23, Amended Answer para. 22). The trial court found that the indicated repairs and maintenance had not been completed (Findings of Fact Nos. 34 and 35 and Memorandum Decision at 5-6), found damages to be $4,000 (Finding of

Fact No. 39 and Memorandum Decision at 6), found appellant's failure to vacate wrongful and an unlawful holdover (Finding of Fact No. 56 and Memorandum Decision at 6-7), and found damages in the nature of rent after forfeiture to be $900 per month (Finding of Fact No. 57 and Memorandum Decision at 7).

The trial court considered but refused to find treble damages for the wrongful and unlawful holdover (Finding of Fact No. 59 and Memorandum Decision at 7). The respondents believe this finding of the trial court is incorrect. Utah Code Annotated 1953, §78-36-10 states in part

> . . . judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for rent and for three times the amount of damages thus assessed.

This is the exact same language which the court had occasion to review in Forrester v. Cook, 77 U. 137, 292 P. 206, 213 (1930). The court states

> This language has been held to require the entry of judgment for three times the amount of damages, after a finding of damages by the [court]. Eccles v. Union Pacific Coal Co., 15 Utah, 14, 48 P. 148. That action was one for forcible and unlawful detainer, but the statute applies as well to unlawful detainer. The statute as construed in Eccles v. U. P. Coal Co., supra, makes it mandatory upon the court to render

judgment for three times the amount of damages thus assessed. Id. at 214.

The court goes on to define what is meant by the term "damages" which are trebled. The appellant correctly points out to the Court that such damages must be the natural and proximate consequence of the unlawful detainer (Brief of Appellant at 17), but he failed to point out to the Court what those consequences were. The court in Forrester said

> The damages which may be recovered in an action such as this are measured by the rule that they must be the natural and proximate consequences of the acts complained of and nothing more. Rents and profits, or rental value of the premises, during detention are included in damages. (emphasis added), Id. at 211.

The second claim for relief in respondents' Amended Complaint deals strictly with the fact appellant refused to vacate the premises as directed. It is the unlawful detention of the premises which triggers the measure of damages. The court stated

> Clearly the loss of the value of the use and occupation of the premises, or the rental value thereof, during the period when the premises were unlawfully withheld from plaintiff, is a damage suffered by her. While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of possession is the minimum of damages. Id. at 214.

In this case, appellant was in unlawful detention from and after five days of service of respondents' notice

on his legal counsel, or at the latest March 4, 1975. This unlawful detainer continued through January 15, 1976, when the sheriff served the Writ of Possession placing respondents in possession of the premises.

So there would be no misunderstanding regarding damages, the court went on to distinquish "rents which accrued before forfeiture" from "damages accruing after forfeiture" based on the rental value of the unlawfully detained premises. It stated

> Rents, which may not be trebled, are such as accrue before termination of the tenancy. After the tenancy has been terminated by notice required by statute, the person in unlawful possession is not owing rent under the contract, but must respond in damages pursuant to law. Rental value or reasonable value of the use and occupation of the premises becomes an element of damages for retaining possession. This is not rent, it is damages. Id. at 214.

Respondents have suffered additional damages as a natural and proximate result of appellant's unlawful holdover in that the condition of the premises continued to decline. The building exterior was not painted and the bare wood continued to weather, the public restroom and kitchen floors were not repaired, the kitchen walls continued to deteriorate from the moisture put out by the ice machine as a result of appellant's refusal to relocate it, and the blocked off

restrooms continued to be exposed to the effects of inclement weather. Respondents were unable to correct these deficiencies as a result of appellant's refusal to vacate and had no opportunity so to do prior to January 15, 1975.

The portion of the trial court's Findings of Fact, Conclusions of Law, and Judgment and Decree denying treble damages for unlawful detainer should be reversed and the matter remanded to the trial court for the entry of appropriate Findings of Fact, Conclusions of Law, and Judgment and Decree awarding respondents the treble damages to which they were properly entitled. The respondents should be awarded their costs and a reasonable attorney's fee in conjunction with this appeal.

## CONCLUSION

It is submitted:

(a) The trial court erred as a matter of law in not concluding that the lease renewal option was void for vagueness and uncertainty.

(b) The trial court erred as a matter of law in not awarding treble damages for unlawful detainer.

(c) In all other respects, the trial court's

Findings of Fact, Conclusions of Law, and Judgment and Decree should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & EVANS

Elwood P. Powell
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs, Respondents, and Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondents and Cross-Appellants was mailed, postage prepaid, to Brian R. Florence, attorney for defendants, appellants, and cross-respondents, 818-26th Street, Ogden, Utah 84401, on the 23rd day of July, 1976.