1977

Big Butte Ranch v. Marjorie R. Holm et al : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BIG BUTTE RANCH, INC., Appellant, vs. MARJORIE R. HOLM, CARL WILLIAM HOLM and ESTHER B. HOLM, His Wife, Respondents.	)	CASE NO. 14630

RESPONDENTS' BRIEF

APPEAL FROM DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, HONORABLE G. HAL TAYLOR, JUDGE, PRESIDING

LAUREN N. BEASLEY
Cotro-Manes, Warr, Fankhauser & Beasley
Suite 430 Judge Building
Salt Lake City, Utah 84111
TELEPHONE: 531-1300

Attorneys for Respondents

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
TELEPHONE: 486-9636

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

BIG BUTTE RANCH, INC., Appellant, vs. MARJORIE R. HOLM, CARL WILLIAM HOLM and ESTHER B. HOLM, His Wife, Respondents.	CASE NO. 14630

RESPONDENTS' BRIEF

APPEAL FROM DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, HONORABLE G. HAL TAYLOR, JUDGE, PRESIDING

LAUREN N. BEASLEY
Cotro-Manes, Warr, Fankhauser & Beasley
Suite 430 Judge Building
Salt Lake City, Utah 84111
TELEPHONE: 531-1300

Attorneys for Respondents

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
TELEPHONE: 486-9636

Attorney for Appellant

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINT I THE TERMINATION AGREEMENT BETWEEN THE PARTIES WAS AMBIGUOUS	5
POINT II THE COURT PROPERLY APPLIED THE LAW OF UTAH IN CONSTRUING THE TERMINATION AGREEMENT AGAINST THE APPELLANT	8
POINT III THE APPELLANT IS ESTOPPED FROM ASSERTING A CLAIM TO ANY PRODUCE WHICH WAS PART OF THE UNIFORM REAL ESTATE CONTRACT	14
CONCLUSION	17

CASES CITED

Buehner Block Company v. Glezos, 6 U. 2d 226, 310 P. 2d 517 (1957). . 17

Bullfrog Marina, Inc. v. Lentz, 28 U. 2d 261, 501 P. 2d 266 (1972). . 7

Continental Bank and Trust Co. v. Bybee, 6 U. 2d 98, 306 P. 2d 773 (1957). 6, 8

Cook v. Cook, et al., 110 U. 406, 174 P. 2d 434 (1946). 14, 15

Corporation Nine v. Taylor, 30 U. 2d 47, 513 P. 2d 417 (1973). . . . 15

Hardinge Co., Inc. v. Eimco Corp., 1 U. 2d 320, 266 P. 2d 494 (1954). 6

Holley v. Federal American Partners, et al., 29 U. 2d 212, 507 P. 2d 381 (1973). 9

J. Seal v. Tayco, Inc., 16 U. 2d 323, 400 P. 2d 503 (1965) 12

Maw v. Noble, 10 U. 2d 440, 354 P. 2d 121 (1960). 6, 9

Migliaccio v. Davis, et al., 120 U. 1, 232 P. 2d 195 (1951) 14

Perkins, et al. v. Spencer, et al., 121 U. 468, 243 P. 2d 446 (1952). 16

Petty v. Gindy Manufacturing Corp., 17 U. 2d 32, 404 P. 2d 30 (1965). 6

Snow v. Utah Automobile Dealers, 112 U. 431, 188 P. 2d 742 (194[illegible] 6

Union Pacific Railroad Company v. El Paso Natural Gas Co., 17 U. 2d 255, 408 P. 2d 910 (1965) 6

Wingets, Inc. v. Bitters, 28 U. 2d 231, 500 P. 2d 1007 (1972) 6,

Zeese v. Siegel, 534 P. 2d 85 (1975) 6,

RULES CITED

Rule 15(b), Utah Rules of Civil Procedure 17

IN THE SUPREME COURT OF THE STATE OF UTAH

BIG BUTTE RANCH, INC., Appellant, vs. MARJORIE R. HOLM, CARL WILLIAM HOLM and ESTHER B. HOLM, His Wife, Respondents.	)	CASE NO. 14630

RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action wherein the Appellant brought suit against the Respondents to enforce a provision in a Uniform Real Estate Contract, which provision was found by the District Court of the Third Judicial District, Salt Lake County, State of Utah, to have been terminated and of no force and effect whatsoever.

DISPOSITION IN THE LOWER COURT

The District Court found that the Termination Agreement entered into between the parties was ambiguous and allowed oral testimony to explain the same; and thereafter found that the Appellant was estopped to now attempt to enforce the Uniform Real Estate Contract that was the subject of the Termination Agreement.

RELIEF SOUGHT ON APPEAL

Respondents submit that this Court should affirm the decision of the District Court.

STATEMENT OF FACTS

The Appellant and CARL O.N. HOLM, MARJORIE HOLM, CARL W. HOLM and ESTHER B. HOLM, entered into a Uniform Real Estate Contract on or about the 1st day of April, 1969, for the purchase of a farm in Idaho (R. 5-12) of which CARL O.N. HOLM, who died prior to the commencement of this action, was the principal purchaser. CARL W. HOLM, son of CARL O.N. HOLM, and his wife, ESTHER HOLM, the only Respondents who lived on and worked the farm, remained on the farm for approximately three years when the Respondents then defaulted under the terms of the Uniform Real Estate Contract. On August 28, 1972, the Respondents and Appellant entered into a Termination Agreement (R. 34-37) of the Uniform Real Estate Contract.

The Termination Agreement was drafted by Ronald C. Barker, who is the attorney and an officer for the Appellant. The document was explained by Ronald C. Barker, who represented to the Respondents that all obligations under the Uniform Real Estate Contract ended upon the execution of the Termination Agreement. (See Point II for testimony.)

The Respondents were led to believe that any and all obligations which they had to supply beef, lamb, potatoes, honey and wheat to the Appellant, and which under Paragraphs 25 and 26 of the Uniform Real Estate Contract was purported to survive any termination or default of the subject Uniform Real Estate Contract, terminated upon the execution of the Termination Agreement. The

Respondents were brought to this position because of the wording in the Termination Agreement and the representations made to the Respondents by Ronald C. Barker and the president of the Appellant corporation, Harold K. Beecher. (See Point II for testimony.)

It would appear that all the Appellant and its attorney had to do in preparing the Termination Agreement in order to preserve the payment of beef, lamb, potatoes, honey and wheat was to specifically and clearly state in the Agreement that beef, lamb, potatoes, honey and wheat should still be supplied. During the discussions that were held at Mr. Beecher's office on August 28, 1972, between the Respondents and Ronald C. Barker and Harold K. Beecher, on the Termination Agreement, the obligation to furnish beef, lamb, potatoes, honey and wheat was not raised nor did any of the parties recall the subject matter being discussed. (T. 63.) The discussion between the parties was that all obligations under the Uniform Real Estate Contract ended upon execution of the Termination Agreement, not that anything survived the Termination Agreement. It should be noted that once the Respondents had left the farm that the Respondents were without means to furnish the beef, lamb, potatoes, honey and wheat to the Appellant, for that produce came from the farm operations, and the Appellant knew this when the Termination Agreement was executed.

Prior to the Termination Agreement being executed, the Appellant requested CARL W. HOLM and ESTHER HOLM, his wife, to remain upon the land to tend and care for it until the Appellant could find nother purchaser. (T. 124.) CARL W. HOLM and his wife, ESTHER HOLM,

agreed to remain in possession of and care for the subject property and did so until the first part of January, 1973.

On the 30th day of April, 1975, the Appellant caused to be served a Summons and Complaint, alleging that the Respondents had not supplied the Appellant with the beef, lamb, potatoes, honey and wheat which was the subject matter of Paragraph 25 of the Uniform Real Estate Contract. (R. 2-18.)

At no time prior to the commencement of this action and since the Termination Agreement had been entered into between the parties had the Appellant made any demand upon the Respondents for any beef, lamb, potatoes, honey and wheat. (T. 107.) A period of almost three years had elapsed since anything dealing with the obligations under the Uniform Real Estate Contract was mentioned as surviving the Termination Agreement.

The wording of the Termination Agreement is such that only one conclusion could be reached, to-wit: that all rights, duties, liabilities and obligations of all the parties to the Uniform Real Estate Contract were terminated upon the execution of the Termination Agreement.

The Trial Court held that the Termination Agreement was ambiguous and allowed oral testimony to be presented, after which the Trial Court accepted the Respondents' interpretation of the Termination Agreement that they believed they had no further obligation to supply produce to the Appellant. The Trial Court further held that the actions of the parties from August 25, 1972 up to the commencement

of this action lends credence to the interpretation of the Termination Agreement as given to it by the Respondents that they had no further obligation to supply beef, lamb, potatoes, honey and wheat to the Appellant.

The Trial Court further held that the Appellant had created the ambiguous language in the Termination Agreement and thus, as draftor of the Agreement it was to be construed against the Appellant, and that because of the Appellant's actions and silence for almost three years on Respondents' alleged obligation to the Appellant, the Appellant was estopped from asserting a claim to the beef, lamb, potatoes, honey and wheat. (R. 62-64.)

POINT I

THE TERMINATION AGREEMENT BETWEEN THE PARTIES WAS AMBIGUOUS.

Upon reading the Termination Agreement entered into between the parties on August 28, 1972 (T. 34-36), one can easily assume that any obligation or liability owing between the respective parties has now terminated. This is especially true when one reads from Paragraph 3 the following wording:

> "First party hereby releases second, third and fourth parties from further liability or obligation under the terms of said Uniform Real Estate Contract . . ."

The Respondents, upon reading the Termination Agreement and from the representations made to them by Ron Barker, secretary and attorney for the Appellant, believed that all obligations and liabilities, including the obligation to furnish beef, lamb, potatoes, honey and wheat, which was part of the Uniform Real Estate Contract, to the Appellant, had ended upon the making and signing of the

Termination Agreement and it wasn't until almost three years later that Appellant took a contrary position.

After reading the pleadings and the Termination Agreement the Court determined the Agreement to be ambiguous. Where parties place different meanings on a contract and there is evidence that the intent of the parties may be different or the contract on its face may be seen as being ambiguous, giving use to different interpretations by the parties, the Court may, upon either of the above, have the contract declared as being ambiguous. Petty v. Gindy Manufacturing Corp, 17 U. 2d 32, 404 P. 2d 30 (1965); Union Pacific Railroad Company v. El Paso Natural Gas Co., 17 U. 2d 255, 408 P. 2d 910 (1965); Maw v. Noble, 10 U. 2d 440, 354 P. 2d 121 (1960); Wingets, Inc. v. Bitters, 28 U. 2d 231, 500 P. 2d 1007 (1972); Continental Bank and Trust Co. v. Bybee, 6 U. 2d 98, 306 P. 2d 773 (1957).

Each of the parties in this case had placed different interpretations on the meaning and intent of the Termination Agreement. When this is coupled with the actions of the Appellant wherein the Appellant represented to the Respondents that all obligations had terminated and that the Appellant did not ask for any beef, lamb, potatoes, honey and wheat for almost three years after the Termination Agreement, it is easily seen that the Respondents were correct in their belief that their obligations to the Appellant were forever terminated.

A Court in interpreting a contract will interpret it as shown by the acts of the parties themselves. Zeese v. Siegel, 534 P. 2d 85 (1975); Hardinge Co., Inc. v. Eimco Corp. 1 U. 2d 320, 266 P.

2d 494 (1954); Snow v. Utah Automobile Dealers, 112 U. 431, 188 P. 2d 742 (1948). The acts of the parties in this matter were such as to terminate all obligations upon the execution of the Termination Agreement.

It was reasonable for the Respondents to believe that all obligations terminated when the Agreement was signed. The Termination Agreement specifically referred to the Uniform Real Estate Contract which contained the provision that the Respondents were to supply the Appellant with beef, lamb, potatoes, honey and wheat.

As noted in Bullfrog Marina, Inc. v. Lentz, 28 U. 2d 261, 501 P. 2d 266 (1972), a case involving the leasehold interest in houseboats, the general rule of law where there are two separate agreements which relate to the same subject matter, is to read the documents together.

> ". . . the rule of law where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other." (Cites omitted.) P. 2d at 271.

Thus, from reading the Uniform Real Estate Contract and the Termination Agreement together, the Respondents were justified in their belief that all obligations contained within the Uniform Real Estate Contract ended upon execution of the Termination Agreement. The Termination Agreement stated that the Respondents were relieved from further liability or obligation under the terms of the Uniform Real Estate Contract. The Uniform Real Estate Contract contained the requirement for beef, lamb, potatoes, honey and wheat which is the subject matter of this action. Placing the documents

together the Respondents thus interpreted their obligation to supply beef, lamb, potatoes, honey and wheat to the Appellant as having ceased, because all obligations under the Uniform Real Estate Contract were now terminated. The Trial Court recognized the ambiguity of the Termination Agreement and how a reasonable man under the circumstances could believe that the obligation to furnish beef, lamb, potatoes, honey and wheat had ceased. Because of this, the Trial Court ruled correctly in determining the Termination Agreement to be ambiguous.

Because the Agreement was ambiguous on its face the Trial Court properly allowed parol evidence to determine the intent and meaning of the terms of the Agreement and what the parties had meant when they signed the Agreement.

When a contract is ambiguous the Court may allow parol evidence to determine the intent of the parties and thus the construction to be given to a contract. Zeese v. Siegel, supra; Continental Bank and Trust Co. v. Bybee, supra.

In this case, the Trial Court concluded that the parties had meant to terminate all their liabilities and obligations owing to one another and thus the obligation of the Respondents to supply the Appellant with beef, lamb, potatoes, honey and wheat had ended. The Termination Agreement had in fact terminated all obligations arising under the Uniform Real Estate Contract.

POINT II

THE COURT PROPERLY APPLIED THE LAW OF UTAH IN CONSTRUING THE TERMINATION AGREEMENT AGAINST THE APPELLANT.

The Appellant not only drafted the document which was ambiguous but the Appellant also attempted to mislead the Respondents.

It is well settled law that any ambiguity in a contract should be construed against the party who prepared the contract, which in this case was the Appellant. Wingets Inc. v. Bitters, supra; Holley v. Federal American Partners, et al., 29 U. 2d 212, 507 P. 2d 381 (1973); Maw v. Noble, supra; J. Seal v. Tayco, Inc., 16 U. 2d 323, 400 P. 2d 503 (1965).

Yet in this case the Appellant has not only prepared the contract and created the ambiguity, but also made representations to Respondents, in their interpretation of the Termination Agreement, to believe that all obligations, including the necessity to furnish beef, lamb, potatoes, honey and wheat under the Uniform Real Estate Contract had terminated.

The testimony of CARL W. HOLM at the trial was that he believed and was lead to believe that all obligations under the Uniform Real Estate Contract ended upon the execution of the Termination Agreement and that no demand had ever been made from August 28, 1972 to the commencement of this lawsuit for the beef, lamb, potatoes, honey and wheat.

"A Well, what I am saying is the wording in this termination agreement led me to believe that there would be no further obligation, produce or whatever, because there would be no way to pay it with no farm to do it with.

"Q It's the wording that led you to believe that; is that correct?

"A Yes, uh-huh." (Tr. 99, L. 30; 100, L. 1-6.)

"Q (By Mr. Barker) Did you understand, after having talked with your father or someone else some one year before, that if you defaulted and if you lost your rights to the ranch because of that default, you would still owe the produce?

"A Yes, depending on the circumstances of this thing. I mean when you explained to us in the office of Mr. Beecher that there would be no further obligation --" (T. 101, L. 13-19.)

and

"BY MR. BEASLEY:

"Q Mr. Holm, so I understand your testimony, it is your testimony that from August 28 of 1972 until this lawsuit was commenced, no one made a demand on you for the produce?

"A Not until we got word of this summons, whatever you call it." (T. 104, L. 16-20.)

Rulon T. Jeffs, who was present at the meeting between the parties, testified similarly to CARL W. HOLM in regards to the obligations between the parties terminating upon the execution of the Termination Agreement.

"A (Mr. Jeffs) We discussed the terms of the agreement and I asked if this resulted in absolving the Holms of any further liability under the contract.

"Q (Mr. Beasley) And was that question responded to?

"A Yes, sir.

"Q And by whom was the response made?

"A Mr. Barker.

"Q And what was his response?

"A That it terminated the further liability of the Holms.

"Q At the time of this meeting, do you recall any conversation with regard to produce?

"A There was no discussion on the matter of produce." (T. 110, L. 4-16.)

also:

"Q (Mr. Barker) I am not asking about your understanding. I am asking about whether or not you asked?

"A Did I ask were they fully terminated from the agreement? Yes." (T. 116, L. 9-12.)

further:

"Q (Mr. Barker) And what was said about that, if anything?

"A That it absolved from any liability under the contract.

"Q Mr. Jeffs, who said that?

"A I understood you said that." (T. 118, L. 18-22.)

Then the testimony of ESTHER B. HOLM was taken which reinforced the testimony of CARL W. HOLM and Rulon T. Jeffs. In discussing the meeting at Mr. Beecher's office, ESTHER B. HOLM testified:

"Q (Mr. Beasley) Do you recall any of the specific things that were discussed?

"A Yes. I remember Mr. Barker saying several times that this would terminate us from any further obligation. He felt that it was a fair agreement." (T. 123, L. 28-30 and T. 124, L. 1-2.)

also:

"Q At any time during that meeting, do you recall anything being said with regard to your continuing obligation to supply Mr. Beecher with the produce that's set forth in the contract?

"A No, sir. There was nothing said.

"Q At any time since that meeting, prior to the commencement of this lawsuit, has anyone made a demand upon you to supply that produce?

"A No, sir, they did not." (T. 124, L. 19-27.)

further:

"Q (Mr. Barker) Was there any discussion about any parts of it that you remember?

"A Only that Mr. Jeffs asked you if this would terminate us from all liabilities, and you said yes it would.

"Q Do you have a specific recollection of that, or is it a little hazy?

"A No. It is not hazy. I remember it.

"Q And how is it you remember that?

"A I remember that you were -- you and he were there talking. And you had already mentioned several times the fairness of the agreement. And he said, 'Does this,' or words to that effect, 'does this terminate all of their liabilities if they sign this, would it terminate all the liabilities they had to Mr. Beecher?' And you said yes it would." (T. 127, L. 22-30 and T. 128, L. 1-5.)

In each instance the person testifying stated that the Appellant represented to the Respondents that the Termination Agreement would end any further obligations or liabilities under the Uniform Real Estate Contract. The Appellant not only represented to the Respondents that all obligations ended upon the signing of the Termination Agreement as to the produce, but represented to the Respondents that everything in the way of liabilities and obligations under the Uniform Real Estate Contract had now ended.

In J. Seal v. Tayco, Inc., supra, a case involving the interpretation of a contract for the delivery of brake shoes, the Court stated at P. 2d 505:

". . . it seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly 'burying' elsewhere in the document, in fine print, provisions which purport to limit or take away the promise and/or preclude recovery for failure to fulfill it."

In the case before this Court the Appellant has attempted to "bury" its intent in the ambiguity of the Termination Agreement and then represent to the Respondents that all obligations and liabilities had ended, including the obligation to supply beef, lamb,

potatoes, honey and wheat. It can only be seen from such language in the Agreement and the actions of the Appellant that the Appellant attempted to mislead the Respondents into believing that all obligations had ceased under the Termination Agreement and that the Respondents entered into the Termination Agreement believing that all obligations were now terminated. Such a belief was reasonable under the circumstances and the Trial Court properly held for the Respondents because of this.

It should also be noted that the actions of the Appellant after the execution of the Termination Agreement were such as to further lead the Respondents in their belief that all obligations to the Appellant had ceased.

In the present case the actions of the Appellant were: (1) making the Termination Agreement; (2) representing to the Respondents that all obligations in the Uniform Real Estate Contract ended upon the execution of the termination; and (3) never making demand, either written or oral, for the delivery of any beef, lamb, potatoes, honey and wheat from August 28, 1972 (which was the date of the execution of the Termination Agreement) until the commencement of this lawsuit (T. 197, L. 12-18), which is a period of almost three years. From the actions of the Appellant the Respondents believed their obligations to the Appellant had ended. This Court stated in Zeese v. Estate of Max Siegel, supra, at P. 2d 90:

> "Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their agreement and so perform, the Court may consider this as persuasive evidence of what their true intention was."

In this case, the Appellant stated its intention as ending the obligations between it and the Respondents and the Appellant then acted to so accomplish such an ending. The Appellant should not be allowed to now change its position.

POINT III

THE APPELLANT IS ESTOPPED FROM ASSERTING A CLAIM TO ANY PRODUCE WHICH WAS PART OF THE UNIFORM REAL ESTATE CONTRACT.

In Cook v. Cook, et al., 110 U. 406, 174 P. 2d 434 (1946), a case involving the payment of insurance proceeds, this Court stated:

> "To constitute an estoppel there must be conduct amounting to a misrepresentation or concealment of material facts; these facts must be known to the party sought to be estopped and unknown to the party who claims the benefit of the estoppel and who, relying upon such conduct, acted upon it to his loss." At P. 2d 436. [Also see Migliaccio v. Davis, et al., 120 U. 1, 232 P. 2d 195 (1951).]

Applying the law in that case, it is clear that the Trial Court correctly found estoppel to be applicable. The Appellant cannot now assert any claim to beef, lamb, potatoes, honey and wheat under the Uniform Real Estate Contract after the Termination Agreement has been executed. From the testimony given at the time of trial, as previously noted, the Appellant represented to the Respondents that all obligations under the Uniform Real Estate Contract had ended. The Appellant made no mention that the obligation to supply beef, lamb, potatoes, honey and wheat was not terminated by the Agreement. The Appellant concealed from the Respondents that the obligation to supply beef, lamb, potatoes, honey and wheat continued after the signing of the Termination Agreement and misrepresented to them that not all obligations under the Uniform Real Estate Contract ended upon execution of that Agreement.

The fact that the obligation to supply beef, lamb, potatoes, honey and wheat might possibly continue beyond the Termination Agreement was known by the Appellant alone, and not the Respondents. The Respondents believed that all obligations under the Uniform Real Estate Contract, including the obligation to supply beef, lamb, potatoes, honey and wheat, terminated upon execution of the Termination Agreement. Thus, the first two requirements of Cook v. Cook, et al., supra, have been met.

Finally, the Respondents acted to their detriment in relying upon the Termination Agreement in that upon executing the Termination Agreement the Respondents realized that they would thereafter be without any means to furnish produce to the Appellants. But acting upon the representations made by the Appellant and the beliefs induced by such representations, the Respondents entered into the Termination Agreement whereby they would lose the land from which they were to furnish the beef, lamb, potatoes, honey and wheat.

Thus, all the requirements of Cook v. Cook, et al., supra, were presented by the evidence and the Trial Court properly held the Appellant to be estopped from asserting a claim to the produce.

The actions of the Appellant would lead a person to believe that the obligations between the parties had terminated upon the execution of the Termination Agreement. In Corporation Nine v. Taylor, 30 U. 2d 47, 513 P. 2d 417 (1973), a case involving specific performance of a real estate contract, this Court said:

> "The test to be applied is an objective one as to what a reasonable and prudent person in the circumstances might conclude . . ." At P. 2d 420.

In view of the actions of the Appellant in this matter, where the Appellant told the Respondents that their obligations under the

Uniform Real Estate Contract had ended; that the Appellant did not mention anything about the beef, lamb, potatoes, honey and wheat at the time of the execution of the Termination Agreement; and that the Appellant made no demand upon the Respondents for the beef, lamb, potatoes, honey and wheat for almost three years; it is clear that the beliefs and actions of the Respondents were what a reasonable and prudent person in like circumstances might conclude.

It should also be noted that it would be unconscionable to require the Respondents to furnish the beef, lamb, potatoes, honey and wheat, or their cash equivalent, to the Appellants. In Perkins, et al. v. Spencer, et al., 121 U. 468, 243 P. 2d 446 (1952), a case involving the cancellation of a contract for the purchase of realty and return of the down payment, this Court stated:

> ". . . where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery, bearing no reasonable relationship to the actual damage suffered, we have uniformly held it to be unenforceable . . ." At P. 2d 450.

In the case presently before this Court the Appellant has suffered no actual damage. Though Perkins, et al. v. Spencer, et al., supra, was about a forfeiture provision, the same unconscionable and exorbitant recovery that was attempted in that case is being attempted in this case. This Court should not allow enforcement of the continuing obligation of the Respondents to supply the Appellant with beef, lamb, potatoes, honey and wheat, especially since the Appellant has retaken the farm which was the only means that the Respondents had for supplying such items to the Appellant.

Though the defense of estoppel was not affirmatively plead in the instant action, a motion to amend the pleadings to conform

to the evidence was made to the Court and granted. Utah Rules of Civil Procedure, Rule 15(b).

Such action by the Court was proper because the evidence of estoppel was before the Court. Buehner Block Company v. Glezos, 6 U. 2d 226, 310 P. 2d 517 (1957).

In this case before the Court the same issues of law and fact would have been presented to the Court whether or not the Court had made a ruling on whether the Appellant was estopped to assert its claim. The Appellant was not prejudiced in any manner by Respondents' failure to affirmatively plead estoppel. The issues of fact and law remained the same whether or not estoppel was raised in the pleadings by the Respondents. The Trial Court would not have heard any new evidence in this matter had estoppel been affirmatively plead. The actions of the Trial Court in denying the claim of the Appellant to any beef, lamb, potatoes, honey and wheat was proper.

CONCLUSION

The Respondents submit that the District Court was correct in its finding that the Termination Agreement was ambiguous and that the same should be construed against its maker, to-wit: the Appellant.

The District Court was Further correct in finding that the Appellants were estopped to now claim the beef, lamb, potatoes,

honey and wheat from the Respondents and thus the decision of the District Court should be affirmed and Respondents should be awarded their costs.

RESPECTFULLY SUBMITTED this 9th day of ~~April~~ May, 1977.

Lauren N. Beasley

LAUREN N. BEASLEY
Cotro-Manes, Warr, Fankhauser & Beasley
Attorneys for Respondents
Suite 430 Judge Building
Salt Lake City, Utah 84111
TELEPHONE: 531-1300

I hereby certify that I mailed two true and correct copies of the above and foregoing Respondents' Brief, postage prepaid, to RONALD C. BARKER, Attorney for Appellant, 2870 South State Street, Salt Lake City, Utah 84115, this 9th day of ~~April~~ May, 1977.

Lauren N. Beasley

LAUREN N. BEASLEY