1985

IFG Leasing Company v. Bonneville Development Corp. d/b/a Ramada Inn of Evanston Wyoming; Ecotek National Corp. n/k/a Irving Financial Corp., Rondney F. Gordon; Jim Hansen; and Frank A. Nelson : Brief of Appellant

Utah Supreme Court

John G. Marshall; Marshall and Willis; James N. Barber; Attorneys for Appellants
J. Bruce Reading; Morgan, Scalley and Reading; Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

IFG LEASING COMPANY,	:	
Plaintiff and Respondent,	:	**APPELLANTS' BRIEF**
-v-	:	
BONNEVILLE DEVELOPMENT CORP. d/b/a/ RAMADA INN OF EVANSTON, WYOMING; ECOTEK NATIONAL CORP. n/k/a IRVING FINANCIAL CORP.; RODNEY F. GORDON; JIM HANSEN; and FRANK A. NELSON,	:	Case No. 20634
Defendants and Appellants.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, JUDITH M. BILLINGS, Judge

J. BRUCE READING,
MORGAN, SCALLEY & READING
261 East 300 South, Second Floor
Salt Lake City, Utah 84111
Attorney for Respondent

JOHN G. MARSHALL,
MARSHALL & WILLIS
525 East Third South, Suite 102
Salt Lake City, Utah 84102
Attorney for Appellant Nelson

JAMES N. BARBER
255 East 400 South, Suite 100
Salt Lake City, Utah 84111
Attorney for Appellants Gordon
and Hansen

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

IFG LEASING COMPANY,	:	
Plaintiff and Respondent,	:	**APPELLANTS' BRIEF**
-v-	:	
BONNEVILLE DEVELOPMENT CORP. d/b/a/ RAMADA INN OF EVANSTON, WYOMING; ECOTEK NATIONAL CORP. n/k/a IRVING FINANCIAL CORP.; RODNEY F. GORDON; JIM HANSEN; and FRANK A. NELSON,	:	Case No. 20634
Defendants and Appellants.	:	

STATEMENT OF ISSUES PRESENTED FOR REVIEW

POINT ONE: THE TRIAL COURT SHOULD HAVE FOUND THAT THE DISPOSITION OF THE COLLATERAL WAS NOT COMMERCIALLY REASONABLE AND THAT PLAINTIFF WAS NOT ENTITLED TO ANY DEFICIENCY JUDGMENT.

POINT TWO: HAVING FOUND THAT THE PLAINTIFF'S DISPOSITION OF A PART OF THE COLLATERAL WAS NOT COMMERCIALLY REASONABLE THE TRIAL COURT ERRED IN GRANTING PLAINTIFF ANY DEFICIENCY JUDGMENT.

POINT THREE: THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANTS GUARANTEED THE LEASES IN QUESTION.

POINT FOUR: THE TRIAL COURT ERRED IN GRANTING ANY JUDGMENT FOR RESIDUAL OR SALVAGE VALUE.

POINT FIVE: THE TRIAL COURT ERRED IN THE AMOUNT OF ATTORNEY'S FEES AWARDED TO PLAINTIFF.

DETERMINATIVE STATUTES

Uniform Commercial Code, §9-504(3). (Corresponds to: §70A-9-504(3), U.C.A. 1953 and §34-21-963(c), Wyoming Statutes 1977.) §78-25-17, U.C.A. 1953; §25-5-4(2) U.C.A. 1953. These sections are reproduced in the Addendum attached hereto.

STATEMENT OF FACTS

Plaintiff sued defendants in the court below for a deficiency judgment arising out of five personal property leases entered into between plaintiff, as lessor, and Bonneville Development Corporation, as lessee. Plaintiff joined the individual defendants (appellants here) claiming that they had guaranteed the leases.

The leases in question were entered into between March, 1981 and September 1981 and concerned certain goods and equipment to be installed in the Ramada Inn of Evanston, Wyoming, which was owned by Bonneville Development Corporation. At the time of trial the plaintiff admitted that the lease agreements were in reality financing vehicles, and that they would be subject to the provision of the Uniform Commercial Code ("UCC") (See Memorandum Decision R.207). [Note: As used throughout this brief the reference "R." refers to the number affixed by the clerk to the record on appeal; the reference "Tr." refers to the number affixed by the court reporter to the transcript of the testimony presented at the trial of this matter.]

The leases in question were written on identical forms, but each bore a distinct identifying number. The guarantee documents were also printed on forms prepared by plaintiff, and the only thing which identified a guarantee

as applying to a specific lease was the identifying number of the lease which was typed on the guarantee document. The individual defendants testified that they had not executed any guarantees in connection with the leases in question (Tr. 120, 221-226, 247), but that they had executed certain guarantee documents in blank, which were delivered to plaintiff with respect to other proposed leases which plaintiff had subsequently declined to fund (Tr. 124-125, 230, 248). They further testified that these lease guarantee forms were never returned to them after plaintiff declined to fund the proposed leases with which they were submitted (Tr. 134, 230, 248). No evidence was introduced to account for these forms.

The trial court found that at the time the guarantee documents were executed they were undated and were not identified by any lease number (Findings of Fact No. 6 — See Addendum). In spite of this finding, and the lack of any evidence in the record as to how the identifying number got placed upon the guarantee documents, the trial court also found that the guarantee documents were executed by defendants in connection with the lease agreements in issue.

In approximately May, 1982 Bonneville Development Corporation defaulted in the payment of the installments due under the lease agreements. At that time Mr. Joe Jimenez, who was then the Regional Collection Manager for plaintiff, wrote various letters in which he threatened to repossess the collateral (Tr. 194-197. See also Exhibits 52-D through 57-D). However, plaintiff did not repossess the collateral.

Mr. Jimenez, who appeared as a witness, also testified that he searched the files relating to the leases in question, and that there were no personal

guarantees of the individual defendants in plaintiff's file (Tr. 200). He then discussed the absence of personal guarantees with various officials of the plaintiff company, and told them that there were no personal guarantees relating to these leases (Tr. 200-204). He testified that he had written a memorandum to the file relating to the lack of personal guarantees for these leases (Tr. 203). His testimony was uncontroverted. However, the memorandum was not produced in evidence nor was any evidence introduced by the plaintiff to explain its absence.

Mr. Jimenez also testified that the normal operating procedure at the plaintiff company at that time in cases where there were personal guarantees, was to write a demand letter to the guarantors, and that would have been one of the first things he would have done had there been personal guarantees, but that due to the lack of personal guarantees relating to the leases in question he did not write any such letters to the individual defendants (Tr. 205). No such letters were offered into evidence.

Mr. Jimenez further testified that in searching the files of plaintiff he did find other files relating to "deals that had been turned down" in which he found personal guarantees which had been executed by these defendants (Tr. 201). He testified that these guarantees had not been filled in with a lease number and a date as of the time he saw them (Tr. 209).

On October 5, 1982, the Ramada Inn of Evanston, Wyoming was placed in receivership (Tr. 46) by order of the district court in Wyoming at the request of Commercial Security Bank (Tr. 97). The receiver took possession of the lease collateral along with the motel facility (Tr. 98). At that time defendant Hansen requested that plaintiff repossess the lease collateral (Tr. 155-157).

The plaintiff sent a letter in which it threatened to repossess the collateral if the lease payments were not brought current by November 15, 1982 (See Exhibit 42-P). Although no payments were made (Tr. 66), plaintiff failed to repossess the collateral (Tr. 95), but left it on the premises where it could be used by the receiver during the time he was in possession (Tr. 98). As of the time of the sale approximately two years later, part of the equipment was missing and plaintiff had no knowledge as to where it was (Tr. 50).

On May 31, 1983 Bonneville Development Corporation filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the District of Utah (Tr. 46).

No evidence was presented which would indicate that plaintiff made any effort to assert the priority of its security interest in the collateral as against the receiver or to obtain a ratification or disclaimer of the leases from the trustee in bankruptcy from October, 1982 until the property was finally sold.

On September 28, 1984, plaintiff consummated a sale of part of the lease collateral to Commercial Security Bank ("Commercial Security") and First Security Bank of Utah, N.A. ("First Security") for the sum of $85,000.00 (Tr. 88-98). The evidence showed that Commercial Security and First Security were creditors of Bonneville Development Corporation holding mortgages on the Ramada Inn of Evanston (Tr. 88). The negotiations for the sale of the collateral took place at the office of Commercial Security in Salt Lake City (Tr. 88), whereas the collateral was located at the Ramada Inn in Evanston, Wyoming (Tr. 95). The representatives of the banks had not inspected the equipment to ascertain its condition or value (Tr. 91-92), and neither plaintiff

nor the purchasers had prepared nor were the purchasers aware of any appraisal of the property (Tr. 91-93).

From the testimony presented at the trial it would appear that the negotiations for the sale did not relate to the then-current condition or value of the collateral, but only to what percentage of "plaintiff's estimate of value" the purchasers would pay. The testimony showed that the agreed purchase price of $85,000.00 was based upon 18 percent of such value (Tr. 94-95). Evidence subsequently presented to the court would indicate that the term "plaintiff's estimate of value" really referred to the original cost of the equipment in the five leases as invoiced to plaintiff. (See Tr. 332, where the original cost was identified as $476,113.11. The purchase price of $85,000.00 realized by plaintiff upon the sale of the collateral equates to 17.9 percent of $476,113.11.)

Gerald M. Engstrom, Vice-President and General Counsel of Commercial Security testified that he personally participated with representatives of First Security and plaintiff in the negotiations in which the banks agreed to purchase the collateral. He could not specifically identify the date that the purchase agreement was negotiated. To the best of his recollection it was in the fall of 1983, but it could have been in the winter of 1983/1984, and it was at least six months before the purchase price was paid (Tr. 90-91). According to plaintiff's records, the purchase price was paid on September 28, 1984 (Tr. 49).

On March 30, 1984 (which was after the commencement of the present action), counsel for plaintiff sent a notice to the individual defendants advising

them: "IFG intends to sell the equipment on or after the tenth day of April, 1984, at public or private sale." (See Exhibit 43-P.)

The evidence presented did not disclose any other effort on the part of plaintiff to sell the collateral. Specifically, the evidence did not show any attempt on the part of plaintiff to contact other potential purchasers, to dispose of the collateral through dealers in that type of equipment or to advertise the collateral in trade journals or any other type of media.

The sale of the lease collateral to Commercial Security and First Security did not include a wood carving which plaintiff appropriated to its own use, allowing an offset therefor in the amount of $4,000.00 (Tr. 50).

The only evidence presented by plaintiff as to value of the collateral was in the form of testimony by Susan Trunzo, who testified that she had been employed in the auction business for 15 years; that she had "looked through" the list of equipment attached to the bill of sale to Commercial Security and First Security and compared it with some invoices supplied by plaintiff (Tr. 165); that she had experience in selling restaurant equipment at auction (Tr. 168); and that she had sold office furnishings based upon her inspection and estimate of the value of the item (Tr. 169). However, she also admitted that she had not seen the equipment listed on the bill of sale (Tr. 175, 179) and that she had no experience with respect to sales of heat exchangers, boilers and other types of heating equipment on the list (Tr. 169).

Over objections raised by the defendants as to the foundation for her testimony and her qualifications to testify as to the value of the items listed on the bill of sale (particularly in view of her testimony that she had not seen the equipment) she was permitted by the trial court to testify that "a fair

market recovery for this equipment" would be "somewhere between 15 to 25 percent" (Tr. 176).

On cross examination she admitted that her estimate of percentage recovery was based upon an average value based upon her experience, rather than anything related to the specific value or condition of the items listed, since she had not seen the items on the equipment list (Tr. 179.) She also testified that in her experience the seller is always at a disadvantage and the sales price of an item is decreased if the item being sold is not seen by the buyer (Tr. 180); that in her experience no one would come to an auction sale if the seller did not contact known potential buyers and that she also would always advertise in newspapers, trade journals and by direct mail (Tr. 181-182), and that "a commercial and reasonable auctioneer" would not attempt "such an auction as this without advertising" (Tr. 183), stating: "We would always advertise something like this." (Tr. 184.)

In determining the purchase price of the collateral, Mr. Engstrom also testified that the buyers gave no value to the heat pumps "because we said they were permanently attached" (Tr. 96). However, another witness, Cal Gordon, testified that there were approximately 60 heat pumps at the Ramada Inn, of which about 50 were new and had never been installed or put into service (Tr. 186-187). In her testimony, Ms. Trunzo also testified that if equipment were new, her experience was that she would expect to get 75 to 80 percent of their worth upon liquidation (Tr. 177). The invoices which plaintiff put into evidence showed that the original cost of the heat pumps amounted to $67,222.12. (See Exhibits 6-P and 13-P.)

After the trial the court held that the individual defendants had guaranteed the leases in question, that the sale of the collateral at private sale by plaintiff was commercially reasonable and conformed to the requirements of the Uniform Commercial Code, except as to the wood carving which was retained by plaintiff and not sold, which the court found to be not commercially reasonable. After allowing an offset of $10,000.00 "for the price of this carving" (Conclusion of Law No. 3. See Addendum), the trial court awarded plaintiff judgment against the individual defendants for the sum of $822,623.22, plus attorney's fees in the amount of $13,485.00 and costs in the amount of $302.00. (See Judgment in Addendum.)

SUMMARY OF ARGUMENTS

Defendants respectfully contend that the trial court erred in finding that the plaintiff's disposition of <u>any part</u> of the collateral was commercially reasonable as required by the UCC. In support of this contention defendants submit that the evidence shows the plaintiff neglected the collateral and the interests of <u>both plaintiff and defendants</u> in the collateral:

a. It clearly appeared that plaintiff failed to exercise any of its rights in the collateral, which left the collateral to be used by others for a period of approximately two and one-half years after default in the payment of the lease rental installments, and for approximately two years after plaintiff was requested by one of the alleged guarantors to repossess the equipment.

b. In disposing of the equipment plaintiff made no attempt in good faith to obtain the best price it could for the collateral, such as by advertising or contacting dealers in this type of equipment or other potential purchasers.

It merely contacted the entities who were in possession of the facility where the equipment was situated and where it had been used without payment for at least two years, and entered into negotiations with them which were not directed at obtaining any price based upon the value of the collateral at that time.

c. The consequence of failing to dispose of the collateral for the leases in a commercially reasonable manner is that plaintiff is not entitled to any deficiency judgment.

In addition to the foregoing, plaintiff retained for its own use part of the leased property, described as a piece of art. The trial court properly found that the disposition of this part of the collateral was not commercially reasonable. However, based upon such finding the trial court also should have held that plaintiff had failed to dispose of the collateral as required by the UCC and should have denied plaintiff any deficiency judgment.

It is further respectfully submitted that plaintiff failed to prove by proper legal standards that these defendants had ever guaranteed the leases in question.

A decision on this appeal favorable to the defendants on any of the foregoing matters would require a reversal of the judgment entered below in its entirety. If this appeal were not to result in such a decision, defendants contend that this court should still enter an order reversing the judgment in part based upon the final two arguments of defendants.

Defendants contend that the court erred in including in the judgment any sum based upon the residual value of the collateral because under the

terms of the lease there is no obligation upon the lessee to pay the lessor for its residual value.

Defendants also contend that the court erred in awarding attorney's fees to plaintiff in excess of $10,000.00, based upon the evidence presented at the trial. The inclusion of this argument is not intended to constitute an admission by defendants that plaintiff is entitled to any sum as attorney's fee.

ARGUMENT

POINT ONE: THE TRIAL COURT SHOULD HAVE FOUND THAT THE DISPOSITION OF THE COLLATERAL WAS NOT COMMERCIALLY REASONABLE AND THAT PLAINTIFF WAS NOT ENTITLED TO ANY DEFICIENCY JUDGMENT.

The trial court stated in its Memorandum Decision:

> "The parties agree that although these are designated as leases, they are in effect financing agreements, and that the Uniform Commercial Code applies. Therefore, it was the obligation of the plaintiff to preserve the assets, and to sell them in a commercially reasonable manner." (R.207.)

UCC §9-504(3), enacted in Utah as §70A-9-504(3) (see copy in Addendum), allows a secured party after default to dispose of collateral, but it requires that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

The courts of a majority of the states which have enacted the UCC (including both Utah and Wyoming) have taken the position that any failure on the part of the security holder to dispose of the collateral in a commercially reasonable manner will result in a denial of the right to obtain a judgment for any deficiency between the contract balance due and the proceeds of the sale of the collateral.

The leading case in Utah on this point is FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah 1979), which holds that in an action for a deficiency judgment the secured party has the burden of establishing that the disposition of the collateral was done in a commercially reasonable manner. In that case the creditor failed to conduct the sale in a commercially reasonable manner and was barred from obtaining a deficiency judgment.

It is respectfully submitted that a comparison of the significant elements in Pro-Printer, supra, with the facts concerning the disposition of the collateral in the instant case will demonstrate that IFG Leasing Co. made even less effort to conduct a commercially reasonable sale.

PRO-PRINTER CASE	THE INSTANT CASE
1. Defendant requested that secured party repossess equipment.	1. Defendant requested that IFG repossess equipment.
2. Secured party repossessed equipment and stored it six months before selling it.	2. IFG failed to repossess equipment but left it to be used for two years prior to selling it.
3. Creditor "contacted only three dealers" in selling equipment.	3. IFG made no contact with dealers or potential purchasers.
4. Creditor made no attempt to advertise equipment in local journals normally used for that purpose.	4. IFG made no attempt to advertise equipment in any media.
5. Creditor sold equipment to owner of place where equipment was stored.	5. IFG sold equipment to banks in possession of facility where equipment was located and where it had been used.
6. Creditor had appraised equipment a few months before sale.	6. IFG made no appraisal of equipment.
7. Sale price was less than half of appraised value, and only 21% of the original invoice cost.	7. Equipment sold for 18% of IFG's original invoice cost.

Courts generally have recognized that the UCC was designed to provide an economical, extra-judicial method for disposing of the collateral after default. Recognizing that the secured creditor is pretty much unsupervised in selecting the method of disposition and in carrying it out, the courts have tended to balance the flexibility given creditors by imposing upon them the burden of proving that their disposition of the collateral was conducted in a manner calculated to protect the debtor's interest as well as their own interest in the resale of the collateral. The courts have noted that these requirements serve the interests of creditors as well as debtors, because producing a greater return upon sale of the collateral reduces the necessity of seeking a deficiency from guarantors. Therefore, if the secured creditor fails to show that it disposed of the collateral having due regard for the interests of the debtor, it is fair that the creditor should lose any right to recover a deficiency from the debtor and the guarantors, if any.

While the requirement of a "commercially reasonable" manner cannot be defined with precision, it clearly means that in disposing of the collatereal the secured party must make a good faith effort to obtain a fair price for the collateral, rather than to neglect the collateral and focus its efforts upon recovering a deficiency from guarantors.

In this case the record shows that plaintiff commenced this action to recover the full balance claimed from the alleged guarantors prior to taking any action with respect to the collateral.

In Chittenden Trust Co. v. Maryanski, 415 A.2d 206 (Vt. 1980), the Supreme Court of Vermont explained the duty underlying the "commercially reasonable" standard as follows:

> "§9-504(3) places a positive duty on the secured party to act, with respect to every aspect of disposition, in a commercially reasonable manner . . . . Although the specifics of this duty 'cannot be meaningfully described except in terms of particular fact situations,' . . . in general it means that '[t]he secured party is required to utilize his best efforts to sell the collateral for the best price and to have a reasonable regard for the debtor's interest.' . . . . Of course, the fact that a better price could have been obtained does not necessarily mean that the sale was not commercially reasonable, . . . but the secured party must make a good faith effort to maximize the value of the collateral . . . ." (Emphasis added.) (All authority cited has been omitted.)

In that case among the key considerations which led the court to hold that the disposition of the collateral was not commercially reasonable was evidence that the collateral (restaurant equipment) was sold to the owners of the building in which the defendant's restaurant had been located (with no discussion of any efforts to find other potential purchasers) and that the equipment, which was two years old and worth $63,000 when new, had been sold for "only $12,000." (It is interesting to note that the sale price in that case equalled 18.3% of its new value.)

The Supreme Court of Vermont concluded:

> "Under any construction of [the] evidence, findings sufficient to support a conclusion that plaintiff carried its burden of showing a commercially reasonable disposition of collateral would be clearly erroneous. The evidence simply does not support the result reached, . . . and therefore the result cannot stand." (Id., 415 A.2d at 209-210.)

In the instant case the record does not show that plaintiff made any good faith effort to maximize the value of the collateral, or that it used its best efforts to sell the collateral for the best price it could obtain or that it had any regard for the interests of the defendants in the collateral.

The disposition of the collateral by plaintiff occurred almost as an afterthought, and was clearly done without any attempt to obtain any substantial

return. Plaintiff's actions in regard to the collateral demonstrate an indifference which falls far short of the judicial requirements of a commercially reasonable disposition.

In In re Hamby, 19 BR 776, 33 UCCRS 1811 (U.S. Bankruptcy Ct., ND Ala. 1982) the court stated:

> "Commercial transactions must have as their purpose the obtaining of a profit as opposed to the incurring of a loss, if they are to be deemed reasonable. A method of sale which produces only one bid and a sale at 15% below wholesale value is calculated to produce a commercial loss and if such a method is consistent and is persisted in, a commercial or business failure will result. It is not a reasonable method in the commercial setting. If the method of sale employed by the claimant was not of this character, appropriate distinctions should have been shown by the secured party."

In the case of Peoples Acceptance Corp. v. Van Epps, 60 Ohio App.2d 100, 395 N.E.2d 912 (1978) the court stated:

> "The standards which should be used to determine a commercially reasonable sale are matters of fairness and business practice. The secured party should always attempt to sell the repossessed collateral for the best price possible, and where there is a gross discrepancy between the disposal and the original sale price of the repossesed collateral, there must be some affirmative showing on the part of the secured party that the terms of the repossession sale were commercially reasonable."

That case involved a situation where the secured party brought suit against a debtor for a deficiency after repossessing and selling a motor vehicle. The purchaser had agreed to pay $1,989.00 for the car which was sold following repossession nine months later for $200.00. The court held that "the price for which a vehicle is sold after repossession is one of the 'terms' which must be considered in determining whether or not a sale is commercially reasonable as required by the Uniform Commercial Code." (Id., 395 N.E.2d at 916.) The court noted in its decision that the record was devoid of any testimony

regarding the condition of the car or its fair market value at the time of the repossession sale, that the sale of the car was not advertised, that the car was sold at private sale for little more than one-tenth of its original purchase price, and concluded that the sale was not commercially reasonable.

In the case at bar, the record also discloses (in addition to the other factors mentioned above) that the deficiency claimed by plaintiff and awarded by the trial court against defendants was approximately ten times the amount realized by plaintiff from its disposition of the collateral.

In Mercantile Financial Corp. v. Miller, 292 F.Supp. 797 (1968), the court stated:

> "The evidence also indicated that Mercantile [the secured party] neither sold these assets 'in the usual manner in any recognized market therefore' nor that it 'sold in conformity with reasonable commercial practices among dealers in the type of property sold * * * ', §9-507(2). It conducted this auction with only a minimal amount of publicity, ... Mercantile's failure to locate likely purchasers of these assets and its eagerness to conduct a sale at which it knew only one bid would be made, and that by a bidder . . . who had no knowledge of the local market for these assets, strongly supports Miller's contention that this sale was not in conformity with §9-504. The conduct of this auction differed markedly from the conduct of a general auction of such materials described as 'commercially reasonable' by the defendant's expert witness." (Emphasis added.)

In addition to the similarity of the underlined portion of material quoted above to the facts of this case, at the trial of this matter the plaintiff produced as a witness an auctioneer, who testified on cross-examination that from her experience the sales price would be decreased if the items being sold were not exhibited at the sale; that in making sales she would always advertise the sale in newspapers, trade journals and by direct mail; that she would also make an effort to contact potential buyers; and that an auctioneer

would not be commercially reasonable to attempt to make a sale without advertising (Tr. 179-184). The record discloses no effort by plaintiff to observe even these minimal precautions in disposing of the collateral for the leases in issue.

In In re: Thomas, 12 UCCRS 578 (1973) the court pointed out that UCC §9-504(3) provides that collateral may be liquidated at either public or private sale. A public sale was stated to be one in which due advertisement of the sale is made to the public to attend and bid. The court then stated:

> "On the other hand, disposition by private sale contemplates that the creditor has used some diligence to obtain buyers who will submit private bids for the property. It is not sufficient, nor can it be said to be a commercially reasonable disposition, to park a vehicle in some obscure lot surrounded by a fence and make such display the only means whereby a private bid might be lodged with the creditor by a prospective buyer. Here there is no evidence that any designated party viewed the vehicle or submitted a bid or declined to do so. No specific party was pointed out in the evidence except the purchaser . . . ."

In the instant case the collateral was not parked on some obscure lot and surrounded by a fence. However, the circumstances were not significantly different than had it been so placed. The collateral was situated in Evanston, Wyoming, while the sale was negotiated in Salt Lake City; the extent, condition and value of the collateral was not demonstrated to the purchaser by the secured party; and, the only subject of the negotiation between the parties related to the percentage of the original invoice price that would be paid by the purchaser. Furthermore, although more than six months elapsed between the date the sale was negotiated and the date it was consummated, the record is devoid of any evidence that the plaintiff made any effort whatever during this interim to obtain a better price for the collateral.

On the contrary, there is a clear inference in the testimony that plaintiff did not make any such effort. At the trial Mr. Bruce Reading, counsel for plaintiff, took the stand and among other things, testified: ". . . at the time that letter went out I knew we were in the final preparations of selling the equipment to the bank and I also knew that, in all likelihood, the sale would take place with the bank." (Tr. 256-257.) The letter he referred to was dated March 30, 1984 (see Exhibit 43-P). The sale was consummated on September 28, 1984 (Tr. 49).

There is no evidence in the record which even suggests that plaintiff took any steps to assert its security interest in the collateral against the receiver or the trustee in bankruptcy, by reason of which the collateral was used without any payment being made on the leases for more than two years.

In Wayne Bank v. Dore, 119 Mich.App. 634, 326 N.W.2d 588 (1982) the plaintiff had a security interest in the inventory of a debtor corporation, which the Internal Revenue Service had confiscated pursuant to a tax lien. Even though its security interest in the inventory was superior to the interest of the Internal Revenue Service, plaintiff did not contact the Internal Revenue Service in any manner to assert its prior lien on the collateral. Rather, eight weeks later plaintiff notified the defendant, seeking to enforce defendant's obligation under a guaranty.

The trial court held that plaintiff had acted in a commercially unreasonable manner by failing to notify the Internal Revenue Service of its prior interest in the inventory. The Court of Appeals of Michigan noted that UCC §1-102(3) requires that a secured party exercise good faith, diligence, reasonableness and care. The court held that the failure of the secured party

to notify the Internal Revenue Service and defendant constituted an unjustifiable failure to meet the standards set forth in §1-102(3). Since this formed the basis of the finding of the trial court that the plaintiff had acted in a commercially unreasonable manner, the judgment of the trial court was affirmed.

It is respectfully submitted that the acts of plaintiff in the disposition of the collateral must be viewed in their totality, and that the failure of plaintiff to assert its security interest in the collateral against the receiver and the trustee in bankruptcy further indicates that the plaintiff did not dispose of the collateral in a commercially reasonable manner.

In Leasco Data Processing Equipment Corporation v. Atlas Shirt Company, Inc., 323 N.Y.S.2d 13 (1971) the court stated:

> "The burden on the secured creditor is by no means onerous. If he wishes a deficiency judgment he must obey the law, the relevant provisions of which are now simpler and more flexible than before. If he does not obey the law he may not secure a deficiency judgment."

It should also be noted here that the lease guarantee forms which the plaintiff relied upon in bringing suit against appellants provided that in the event any controversy or claim arose out of the guaranty, any questions of law should be decided in accordance with the laws of Wyoming. (See Exhibits 2-P, 9-P, 16-P, 23-P and 30-P.)

The State of Wyoming has enacted the Uniform Commercial Code. The Wyoming equivalent of UCC §9-504(3) is found substantially unchanged as §34-21-963(c) Wyoming Statutes, 1977. (See Addendum.)

The decisions of the Wyoming Supreme Court are consistent with the decisions cited above, and among other things clearly hold that the secured

party has the burden of pleading and proving that its disposition of the collateral was in strict compliance with the requirements of §9-504(3). Failure to do so will prevent the creditor from obtaining a judgment for any deficiency between the unpaid balance and the sale price of the collateral. See, Aimonetto v. Keepes, 501 P.2d 1017 (Wyo. 1972).

In Eggeman v. Western National Bank, 596 P.2d 318 (Wyo. 1979), the Wyoming Supreme Court further stated:

> "A judicial sale cannot be held in a 'grab bag' fashion. Such a sale would not be commercially reasonable. All parties to the sale must have an opportunity to see and evaluate the goods being sold."

Evidence presented at trial clearly shows that plaintiff failed to meet the standards of a commercially reasonable disposition of the collateral sold to Commercial Security and First Security, and therefore, that the judgment of the trial court should be reversed.

POINT TWO: HAVING FOUND THAT THE PLAINTIFF'S DISPOSITION OF A PART OF THE COLLATERAL WAS NOT COMMERCIALLY REASONABLE THE TRIAL COURT ERRED IN GRANTING PLAINTIFF ANY DEFICIENCY JUDGMENT.

The trial court held that the retention by plaintiff of the wood carving was not a commercially reasonable disposition. However, the trial court also held that the plaintiff's disposition of the remaining collateral was commercially reasonable. (Conclusions of Law Nos. 2 and 3. See Addendum.)

it is respectfully submitted that the trial court erred in so holding, inasmuch as the requirement of the UCC is that ". . . every aspect of the disposition . . . must be commercially reasonable." The UCC does not say that

to the extent that the disposition is found to be commercially reasonable the creditor may obtain a deficiency judgment.

The case of DeLay First National Bank and Trust Company v. Jacobson Appliance Co., 196 Neb, 398, 243 N.W2d 745 (1976) involved a situation where a secured creditor disposed of the collateral in several transactions. As stated by the Supreme Court of Nebraska:

> "The problem herein is that there was more than one sale, some of which can be upheld. We believe the intent of the Uniform Commercial Code would appear to mandate that the entire disposition of collateral by the secured party be viewed as one transaction, and that every aspect of that transaction be in accord with the requirements of the Uniform Commercial Code. To adopt any other rule would place upon the court the sometimes impossible and time-consuming task of attempting to determine the amount of recoverable deficiency as well as the amount of unrecoverable deficiency.
>
> What we said in Bank of Gering v. Glover, [192 Neb. 575, 223 N.W.2d 56 (1974)], is pertinent herein: 'The creditor is given several options in disposing of collateral and very minimal formal requirements. The burden on the secured creditor is to comply with the law. The act is framed in his interest. It is not onerous to require him to give notice of the time and place of sale. In some instances it will be to the creditor's advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor.'
>
> "We adhere to the position we adopted in Bank of Gering v. Glover, supra. The right to a deficiency judgment depends on compliance with the statutory requirements. We now hold that if a creditor wishes a deficiency judgment he must comply with the law in each transaction. While this rule may seem harsh, we are persuaded by the fact that the burden is on the secured creditor to comply with the law. The act is framed in his interest. It is not onerous to require him to observe the provision of the law." (Emphasis added.)

In the case of Jackson State Bank v. Beck, 577 P.2d 168 (Wyo. 1978), the Supreme Court of Wyoming ruled to the same effect. In that case the plaintiff had repossessed the assets (consisting of parts, inventory, used vehicles,

tools, equipment, furniture and fixtures) of an automobile dealer. The bank "sold" the collateral to itself by entering a credit upon certain promissory notes after giving notice to the debtors (including the defendant Beck, who was a guarantor) that after a specified date all collateral would be sold at private sale pursuant to the UCC.

The Supreme Court of Wyoming noted that §9-504(3) contains the following provision:

> "The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at a private sale."

The opinion of the court indicated that the collateral was not of the type indicated in that provision. Therefore, the court rejected the argument of the creditor that even though it had violated the commercial code, the trial court was in error in finding that the bank operated in a commercially unreasonable fashion.

The Wyoming Supreme Court held that the violation of a specific statute is commercially unreasonable as a matter of law. However, the court also recognized that the courts are not in agreement as to the penalty to be imposed upon the creditor in such situations. After analyzing the holding of various states on the subject, the Wyoming Supreme Court concluded that the law in Wyoming had been settled in the case of Aimonetto v. Keepes, supra. where the court stated:

> "* * * [W]e are persuaded that one general principle upon which plaintiffs rely is applicable here, that is, compliance with §34-9-504(3) is a condition precedent to recovery of any deficiency between sale price of collateral and the amount of the unpaid balance." (Emphasis added.)

Consequently, the court sustained the trial court and denied the secured party any deficiency judgment.

The evidence in this case showed that a wood carving (described in the testimony by plaintiff's witness as "a piece of art" — Tr. 50.) formed part of the collateral for the leases in question, and that it was retained by plaintiff rather than sold with the other collateral.

Plaintiff's witness testified that plaintiff "as the current owner of that art piece" had assigned it a value of $4,000.00, although it was originally invoiced to plaintiff for $2,000.00 (Tr. 50).

Defendant Hansen, however, testified that the invoiced price to plaintiff was only a part of the total price Bonneville Development Corporation had paid for the carving; that $4,000.00 was not a fair price for it because, "It is one of a kind. It was featured in a number of articles. It is a great piece of work." (Tr. 159.) Although he was an officer of the corporation which had owned the art work, Mr. Hansen was not permitted by the trial court to give his opinion of the value of the work, but he was permitted to testify that he felt that the total purchase price paid for it by the corporation was $10,000.00. (Tr. 160.)

The trial court held that the "sale" of the wood carving was not commercially reasonable and allowed an offset therefor in the amount of $10,000.00. (Conclusion of Law No. 3.)

It is respectfully submitted in view of the authority cited above that the trial court was correct in ruling that the plaintiff had not disposed of the art piece in a commercially reasonable manner, but that the trial court should have ruled also that plaintiff's failure to comply with §9-504(3) in its disposition of all of the collateral barred the recovery of any deficiency judgment.

POINT THREE: THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANTS GUARANTEED THE LEASES IN QUESTION.

Evidence was presented at the trial with regard to guarantee agreements executed by defendants which plaintiff asserted showed that the defendants had guaranteed the leases in question.

The alleged guarantees were marked as Exhibits 2-P, 9-P, 16-P, 23-P and 30-P. All of these documents bore dates prior to December 31, 1981. The witness who introduced these exhibits, Ms. B. J. Rakes, testified that she was not employed by plaintiff until January 4, 1984, and that she first received the records concerning this case at the end of July, 1984 (Tr. 13).

The testimony of Ms. Rakes which served as the foundation for the introduction into evidence of Exhibit 2-P is as follows:

> "Q (By Mr. Reading) B. J., you said those are guarantee documents; is that correct?
>
> "A That's correct.
>
> "Q How do you know that they apply to this particular lease file?
>
> "A They indicate that it is the Bonneville Development Corporation d.b.a. Ramada Inn, Evanstion, Wyoming with lease no. 56809.
>
> "Q And that is the same lease number that is on Exhibit 1; is that correct?

"A That's correct.

"Q Can you read the signature on the bottom of those documents?

* * * * *

"A (By the witness) Someone has signed the signature above Jim P. Hansen where it has been typed in as Jim P. Hansen.

"Q (By Mr. Reading) What is the typed names on that document on the left of the guarantors?

"A One is typed Rodney S. Gordon and one is typed Frank A. Nelson." (Tr. 14-17.)

Subsequently, when Exhibit 2-P was offered into evidence, upon voir dire examination Ms. Rakes testified that she did not know when the identifying number in the box in the upper right-hand corner of the document was put on the document or who put it there. She also testified that she did not know when the document was dated, or by whom. (Tr. 26-27.)

Thereafter the court inquired of counsel:

"Do you have an objection to the receipt of the document [Exhibit 2-P] as a business record?

"Mr. Marshall: Of course I do have an objection to the receipt of the document as to what the document purports to be, Your Honor, for any purpose. Now, she can say she found it in the company files, [which the witness had not stated in her testimony at that point] but beyond that I don't think this witness is qualified to testify to this by her own testimony here, Your Honor. On that basis I would object to the admission of that document.

* * * * *

"Judge Billings: Well, the objection as to the receipt of Exhibit 1, 2, 3, 4, 5, and 6 as to them being received as business records will be overruled but counsel may have—

"(Whereupon, plaintiff's Exhibit Nos. 1 through 6 were offered and received into evidence at this time.)" (Tr. 28-29.)

Subsequently, similar objections were preserved as to the other documents claimed as guarantees (Exhibits 9-P, 16-P, 23-P and 30-P) which were also admitted into evidence upon the basis that they were business records of the plaintiff. (Tr. 35.)

It is respectfully submitted that no proper foundation was laid for introducing these exhibits into evidence even upon the basis that they were business records, since no one had presented any evidence up to that point as to where the documents came from.

Subsequently, the defendants testified that they had executed certain guarantee agreements upon forms presented bv plaintiff, but that those forms were submitted to plaintiff in connection with other lease proposals which the plaintiff later declined to fund, and that those forms were executed in blank, in the sense that neither the date nor the identifying number were filled in at the time they were executed and delivered to plaintiff.

This testimony of the defendants was uncontroverted, and was supported by evidence presented by the plaintiff to the effect that the procedures of the plaintiff required that all lease documentation had to be executed by the lessee and returned to plaintiff for acceptance, and that plaintiff did not assign a number to a lease until it had the documentation completed, and had accepted the lease. (Tr. 55.)

The trial court found that at the time the guarantee agreements were presented they were not dated and were not identified by lease number. (Finding of Fact No. 6 — copy in Addendum.)

It is important to note that the identifying number is the only thing on the document which ties the guarantee to any specific lease. However,

no evidence was presented at any time to indicate the identity of the person who put these numbers on the guarantee agreements or the circumstances under which they were put on those documents.

It is respectfully submitted that the trial court erred in admitting Exhibits 2-P, 9-P, 16-P, 23-P and 30-P into evidence for any purpose.

§78-25-17, U.C.A., 1953, reads as follows:

> "The party producing as genuine a writing which has been altered, or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance of alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration does not change the meaning or language of the instrument. If he does this, he may give the writing in evidence, but not otherwise." (Emphasis added. See copy in Addendum.)

It should be noted here that filling in blanks is considered as an alteration of the document. See, First National Bank in Dallas v. Walker, 544 S.W.2d 778 (Tex. 1976); Farmers State Bank of Yuma v. Klein, 410 P.2d 632 (Colo. 1966.).

Since there was no evidence presented to the trial court showing the identity of the person(s) who put the identifying numbers on the exhibits in question or the circumstances under which they were put there, the court erred in admitting them into evidence. Without those documents in evidence the finding of the trial court that defendants guaranteed the leases in issue would be unsupported in the evidence, and contrary to the Utah Statute of Frauds, §25-5-4(2) U.C.A., 1953. (See copy in Addendum.)

POINT FOUR: THE TRIAL COURT ERRED IN GRANTING ANY JUDGMENT FOR RESIDUAL OR SALVAGE VALUE.

During the course of the trial proceedings the parties stipulated that the equipment which was the subject of the lease agreements had a residual value of five percent (Tr. 85.) No other evidence was presented to the trial court with reference to this residual value.

In the Findings of Fact and Conclusions of Law the trial court concluded that plaintiff "should be awarded the residual value of the equipment," in the amount of $23,805.65 (Conclusions of Law No. 5(b) — See Addendum).

According to the discussion of this court in Pro-Printers, supra, the residual value normally refers to the amount for which the equipment could be purchased at the conclusion of the lease and therefore, the stipulation that the equipment had a residual value of five percent was material to the determination that the leases were in reality financing agreements.

However, no evidence was presented to the court in this case that the lessee had ever agreed to pay plaintiff the residual value of the equipment. The leases do not impose any such obligation on the lessee. Furthermore, the leases do contain an integration clause which states: "This instrument constitutes the entire agreement between lessor and lessee. . . ." (See paragraph 26 of Exhibits 1-P, 8-P, 15-P, 22-P and 29-P. Emphasis added.)

Therefore, it is respectfully submitted that the court erred in including an award for residual value in any amount in the judgment.

POINT FIVE: THE TRIAL COURT ERRED IN THE AMOUNT OF ATTORNEY'S FEES AWARDED TO PLAINTIFF.

During the course of the trial Mr. Bruce Reading, counsel for plaintiff, desired to present his own testimony as to the amount of attorney's fees which he claimed should be awarded. Counsel for defendants stated that they would accept a proffer. (Tr. 99.) Thereupon, according to the transcript, the following occurred:

> "Mr. Reading: Your Honor, I would proffer that I'm an attorney of the Utah State Bar and that our office has an across-the-board billing rate of $75.00 per hour whether it is a senior attorney or first associate out of school, that we have spent significant time not only in preparation for this trial but also in the various motions that were heard before on the default judgment and memorandum that we've submitted in regards to that. We feel a reasonable attorney's fee in the prosecution of this case is $10,000.00.
>
> "Judge Billings: Just for the benefit of counsel, this court, if, in fact, it ends up awarding a judgment for attorney's fee, feels that pursuant to our local rules that that would not be sufficient and will ask, if you could, get accounting sheets and simply attach it to an affidavit. But there's no reason for you to testify in court as to that if it's acceptable to counsel.
>
> "Mr. Marshall: That's acceptable.
>
> "Mr. Barber: That's fine." (Tr. 99-100. Emphasis added.)

Thereafter, on March 11, 1985, two weeks after the trial concluded, Mr. Reading filed with the court an affidavit, to which he attached copies of his billings to plaintiff. In the affidavit, Mr. Reading stated:

"3. That the actual time expended and billed in the above matter is Thirteen Thousand Four Hundred Eighty-Five Dollars and Fifty Cents ($13,485.50).

* * * * *

"5. Based upon the amount in controversy and the defenses raised, a reasonable attorney's fee in this action should be Seventeen Thousand Dollars ($17,000.00)." (R. 223-224. Emphasis added.)

On March 15, 1985, counsel for defendants filed with the court Objections to Proposed Findings of Fact, Conclusions of Law and Judgment, in which among other things they objected to an award of attorney's fees as set forth in the proposed judgment ($17,000.00), upon the basis that counsel for plaintiff had testified that the amount of attorney's fee which he sought was $10,000.00. (R. 213.)

The trial court awarded attorney's fees in the sum of $13,485.00. (See Judgment in Addendum.)

It is respectfully submitted that the court's invitation to which counsel for defendants agreed was for counsel for plaintiff to justify by affidavit his testimony that a reasonable attorney's fee was in the amount of $10,000.00. It was not an open-ended invitation or consent that a different amount could be submitted to or awarded by the court.

Consequently, it is submitted that in the event this court finds that any amount of attorney's fee should be awarded, which defendants do not admit, plaintiff should be limited to the sum of $10,000.00.

CONCLUSION

Defendants respectfully submit, in the alternative:

1. That the judgment of the lower court should be reversed because the evidence presented at trial did not show that plaintiff disposed of any part of the collateral in a commercially reasonable manner.

2. That the judgment of the trial court should be reversed because the trial court correctly concluded that the retention of the art piece by plaintiff was not a commercially reasonable disposition, which should preclude plaintiff from obtaining any deficiency judgment.

3. That the judgment of the trial court should be reversed because the finding of the court that defendants had guaranteed the leases in question was based upon evidence which was improperly admitted into evidence.

4. That the judgment of the trial court should be reduced by the sum of $23,805.65 (plus interest calculated thereon) because the plaintiff is not entitled to any award based on the residual value of the equipment.

5. That the judgment of the trial court for attorney's fees should be reduced to an amount not in exess of $10,000.00.

Respectfully submitted,

John G. Marshall

James N. Barber

CERTIFICATE OF MAILING

I hereby certify that I served four copies of the foregoing APPELLANT'S BRIEF upon the plaintiff, by mailing the same to Plaintiff's Attorney, J. Bruce Reading, 261 East 300 South, Second Floor, Salt Lake City, Utah 84111 on this 22nd day of August, 1985.

John D. Marshall

ADDENDUM

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW
2. JUDGMENT
3. SECTION 70A-9-504(3), U.C.A. 1953
4. SECTION 34-21-963(c), WYOMING STATUTES, 1977
5. SECTION 25-5-4, U.C.A. 1953
6. SECTION 78-25-17, U.C.A. 1953

J. BRUCE READING, No. 2700
MORGAN, SCALLEY & READING
Attorney for Plaintiff
261 East 300 South, Second Floor
Salt Lake City, Utah 84111
Telephone: 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

IFG LEASING COMPANY, Plaintiff,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
BONNEVILLE DEVELOPMENT CORPORATION d/b/a RAMADA INN, EVANSTON, WYOMING, et al.,	:	Civil No. C-83-8536
Defendants.	:	Judge Judith M. Billings

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

The above-entitled matter came on for trial before the Honorable Judith M. Billings, Judge of the above-entitled Court, during the time period of February 21, 1985 through February 25, 1985, with the plaintiff being represented by Mr. Bruce Reading, attorney at law, the defendants Hansen and Gordon being represented by Mr. James Barber, attorney at law, and defendant Nelson being represented by Mr. John Marshall, attorney at law, and the Court having heard evidence and accepted exhibits and having reviewed both testimony and documents after taking the matter under advisement now enters the following:

FINDINGS OF FACT

1. That the defendants are residents of Salt Lake County, and the Court has jurisdiction of both the individual

defendants and the subject matter of this litigation.

2. That the corporate defendants Ecotek National n/k/a Irving Financial Corporation and Bonneville Development Corporation are Utah corporations doing business in Salt Lake County, State of Utah, and presently, are under the protection of the United States Bankruptcy Court having filed Chapter 11 proceedings.

3. That during the time period of October 1980 through September 1981, the individual defendants were principals in the control and operation of Bonneville Development Corporation, each serving on the board of directors and as officers of the corporation, and holding existing shareholder interests or the right to acquire that position.

4. That the defendant Bonneville Development Corporation d/b/a Ramada Inn, Evanston, Wyoming executed and delivered to the plaintiff the following leases on or about the dates indicated:

a. On or about March 6, 1983, lease no. 56809;

b. On or about May 14, 1981, lease no. 56810;

c. On or about June 20, 1981, lease no. 56811;

d. On or about July 29, 1981, lease no. 56812; and

e. On or about September 3, 1981, lease no. 57938.

5. That on or about the dates of the execution of each of the five leases, each of the individual defendants, Hansen, Gordon, and Nelson, executed a continuing and unconditional guaranty agreement whereby they agreed to perform, pay, and

SALT LAKE CITY, UTAH 84111
(801) 531-7870

discharge all of the defendant Bonneville Development Corporation's obligations under the respective lease agreements.

6. At the time when guaranty agreements were presented with each of the above five leases, the guaranty agreements were not dated and were not identified by lease number.

7. That each of the five leases were funded by the plaintiff, and the defendant Bonneville Development Corporation received the use of personal property pursuant to those leases.

8. That the last payment made by the defendants under any of the lease contracts was on May 13, 1982.

9. Plaintiff attempted to force payments during the summer of 1982, but did not repossess the collateral.

10. The defendant Bonneville Development Corporation d/b/a Ramada Inn, Evanston, Wyoming was placed in receivership on the 5th day of October, 1982.

11. That the defendant Bonneville Development Corporation filed for protection in the United States Bankruptcy Court for the District of Utah on May 31, 1983.

12. That on or about March 30, 1984, letters were sent to the defendants Gordon, Hansen, and Nelson informing them of the date after which the personal property, which was the subject matter of the leases, would be sold at private or public sale.

13. The personal property was sold to Commercial Security Bank and First Security Bank during the month of September, 1984 at private sale for the amount of Eighty Five Thousand Dollars ($85,000.00).

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

14. Expert witness testimony placed the value of the personal property at fifteen to twenty-five percent of the original purchase value. The actual amount received was approximately eighteen percent (18%) of its original value.

15. No written notification of acceleration of payments pursuant to paragraph 19(b) of the leases was ever sent by the plaintiff to the defendants. Such notification was only given by filing of the complaint in this matter on or about 12th day of December, 1983.

16. As a part of plaintiff's bargain, it had established residual or salvage value in the equipment of Twenty-Three Thousand Eight Hundred Five Dollars and Sixty-Five Cents ($23,805.63).

17. At the time of the sale of the personal property, a wood carving was retained by the plaintiff and not sold with the other personal property.

18. A check in the amount of Six Thousand Dollars ($6,000.00) paid by the plaintiff for certain items of personal property under the leases was never cashed.

19. Attached hereto, as appendix "A" to these findings, is the recap of all amounts due and owing and amounts credited under each of the leases for the sale of equipment.

20. The defendant Bonneville Development Corporation agreed, pursuant to the lease agreements, to pay any reasonable attorney fees.

21. Plaintiff's counsel has submitted an affidavit in support of attorney's fees with said affidavit incorporating

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

actual time and charges made in this matter.

22. All of the parties agree that the leases were, in fact, financing agreements that were subject to the Uniform Commercial Code.

From the foregoing findings of fact, the Court now enters its:

CONCLUSIONS OF LAW

1. That the guaranties of the individual defendants, Rodney F. Gordon, Jim Hansen, and Frank A. Nelson (exhibits 2, 9, 16, 23, and 30) were intended by the parties to guarantee the leases entered into by Bonneville Corporation and are legally binding contracts. Although these documents may have been blank as to lease number, date, and even the equipment covered, the defendants knew or should have known that the documents were intended for the five leases at issue.

2. That the sale of the collateral was commercially reasonable and conformed to the requirements of the Uniform Commercial Code. The sale was a private sale, after notice was given to the individual defendants, and the price obtained was commercially reasonable.

3. The Court finds that the sale of the wood carving was not commercially reasonable and allows an offset of Ten Thousand Dollars ($10,000.00) for the price of this carving.

4. The Court finds that the Six Thousand Dollar ($6,000.00) check that was not cashed should also be allowed as an offset.

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

5. The Court finds that the damages should be computed as follows:

a. All principal amounts due and owing as of the date of the filing of the complaint should earn interest at the the statutory rate of ten percent (10%) per annum.

b. The plaintiff should be awarded the residual value of the equipment in the amount of Twenty-Three Thousand Eight Hundred Five Dollars and Sixty-Five Cents ($23,805.65).

c. The amount of damages pursuant to lease number 56809 is One Hundred Sixty-Three Thousand Nine Hundred Ninety-Seven Thousand and Ninety-Seven Cents ($163,997.97).

d. The amount of damages pursuant to lease number 56810 is One Hundred Seventy-Four Thousand Eight Hundred Seventy-Nine Dollars and Fourteen Cents ($174,879.14).

e. The amount of damages pursuant to lease number 56811 is Three Hundred Five Thousand Eight Hundred Forty-Five Dollars and Sixty-Three Cents ($305,845.63).

f. The amount of damages pursuant to lease number 56812 is One Hundred Forty-Eight Thousand Six Hundred Seventy-Seven Dollars and Ninety-Two Cents ($148,677.92).

g. The amount of damages pursuant to lease number 57938 is Twenty-One Thousand Four Hundred Sixteen Dollars and Ninety-One Cents ($21,416.91).

The total amount of damages suffered by the plaintiff is Eight Hundred Thirty-Eight Thousand Six Hundred Twenty-Three Dollars and Twenty-Two Cents ($838,623.22).

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

6. Defendants should be awarded an offset against these damages in the amount of Ten Thousand Dollars ($10,000.00) and Six Thousand Dollars ($6,000.00) for the unpaid check.

7. The total amount of damages awarded to the plaintiff should be Eight Hundred Twenty-Two Thousand Six Hundred Twenty-Three Dollars and Twenty-Two Cents ($822,623.22).

8. In addition to the foregoing, plaintiff should be awarded its attorney's fees in the amount of ~~Seventeen Thousand Dollars ($17,000.00).~~ Thirteen Thousand Four Hundred and Eighty-Five Dollars ($13,485.00). JB.

9. Plaintiff should be awarded its costs incurred herein in the amount of Three Hundred Two Dollars ($302.00).

DATED this 19 day of March, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk
By Debra D. Rickes
Deputy Clerk

Judith M. Billings
District Court Judge

Mailing Certificate

I hereby certify that on the 14 day of March, 1985, I mailed a true and exact copy of the foregoing Findings of Fact and Conclusions of Law to the following:

John G. Marshall
Attorney for defendant Nelson
525 East 300 South, No. 102
Salt Lake City, Utah 84102

James N. Barger
Attorney for defendants Hansen and Gordon
255 East 400 South, No. 100
Salt Lake City, Utah 84111

Marsha Gibbs

SALT LAKE CITY, UTAH 84111
(801) 531-7870

ATTACHMENT A to Findings of Fact and Conclusions of Law
IFG Leasing Company v. Bonneville Development Corporation, Civil No. C-83-8536

Lease Number	Date	Amount (Remaining lease payments)	Amounts Received Accounts Receivable	Sales Taxes	Interest 10% from 12/12/83 (Date complaint filed)	Ba I
56809	5/13/82 9/28/84 2/21/85	$162,280.08	$16,982.84	$679.31	**$12,849.03 $ 5,851.70	$162, $158, **$163,**
56810	5/13/82 9/28/84 2/12/85	$172,385.24	$17,397.21	$695.89	**$13,649.13 $ 6,241.98	$172, $168, **$174,**
56811	5/13/82 9/28/84 2/21/85	$301,486.67	$30,428.76	$1,217.15	**$23,871.14 $10,916.58	$301, $294, **$305,**
56812	5/13/82 9/28/84 2/12/85	**$146,558.34**	$14,791.41	$591.65	**$11,604.21 $ 5,306.78	$146, $143, **$148,**
57938	5/13/82 9/28/84 2/21/85	$21,111.46	$2,130.55	$85.23	$ 1,671.56 $764.44	$21, $20, **$21,**

**Calculated from date of filing of complaint, December 12, 1983.

Total: $838,

J. BRUCE READING, No. 2700
MORGAN, SCALLEY & READING
Attorney for Plaintiff
261 East 300 South, Second Floor
Salt Lake City, Utah 84111
Telephone: 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

IFG LEASING COMPANY, Plaintiff,	:	JUDGMENT Bk. 196 No. 2019 3-19-85 - 3:02 p.m.
vs.	:	
BONNEVILLE DEVELOPMENT CORPORATION d/b/a RAMADA INN, EVANSTON, WYOMING, et al.,		Civil No. C-83-8536
Defendants.	:	Judge Judith M. Billings

The above-entitled matter was tried to the Court from February 21, 1985 through February 25, 1985 with the plaintiff appearing through its authorized representatives and through its counsel, J. Bruce Reading, the defendants Hansen and Gordon being represented by Mr. James Barber, attorney at law, and the defendant Nelson appearing in person and being represented by Mr. John Marshall, attorney at law, and the Court having heretofore entered its findings of fact and conclusions of law now enters the following judgment.

1. The guaranties of the individual defendants Rodney F. Gordon, Jim Hansen, and Frank A. Nelson (exhibits 2, 9, 16, 23, and 30) were intended by the parties to guarantee the lease agreements entered into by Bonneville Development

Corporation and are legally binding contracts.

2. The sale of the collateral was commercially reasonable and conformed to the requirements of the Uniform Commercial Code. The sale of the wood carving was not commercially reasonable.

3. It is ordered that the defendants be allowed the following offsets:

a. Ten Thousand Dollars ($10,000.00) for the wood carving; and

b. Six Thousand Dollars ($6,000.00) for the uncashed check.

4. All principal amounts due and owing as of the date of the filing of the complaint shall earn interest at the statutory rate of ten percent (10%) per annum.

5. Damages shall be computed regarding the leases as follows:

a. Residual value in the equipment:	$23,805.65
b. Damages pursuant to lease number 56809:	$163,997.97
c. Damages pursuant to lease number 56810:	$174,879.14
d. Damages pursuant to lease number 56811:	$305,845.63
e. Damages pursuant to lease number 56812:	$148,677.92
f. Damages pursuant to lease number 56938	$21,416.91
Total amount of damages suffered by plaintiff:	$838,623.22

SALT LAKE CITY, UTAH 84111
(801) 531-7870

6. The total amount of damages awarded to the plaintiff shall be Eight Hundred Twenty-Two Thousand Six Hundred Twenty-Three Dollars and Twenty-Two Cents ($822,623.22), and judgment is hereby awarded to the plaintiff and against the defendants in said amount.

7. In addition, plaintiff shall be awarded its reasonable attorney's fees in the sum of ($13,485.00) ~~Seventeen Thousand Dollars~~ ($~~17,000.00~~).

8. Plaintiff should be awarded its costs incurred in the amount of Three Hundred Two Dollars ($302.00).

9. The above amounts shall accrue interest at the rate of twelve percent (12%) per annum from the date of judgment until paid in full.

DATED this 19 day of March, 1985.

ATTEST
H. DIXON HINDLEY
Clerk
By Debra D. Ricks
Deputy Clerk

BY THE COURT:

Judith M. Billings
District Court Judge

Mailing Certificate

I hereby certify that on the 14th day of March, 1985, I mailed, postage prepaid, a true and exact copy of the foregoing Judgment to the following:

Mr. John G. Marshall
Attorney for defendant Nelson
525 East 300 South, No. 102
Salt Lake City, Utah 84111

Mr. James N. Barber
Attorney for defendants Hansen and Gordon
255 East 400 South, No. 100
Salt Lake City, Utah 84111

Marsha L. Libby

261 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 531-7870

70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.

* * * * *

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

§ 34-21-963. Secured party's right to dispose of collateral after default; effect of disposition (9-504).

* * * * *

(c) Disposition of the collateral may be by public or private proceedings and may be made by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

25-5-4. Certain agreements void unless written and subscribed. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another.

(3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

(4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate.

78-25-17. Writings bearing obvious alterations—Explanation required. —The party producing as genuine a writing which has been altered, or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance of alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration does not change the meaning or language of the instrument. If he does this, he may give the writing in evidence, but not otherwise.