

1977

William J. Johnson And Patricia Johnson v. C. E. Carman, Aka Cal E. Carman : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM J. JOHNSON and
PARTICIA JOHNSON,

Respondents,

-VS-

Case No. 14807

C. E. CARMAN, aka
CAL. E. CARMAN,

Appellant.

BRIEF OF RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the lower Court's determination that Respondents' forfeiture of all payments made under a Uniform Real Estate Contract upon Respondents' default was unconscionable.

DISPOSITION OF THE LOWER COURT

A non-jury trial was held on September 9, 1976, in the Fourth Judicial District Court of Duchesne County, State of Utah, the Honorable J. Robert Bullock presiding. By a memorandum decision dated September 13, 1976, the lower Court entered judgment for Respondents in the sum of \$8,845.00 with interest, determining that to allow Appellant to retain this amount as liquidated damages was unconscionable.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the lower Court's decision affirmed.

STATEMENT OF FACTS

Appellant and Respondent entered into a contract for the sale of Appellant's land to Respondents on May 3, 1975. Pursuant to the Uniform Real Estate Contract, the Respondents were to pay \$170,000.00 in installment payments, after an initial down payment of \$20,000.00, which was paid. The terms provided that Respondents were to pay the balance (\$150,000.00) beginning on June 15, 1975, at the rate of \$1,477.11 per month for 12 months. At the end of 12 months a balloon payment of \$15,000.00 would be due. The monthly payments would remain the same for the second 12 months of the contract, with another balloon payment of \$7,649.36 due at the end of the second 12 month period. The remaining balance was to be paid in equal monthly installments of \$1,428.57 for the next ten years. These final payments included interest at $8\frac{1}{2}\%$ per annum.

Respondents performed under the contract until the early part of 1976, when Respondents were unable to meet the payments. At this time the parties agreed to alter the contract.

The alteration provided that the contract price would be \$150,000.00 even though Respondents had in fact paid the \$20,000.00 down payment (reducing the balance on the original contract to \$150,000.00) and substantial other payments. The monthly payments were reduced to \$1,301.80 and the provision for balloon payments was deleted. The effect of this alteration was actually an increase in the total price to be paid, while reducing the monthly installments.

Payments under the altered contract were to begin on April 1, 1976. Respondents made the first payment and then became unable to meet any further payments. Respondents informed Appellant of this fact in May, 1976. Appellant sent Respondent a demand notice and Respondent quit the premises on May 24, 1976.

Respondents approached the Appellant with a request to retain their equity, however, Appellant would not agree. Thereafter, on June 3, 1976, Respondents, through counsel,

sent a letter to Appellant asking Appellant to quit the premises. Appellant remained in possession and this suit was filed on behalf of the Respondents on June 17, 1976.

ARGUMENT

POINT I

A LIQUIDATED DAMAGE CLAUSE IS IMPROPER AND AGAINST PUBLIC POLICY IN AN INSTALLMENT LAND CONTRACT AND SHOULD NOT BE ENFORCED.

This Court has recognized that forfeitures are disfavored under the law. *Perkins v. Spencer*, 121 Ut. 468, 243 P.2d 446 (1952). Forfeitures are disfavored for the simple reason that forfeitures work as a penalty above and beyond the actual damages under a contract. And it is well settled that contract damages are limited to those that are reasonably foreseeable under the terms of the particular contract. *Hadley v. Baxendale*, 9 Exch. 341 (1854).

In some situations, however, Courts have allowed parties to a contract to fix the damages in the event of breach in advance. This Court has adopted the position taken by the Restatement of Contracts § 339:

(1) An agreement made in advance of breach fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach unless:

(a) The amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) The harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. *Perkins v. Spencer*, supra.

the wisdom behind this approach is that it guards against the use of liquidated damages provisions as a penalty, while at the same time allowing parties to settle disputes outside the judicial process, in appropriate cases. It can readily be seen that an installment land contract is not such an appropriate case.

Paragraph 16A of the Uniform Real Estate Contract meets neither of the criteria set forth in § 339 of the Restatement of Contracts. The forfeiture of all monies paid by the buyer is not a reasonable forecast of just compensation in that it fails to take into account

any of the criteria concerning actual damages that this Court has endorsed. These criteria were set forth in *Cole v. Parker*, 5 Ut. 2d 272, 300 P. 2d 263, 267:

- (1) Loss of an advantageous bargain;
- (2) Any damage to or depreciation of the property;
- (3) Any decline in value due to change in market value of the property not allowed in items number 1 and 2; and
- (4) For the fair rental value during the period of occupancy.

Paragraph 16A, which is fixed in the contract and not a bargained-for provision, has no relationship to damages at all, but rather, has a varying effect subject to the contract price, the monthly installments, and the length of time the payments are actually paid. Therefore, Paragraph 16A is not a reasonable forecast of just compensation and should not be enforced.

The Court made Findings of Fact pursuant to its memorandum decision finding that payments had been made by Plaintiffs to Defendant as follows:

Down payment	\$20,000.00
Payments on principal	3,839.31
Payments on interest	<u>10,756.79</u>
Total	\$34,596.10

The Court also found that Defendant had sustained damages as follows:

Interest on \$150,000.00 to May 24, 1976, at 8½ % per annum	\$14,485.00
Benefit of bargain	5,500.00
Attorney's fees	1,165.00
Reasonable cost to restore premises	<u>4,500.00</u>
Total	\$25,650.00

Upon these facts the Court found that the forfeiture of \$8,845.00 as liquidated damages was unconscionable and entered judgment accordingly.

A more compelling reason for not enforcing Paragraph 16A lies in the fact that this is not a situation in which damages are incapable or very difficult of determination. In fact, the test spelled out by this Court in *Cole v. Parker*, supra, and related cases, provides a formula to determine *exactly* the actual damages to the seller. And this is in fact done under this Court's present method of determining unconscionability.

The Provisions of Paragraph 16A of the Uniform Real Estate Contract meet neither of the requirements of § 339 of the Restatement of Contracts. It must meet both requirements to be enforceable. Therefore, the provision is against public policy and well settled contract principles and must not be enforced.

POINT II

UNCONSCIONABILITY IS AN EQUITABLE PRINCIPLE REQUIRING CONSIDERATION OF ALL THE FACTS AND CIRCUMSTANCES OF THE CASE.

Assuming *arguendo* that this Court fails to find Paragraph 16A *per se* unenforceable, the Court must uphold the lower Court's determination that the operation of Paragraph 16A worked an unconscionable penalty to the Respondents.

A finding of unconscionability is not arrived at by a mechanical comparison of figures. This Court, recognizing that the heart of the matter is firmly grounded in equity, has looked to the totality of the circumstances.

In *Carlson v. Hamilton*, 8 Ut. 2d 272, 332 P. 2d 989 (1958), the case which Appellant contends is controlling, the Court considered factors other than mere figures in determining that there was no unconscionability. When the buyer first became in arrears in *Carlson*, the seller offered to forego payments on principal if only the buyer would pay the interest and taxes. The buyer was still unable to perform. In addition there was considerable damage done to the property. The equities were clearly in favor of the seller, and consequently the Court found that a forfeiture of 9½% (\$119.94) was not unconscionable.

In *Jacobsen v. Swan*, 7 Ut. 2d 420, 326 P. 2d 712 (1954), cited in Appellant's brief, the

Court found that after carrying the buyer in default for over 18 months, the seller actually suffered a loss. The Court said.

(T)he trial Court rightly found that the least to which Plaintiffs were entitled were the return of the property and the retention of the amounts paid in by Defendants which were far short of making Plaintiffs whole. *Jacobsen v. Swan*, supra, at 716.

If a determination of unconscionability rests simply upon a sterile comparison of figures the entire basis of equity is ignored. A reasoned analysis will reveal that reliance on a fixed formula will cause inequitable results.

First, a Court cannot set a fixed percentage limitation and decide that forfeitures above a certain percentage are unconscionable, while those below are not. That is not the nature of equity. Second, the same sum of money may be a penalty to one buyer, and not so as to another, depending on the circumstances of the particular buyer.

POINT III

THE TRIAL COURT IS IN THE BEST POSITION TO DETERMINE THE EQUITIES OF THE SITUATION AND ITS DETERMINATION SHOULD NOT BE DISTURBED.

The trial judge, sitting as trier of fact, heard extensive evidence on the events prior to and subsequent to buyers default. Evidence of the alteration of the contract showed that Appellant did indeed profit from the alteration. The alteration resulted in a net increase of payments to be received by Appellant.

The trial judge was also aware of the circumstances leading to default. The judge knew that Respondent, William J. Johnson, had been disabled in an auto accident shortly before the date of default. The default was due to an inadvertent turn of events making it impossible for Respondents to meet their obligations. And Appellants have been made whole for their actual damages. The trial judge considered all of the relevant equities involved and determined that the forfeiture was unconscionable. This finding should not be disturbed. Even assuming the Court made an error in computing the measure of actual damages, this would not change the result, but only the ultimate amount of recovery.

CONCLUSION

Paragraph 16A of the Uniform Real Estate Contract is not enforceable under the accepted principles this Court has endorsed with respect to liquidated damages. It is not a reasonable forecast of damages, nor is an installment land sale the type of situation suitable for liquidated damages. And the enforcement of the forfeiture clause works an unconscionable penalty upon Respondents in this case. The trial Court's ruling must be affirmed.

DATED this 29th day of April, 1977.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent to Robert M. McRae, attorney for Appellant, 370 East Fifth South, Salt Lake City, Utah, 84111, postage prepaid, this 2nd ^{May} day of April, 1977.


MATT BILJANIC