

1977

# Robert E. Call Everett H. Call And Ann D Call v. Timber Lakes Corporation A Utah Corporation \_ Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

ROBERT E. CALL, EVERETT H. )  
CALL and ANN D. CALL,

Plaintiffs and  
Respondents,

Case No. 1428

vs.

TIMBER LAKES CORPORATION,  
a Utah Corporation,

Defendant and  
Appellant.

BRIEF OF RESPONDENTS

Appeal from the District Court,  
Judicial District In and For Wasatch County

Honorable J. Robert Bullock,

\*\*\*\*\*

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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ROBERT E. CALL, EVERETT H. )  
CALL and ANN D. CALL,

Plaintiffs and )  
Respondents, )

Case No. 14839

vs. )

TIMBER LAKES CORPORATION, )  
a Utah Corporation, )

Defendant and )  
Appellant. )

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BRIEF OF RESPONDENTS

\* \* \* \* \*

STATEMENT OF THE CASE

This is an action brought by Respondents for a Declaratory Judgment declaring a certain contract for sale of real property, dated November 6, 1971, by and between the parties, to be in full force and effect and adjudicating the respective rights and duties of the parties under and pursuant to the provisions of said contract.

DISPOSITION OF THE LOWER COURT

A nonjury trial was held in the District Court of the Fourth Judicial District in and for Wasatch County, State of Utah before the Honorable J. Robert Bullock. Pursuant to his

Findings of Fact and Conclusions of Law (set out in more detail in Appellant's Statement of Facts), Judge Bullock entered a Memorandum Decision reinstating the contract upon payment by Respondents to Appellant of all delinquent payments and accrued interest together with costs (not attorney's fees) within fifteen days from the date of judgment.

This appeal was taken to the Supreme Court of the State of Utah pursuant to Rule 72(a) of the Utah Rules of Civil Procedure.

#### RELIEF SOUGHT ON APPEAL

Respondents ask this Court to affirm the judgment of the lower court.

#### STATEMENT OF FACTS

The Respondents accept generally the facts set forth in Appellant's brief with the following minor additions. Although there is a conflict in the testimony, it is the position of the Respondents that prior to termination of the ten day notice furnished them by letter of December 12, 1974, they did, in fact, contact responsible officers of Appellant company in response to such notice. (See transcript of trial, page 14, lines 19 through 27.) It is noted further that the time between the notice of December 10, 1974, and

the offer of payment by the Respondents was, in fact, twenty-two rather than twenty-three days as set forth in Appellant's statement.

#### ARGUMENT

UNDER ALL THE CIRCUMSTANCES OF THIS CASE THE TEN DAYS SPECIFIED IN THE LETTER OF DECEMBER 12, 1974, IN WHICH THE CONTRACT WAS TO BE BROUGHT CURRENT WAS NOT A REASONABLE TIME AND TWENTY-TWO DAYS WAS NOT AN UNREASONABLE TIME FOR RESPONDENTS TO TENDER PERFORMANCE AFTER NOTICE.

The cases cited by Appellant represent those cases which most strongly present and represent its position. Included are cases which speak of a so-called waiver of rights by the Seller and the need for notice after delinquencies. With these we have no quarrel. But the two cases in fact relied upon by Appellant to state its case are Pacific Development Company vs. Stewart, 113 U. 403, 195 P. 2d 748 (1948) and Fullmer vs. Blood \_\_\_\_ U. 2d \_\_\_\_, 546 P. 2d 606 (1976). In those cases the Court upheld the right of the Seller to terminate the interest of the Buyer under facts and upon conditions which the Court found to be reasonable under all the circumstances. As suggested by Appellant's brief, "each case must be considered on its own facts and what may be reasonable time in one case may not be reasonable in another".

Both of Appellant's cases may be readily distinguished from the one here to be decided.

We look first at Pacific Development Company vs. Stewart, supra. Notwithstanding the extensive quotations from this case used by the Appellant in support of its contentions, the real holding of the case is this:

We hold that twenty-three days was a reasonable time to allow Defendant to make up the overdue payments under the circumstances of this case. (Page 751)

The significant and controlling difference between Pacific Development Company vs. Stewart, supra, and the present case is simple. In Pacific, the Sellers were given a right to foreclose because they had given the Buyers twenty-three days to pay the delinquency and the Buyers had not done so. In our case, the Buyers tendered the full delinquency within twenty-two days (twelve days past the deadline) and the tender was refused by the Seller. It is the testimony of Respondents that their tender of the full delinquency was within the period approved by the Appellant Seller. (See Transcript of Trial page 14, lines 19 through 30, page 15, full page, and page 16, lines 1 through 29.) At trial there was conflicting testimony as to certain facts and dates, due to fabrication, misunderstanding, mistake, or poor memories. Based upon this conflicting testimony, the lower court found that there was no

representation, commitment, or agreement that the time for bringing the contract current would be extended beyond December 22, 1974. More significantly for our purposes here, however, the trial court did find that there was some contact between the parties following the notice and prior to January 3, 1975. (See paragraph 5 of Findings of Fact.) Based upon all the evidence and after sifting certain conflicting testimony and appraising the demeanor of the witnesses, Judge Bullock entered as paragraph 6 and 8 of his Findings of Fact the following:

6. On January 3, 1975, Plaintiffs offered to then bring the contract current by paying all delinquent payments and accumulated interest and were ready and able to do so, but such offer was refused by the Defendant.

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8. Under all the circumstances of this case, the ten days specified in the letter of December 12, 1974, in which the contract was to be brought current was not a reasonable time and twenty-two days was not an unreasonable time for Plaintiffs to tender performance after notice.

As indicated by references to Transcript of Trial in the Paragraph above at pages 14, 15, and 16 the testimony of Respondents is clearly to the effect that in their minds at least they were still negotiating this matter, both as to time and amount, right up to the date they tendered payment

of the delinquency, to-wit, January 3, 1975. They were not unaware or nor indifferent to the need to do something to cure the delinquency. They clearly wanted to retain their interest in the contract. They were, however, limited in this regard not only by their own circumstances, but by the actions of the Sellers. It is true as argued by Appellant that Respondents did not plead hardship as a reason for their failure to make timely tender. However, the testimony of Respondents is that on the due date given in the notice they asked for and received additional time at the end of which period they tendered full payment of the delinquency. While testimonies differ as to the dates and efforts, the fact is that the Respondents were trying to and finally did tender payment within what the Court below considered under all the circumstances to have been a reasonable period.

Next, in Appellant's case of Fullmer vs. Blood, *supra*, in which Sellers were permitted to terminate the rights of purchasers, note that it was nearly two months before purchasers made any effort to comply with the Seller's demand. The language of the Court in this case is significant:

We do not confront the specific problem as to whether the giving of five days notice to make the one

yearly payment or suffer forfeiture was a reasonable time. The question is whether it was a reasonable demand under the terms of the contract and the total circumstances to which the Court looks in making that determination. The facts are that Dean Fullmer wrote the letter on March 26, 1974, requiring that one annual payment be made within five days.....and it was not until nearly two months later on June 5, that the Defendants made any effort to comply with the demand by offering to pay one annual payment.

This is in sharp contrast to the efforts of the Respondents in the present case, whose testimony is that they tried to contact Appellant the day before the deadline, did contact Appellant the day of the deadline, received assurance that they would have until January 3, to pay (again recognizing the difference in the testimony as hereinabove referred to) and on January 3, did, in fact, tender full payment of the delinquency. However the conflicting evidence is viewed by the Court and whichever witnesses the Court chooses to believe, that is a far different set of circumstances than those in Fullmer vs. Blood, supra, where the Defendant made no effort to comply for nearly two months. As argued elsewhere in this brief, the trial court heard the conflicting testimony and determined that the efforts of Respondents were adequate to insulate them against forfeiture.

The case of Fullmer vs. Blood, supra, also sets forth what this Court has called in another matter "the traditional

rule of review" (Jensen vs. Nielsen, 26 U. 2d 96, 485 P. 2d 673 (1971)). At page 610 of Fullmer vs. Blood, the Court said:

A suit of this nature involving the invocation of the forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court. (Emphasis added.)

Appellant's brief at page 6 quotes First Security Bank of Utah vs. Demiris, 10 U. 2d 405, 354 P. 2d 79, in support of its contentions that the Supreme Court need not accept the findings of the lower court, but has the prerogative to modify or make new findings. A reading of the first half of the paragraph relied upon by Appellant rather than just the second half of the said paragraph sets forth the duty of the Supreme Court in such a matter:

It is to be recognized that in reviewing the Findings of Fact, we should indulge considerable latitude to the findings of the trial court and should not disturb them unless the evidence clearly preponderates to the contrary. (Pages 98 and 99) (Emphasis added.)

The Supreme Court has said similarly in re Crandell's Estate, 9 U. 2d 161, 340 P. 2d 760 (1959):

Accordingly it is the prerogative of this Court to review the evidence upon which the said order was based. Nevertheless, it is our declared policy to indulge considerable

latitude to the determination made by the trial court, and not to disturb his judgment unless the evidence clearly preponderates against it. (Emphasis added.)

It is respectfully submitted to this Court that in the case at hand not only does the evidence not clearly preponderate against the findings of the trial court, but rather clearly supports such findings and judgment.

#### CONCLUSION

The lower court found that Respondents had paid approximately \$3,181.00 on a \$10,000.00 purchase of real property; they had been delinquent on several occasions and had been permitted by the Appellant to make up the payments. On December 12, 1974, they were served a ten-day notice as a result of which they contacted and negotiated with Appellant company and on January 3, 1975, tendered full payments of the delinquency. Payment was refused by the Seller.

Recognizing that the law generally does not favor forfeitures and under the settled principle that in reviewing an equity matter, the Supreme Court's declared policy is to indulge considerable latitude to the determination made by the trial court, Respondents respectfully request this Court to affirm the findings of the lower court and to uphold its judgment "that upon tender by Plaintiffs to the Defendant

of delinquent payments and interest in the amount of \$4,832.59, plus costs by September 11, 1976, the contract between the parties is ordered reinstated and in full force and effect".

Respondents further pray for an award of reasonable attorney's fees and costs expended in responding to the appeal.

Dated this 24th day of February, 1977.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Russell C. Harris", is written over a horizontal line.

RUSSELL C. HARRIS  
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CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of February, 1977, two true and correct copies of the foregoing Brief were mailed, postage prepaid, to John S. Adams, Adams, Kasting & Anderson, Attorney for Appellant, Suite 200, The Glass Factory, Arrow Press Square, Salt Lake City, Utah 84101.

  
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