

1986

George S. Perkins and Lillie Perkins v. Interlake Thrift : Brief of Appellant

Utah Supreme Court

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CKET NO. 860306-CA IN THE ~~SUPREME~~ COURT OF THE STATE OF UTAH

Supreme Court No. 20642

APPEAL FROM BENCH TRIAL IN
SALT LAKE COUNTY DISTRICT COURT,
JUDGE PHILIP R. FISHLER

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AUG 23 1985

Clerk, Supreme Court

LIST OF PARTIES

George S. and Lillie Perkins - plaintiffs and appellants on appeal.

Interlake Thrift - defendant and respondent on appeal.

Dick E. Coombs - defendant, actions by or against whom were stayed by bankruptcy filing; not a party on appeal.

Coombs Investment Corporation - defendant, actions by and against which were stayed by bankruptcy filing, not in business, not a party on appeal.

Century 21--Monson and Company - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Peter Robert Lucero - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Jesse Monson - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Guarantee Title Company - Third-party defendant, not in business; not a party on appeal.

Mark J. Williams - Third-party defendant, dismissed out by trial court; not a party on appeal.

Southern Title Guaranty Company, Inc. - Third-party defendant. Did not appeal judgment against it in favor of Interlake Thrift.

Fidelity National Title Insurance Company, Inc. - Third-party defendant; not a party on appeal.

Ruth R. Coombs - Third-party defendant, actions against whom were stayed by bankruptcy filing; not a party on appeal.

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE S. PERKINS and)	
LILLIE PERKINS,)	
)	
Plaintiffs and)	
Appellants,)	District Court No. C82-6009
)	
vs.)	
)	Supreme Court No. 20642
INTERLAKE THRIFT, a Utah)	
corporation,)	
)	
Defendants and)	
Respondents.)	

APPELLANT'S BRIEF

APPEAL FROM BENCH TRIAL IN
SALT LAKE COUNTY DISTRICT COURT,
JUDGE PHILIP R. FISHLER

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STATEMENT OF ISSUES PRESENTED

Appellants believe that Phase I presents simply an issue of whether the trial court's conclusion as to the priority of liens on real property was supported by its own findings or by the evidence.

Issues presented in Phase II are whether the trial court granted the appropriate remedy, whether its limited award of damages is supported by the evidence, and whether it abused its discretion in failing to award punitive damages and adequate attorney fees.

STATEMENT OF THE CASE

NATURE OF THE CASE:

Plaintiffs brought action to determine priority of lien interests on real property which had been their home until they sold it in October, 1980, and for fraud involved in a loan rewrite and subordination agreement pertaining to those interests in the same property in late 1981 after the buyer became delinquent in payment.

PROCEEDINGS AND DISPOSITION IN LOWER COURT:

Plaintiffs (hereinafter Perkins) initially filed their complaint against Dick E. Coombs, (hereinafter Coombs), Coombs Investment Corporation, (hereinafter CIC) and Interlake Thrift on July 26, 1982. (R. 2) Interlake cross-claimed against Coombs and brought a third-party complaint against Guarantee

Title Company (hereinafter Guaranty), Southern Title Guarantee Company, Fidelity National Title Insurance Company, Mark J. Williams and Ruth R. Coombs. Coombs and CIC brought a third-party complaint against Monson & Company, Peter R. Lucero and Jesse Monson. The third-party actions against Monson & Co., Lucero, and Monson were subsequently dismissed pursuant to motion and stipulation. (R 326, 408-409). Interlake's claim against Williams was dismissed after Phase I of the trial (R. 680). Actions by and against Coombs and Ruth Coombs were stayed by their bankruptcy filings (R. 640-641).

Phase I judgment, tried in 1983, entered December 11, 1984, gave all parties judgment on their claims against CIC, and Interlake was found to have priority over Perkins after the sale of October 31, 1980.

Phase II judgment, tried in 1984, entered November 19, 1984, gave Perkins judgment against Interlake for fraud, and the trial court certified the judgments between Perkins and Interlake for purposes of appeal pursuant to Rule 54(b), Utah Rules of Civil Procedure (R. 821-824), even though proceedings against Dick and Ruth Coombs were stayed due to their having taken bankruptcy in Las Vegas, Nevada. The trial court gave Interlake judgment against the underwriter, Southern Guaranty Title Company, which chose to pay and satisfy the judgment and is not a party to this appeal.

Perkins brought Motion to Amend Judgment, filed December 21, 1984 (R. 874-876), which was denied by Order entered March 19, 1985. (R. 949-950).

Perkins filed their Notice of Appeal on April 16, 1985. (R. 952-954).

STATEMENT OF FACTS

This case was tried in two phases. Phase I involved sale of the Perkins' home in 1980, and Phase II involved its subordination in 1981. The court's non-jury findings for Phase I are annexed as Addendum 1 and Phase II as Addendum 2.

Perkins contend that the evidence justified findings of fact in addition to those made by the trial court.

Perkins believe that they are entitled to the relief they seek based on the existing trial court's Findings of Fact, but that even so, particularly in the area of balancing of equities, an interpretation of the facts will be helpful.

The line between interpretation of facts and argument of facts is thin, so Perkins will refer essentially to testimony of Interlake, to its documents, and to the testimony of Paul Scott, the real estate agent for Coombs and CIC. Perkins will draw from these factual conclusions they deem logical and compelling.

In 1980, plaintiffs-appellants, George and Lillie Perkins, decided to move from their home at 54 South Jeremy Street, Salt Lake City, Utah. They had fee simple title to the home and it was fully paid for.

They sold their home to Coombs Investment Corporation (CIC). This was a corporation formed and run by Dick E. Coombs (Coombs) who was licensed as a real estate salesman. (R. 1050, L. 18-20).

Mr. Coombs had figured, accurately, how to make money when buying a home rather than paying money. Mr. Coombs' wife, Ruth, was owner and broker for a real estate company, ERA New World Realty. Mr. Coombs would prepare his standard purchase offer on listings, give these each day to a 20-year-old salesman working for his wife, Paul Scott, (R. 1224, L.13-21), and Mr. Scott would then give a presentation to the owner using a memorized speech taught him by Mr. Coombs. Mr. Scott described these as being:

"Q. Did you have any say in the language that was placed in the document? (Earnest Money)

A. No.

Q. You immediately presented it for ERA New World Realty?

A. He (Dick Coombs) had a presentation you memorize, basically like a Mormon missionary would memorize his presentation that he would give to a prospect. That's what I did, I gave the rote description. I would say I presented maybe a hundred of these offers altogether, or more. And they are all just a rote." (R. 1245, L. 4-14).

Mr. Scott attended at least 15 closings on purchases he made for Mr. Coombs. (R., 1270, L. 24-1271, L. 9)

The Perkins' home shows how Mr. Coombs could make money while purchasing property. He borrowed more money than

he needed for the downpayment to them, giving him a net, after costs and downpayment, of \$4,578. (R. 1061 L. 9-1062 L. 25). His wife's real estate agency also received \$2,200 as a commission on the Perkins' sale. (R. 1243 L. 3-19). In addition, while he held the property, he rented it out.

Mr. Coombs contacted Interlake Thrift to borrow the downpayment.

The earnest money (Exhibit 1; Addendum 3) provided CIC was to pay \$13,000 down, and give a note and trust deed back to the Perkins for \$24,000, on a total purchase price of \$37,000.

Interlake obtained an appraisal showing the property to be worth \$39,700 (Ex. 3), and a title report indicating the Perkins were clear owners (Ex. 11). Nevertheless, Interlake made no effort to review the earnest money to see if its loan terms conformed with those authorized by the Perkins (R. 1023, L. 2-5), which is customary lender practice (R. 1140, L. 21-R. 1141, L. 25), made no effort to have Perkins sign a subordination agreement to Interlake's lien (R. 1023, L. 12-15), made no effort to have any kind of contact at all with the Perkins (R. 1027, L. 4-6), yet nevertheless approved a loan to CIC of \$20,756.44 at 18% per annum. (Ex. 6). Perkins, in fact, in the earnest money (Addendum 3), authorized CIC to borrow \$17,000 at 14% (the \$4,000 over the \$13,000 downpayment to be used for "refurbishing").

Judge Fishler correctly found the Interlake loan to be at variance from the authorization given by Perkins (Addendum

1, paragraph 12). Interlake's itemization of its loan to CIC is annexed as Addendum 4. It is titled "Statement of Loan."

The Statement of Loan is an interesting document. On its face, Coombs agrees to pay Interlake 18% interest on a loan of \$20,756.44. However, it is a loan at 24%.

In the portion of the form marked, "Disbursement of Amount Financed," there is an entry for \$3,451.40 to "Interlake Thrift and Coombs Investment." This money never left Interlake's office. Mr. Coombs signed the check and returned it on the spot to Interlake so that money was not actually loaned. (R. 1027, L. 7-R. 1029, L.7) This made the document's interest amount appear to be 6% smaller than it actually was.

A major advantage to Interlake in appearing to loan \$20,756.44, when it actually loaned \$17,305.04, is that it drew interest, and could charge penalties and fees, on a principal sum \$3,451.40 higher than it actually paid out.

"Points" are frequently charged by lending institutions in real estate loans. The 24% can also be considered as "points."

Testimony on this subject was given by Ronald Adams, vice president of Interlake (R. 1021, L. 1-15), who was also a licensed real estate salesman (R. 1051, L. 23-1052, L. 3). He handled all the transactions with Coombs and CIC. His testimony is as follows:

"Q. (Mr. King) All right. The actual loan to CIC was at 24% interest?

A. (Mr. Adams) That would have been the return.

Q. All right. And you, in response to Mr. Hunt's questions said that part of this, \$3,541 was points; is that right?

A. Yes. That's correct.

Q. Now, points are sometimes charged by a financing institution, a lender, to increase the amount of return they receive on a loan; is that correct?

A. That's correct.

Q. And one point, two points, three points, they are the range of points that we customarily see do we not?

A. That's correct.

Q. You charged 20 points, didn't you?

A. It was 20 points per year for the term of the loan.

Q. That's 20 points?

A. Yes.

(R. 1049 L. 13-1050 L. 6)

Whether considered as 20 points, or as 24% interest, either was a bonanza for Interlake as profit on the transaction.

An illumination of the relative profit from this CIC loan is that Interlake's computer was programed to handle all anticipated loans and interest rates. The smaller the loan the larger the interest 3% per month on loans up to \$300, down to 18% per annum on balances over \$1,000. (70B-3-508[2], UCA).

The interest rate and principal amount were both so high on the CIC loan, that the computer's programming couldn't handle them, and the entries had to be made manually. (R. 1384, L. 7-23).

The testimony of Paul Scott, Mr. Coombs' real estate representative, was that he was familiar with the market at that time in 1980, and that the interest rates on first mortgages, such as Coombs was attempting to obtain, were at 12% to 15% per annum, and that at 14% or 15%, no points were being charged. (R. 1252 L. 15-23; R. 1266, L. 19-1267 L. 4.)

In fact, as Mr. Adams agreed, the 24% interest rate would have been illegal had it been a personal loan, but as Mr. Coombs dealt through his corporation as borrower, the consumer interest rate statutes did not apply. (R. 1030 L. 25-1031 L. 6).

Interlake was unwilling to make the loan unless it had a first priority on the home as against the Perkins. This need for security was particularly strong because at the time, October, 1980, Coombs had a delinquent personal loan with Interlake (R. 1048, L. 8-1049, L. 5).

Mr. Adams made no effort to check the CIC financial statement, testifying that he viewed Mr. Coombs as being CIC. (R. 1031 L. 8-1032 L. 21).

Analyze Coombs' interest, as an experienced banker would, and an even more compelling reason for Interlake to have ironclad security becomes apparent. The banker, as he considers the loan application, has to consider why a realtor buying realty offers such terms. If Mr. Coombs had an intent of repaying his loans, he would have obtained ordinary market terms so that he would have profits and be competitive.

At 20 points, or 24% interest, he couldn't be. What he could do, as he and his wife made \$6,778 cash off the Perkins deal alone, is take his profits, get his rentals, run out the string, and then dump the project. This is what he did.

Whether the above is accurate or speculation is immaterial because lines of thought like this would cross the mind of the lender, and it would take steps to protect itself against the possibility. If a person offers large profits, it is good business to accept them, but with that a strong security position is needed if the project is questionable.

At that time, Interlake had the following information:

1. It knew Perkins were fee owners of the property and in possession (Ex. 11; R. 1331, L. 8-11).

2. It knew the Perkins' property at 54 South Jeremy Street was free of any mortgages or encumbrances. (Ex. 11).

3. It knew Coombs was borrowing the money to buy the Perkins' property. (R. 1022 L. 22 - 1023 L. 1)

4. It knew that Coombs, borrowing \$17,305.04 from it, was borrowing \$22,394.96 less than the appraised value of \$39,700 (R. 1021 L. 21 - 1022 L. 3), so it had to consider whether Perkins were retaining an equity interest for the balance of the purchase price.

5. Interlake assumed Coombs had an earnest money from the Perkins to purchase the property. (R. 1022 L. 22 - 1023 L. 5).

6. Interlake knew that Coombs was a realtor (R. 1050, L. 18-20), offering to pay 24% for a real estate loan that was available in the market at 12% to 15% or, computing the "points", as Mr. Adams did, that Coombs was willing to pay 20 points when 1, 2 or 3 points were customary on 12% loans, and no points were paid on loans at 14% to 15% per annum.

7. Interlake could reasonably be assumed to know that almost no sellers would be willing to have their home equity subject to a prior loan drawing 24% interest when far less expensive loans were standard.

It seems fairly patent that Interlake felt it could not contact the Perkins and ask them to subordinate their \$24,000 remaining equity in the home to Interlake's loan of \$20,756.44. In addition to the long-term growth effects of the 24% interest accumulating, the immediate effect was that deducting the Interlake loan at face value of \$20,756.44 from the sale price left a balance in the property of \$16,243.56, \$7,756.44 less than the security the property gave Perkins if they did not subordinate to Interlake.

At the same time, the loan was so appealing that Interlake wanted to close, but in a first priority position, if it could. The question was how to do it.

THE FAIL SAFE POSITION

Guarantee Title Company, a small title company which went out of business before this case came to trial, was selected to handle the closing. Interlake wrote a letter of

closing instructions to Guarantee Title dated October 30, 1980, (Ex. 2; Annexed as Addendum 5), which stated in part:

"Pay to Coombs Investment all remaining monies when Interlake Thrift is in a first mortgage position on this property wested [sic] under Coombs Investment Corp. with no other tax liens or any other liens ahead of Interlake Thrift."

This letter makes it clear, incidentally, that Interlake knew that all of the money it was loaning was not going to apply to the property, because of its statement that after the Perkins received their downpayment, "Pay to Coombs Investment all remaining monies"

The primary significance of this letter of instructions is that the title company was directed that it could only disburse the loan proceeds after it gave Interlake a first priority position over the Perkins.

This was the fail-safe position. If a title company fails to follow the instructions from the lender, the title company is liable to it. Accordingly, if the loan went through and there weren't difficulties, Interlake would have priority ahead of Perkins and make its profits. If the loan did not go through, no money was lost as there would be no disbursement, and if there were later difficulties, Interlake would have recourse against Guarantee Title. Either way, Interlake would be protected.

The closing was scheduled for October 31, 1980.

Interlake signed its loan papers two days earlier with

CIC on October 29, and submitted its trust deed and letter of instructions on October 30, 1980 to Guarantee Title.

Interlake did not send any papers to the Perkins, their agent Mr. Lucero, Coombs' agent, Mr. Scott, nor to Guarantee Title showing the actual terms of its loan. It withheld the statement of loan (Addendum 4) and the trust deed note to it from CIC (Ex. 6; R. 1024, L. 6-14).

Guarantee's closing officer, Mr. Williams, testified that he did not know that CIC's loan with Interlake was at different terms than those authorized by the Perkins in the earnest money. (R. 1056 L. 22 - 1058 L. 18; R. 1059, L. 7-1060 L. 22).

Mr. Williams testified that the normal practice for title companies in closings, and his practice, was that if he became aware that seller and lender terms differed, that these had to be pointed out to each, agreement had to be arrived at and, to satisfy the Statute of Frauds, a writing stating the agreement had to be executed. (R. 1063 L. 9 - 1065 L. 6).

Not being advised by Interlake of the difference in terms, and Coombs' young realtor, Paul Scott, not being aware of the difference (R. 1219, L.5-1220, L.2), Williams handled the closing in due course, and had the documents recorded, first the deed to Interlake, then the deed to Perkins, intending to give Interlake priority. (R. 1068, L. 3-25).

CIC promptly defaulted on its payments, both to Interlake and to Perkins. The first part of this case, Phase

I, deals with the issue of who should have priority on the foreclosure proceeds, the Perkins or Interlake. This involves consideration of the conduct and attitude of each.

Mr. Adams was the subject of fairly intense examination on the attitude of Interlake toward the Perkins. His answers stand by themselves.

"Q. Did you obtain or ask him (Coombs) to submit to you a copy of the earnest money or the contract that he had with the Perkins?

A. No, I did not. (R. 1023 L. 2-5).

Q. Did you prepare any document for the Perkins' to sign indicating that they would be willing to take a position secondary against security to Interlake?

A. No, I did not." (R. 1023 L. 12-15)

"Q. OK. What was your understanding as to his (Coombs) use of the money?

A. Mr. Coombs told me he was purchasing the property.

Q. Huh.

A. He wanted a loan from me to purchase the property.

Q. Uh-huh. Did you make any effort to determine if the amount you were lending Mr. Coombs and CIC was the amount authorized by the sellers as a downpayment on the property?

A. No, I did not.

Q. Did you make any effort to determine if the interest rate authorized by the sellers for a downpayment was the same interest rate you were charging Mr. Coombs and CIC?

A. No. I did not.

Q. And you made no effort of any kind to communicate your loan to Mr. Coombs to the Perkins'?

A. I had no dealings with the Perkins at all.

(R. 1027 L. 14 - 1028 L. 6)

Q. Now, what was your position in regard to the Perkins' on this property. What concern did you have about them and their security in the property?

A. The only concern I had was placing Interlake Thrift in a first position on the loan."

(R. 1023 L. 22 - 1024 L. 1)

Q. Well, you knew that the property was appraised at \$39,700, that Mr. Coombs was only borrowing about half that amount."

A. Yes, I knew that.

Q. \$17,000 in real money, but standing against the property as a loan of \$20,700?

A. That's the amount of our loan, yes."

(R. 1034 L. 9-15)

Q. And your interest charges on this loan were how much?

A. The finance charge, based on the amount financed at \$20,756.44, the finance charge was \$41,000--or I'm sorry--\$24,123.56.

Q. And in addition to the \$3,700 that was shown as paper transaction?

A. Yes, that's correct.

Q. And you wanted all of this to constitute a lien standing ahead of the Perkins?

A. Yes, that's true.

Q. And you never considered whether Perkins would agree to be second to those amounts or interest rates?

A. I never considered whether anyone would. My specific instructions were to be solely in a first position with no other liens or encumbrances in front of us, period." [Emphasis added]

(R. 1039, L. 10-25)

Opposed to the active concealment by Interlake and Coombs of existing, material facts, the only act chargeable against the Perkins is that at the closing they asked no questions as they assumed their offer had been honored-an assumption supported by law as the Arguments will demonstrate.

At the closing it was not only the Perkins and their agent Mr. Lucero, who failed to sense danger. Mr. Coombs' own realtor, Paul Scott, testified at trial that he attended the whole closing and was shocked to find out later, when Perkins subpoenaed him, that Interlake's terms differed from the earnest money authorization. (R. 1219, L. 6-1120, L.15).

Interlake's tactics of keeping the closing officer in the dark as to its loan terms can fairly be interpreted as an intent by Interlake to seize a profitable loan opportunity regardless of harm to others, not only the Perkins, but also Guaranty Title Company, Mr. Williams, and the underwriter, Southern Title Guaranty Company. When the flawed contract led to litigation, Interlake immediately sued all of them for fiduciary liability and for recoupment of fees and costs and won. This is the "failsafe position" put into operation. Southern Title chose to take its losses on Interlake's judgment against it, paid it, and did not join the appeal.

Interlake's attitude toward Guaranty Title was succinctly stated:

Q. Well, how can you possibly expect Guaranty to give you a priority when they don't know the terms of your loan?

A. (Adams) I don't believe they need to know the terms of my loan.

(R. 1051, L. 13-17).

This "no need to know" attitude of Interlake towards Guaranty was misplaced. Guaranty was clearly acting as Interlake's agent to get Interlake first priority before the loan proceeds were disbursed. Mr. Williams acknowledged that he knew it was his obligation to do this. (R. 1066, L. 19-1067, L.20).

The failure of Mr. Williams to advise the Perkins as to Interlake's loan terms is a directly imputable concealment of material fact right back to Interlake itself. The testimony of Perkins closing expert, Rodney Pipella, house counsel to Security Title, was not rebutted. He testified that as a matter of standard business practice the closing officer is the agent for all those affected by the closing, and that includes Mr. Williams being agent for Interlake. (R. 1064, L. 5-1065, L. 6; 1107, L. 5-13; 1173, L. 4-17).

This means that Interlake had an agent at the closing who failed to reveal to the Perkins that Interlake sought priority on a loan in excess of what the Perkins had authorized, which took from them their chance to object.

Accordingly, Mr. Williams' unwitting concealment of the Interlake loan terms is the act of Interlake.

Judge Fishler erred in finding that Interlake should have priority over Perkins.

PHASE II

Interlake's ledger cards indicate that during the year 1981, Coombs remained continuously delinquent in his personal loan (Ex. 13), and that his corporation, CIC, remained continuously delinquent in its loan (Ex. 14; R. 1348 L. 11-24). These ledgers have many notes indicating promises to pay by Coombs which were not kept.

In October, 1981, Interlake's vice-present, Mr. Adams, met with Mr. Coombs. Adams gave Coombs options of pay, be sued, or consolidate. Coombs agreed to consolidate both his personal loan and the CIC corporate loan into a single loan (R. 1385 L. 10-1386 L. 7). Coombs was to receive no cash. The consolidated loan would bear interest at 24% and be secured by Perkins' home. (R. 1349 L. 4-1351 L. 15; R. 1357, L. 17-24).

The advantage to Coombs was that he would not have to repay the personal loan because it would be secured by the Perkins' property. The advantage to Interlake, in view of Coombs' history of non-payment, is that they would be assured of recovering his personal loan.

State banking procedure requires that a commercial loan have an executed "Declaration of Purpose" form to ensure that a consumer not be treated as a commercial borrower, but rather be given the protection of the consumer loan laws.

A Declaration of Purpose form declares that all of a loan is for commercial purposes and none of it is for personal use. Interlake prepared, and Coombs signed, a declaration of

purpose for the new loan as being entirely commercial. (Ex. 51, R. 1389, L. 16-R. 1390, L. 5). The form was false as Coombs had his personal loan debt of \$2,464 included in the new loan (R. 1353, L. 17-1354, L. 6).

Interlake's combining of the two loans into the new commercial loan was improper for another reason. It carried 24% interest (R. 1349, L. 4-1351 L. 15). The 24% exceeds the legal interest rate on a personal loan over \$1,000. (70B-3-508, Utah Code Annotated; R. 1035, L. 25-1036, L. 6). No money passed hands in 1981 when the loans were consolidated. The personal loan never became a commercial loan. It had been borrowed and used for personal purposes. Accordingly, charging 24% on it was illegal.

70B-3-205 provides that on a rewrite or refinancing, and 70B-3-206, on a consolidation, that the interest rates may not exceed the interest provisions of 70B-3-508, i.e., 18%.

Mr. Adams acknowledged that he knew the law at the time he prepared the Declaration of Purpose and new loan. (R. 1359, L. 2-R. 1361, L. 25).

Why was Interlake willing to do these wrongful acts?

Interlake's gains in these procedures are multiple. The personal loan is not only secured, but draws 24% interest. The paperwork on its surface satisfies the state. Its accounts are "current," so that the pressures incident to delinquent accounts (R. 1396, L. 22-1397, L. 25) are relieved and, a primary factor, the new principal amount is \$24,688.70, all of

which draws interest at 24% and all presumably recoverable from Perkins' home. At that time, November 27, 1981, both existing loans were stamped "Paid in Full." (Ex. 13, Ex. 14)

History repeats. As Interlake had had to figure a way of getting its loan ahead of Perkins without their knowledge in Phase I, now it had the problem of getting Perkins to agree to subordinate to the new loan incorporating an unrelated loan.

Mr. Adams solved this problem, as he had the other one, by not dealing with the Perkins directly.

Q. Mr. Adams in the Subordination Agreement of November 27, 1981, will you please tell the court who prepared that document?

A. Interlake Thrift prepared it.

Q. And can you tell the court, then what happened in a sequence of events as far as you know until you received that document back?

A. Interlake Thrift prepared this document in conjunction with the other documents of the loan of November 27, '81. This document was given to Mr. Coombs to obtain signatures of Mr. and Mrs. Perkins on it.

(R. 1390, L. 8-18).

Interlake ran into a problem because the Perkins refused to sign the subordination agreement Coombs gave them.

"Q. (King) And did you give the responsibility to Mr. Coombs for taking the subordination agreement which you had prepared to the Perkins for execution?

A. (Adams) Yes, I did.

Q. And to your knowledge, the Perkins refused to sign that subordination, did they not?

A. That's what Mr. Coombs had alleged to me early in December of 1981.

Q. Well, you had a number of conversations with him between November 27, 1981 and December 30, 1981, in which you were trying to get the subordination signed and he was telling you that he was having trouble with the Perkins, isn't that true?

A. That's correct.

(R. 1354, L. 9-1355, L. 1)

The Perkins called Adams in December, 1981, after Coombs had talked to them, and Adams told the Perkins he would foreclose the trust deed if they didn't sign the subordination. (R. 1355, L. 2- 1356, L. 8).

Mr. Adams acknowledged that when he spoke to the Perkins on the telephone and told them he was going to foreclose unless they signed the subordination, he didn't tell them that the commercial loan was being increased from its stated 18% (based on \$3,541 being held as points, on a 18% loan) to a flat 24%, nor that he was incorporating Coombs personal loan into the loan secured by their home, nor that he was limiting to one year the time that Coombs/CIC had to repay the entire amount. (R 1362, L. 1-10).

Mr. Adams acknowledged that during the period from November 27 to December 30, 1981, he had a good deal of work with Mr. Coombs and the CIC files. (R. 1362, L. 1-1363, L. 1).

Mr. Adams acknowledged that at the time he spoke to the Perkins he had personal knowledge that the new loan included the

personal loan secured by the Perkins property. (R 1363, L. 18-1364, L. 13).

The Perkins sought legal advice and contacted a Salt Lake City attorney, Robert Knight.

Mr. Knight called Mr. Adams. Mr. Adams told Mr. Knight that he was rewriting the CIC loan and needed to have the Perkins subordinate to it. Knight asked Adams what the amount of the new loan would be and Adams told him that it would be the existing loan plus accumulated interest and charges. Mr. Adams withheld telling Mr. Knight that the new loan would include an unsecured personal loan which would then stand as a lien against the Perkins property in front of the Perkins. He also did not tell Mr. Knight that the time of payment was being reduced to one year from 10 years. (R 1364, L. 23-1372, L. 2).

Mr. Adams knew that the Perkins and their attorney Mr. Knight were relying on him as to the subordination. He withheld telling them of Coombs personal loan.

"Q. (By Mr. King) Let me direct your attention to your conversation with the Perkins'. You've already admitted that you did not tell them about including the personal loan. Do you recall that?

A. Yes. We've already discussed that.

Q. All right. Now, why didn't you tell them?

A. Because the issue never came up. All they wanted to know was what position Interlake Thrift held and what would happen if the subordination agreement was not signed.

Q. Do you know of any means the Perkins' would have of knowing that Coombs had a personal loan with you that was delinquent if you hadn't told them?

A. That was Mr. Coombs' obligation. I had no obligation to Mr. and Mrs. Perkins. Mr. Coombs was my borrower. [Emphasis added]

Q. And you felt that you had no obligation to the Perkins' to tell them that you were going to use their former home as security for you on a personal loan of Mr. Coombs?

A. I don't believe I had any obligation to them in any regard. [Emphasis added]
(R 1381, L2-23).

The effect of this remarkable testimony is that Interlake Thrift felt it had no duty to an elderly couple to tell them that they wanted to use the couple's home as equity to secure payment of a delinquent personal loan by a man who had repeatedly made and broken promises to bring the account current. (Ex. 13)

The attitude of Interlake Thrift raises the question as to when "obligations" arise if not then.

In dealing with the attorney Mr. Knight, Mr. Adams had a similar attitude:

'Q. (By Mr. Hunt) In your telephone conference with Mr. and Mrs. Perkins some time in the month of December or November, and in your subsequent conversation with Mr. Knight and your letter of December 30, which is before you, 1981, wherein you talked about the subordination agreement and other matters, did you feel that you had complied with whatever disclosure provisions that you were required to make?

A. Yes, I do. Like I mentioned before, I felt that we had disclosed to our borrower, Mr. Coombs, every pertinent bit of information about the loan in every regard. We had supplied the subordination agreement for signatures of Mr. and Mrs. Perkins. As far as disclosing to Mr. Knight, I don't think I had any duty to disclose anything to him. [Emphasis added] (R 1393, L. 17-1394, L. 10)

It is important to note, as Perkins' claim is not against Mr. Adams, but against Interlake, that in withholding information from the Perkins, on the basis that they were junior lienholders and not people to whom Interlake had any contractual obligation, that Mr. Adams was complying with Interlake policy. This is spelled out by Mr. Adams:

Q. (By Mr. King) I understand your testimony to be that in everything you did here you complied with the existing practices and procedures of Interlake Thrift, your employer; is that right?

A. Yes, we did. I did act on behalf of Interlake under our normal procedures.

Q. Is the practice and normal procedure of Interlake Thrift when it seeks to obtain a subordination agreement from an intervening lienholder to not advise the lien holder of increases in the renewed loan not directly relating to the secured property?

A. Any time we obtain a subordination agreement we furnish the subordination agreement to them totally prepared.

Q. You didn't answer my question, sir.

A. Yes, I did. Because that's what we do. I don't discuss any of the detail with any junior lien holders.

Q. The specific question was if Interlake Thrift increases the loan, such as it did, by including personal material, it is the practice of Interlake Thrift to not let the other lienholder know?

A. We don't call them up and tell them, yes, this was it or this wasn't it. We supply them with the subordination agreement.

Q. But none of the supporting data so they can see where that fits in context?

A. No.

Q. That is the practice of Interlake Thrift not to do that?

A. That is correct.

Q. And the purpose of Interlake Thrift in doing that is that if people realized that obligations or changes in interest rate are being put before them they are going to object to them.

A. In actual practice, that they want to object to or not object to it totally is up to them. We supply the subordination agreement, which clearly spells out our loan in the amount they would subordinate to.

Q. Right. And the practice of Interlake Thrift would be not to give them the other information by which they can determine if the subordination is strictly a rewrite of an existing loan or whether it includes additions in interest or other charges for other loans. That is Interlake's practice, is it not?

A. Usually it is. (R 1415, L. 9-1417, L. 6)

It only takes a moments thought to realize the difficulty Interlake's practice puts a junior lienholder to.

If Interlake says that "X" amount is the amount that has to be paid, and that the junior lienholder has to subordinate to it or that amount will be foreclosed, the junior lienholder has no way of evaluating that dollar amount. How many payments have been made, how many have been missed. What charges have been properly assessed, what costs incurred? Lacking this information, they reasonably rely on the figures submitted by a state licensed lending institution such as Interlake, and that the subordination is the amount of the actual delinquency plus normal interest and charges.

At Mr. Knight's request, Interlake put in a letter the representation that the new loan increased the old loan only by accumulated interest and costs and threatened foreclosure if Perkins didn't subordinate. (Ex. 50; Addendum VI).

As found by Judge Fishler in the Statement of Facts on Phase II, Interlake Thrift committed fraud when it induced the Perkins to sign the subordination agreement. The result was that the Perkins entirely lost all equity in their home, Coombs having taken bankruptcy and his company CIC having become defunct. They will never be repaid unless it is from Interlake. On October 27, 1981 Interlake marked as fully paid both of its ledgers on its existing loans to Coombs and to CIC. As soon as Perkins signed the subordination agreement on December 30, 1981, it filed a new trust deed with the County Recorder on the new, 1981, consolidated loan. As the Perkins' trust deed was executed in 1980, the Perkins now have a year's priority and should be entitled to the proceeds from the home.

The Perkins' home on Jeremy Street was sold by Interlake in 1982 for \$28,700. At that time the Perkins had commenced their lawsuit, but to keep the home unsold until the lawsuit was resolved was not practical, so counsel for Perkins and for Interlake agreed that Interlake could use its expertise to sell the home and would then hold the proceeds of the sale subject to direction of the court as to which, Perkins or Interlake, had priority.

Judge Fishler's Findings of Fact concerning Phase II are set forth verbatim at Addendum II. The Perkins believe

these facts are essentially accurate as far as they go, but don't go far enough, and that many of them are actually conclusions of law which are inappropriate to the facts, as will be stated in Phase II argument.

SUMMARY OF ARGUMENTS

Perkins (appellants) argument as to Phase I of the trial court's decision is that the trial court's conclusions of law are not supported, either by its own findings of fact or by the evidence.

Perkins believe they were purchase money vendors of the Jeremy property, and that Interlake, having failed to meet the terms of subordination in the CIC-Perkins earnest money agreement, did not obtain priority over the Perkins, either by the earnest money agreement, the recording acts, or theories of waiver/estoppel or merger.

As to Phase II of the trial, Perkins arguments are related to remedies and damages. First, that the trial court ignored their election of the remedy of rescission, which they believe would result in their having first priority in the property. Second, that if the court was correct in awarding actual damages, its determination was erroneous. Third, that the court abused its discretion in failing to award punitive damages. Fourth, the court awarded inadequate fees.

ARGUMENT

I. THE TRIAL COURT'S CONCLUSIONS ARE NOT SUPPORTED BY ITS FINDINGS OF FACT IN PHASE I, NOR BY THE EVIDENCE.

Perkins' primary argument on appeal with respect to Phase I in the trial court is that the court's legal analysis of its own findings of fact (as well as undisputed, or admitted, facts) was erroneous. On a review of questions of law, the Supreme Court need pay no deference to the trial court's legal conclusions, but is empowered to determine on its own the correct legal analysis based upon the factual findings of the trier of fact. Wade v. Utah Farm Bureau Insurance Co., 9 UAR 13 (1985); Bradshaw v. Burningham, Utah, 671 P.2d 196 (1983).

A. UNDERLYING FINDINGS OF FACT.

Perkins believe that the trial court's Findings of Fact compel a verdict favorable to them as to priority on the Jeremy property. The key findings, Perkins believe, are the following:

1. Perkins agreed in the earnest money agreement to sell their house to Coombs investment Corporation (hereinafter called CIC) and to subordinate to a loan of approximately \$17,000 at 14% interest. (Addendum III)

2. Perkins were purchase money vendors (in possession). (Addendum I, Addendum III-Counteroffer)

3. The loan actually obtained by CIC from Interlake was \$20,756.44 at an effective interest rate of 24% and that it was not approximately \$17,000 at 14% (i.e. material difference). (Addendum I, F.F. 12)

4. Perkins were not advised of the actual terms of the loan from Interlake to CIC. (Addendum I, F.F. 6)

B. BASED UPON COURT'S FINDINGS OF FACT, ITS CONCLUSIONS OF LAW ARE ERRONEOUS.

1. Perkins, as purchase money vendors, have presumed priority.

The well-settled law in Utah as well as other jurisdictions is that special priority is accorded a vendor's purchase money mortgage. See, e.g., Nelson v. Stoker, Utah, 669 P.2d 390 (1983); Kemp v. Zions First National Bank, 24 U2d 288, 470 P.2d 390 (1970).

A leading treatise indicates that:

"It is familiar learning that a purchase money mortgage, executed at the same time as the deed of purchase of land, or in pursuance of agreement as part of one continuous transaction, takes precedence over any other claim or lien attaching to the property through the vendee mortgagor. This is so even though the claim antedates the execution of the mortgage to the seller"

IV American Law of Property, Sec. 16.106E at 220-21 (1952).

Further, another leading authority has shown the broad extent of such presumption favoring a purchase money vendor:

"This rule, of course, is not confined to judgments and attachments; on the contrary, it extends to all liens, legal or equitable, that otherwise might clasp the land at and with its acquisition by the mortgagor. All such liens, indifferently, yield to the purchase money mortgage."

II. G. Glenn, Glenn On Mortgages, Sec. 345.1 at 14.40 (1943); accord, Nelson v. Stoker, supra.

The policy behind giving a vendor such special priority over other liens has been stated as follows:

"[The doctrine is justified] on the equity and justice of protecting one who has parted with his property on the faith of having a security interest in it until the money for which he was exchanging it is received, as against persons who, for different reasons, have inferior claims. ... As against other mortgagee claimants to the property, especially those who have made their loan for the purpose of paying part of the purchase price, the question is closer [than those claiming through dower, curtesy, community property or homestead rights or judgment liens]. These, unlike the others, have relied upon getting paid out of the same specific property and have parted with value on that reliance. Even so, the vendor has the edge because the property he is relying on for payment was previously his up to the time of sale and mortgage back. There was never an instant when he relinquished a hold on it. And he would never have parted with it at all except upon the belief and faith that if his buyer defaulted, he could either recapture his property or get paid out of it. And this is normally so even though he may know that his buyer is going to finance the deal in part by borrowing some of the purchase money from another and by giving him a mortgage on the property. Other mortgagees, on

the other hand, even including lenders of purchase money, parted only with money in which they retain no interest whatsoever, and place their reliance for repayment of their debts on getting a security interest in other property not only never previously owned by them, but not even owned by the mortgagor at the time the money was loaned, even though they might not have known that fact. This difference in attitude towards the hazard of losing the property previously owned and that of not getting an interest in property which had never before belonged to the claimant is an old and important one."

IV, American Law of Property, supra, at pages 225-226. Accord, G. Osborne, G. Nelson and D. Whitman, Real Estate Finance Law, Sec. 9.1 at pp. 577-578 (1979) (hereinafter, G. Osborne).

Perkins, who owned the subject property free and clear prior to the transactions in question, and who took back a trust deed to secure the balance of the purchase price, are clearly purchase money vendors entitled to those presumptions.

It is equally clear that Interlake's lien is not a purchase money mortgage, and hence not entitled to any equitable presumptions that go with that position. A third-party lender may obtain this status only where the money was loaned solely as purchase money paid to the vendor. IV American Law of Property, supra, at o, 229, Accord, G. Osborne, supra at p. 574.

Since portions of Interlake's loan went either directly back to Interlake as points (Addendum IV, \$3,451.40) or to Coombs as excess (Addendum V, \$4,578.79), it was not used only for payment of the purchase price on the Jeremy property

and Interlake's interest does not qualify as a purchase money interest.

2. Subordination in earnest money not effective.

Of course, a subordination agreement is one way purchase money vendors may relinquish the special priority accorded them under the law. However, the facts of this case cannot support such a relinquishment.

It is generally accepted that subordination agreements are to be strictly construed and where terms of a subordination have not been complied with, the subordination agreement is ineffective and unenforceable. See, e.g., Troj v. Cheseboro, 30 Conn. Sup. 30, 296 A.2d 685 (1972) (Subordination lacked certainty in minimum terms and was unenforceable.) Miller v. Citizen's Savings and Loan Association, Ct.App., 56 Cal. Rptr. 741 (1967) (Subordination conditions were not satisfied and hence construction money trust deeds were not entitled to priority over purchase money trust deeds.); Gluskin v. Atlantic Savings & Loan Association, Ct.App., 108 Cal. Rptr. 318 (1973) (Lender and purchaser-borrower may not bilaterally make material modification in loan agreement to which vendor has subordinated his purchase money deed of trust without the knowledge and consent of the vendor to that transaction.) Campanella v. Ranier National Bank, 26 Wash. App. 418, 612 P.2d 460 (1980) (Subordination agreement strictly limited to express

terms and conditions of agreement); Ban-Co Inv. Co. v. Loveless, 22 Wash. App. 122, 587 P.2d 567 (1978) (Subordination agreement is to be strictly construed.)

Thus, the terms of the earnest money agreement are conditions precedent to the subordination becoming effective. The loan obtained by CIC from Interlake was for \$20,756.44 at an effective interest rate of 24%, a substantial and material difference from the terms set forth in the earnest money, as the court found in Phase I's Finding of Fact No. 12 (Addendum I), that it was not approximately \$17,000 at 14% interest.

On substantially identical facts, the Court in Gluskin, supra, held that:

'A lender and borrower may not bilaterally make a material modification in the loan to which the seller has subordinated, without the knowledge and consent of the seller to that modification, if the modification materially affects the seller's rights.'

Id. at 323.

Thus, as was held in Gluskin, and as should be held in the instant case, the conditions precedent were not met and the subordination was not obtained. The loan, of course, was made and CIC purchased the property, but Interlake must bear the loss as against the Perkins because their loan did not qualify for priority. As the court in Miller, supra, stated:

'It follows that the payment by Citizen's to Wes Glenn of the disputed \$26,341.30 was not illegal, but merely that it was a loan not within the subordination agreement and, therefore, subject to and not prior to plaintiffs' trust deed and the \$95,000 obligation which that trust deed secured.'

Id. at 852.

Additionally, Interlake is barred from alleging that any modification of the earnest money agreement terms was accepted by Perkins. The statute of frauds and cases interpreting it require that any modification of a contract which is required to be in writing, as here dealing with an interest in real property, must also be in writing. See, Utah Code Annotated (1953) Sections 25-5-1, 3; Zions Properties, Inc. v. Holt, Utah, 538 P.2d 1319 (1975); Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970); Combined Metals v. Bastian, 71 Utah 535, 267 P. 1020 (1928).

No such writing exists and therefor no such modification may be asserted.

3. NO BASIS TO MAKE EXCEPTION AS IN KEMP CASE.

The trial court felt the instant action was comparable to the case of Kemp v. Zions First National Bank, supra, and found that plaintiffs had waived their priority rights by failing to inquire as to the terms of the CIC loan at the closing. Perkins believe that the instant action in fact lacks the factors which prompted the Kemp court to deviate from the general rule, stated in Kemp, of purchase money vendor priority which favors the Perkins.

A review of the Kemp case reveals that the decision is pinned on two possible rationales, the recording acts, and the doctrines of waiver and/or estoppel. It will be seen that the facts which gave rise to those lynchpins in Kemp are absent in this case.

(a) The recording acts offer Interlake no refuge.

In Kemp, the vendors conveyed their property to buyers by warranty deed and took a mortgage back to secure the balance of the purchase price, which they failed to record for over a year. Buyers then went to the lender the following day to sign up for a loan. The day after that, vendors went to the lender, discussed the loan and the allocation of the proceeds to them and accepted the balance as their downpayment without disclosing to the lender their retained interest. The lender promptly recorded its trust deed. Id. at 392.

Thus, under the facts in Kemp, along with the indication of a waiver/estoppel, the court was faced with a recording act issue and found that a prior recorded trust deed of the lender (a subsequent purchaser) prevailed over the prior in time, but later recorded, purchase money mortgage of the vendor. Id. If the vendors in Kemp had promptly recorded their interest on the day they received their trust deed to secure the balance of the purchase price, the lender might have discovered it in a last minute title check before disbursing its funds. The lender in Kemp was in fact within the class of persons the recording acts were designed to protect, subsequent purchasers in good faith.

In the instant action, the recording acts do not come to bear on the priority issue, because Interlake was not a subsequent purchaser in good faith. The pertinent section of Utah's recording statutes is Section 57-3-3, U.C.A. It provides as follows:

"57-3-3. Effect of Failure to Record--Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

[Emphasis added.]

As seen from the language of the statute, the recording act provides protection only to "subsequent purchasers in good faith." Perkins believe that Interlake was not a purchaser in good faith, because of the inquiry notice they were put on as to Perkins' interest in the property, discussed infra, but regardless of such status, the documents show that Interlake was not a subsequent purchaser, but a prior one, and hence can claim no protection from the recording statutes. This fact is illustrated by a leading authority as follows:

"Under most recording acts, a mortgagee is protected against a prior unrecorded mortgage if he took his mortgage without knowledge and, in some states, if he recorded it first.

...

"Most institutional lenders are required to, or at least desire to hold first mortgages. The third party lender cannot however, guarantee this priority status simply by making sure that

its mortgage is recorded first, unless of course, the land is in one of the few jurisdictions having a "race" recording act [not Utah], under which being the first to record assures priority. A couple of hypotheticals will illustrate why this is so. Suppose, for example, that vendor, purchaser and third party lender are each aware that the purchase price will be financed by two purchase money mortgages. Where two such mortgages are going to be utilized, it normally will be known by all of the parties because they will be referred to in the earnest money contract, a copy of which the third party lender routinely requires and examines before approving a loan. In this situation, the third party lender cannot gain priority simply by recording first because it will have taken and recorded with knowledge of the vendor's mortgage. While recording first will not, for the same reason, give the vendor priority, the general presumption in favor of the vendor purchase money mortgagees probably will. Moreover, even if the third party lender takes and records its mortgage prior to the execution of the vendor's mortgage and without knowledge of it, it cannot rely on the recording act to achieve priority because such legislation normally protects only those without notice who take subsequent to an unrecorded instrument."

G. Osborne, supra, Sec. 9.2 at pp. 578-580. [Emphasis added]
Since the trust deed and loan between CIC and Interlake were executed on October 29, 1980, two days prior to Perkins' trust deed security, Interlake cannot qualify as a subsequent purchaser as against the Perkins' interest and receives no benefit from Utah's recording acts.

(b) No basis for waiver/estoppel.

The trial court concluded that Perkins had waived, or were estopped from claiming, priority ahead of Interlake (Addendum I, paragraphs 12, 15), as had been the case between

the lender and vendor in Kemp. As will be seen from comparing the factual backgrounds of Kemp and the instant action, the trial court's legal conclusion of waiver and/or estoppel by the Perkins is unfounded and erroneous.

In Kemp, the vendors discussed the loan with the lender, accepted the proceeds and never advised the lender of their retained interest, nor did they promptly record their trust deed, discussed supra. The court found that the vendors knew the lender would require a first priority position, and having failed to disclose their interest to the lender, either during their discussions with it or by recording promptly, they were not in a position to then claim priority.

The facts of this case are markedly different from those in Kemp and do not provide a basis for abandoning the general rule of purchase money vendor priority.

The Perkins had agreed in the earnest money agreement to subordinate to a loan of approximately \$17,000 at 14% interest. They had no contact with the lender, Interlake, and appeared at the closing to receive a down payment and credits in complete conformity to the terms of their earnest money agreement (see sellers' closing statement, Ex. 9-P).

Interlake, on the other hand, made no efforts to determine the terms of the sale from Perkins to CIC, (Adams, R. 1023, L.2-8), nor did it make any attempt to see if its loan complied with the terms of the Earnest Money (Adams, R. 1027,

L. 19-R. 1028, L. 6). It was aware that CIC intended to buy the property and that CIC wanted a loan of around \$20,000. It had a P.R. which indicated the Perkins were free and clear titleholders to the property. (Ex. 11-P, Adams, R. 1022, L. 9-19) It had an appraisal which indicated the property was valued at \$39,700 (Ex. 3-P; Adams, R. 1021, L. 21 - R. 1022, L. 3) Although Interlake maintains it had no knowledge of the Perkins' retained interest, plaintiffs believe the evidence does show such actual knowledge, and, in any event, the law imputes constructive notice to Interlake under the facts before the trial court.

The record reveals the following testimony by Interlake's manager, Mr. Adams:

Q. And you wanted all this to constitute a lien standing ahead of the Perkins?

A. (Mr. Adams) Yes, that's true.

R. 1039, L. 16-19.

Supplementing this strong evidence of actual knowledge of Perkins' retained interest by Interlake, the law applied to the facts of this case imputes such knowledge to Interlake.

Utah courts have held that whatever is notice enough to excite attention and put a party on his guard and call for inquiry is "notice" of everything to which such inquiry might have led, and when a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. See,

e.g., Universal C.I.T. Corp. v. Courtesy Motors, 8 Utah2d 275, 333 P.2d 638 (1959); Salt Lake, Garfield & Western Railway Co. v. Allied Materials Co., 4 Utah2d 218, 291 P.2d 883 (1955).

Additionally, Perkins were in actual exclusive possession of their home on Jeremy and (earnest money counteroffer, Addendum III) of which Interlake was aware (Adams, R. 1331, L. 8-11). The Utah Court has previously indicated that actual exclusive, possession of real property will put upon inquiry those acquiring any title to or lien upon the land so occupied to ascertain the nature of the rights the occupants really have in the premises. Peterson v. Callister, 6 Utah 2d 359, 313 P2d 814 (1957); Mathis v. Madsen, 1 Utah 2d 46, 261 P.2d 952 (1953).

These facts should impute constructive knowledge of Perkins' retained interest in the Jeremy property, in spite of the fact that Interlake made no effort to obtain the earnest money, an effort which G. Osborne, supra, and Rodney Pipella, trial expert witness, described as the routine practice of lenders. (Pipella, R. 1140, L. 21-R. 1141, L. 25).

With this background in mind, the trial court's conclusion of waiver and/or estoppel cannot stand. The Utah Supreme Court has defined waiver as a voluntary and intentional relinquishment of a known right, claim or privilege. Hunter v. Hunter, Utah, 669 P.2d 420 (1983);

Rowley v. Marcrest Homeowner's Association, Utah, 656 P.2d 414 (1982); International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., Utah, 626 P.2d 418 (1980). As the court stated in Hunter, supra:

"A waiver is an intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it... . To constitute waiver, one's actions or conduct must be distinctly made, must evince in some unequivocal manner an intent to waive, and must be inconsistent with any other intent."

Id. at 432.

Since the Perkins were uninformed of the actual facts of the CIC Interlake loan, their silence at the closing cannot under the circumstances be viewed as actions or conduct "distinctly made" which "evince in some unequivocal manner an intent to waive." Nor is it "inconsistent with any other intent," since they received at the closing the payment and credits consistent with their earnest money agreement, and had every right to assume that the earnest money had been complied with.

Similarly, the closely associated doctrine of estoppel does not apply here.

"Estoppel arises when a party...by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through comparable negligence, induces another...to believe certain facts to exist and that such other...acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former...is permitted to deny the existence of such facts."

Morgan v. Board of State Lands, Utah, 549 P.2d 695, 697 (1976).

The facts of the instant case fail to support estoppel, just as they fail to support a waiver. Interlake did not act with reasonable prudence and diligence and, as indicated above, had constructive, if not actual, knowledge of Perkins' agreement and terms with CIC. Nor did Perkins intentionally or through negligence induce Interlake to believe any facts upon which it could properly rely.

4. NO DUTY ON PERKINS TO INQUIRE.

The trial court in its ruling, determined that the Perkins' had a duty at the closing to inquire as to what the actual terms of the CIC-Interlake loan were, to see if it met the terms of their earnest money agreement, and, having failed to do so, they "waived" their priority right. The Perkins believe this is the trial court's pivotal error in its legal analysis.

Aside from the plain fact that inquiring at the closing would likely have elicited no information from the closing officer since he admittedly had not been given such information from Interlake (R. 1056, L. 22 - R. 1058, L. 7 - R. 1060, L. 22), and materials from Interlake supported a belief that the earnest money agreement had been complied with (R. 1063, L. 9 - R. 1065, L. 6), there is no basis to impose such a duty on the Perkins in any event.

Certainly there is no duty arising by way of contractual relationship. Perkins had set forth their terms on the earnest money agreement, in what was in essence an offer for a unilateral contract, that is, if a lender provided CIC with a loan of approximately \$17,000 at 14% interest, Perkins would subordinate their trust deed security interest to that loan.

However, Interlake chose not to accept Perkins' offer, the trial court finding that its loan to CIC was not approximately \$17,000 at 14% interest. Hence, no contractual relation was formed between Perkins and Interlake and, therefore, no contractual duty could arise.

Nor, under the facts of the case, could the Perkins be found to owe Interlake any duty based upon equitable grounds. The Perkins were elderly homeowners. Mr. Perkins was in post-retirement employment in the field of janitorial services, and had a limited education (Perkins, R. 1282, L. 19-24; R. 1288, L. 22-23). They had agreed in the Earnest Money to subordinate their retained interest to a loan of approximately \$17,000 at 14% interest. They were never contacted by Interlake (R. 1027, L. 14 - R. 1028, L.6). They attended the closing, where they signed the warranty deed, received their trust deed, and reviewed the seller's closing statement which indicated amounts credited to their account in line with the Earnest Money terms.

Similarly, nothing at the closing alerted the professionals. Neither Perkins' realtor, Mr. Lucero, Coombs'

realtor, Mr.Scott, nor the closing officer, Mr. Williams, raised any questions as to Interlake's loan, quite likely presuming that it would have reviewed the earnest money, as is the customary practice (G. Osborne, supra, at p. 578-580; Pipella, R. 1140, L. 21 - R. 1141, L. 25)

Interlake, on the other hand, was a licensed financial institution experienced in real estate financing transactions. They knew Perkins were free and clear owners of the Jeremy property (preliminary report, Ex. 11-P). They knew that Perkins were in possession of the home (Adams, R. 1331, L. 8-11). It knew CIC wished to obtain a loan of slightly over one-half the appraised value of the Jeremy property. (Appraisal, Ex. 3-P; loan, Ex. 6-P). Yet they failed to ask Coombs how he was going to purchase the property (Adams, R. 1330), and failed to request a copy of the Earnest Money agreement (Adams, R. 1323, L. 2-12), which leading authorities (G. Osborne, supra, at P. 578-580) and an expert witness at trial (Pipella, P.1140, L. 21-R. 1141, L.25) have described as being the customary practice.

The imposition of a duty of inquiry on Perkins by the trial court in consideration of the above-cited facts was clearly erroneous. Who should bear the burdens and risks as between the Perkins, who set forth in the Earnest Money the terms they would subordinate to and which hold the preferred status as purchase money vendors, and Interlake, who desire to loan money on different terms and which wanted a priority not ordinarily afforded it? The answer is patently obvious and contrary to the trial court's ruling. Since Interlake did not

request a modification of the terms of the earnest money agreement, which they, as seen above, had legal knowledge of, nor ask them to suborindate, the assumption on the part of Perkins and others at the closing that Interlake had conformed its loan to these terms is reasonable.

The Utah Supreme Court has also endorsed the equitable principle that where one of two innocent parties must suffer a loss, it should fall on him who created the circumstances from which it resulted. Hanson v. Beehive Security Co., 14 Utah2d 157, 380 P.2d 66 (1963). Although characterizing Interlake as an innocent party would be overly charitable, Perkins believe the facts show that the circumstances which created the loss were the following: Interlake's failure to acquire a copy of the Earnest Money or ask CIC for specifics of the purchase of the Jeremy property; Interlake's failure to inquire as to Perkins' interest in the property since they were in possession of it; Interlake's failure to provide the closing officer with documentation on its loan to CIC, which would have afforded him the opportunity to determine that the Earnest Money terms had not been met. Thus, under the law as stated in Hanson, supra, Interlake must bear the loss.

5. MERGER UNFOUNDED AND UNAVAILING.

The trial court has made reference to the doctrine of merger in its ruling. Perkins believe merger has no application in this action, but if applied, leads to the conclusion of priority in the Perkins.

First, the defense of merger was not pleaded by Interlake. However, assuming that the issue of merger was properly before the court, it is of no benefit to Interlake's claim to priority.

Like most rules of contractual construction, the merger doctrine is applied only when it is shown to be the intention of the parties. There is no evidence in the trial of this action that the parties intended the terms of their agreement as evidenced in the Earnest Money to be merged into the deeds.

Additionally, the doctrine of merger operates only to bar extrinsic evidence which tends to vary or contradict the express terms of the final written instrument. VanLeeuwen v. Huffaker, 78 Utah 521, 5 P.2d 714 (1931); Halloran-Judge Trust Co. v. Heath, 70 Utah 124, 248 P.342 (1927). As can be seen from an inspection of the deeds involved (Exhibits 5, 7), neither contains even the slightest indication of the intentions as to priority between Perkins and Interlake. Neither trust deed indicates "first" or "second", nor that one may be "subject to" the other. Thus, the merger principle does not bar extrinsic evidence to resolve the priority issue.

Assuming, arguendo, that the doctrine does apply, one arrives at the conclusion that Perkins retain their first priority as purchase money vendors.

If merger is accepted, the court was left with

three simple deeds: a warranty deed from Perkins to CIC, a trust deed from CIC to Perkins, and a trust deed from CIC to Interlake, without any other documentation as to the intent of the parties. Absent any expression as to priority on the face of the deeds, the Perkins must prevail on the general policy considerations which favor purchase money vendors. Kemp v. Zion's First National Bank, supra; IV American Law of Property, Section 16.106E (1952); II G. Glenn, Glenn on Mortgages, Section 345.1 (1943); G. Osborne, supra, Section 9.1

And as seen previously, Interlake is not afforded protection by the recording statutes because they are not subsequent purchasers. Thus, priority based on the deeds alone is accorded to the Perkins by virtue of their special position as purchase money vendors.

II. PHASE II - THE TRIAL COURT IGNORED PERKINS' ELECTION OF REMEDIES WHICH WOULD HAVE PLACED THEM IN FIRST PRIORITY POSITION.

Perkins had consistently sought both rescission and punitive damages in Phase II of the trial. Their election is reflected in the minute entry of the court, R. 728.

The trial court apparently ignored Perkins' election and awarded \$2,464.41 plus interest as their actual damages,

reflecting merely the amount of the personal loan of Dick Coombs included in the 1981 rewrite. (F.F. 10, 11, R. 818).

Perkins believe rescission of the subordination would have left them in first priority position, since a rescission of the subordination agreement which was induced by fraud would have left Perkins with a secured position based on their 1980

Whether the taking of a new mortgage in place of a prior one amounts to an extinguishment of the first mortgage is a question of the intention of the parties. First Security Bank of Utah v. Proudfit Sporting Goods Co., Utah, 552 P.2d 123 (1976).

It is quite clear from the evidence that the intent of Interlake and Coombs was to extinguish the prior mortgage. Adams testified that the old loan was totally paid, and satisfied, and cleared (Adams testimony, R. 1350, L. 16-22). The ledger on the loan itself was stamped "paid in full." (Ex.14-P)

Additional indication of the intent to extinguish the prior mortgage is the language of the trust deeds themselves. The 1980 trust deed provided that the deed secured

"..., the payment of such additional loans, or advances as may hereafter be made by Beneficiary to Trustor, its successors and/or assigns, when evidenced by a Promissory Note or Notes reciting that they are secured by this Trust Deed;"

Thus, by the terms of the 1980 trust deed, if the parties had intended the 1981 note to be secured by the 1980 trust deed, they

need only have said so. But the new 1981 note recites that it is secured by a trust deed of even date (Ex. 35-D), and the 1981 trust deed likewise refers to the note of even date (Ex. 34-D).

On virtually identical facts, Judge Jenkins, in the Federal District Court for Utah, found a strong inference that it was the intent of the parties to satisfy and extinguish the prior deed and secure the new obligation with the latter deed.

Peterson v. United States, D. Utah, 511 F.Supp. 250 (1981).

This result is also supported by a leading authority on property law, who indicates that

"...where the new mortgage secures a debt distinct from the old, or an additional debt; the satisfaction in such cases operating as a complete discharge of the first mortgage."

8A G. Thompson, Thompson on Real Property, Section 4424 at p. 207 (1963).

Thus, the evidence clearly indicates an intention on Interlake's part to extinguish the 1980 mortgage. Since the trial court properly found that the 1981 subordination agreement was induced by fraud, a rescission of that agreement would leave Perkins in a first priority position, secured by the 1980 trust deed as against Interlake's 1981 trust deed.

Under the agreement made by the parties during the course of the litigation, by which Perkins released their lis pendens on the Jeremy property and allowed Interlake to foreclose in exchange for Interlake's promise to be good for any damages to Perkins as found by the court, Interlake must

pay Perkins the full balance on their secured interest, plus any interest accrued thereon. See, discussion of agreement, R. 1382, L. 3 - R. 1383, L. 10; R. 984, L. 7 - R. 985, L. 4.

III. TRIAL COURTS FINDING OF FAILURE OF PERKINS TO MITIGATE DAMAGES WAS IMPROPER AND NOT SUPPORTED BY THE EVIDENCE.

The court, in its bench ruling, found that Perkins were limited in their recovery for loss of their property because they hadn't bid in on the property in front of Interlake. The trial court made this ruling, sua sponte, even though Interlake had not pleaded nor argued mitigation of damages and plaintiffs were not prepared to respond to it when it was raised for the first time in the court's bench ruling. (Bench Ruling, January 23, 1984, R. 982, L. 3-R. 985, L. 4). But for this ruling, Perkins' damages were substantially greater, up to the full amount of their secured position, as seen above.

The law and the facts do not support the conclusion of failure to mitigate damages. First, no one is generally required to expend more sums of money to minimize their loss because this would require one to incur risks beyond those in the contract. 22 Am.Jur.2d Damages, Section 37; Support, Alexander v. Brown, Utah, 646 P.2d 692 (1982).

Second, because of the agreement of counsel for the parties allowing sale of the Jeremy property for the specific

purpose of avoiding further loss, the trial court's ruling that Perkins could have "totally" mitigated their damages by redeeming the property is completely unwarranted. See, Bench Ruling, January 23, 1984, R. 982, L. 3 - R. 985, L. 4. Certainly, since the Perkins did not discover the inclusion of Coombs' personal loan in the rewrite until Mr. Adams' deposition in September, 1982 (R. 983, L. 10-18), their release of the property for sale by Interlake was the only action to mitigate that they had available by that time.

Finally, the facts do not support such a limitation. The fraud was committed in late 1981, at which time the Interlake lien was \$22,093.89. Perkins did not discover the fraud until after this action was begun. By agreement with Interlake's counsel that Interlake would be good for any damages found by the court, Perkins released a lis pendens and allowed the foreclosure to proceed, in order to hold damages to a minimum. (Bench Ruling, supra). When the property was sold, Interlake's bid at the trustee sale was \$36,068.73. At about the same time the property value had dropped considerably from neglect during the CIC ownership, and was unmarketable for \$32,800 (Anderson testimony, R. 1481, L. 20-R. 1482, L. 2 and R. 1485, L. 5-24), and eventually was sold for \$28,700 (R. 1406, L. 10-20). Obviously, by the time of the default after the loan rewrite and subordination, Perkins could not have mitigated their damages by bidding in

on the property at that time, since Interlake's lien claim of \$36,068.73 apparently exceeded the value of the property. The law does not require people to perform futile acts.

What Perkins' actual damage was from Interlake's fraud, if rescission is not granted, was the value of the property over and above the Interlake lien at the time of the fraud. The only evidence of the market value of the Jeremy property at the time of the fraud in late 1981 is Interlake's own estimate of \$39,700 (Exhibit 39-D, "Real Estate Loan Summary"). Thus, the actual damage measure of loss for which Interlake should be liable to Perkins would be that market value minus Interlake's prior lien interest, or \$17,606."

IV. TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD PUNITIVE DAMAGES

Perkins believe that the facts of the instant case demand the award of punitive damages, and the trial court's failure to do so amounted to an abuse of discretion.

Although punitive damages are admittedly awarded sparingly, the Utah Supreme Court has found it appropriate where conduct manifests a knowing or reckless indifference toward, and disregard of, the rights of others. Synergetics v. Marathon Ranching Co., Ltd., Utah, 12 UAR 15 (1985); Behrens v. Raleigh Hills Hospital, Inc., Utah, 675 P.2d 1179, 1186 (1983).

Interlake's conduct clearly indicated a knowing indifference toward, and disregard of, the rights of the Perkins. The Utah Court has indicated several factors should be considered in the award of punitive damages: the nature of the alleged misconduct, the extent of the effect of the misconduct on the lives of plaintiffs and others, the probability of future recurrence of such misconduct, the relationship between the parties, the relative wealth of the defendant, the facts and circumstances surrounding the misconduct, and the amount of actual damages awarded. First Security Bank of Utah v. J.B.J. Feedyards, Inc., Utah, 653 P.2d 591, 598 (1982). A review of the facts and circumstances surrounding Interlake's misconduct and in relation to various of these factors reveals an established pattern which cheated the Perkins out of equity in their home.

The nature of Interlake's misconduct was fraud as found by the court. The facts show that in the fall of 1981, CIC was grossly delinquent in its loan secured by the Perkins' home and Coombs similarly delinquent in his unsecured personal loan. CIC had made so few payments that Interlake's secured loan was larger than when it was first made (Adams, R. 1407, L18-22). Coombs' personal loan was five months delinquent. (Adams, R. 1408, L10-13). Adams suggested a consolidation of the two (Adams R. 1404, L15-19), which would serve both Coombs and Interlake - Coombs by having his personal loan paid from

Perkins' equity and Interlake by making that which was hard to collect as a personal loan into a loan secured by the Perkins' nome.

In consolidating, Interlake indulged in conspicuously improper actions. First, the regulated interest rate on the consumer loan was escalated from 18% to an unregulated commercial rate of 24% (70B-3-205, 206, 508, Utah Code Annotated), for which Interlake prepared a corporate declaration of purpose that the entire amount of the loan was used for commercial purposes which it knew (Ex. 51-P; Adams, R. 1357, L7-24). Then, it committed fraud in obtaining the Perkins' signatures on the subordination agreement.

The entire trial of this case was replete with evidence of Interlake's callous disregard of and indifference to the Perkins' interest. In regard to the rewrite, Adams was asked to address himself to the concern that Interlake had for the Perkins:

"Q. (By Mr. King) Let me direct your attention to your conversation with the Perkins'. You've already admitted that you did not tell them about including the personal loan. You recall that?

A. Yes. We've already discussed that.

Q. All right. Now, why didn't you tell them?

A. Because the issue never came up. All They wanted to know was what position Interlake Thrift held and what would happen if the subordination agreement was not signed.

Q. Do you know of any means the Perkins' would have of knowing that Coombs had a personal loan with you that was delinquent if you hadn't told them?

A. That was Mr. Coombs' obligation. I had no obligation to Mr. and Mrs. Perkins. Mr. Coombs was my borrower.

Q. And you felt that you had no obligation to the Perkins to tell them that you were going to use their former home as security for you on a personal loan of Mr. Coombs?

A. I don't believe I had any obligation to them in any regard." (Adams, R. 1381, L2-23).

And as to Mr. Knight's, Perkins' attorney, inquiry, Adams stated, "As far as disclosing to Mr. Knight, I don't think I had any duty to disclose anything to him." (Adams, R. 1394, L8-10).

Further testimony of Mr. Adams indicated that the policy of intentional non-disclosure was the accepted practice at Interlake:

"Q. (By Mr. King) I understand your testimony to be that in everything you did here you complied with the existing practices and procedure of Interlake Thrift, your employer; is that right?

A. (Mr. Adams) Yes, we did. I did act on behalf of Interlake under our normal procedures.

Q. (By Mr. King) It is in the practice and normal procedure of Interlake Thrift when it seeks to obtain a subordination agreement from intervening lien holder to not advise the lien holder of increases in the renewed loan not directly relating to the secured property?

A. Any time we obtain a subordination agreement we furnish the subordination agreement to them totally prepared.

Q. You didn't answer my question, sir.

A. Yes, I did. Because that's what we do. I don't discuss any of the other details with any junior lien holders.

Q. And the specific question was if Interlake Thrift increases a loan, such as it did, but including personal material, it is the practice of Interlake Thrift not to let the other lien holder know?

A. We don't call them up and tell them yes, this was it or this wasn't it. We supply them with the subordination agreement.

Q. But none of the supporting data so they can see where that fits in context?

A. No.

(Adams, R. 1415, L. 9-R. 1416, L. 14).

Thus, the only reasonable inference is that it is virtually inevitable that the kind of fraud committed against the Perkins would recur.

Punitive damages is perhaps the only method of taking the profit out of such wrongdoing where, as here, the compensatory damages are small in relation to Interlake's financial resources and can be subsumed as a cost of doing business. Support, Behrens v. Raleigh Hills Hospital, Inc., supra, at 1187.

There is not a word in the transcript indicating any

expression of regret by Interlake for the harm it has done the Perkins. Nowhere is there any indication that Interlake has undertaken different policies and procedures to avoid recurrence of this situation. Mr. Adams is still vice-president.

The type of attitude and conduct displayed by Interlake should not be passively condoned as the trial court has done. Punitive damages are the only means of serving the societal interest of punishing Interlake, giving notice to others, and redressing the effect of its conduct on the Perkins. Judge Fishler erred in awarding not a penny in punitive damages.

V. THE TRIAL COURT ERRED IN REDUCING PERKINS'
ATTORNEY FEES.

Perkins' attorneys, Samuel King and Eric Hartman, submitted affidavits as to their attorney fees in connection with Phase II (Ex. 54). They were not given an opportunity to testify, nor Interlake to cross examine. Their affidavits excluded all fees and costs for Phase I.

Judge Fishler reduced the fees from \$5,068.25 for Mr. King, and \$5,047.50 for Mr. Hartman, to a total of \$2,500 without a factual basis for doing so, stating:

"The court has reviewed this file in detail, and it appears to this court that since this matter was filed in the summer of 1982, and the court is very familiar with all of the hearings that were held when this division of the court had law and motion, and all of the hearings subsequent, that the amount of the attorney's fees in this case just boggle the mind of the court. Therefore, in the discretion of the court, the court is not going to award Mr. and Mrs. Perkins the full amount of their attorney's fees; only \$2500. That will be the judgment on that point."

R. 976, L. 2-11.

The court's rationale is hard to follow particularly as the judge gave Interlake the full fees it requested against Southern Title-\$7,000-for Phase I. (R. 990, L. 15-25)

Provided that Perkins' fees are reasonable, it is proper that Interlake, not Perkins, nor their counsel, should absorb them. It is submitted that a glance at the whole file shows them to be modest, (although counsel admit that here they might finally have become factually argumentative,) so that the trial court's reduction of the fees should be reversed, with fees either approved prima facie, or remanded for hearing as to their full, reasonable amount.

CONCLUSION

Perkins pray that as a matter of law they be held to have priority over Interlake based on either Phase I or II or both, and that their damages be the unpaid balance due them on their trust deed note with interest or, that failing, \$17,606.00, which is the difference between the property's value


at the time of fraud in December, 1981, and the lien on the property of Interlake at that time.

Perkins pray the issue of punitive damages be remanded for trial as to amount.

Perkins pray they be awarded full attorney fees for Phase II of \$10,115.75, or that these fees be remanded for determination and award, of their full, reasonable amount.

Perkins pray their costs and, for Phase II their fees, for this appeal, and for such other relief as may be proper.

DATED August 23, 1985.



SAMUEL KING



ERIC P. HARTMAN

DELIVERY CERTIFICATE

I certify that I hand carried four copies of this brief to Hollis Hunt, attorney for defendant-respondent, Interlake Thrift, 243 East 400 South, Salt Lake City, Utah 84111, August 23, 1985.

Eric P. Hartman

ERIC P. HARTMAN

DEC 11 1984

H. Dixon Hindley, Clerk 3rd Dist. Court
By R. J. J. J. J. J. Deputy Clerk

ERIC P. HARTMAN, No. 1400
SAMUEL KING, No. 1195
Attorney for Plaintiff
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Salt Lake City, Utah 84106
(301) 436-3751

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

GEORGE S. PERKINS and LILLIE
PERKINS,

Plaintiffs,

v.

DICK COOMBS, an individual,
COOMBS INVESTMENT CORPORATION,
a Utah corporation, INTERLAKE
THRIFT, a Utah corporation, and
JOHN DOE FIDELITY COMPANY,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

DICK COOMBS, COOMBS INVESTMENT
CORPORATION, and JOHN DOE
FIDELITY COMPANY,

Defendants and
Third Party
Plaintiffs,

v.

PETER ROBERT LUCERO

Third Party
Defendant

Civil No. 82-6000

Judge Philip R. Fishler

INTERLAKE THRIFT, a Utah
corporation,

Cross-Claimant

v.

DICK E. COOMBS,

Cross-Defendant

INTERLAKE THRIFT, a Utah)
corporation,	
Third Party)
Plaintiff,	
v.)
GUARANTY TITLE COMPANY, a Utah)
corporation; SOUTERN TITLE	
GUARANTY COMPANY, INC., aka)
FIDELITY NATIONAL TITLE INSUR-	
ANCE COMPANY, INC.; MARK J.)
WILLIAMS, an individual; and	
RUTH R. COOMBS, an individual,)
Third Party)
Defendants.	

The trial of the above-entitled matter came on regularly for hearing on November 28, 1983, before the Honorable Philip R. Fishler, Judge of the above-entitled court. The trial in this matter was to determine the issue of priority of the recording of the various conveyances on October 31, 1980, involved in the purchase and sale of certain real property known as 54 South Jeremy Street, Salt Lake City, Salt Lake County, State of Utah. All other issues relating to the parties' respective claims were bifurcated on October 26, 1983, at the Pre-Trial Conference and all matters relating to the November 27, 1981, rewriting of the defendant Interlake Thrift's Trust Deed and Note and subordination by the plaintiffs were separated from this first trial and were scheduled for trial on January 10, 1984.

The plaintiffs were present and represented by their counsel, Samuel King and Eric P. Hartman; the defendants Dick E. Coombs and Ruth R. Coombs, individuals, had previously filed for bankruptcy and were stayed from any liability in these proceedings. Coombs Investment Corporation, a Utah corporation, previously having filed a Chapter 11 bankruptcy which was dismissed, did not appear in these proceedings by counsel or any corporate officer but was a party; Interlake Thrift was represented by and through their attorney, Hollis S. Hunt; Century 21 Monson & Company and Peter Robert Lucero and Jessie Monson had previously been dismissed from this action; Guaranty Title Company, a Utah corporation, had

notified the court of their intention not to appear or to defend this action at trial and were not present, but a party; Southern Title Guaranty Company, Inc., now known as Fidelity National Title Insurance Company, Inc., was represented by and through its attorney Brant H. Wall; Mark J. Williams was represented by and through his attorneys Lon Rodney Kump and Lisa K. Olsen. The court heard the testimony and was in session for three and one-half days and heard the respective witnesses called by the parties received and reviewed numerous pretrial memoranda and briefs, and having been fully advised in the premises now makes the following:

FINDINGS OF FACT

1. The plaintiffs, George S. Perkins and Lillie Perkins, husband and wife, were the vested owners of certain real property located at 54 South Jeremy Street, Salt Lake City, Utah, Salt Lake County, State of Utah, for approximately twenty-two (22) years. In June, 1980, they determined to sell their residence and listed their residence with a real estate agent, Peter R. Lucero.

2. In September, 1980, Mr. and Mrs. Perkins determined to sell their home to Coombs Investment Corporation (hereinafter referred to as "CIC"). CIC's real estate agent, Paul Scott, on September 18, 1980, brought to the Perkins, at their home, an Earnest Money Receipt and Offer to Purchase and presented it to the Perkins for their signature.

3. At that meeting the real estate agent, Paul Scott, advised the plaintiffs in detail as to their second position should the sale be consummated and that they would be required to subordinate their primary interest in their residence located at 54 South Jeremy Street. On September 23, 1980, the Perkins made a counter-offer to CIC which was fully signed by all parties on September 25, 1980, which did not alter the terms or conditions of the Earnest Money Receipt and Offer to Purchase other than modifying the closing date. On October 29, 1980, CIC entered

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into and negotiated a loan with Interlake Thrift in the amount of \$20,756.44, with an effective annual percentage interest rate of 24%. The earnest money indicates that the Perkins were to take a second position to a loan in the sum of \$17,000.00 at the rate of 14%. The term of that loan was not specified in the document.

4. On October 29, 1980, Interlake Thrift by and through its manager, Ronald D. Adams, sent an escrow letter to Guaranty Title Company instructing them not to disburse funds that were included with the escrow letter to the various parties until the property had been placed fully in the name of CIC and that Interlake Thrift had received a first trust deed on the property. At such time the Guaranty Title Company would then be free to disburse the funds that were included with the escrow letter.

5. On October 31, 1980, the closing was held at the offices of Guaranty Title Company located at 4525 South 2300 East, Salt Lake City, Utah, and was attended by George S. Perkins and Lillie Perkins, their realtor, Peter R. Lucero; Dick E. Coombs, as president of CIC, and Paul W. Scott, CIC's realtor; the closing officer of Guaranty Title Company, Mark J. Williams conducted the closing. At that closing a warranty deed from Perkins to CIC was executed and delivered. The Trust Deed from CIC to Interlake Thrift was delivered to Mr. Williams and the Trust Deed from CIC to Perkins was presented to the Perkins for the balance of the purchase price.

6. Mr. Williams did not advise the Perkins that the loan to Interlake was one which had a greater interest rate and a greater principal amount than that specified in the Earnest Money.

7. At that closing neither Mr. or Mrs. Perkins nor did their real estate agent, Peter R. Lucero, ask any questions or inquire about the documents or recording sequence.

8. This transaction is similar to the leading case in this area in the State of Utah, Kemp v. Zions First National Bank, 470 P2d 390 (Utah 1970), where Zions Bank was in the same position as Interlake Thrift; Kemp is in the same position as Mr. and Mrs. Perkins and CIC is in the same position as the Nobles

9. The court finds that there was one continuous transaction at the closing of October 31, 1980, using one agent which was the escrow officer and closing agent, Mark J. Williams, making this a purchase money mortgage situation.

10. Mr. and Mrs. Perkins would be in a first position on the property but for the Subordination Agreement which was incorporated into the Earnest Money Agreement of September 25, 1980. There, the Perkins agreed that CIC would obtain a loan from the lender.

11. Mr. and Mrs. Perkins did agree to take a second position and subordinate their interest to the lender that CIC obtained. In this case that lender was Interlake Thrift. The Earnest Money Agreement of September 25, 1980, clearly spelled out the intent that the Perkins knew that they were going to subordinate their interest as CIC would obtain a lender for the purchase. Paul Scott on September 18, 1980, informed the Perkins in a detailed presentation that they would be in a second position then on the closing on October 31, the closing officer, Mark J. Williams made available deeds and trust deeds and other documents which would indicate that Interlake Thrift would be in a first position.

12. The loan actually obtained by CIC from Interlake, \$20,756.44 at the effective interest rate of 24% is not "approximately" a loan of \$17,000 at 14% interest (authorization of the Earnest Money Agreement). However, Perkins and their agent attended the closing and failed to attempt to ascertain what was ultimately going to be put on the property by way of a trust deed and trust deed note, so they waived any objection to the difference in terms.

13. Mr. and Mrs. Perkins attended the closing of October 31, 1980, and asked no questions at the closing and neither did their real estate agent, Peter R. Lucero.

14. The Earnest Money Agreement of September 25, 1980, was vague with no definite terms and conditions so as to compute an exact amount of the Subordination Agreement. Mr. and Mrs. Perkins had a duty to clarify those terms as the Earnest Money Agreement of September 25, 1980, was used as the escrow instructions for the Perkins to the title company to prepare the closing papers. In addition, Mr. and Mrs. Perkins had a duty to speak up and to clarify those areas where they may have had any question or concern. They failed to inquire as to the terms and conditions at the closing, in light of the fact that the amount of the subordination had not been fully agreed upon.

15. At the time the Perkins failed to inquire as to the terms and conditions of the Subordination Agreement. They had a duty to inquire, did not do so and waived any claim to the limitation of the Earnest Money Agreement of September 25, 1980, which was merged into the Warranty Deed from Perkins to CIC of October 31, 1980.

16. At the closing on October 31, 1980, the escrow officer, Mark J. Williams, would have had no way of knowing that the subordination portion of the Earnest Money Agreement of September 25, 1980, and the ultimate subordination to Interlake Thrift on October 31, 1980, were not the same. He did not receive the Promissory Note from Interlake Thrift but only the Trust Deed from CIC to Interlake Thrift. Additionally, in view of the fact that there was no inquiry made or questions by Mr. and Mrs. Perkins or their realtor, Peter R. Lucero, there was nothing to put the escrow officer on notice of any discrepancy or that the documentation as was prepared and handled did not reflect the terms of the Earnest Money Agreement.

17. Interlake Thrift has a first position by virtue of their Trust Deed of October 29, 1980, and the Perkins have a second position by virtue of their Trust Deed of October 31, 1980, which were recorded with Interlake Thrift's being recorded first and Mr. and Mrs. Perkins' being recorded second.

18. The Warranty Deed of October 31, 1980, from Mr. and Mrs. Perkins to CIC merged the Earnest Money Agreement of September 25, 1980, and any differences in the terms of the Earnest Money Agreement as to the terms surrounding the Warranty Deed and the subordination by CIC to Interlake Thrift were merged and no differences by virtue of the Earnest Money Agreement of September 25, 1980, can exist or be asserted now.

19. The cause of action against Mark J. Williams as a third-party defendant by third-party plaintiff, Interlake Thrift, is hereby dismissed, as he was their disclosed agent. This cause of action is dismissed on the basis of agency law wherein Mark J. Williams was operating within his capacity as an agent and any liability would be passed on to his employer, Guaranty Title Company, Inc.

20. Interlake Thrift shall have a judgment against Guaranty Title Company by default and their failure to defend this action, for damages to be determined at the second trial.

21. Dick E. Coombs and Ruth R. Coombs' actions are stayed by the filing of their bankruptcy in the State of Nevada.

22. All remaining issues between the parties including the third-party claims by Interlake Thrift against Southern Guaranty Title Company and all matters surrounding the transaction of November 27, 1981, are reserved for trial on January 10, 1984.

23. In making its Findings of Fact, the court has not placed reliance on, nor taken into account, the depositions of Mr. Coombs.

Having made the Findings of Fact the court now makes the following:

CONCLUSIONS OF LAW

1. That the plaintiffs, George and Lillie Perkins, did agree to subordinate their interest in certain real property located at 54 South Jeremy Street, Salt Lake City, Salt Lake County, State of Utah, more particularly described as follows:

COMMENCING at a point 18 rods East and 11 rods North of the Southwest corner of Block 51, Plat "C", Salt Lake City Survey, and running thence North 3 rods; thence West 9 rods; thence South 3 rods; thence East 9 rods to the place of beginning.

The Earnest Money Agreement of September 25, 1980, was the instrument in which the Subordination Agreement was incorporated where the Perkins agreed to the subordination in the approximate sum of Seventeen Thousand Dollars (\$17,000) at Fourteen percent (14%) interest.

2. At the closing of October 31, 1980, at Guaranty Title Company, George and Lillie Perkins had a duty to inquire as to the terms and conditions of the Subordination Agreement which they did not do and neither did their realtor, Peter R. Lucero.

3. Interlake's Trust Deed was Twenty Thousand Seven Hundred Fifty-six Dollars and Forty-four cents (\$20,756.44) at the effective interest rate of Twenty-four percent (24%) which was not approximately Seventeen Thousand Dollars (\$17,000) at Fourteen percent (14%) interest as stated in the Earnest Money Agreement of September 25, 1980. However, any differences between the ultimate subordination and the subordination agreed to in the Earnest Money Agreement was merged into the Warranty Deed between Perkins and CIC. Plaintiffs' claim that defendants failed to satisfy the requirements of the Statute of Frauds is without merit due to the Doctrine of Merger. The Earnest Money Agreement and related documents are merged into the Warranty Deed.

4. Interlake Thrift's Trust Deed of October 29, 1980, has priority over the Perkins' Trust Deed of October 31, 1980,

and is a valid first security interest and the Trust Deed of October 29, 1980, recorded as Entry No. 3497141, Book 5172, Page 720, is, in fact, in a first position and has priority over any subsequent recording by Mr. and Mrs. Perkins or any others.

5. The third-party Complaint against the third-party defendant, Mark J. Williams, is dismissed as Mr. Williams is a disclosed agent and was acting within the scope of his authority.

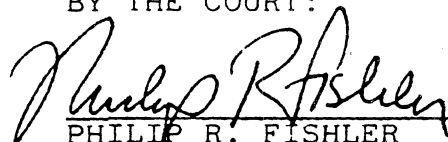
6. Interlake Thrift shall have a judgment against Guaranty Title Company, Inc., for any damages as are sustained by Interlake Thrift on the basis of Guaranty Title Company, Inc., default, as shall be determined at the second trial.

7. Interlake Thrift has judgment against CIC for damages such as shall be determined in the second trial on January 10, 1984. All causes of action against Dick E. Coombs and Ruth R. Coombs are stayed by their bankruptcy filed in the State of Nevada. All parties with claims against CIC have judgments against it.

8. All remaining issues claimed by the plaintiffs against defendant, Interlake Thrift, shall be reserved for the second trial to be held on January 10, 1984, as to the subordination and rewrite of the second transaction of November 27, 1981, and all issues as relate to Interlake Thrift's claim against Southern Guaranty Title Company with the tender of the defense and damages incurred. In addition thereto the issues as to damages on Interlake Thrift's judgment against Guaranty Title Company, Inc., and Coombs Investment Corporation shall also be determined.

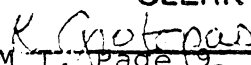
DATED this 11th day of December, 1984.

BY THE COURT:


PHILIP R. FISHLER
District Court Judge

ATTEST

H. DIXON HINDLEY
CLERK

ADDENDUM 1, 
Deputy Clerk

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MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing was mailed to the parties of interest listed below, U. S. Mail, postage prepaid, Nov 29, 1984.

Hollis S. Hunt
Attorney for defendant
Interlake Thrift
311 South State, Suite 440
Salt Lake City, UT 84111

CIC
c/o Dick E. Coombs, President
4522 Buena Vista
Las Vegas, Nevada 89102

William D. Holyoak
Attorney for Third Party
Defendant Lucero
50 South Main, Suite 900
Salt Lake City, UT 84144

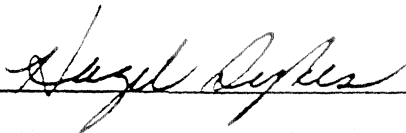
Brant H. Wall
Attorney for Security
Title and Southern Title
500 Judge Bldg.
Salt Lake City, UT 84111

R. Mont McDowell
Attorney for Third Party
Defendants Dick & Ruth Coombs
50 West Broadway, Suite 110
Salt Lake City, UT 84101

Dennis R. James
Attorney for Third Party
Defendant Guarantee Title
1800 So. West Temple, #310
Salt Lake City, UT 84115

Lon Rodney Kump & Lisa K. Olsen
Attorney for Mark Williams
333 East 400 So., #200
Salt Lake City, UT 84111

Dick E. Coombs & Ruth Coombs
4522 Buena Vista
Las Vegas, Nevada 89102



NOV 19 1984

H. Dixon Hines, Clerk of Dist. Court

By R. Golepas Deputy Clerk

ERIC P. HARTMAN, No. 1400
 SAMUEL KING, No. 1195
 Attorney for Plaintiff
 301 Gump & Ayers Bldg.
 2120 South 1300 East
 Salt Lake City, Utah 84106
 (801) 486-3751

 IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

GEORGE S. PERKINS and LILLIE)
 PERKINS,)

Plaintiffs,)

v.)

DICK COOMBS, an individual,)
 COOMBS INVESTMENT CORPORATION,)
 a Utah corporation, INTERLAKE)
 THRIFT, a Utah corporation, and)
 JOHN DOE FIDELITY COMPANY,)

Defendants.)

FINDINGS OF FACT AND
 CONCLUSIONS OF LAW

DICK COOMBS, COOMBS INVESTMENT)
 CORPORATION, and JOHN DOE)
 FIDELITY COMPANY,)

Defendants and)

Third Party)

Plaintiffs,)

v.)

PETER ROBERT LUCERO)

Third Party)

Defendant)

Civil No. 82-6009

INTERLAKE THRIFT, a Utah)
 corporation,)

Cross-Claimant)

v.)

DICK E. COOMBS,)

Cross-Defendant)

INTERLAKE THRIFT, a Utah)
corporation,	
Third Party)
Plaintiff,	
v.)
GUARANTY TITLE COMPANY, a Utah)
corporation; SOUTERN TITLE	
GUARANTY COMPANY, INC., aka)
FIDELITY NATIONAL TITLE INSUR-	
ANCE COMPANY, INC.; MARK J.)
WILLIAMS, an individual; and	
RUTH R. COOMBS, an individual,)
Third Party)
Defendants.	

Phase II of the trial of the above-entitled matter came on regularly for hearing on January 10, 11, and 12, 1984, before the Honorable Philip R. Fishler, Judge of the above-entitled court. Phase I of the trial concerned the priority of the various parties to this action to what had been the Perkins' home on 54 South Jeremy Street, Salt Lake City, Utah; the court having found that, although the Perkins were not advised of the terms of the loan between Coombs and Interlake, Perkins waived their priority in the home by failing to inquire as to the terms of the Interlake-Coombs loan at the closing October 31, 1980. Phase II of the trial concerned the Perkins' claim that Interlake in 1981 had induced Perkins by fraudulent misrepresentations to subordinate their interest in the home to a rewrite of the Interlake-Coombs loan. Phase II also concerned the claims of Interlake against the issuers of its title insurance for fees, costs and indemnification.

The plaintiffs were present and represented by their counsel, Samuel King and Eric Hartman; defendant Interlake Thrift was represented by its counsel, Hollis Hunt; defendant Dick E. Coombs and third party defendant Ruth R. Coombs, individuals, had previously filed for bankruptcy and the actions against them were stayed; defendant Coombs Investment Corporation

did not appear, having been previously defaulted; third party defendant Guaranty Title Company did not appear, having been previously defaulted; third party defendants Southern Title Company, Inc. and Fidelity National Title Insurance Company, Inc. were represented by their counsel, Brant H. Wall.

The court heard the testimony of witnesses called by the parties, received numerous exhibits over the course of Phase II of the trial, heard argument and motions, and being fully advised in the premises now makes the following:

FINDINGS OF FACT

1. In the Fall of 1981, title to the real property commonly known as 54 South Jeremy, Salt Lake City, Utah, was vested in Coombs Investment Corporation (CIC), subject to a first Trust Deed held by defendant Interlake Thrift (Interlake), and a second Trust Deed held by plaintiffs George S. Perkins and Lillie Perkins (Perkins).

2. In the Fall of 1981, CIC allowed both Trust Deeds to go into default.

3. CIC and Coombs resolved their difficulties by a rewrite of CIC's 1980 loan with Interlake, which also included in the total figure a delinquent loan owed Interlake by Dick E. Coombs (Coombs) as an individual. The new loan combining both the existing loans was for \$24,688.70. The interest rate on the new loan was the same as the effective interest rate on the old loan. However, the new loan had only one year in which to make final payment rather than 10 years, and included in the total principal sum the amount of Coombs' personal loan, \$2,464.41. Interlake deemed it necessary to obtain a subordination agreement from Perkins agreeing that they would be subordinate to this new consolidated loan. Coombs and CIC at all times dealt with Ronald Adams, Manager of the Interlake Branch that dealt with them. Adams had a subordination agreement

prepared for signature by the Perkins and delivered it to Coombs for execution by the Perkins. On presentation of the subordination agreement, the Perkins refused to sign it.

4. The Perkins retained P. Robert Knight, an attorney, to recover the payments due them from CIC.

5. Knight contacted Adams on or about December 26, 1981 and discussed the subordination agreement with him.

6. Adams, acting in his capacity as branch manager of Interlake, indicated to Knight that the subordination agreement was necessary to avoid Interlake foreclosing the home, as it had priority ahead of Perkins. Adams advised Knight that the new loan between CIC and Interlake was only an extension of the existing loan, included only the amounts due under the first loan and was increased only by late charges and accumulated interest.

7. Knight requested Adams to put his representations in writing. Adams agreed and wrote Knight a letter dated December 30, 1981, which is Exhibit 50P received in evidence.

8. Based on Adams' verbal representations and his letter, Knight believed that Interlake would accurately state the "rewrite terms" with CIC. Knight reasonably assumed and believed that the Perkins were in fact subordinate to Interlake with regard to priority and that if they did not sign the 1981 subordination agreement, they would lose their home. He further reasonably assumed and believed that the terms of the 1981 loan were consistent with the terms of the 1980 Interlake--CIC loan except for inclusion of late charges and accumulated interest. The court finds as fact that this reliance was reasonable under the circumstances. Based on that reliance, Knight advised his clients, the Perkins, to sign the subordination agreement, which they did on December 31, 1981, the Perkins reasonably relying on the advice of their attorney.

9. Interlake had closed Coombs' personal loan and included it into the CIC loan before Adams made his verbal and written representations to Knight.

10. The court finds there is clear and convincing evidence of all the elements of fraud:

a. Representations were made both by telephone conversation and letter that the rewrite of the CIC loan, and the subordination agreement the Perkins were to sign, covered only the amount including interest and late charges CIC owed Interlake on the 1980 Trust Deed Note secured by the Perkins' home.

b. These representations concern presently existing material facts.

c. The representations were false (1) because they omitted that Interlake had included Coombs' personal loan of \$2,464.41 which is not only a personal loan but had not been previously secured by the property of the Perkins; and (2) the term of the new loan shortened from 10 years to one year the amount of time in which CIC had to pay. All these misrepresentations were material.

d. Ronald Adams, having taken entire charge of the matter on behalf of Interlake in negotiations with CIC, Coombs, the Perkins, and the Perkins' attorneys, knew or should have known the representations to be false or he made them recklessly without sufficient knowledge upon which to have based such representations. This is apparent from the facts that: (1) Interlake, one month prior to the time Adams spoke to Knight, had closed Coombs' personal loan as fully paid, and (2) had rewritten and had executed the new CIC loan from Interlake secured by the Perkins' property with final figures including Coombs' personal loan, and the shortened time for payment.

e. Adams did so for the purpose of inducing Knight to act upon his representations and to have the Perkins sign the subordination agreement.

f. Knight, and in turn the Perkins, acted reasonably in reliance on the representations of Interlake made through its manager, Adams.

g. Knight and the Perkins did in fact rely on Adams' misrepresentations.

h. The Perkins were thereby induced to act by signing the subordination agreement.

i. The Perkins were damaged in that the equity in their home was reduced by \$2,464.41.

11. The Perkins' damages are the amount of the personal loan of \$2,464.41, merged into the 1981 loan which, at 24% interest from the date of recordation of the subordination agreement, January 6, 1982, until the date of sale by Interlake Thrift as trust deed dated December 7, 1982, interest to accrue at the legal rate of 10% thereafter.

12. The Perkins failed to mitigate their damages, in that they could have done so by coming in after the second default and redeeming their property, which would have limited their damages to the amount of Coombs' personal loan.

13. The Perkins should be awarded \$2,500.00 as reasonably attorney fees for Phase II.

14. Punitive damages should not be awarded as the above relief to the Perkins is adequate.

15. Perkins are awarded costs against Interlake for Phase II.

16. No decision is made herein concerning claims by or against Dick E. Coombs or Ruth Coombs, as these proceedings have been stayed as to them by their filing a Petition in Bankruptcy. However, pursuant to Rule 54(b), Utah Rules of Civil Procedure, the Court has determined that there is no just reason for delay and directs the entry of a final judgment as to the claims between plaintiffs and Interlake for purposes of immediate appeal, as to both Phase I and II of this trial.

CONCLUSIONS OF LAW

1. That defendant Interlake Thrift committed fraud upon the plaintiffs, George S. Perkins and Lillie Perkins, through misrepresentations of Interlake's branch manager, Ronald Adams.

2. That plaintiffs were damaged in the amount of \$2,464.41 at 24% interest from January 6, 1982, through December 1982, and at the legal rate of 10% thereafter.

3. That plaintiffs are entitled to reasonable attorney fees of \$2,500.

4. That plaintiffs failed to mitigate their damages by not redeeming the Jereby Street property after the second default, such that their damage award should be limited to the above amounts.

5. That plaintiffs are entitled to costs.

DATED November 16, 1984.

ATTEST

H. DIXON HINDLEY
CLERK

BY THE COURT:

By K. Gutierrez
Deputy Clerk

Philip R. Fishler
PHILIP R. FISHLER, JUDGE

MAILING CERTIFICATE

I certify I mailed a copy of the foregoing Findings of Fact, Conclusions of Law, to Hollis Hunt, attorney for Interlake Thrift, 311 South State, No. 440, Salt Lake City, UT 84111, U. S. Mail, postage prepaid, _____, 1984.

REALTOR[®]**EARNEST MONEY RECEIPT AND OFFER TO PURCHASE**

This may be a legally binding form, if not understood seek other advice

TO: ERA NEW WORLD REALTY

Name of Broker Company

Salt Lake City

Utah

7/17/80IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we COOMBS INVESTMENT CORPORATIONhereby deposit with you as earnest money the sum of (\$ 100.00*) One Hundred----- DOLLin the form of Company checkto secure and apply on the purchase of the property situated at: 54 South Jeremy MLS #23996City Salt Lake County, State of Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other item

except NoneThe following personal property shall also be included as part of the property purchased: Personal property as per listing agreement.Seller to Warrant that all heating, plumbing, electrical and appliances to be in goodworking order at time of close or may purchase applicable ERA Buyer Protection Plan.The total purchase price of \$ 37,000.00* Thirty-seven thousand----- DOLLshall be payable as follows: \$ 100.00* which represents the aforesaid deposit, receipt of which is hereby acknowledged by you:\$ -0- when seller approves sale: \$ 12,900.00* on delivery of deed or final contractdate which shall be on or before October 30 19 80 and \$ 219.54 the first day ofDecember 1, 1980 which amount shall include principle and interest on the unpaid balanceat 10 1/2% per annum amortized over 30 years. Buyer shall make a Ballon payment on the entremaining balance of the purchase price on December 1, 1990. Buyer shall secure paymentby executing a second trust deed and second trust deed note on Purchase property. Sellershall provide an appraisal of Purchase property. Buyer and seller shall share escrow co50/50. Payment shall be madeuntil the balance of \$ 24,000.00* together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the mpayments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 10 1/2 % per annum on the unpaid portionspurchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before October 30 19 80 All risk of loss and destr

of property, and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rent, insurance, interest and other expenses of the property sh

allered as of date of possession. All other taxes, and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be p

the seller except: NoneThe following special improvements are included in this sale: Sewer ☒ Connected ☒ Septic Tank and/or Cesspool ☒ Sidewalk ☒ Curb and Gutter ☒ Special Street☒ Special Street Lighting ☒ Culinary Water (City ☒ Other Community System ☒ Connected ☒ Private ☒ (Legend: Yes (x) No ())

Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of

To be determined at closing.This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 1 days from date hereof, and u

approved the return of the money herein received shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of it

be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement or

anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contra

stitute this Earnest Money Receipt and Offer to Purchase.

ERA NEW WORLD REALTY Agent By Paul W. Scott

Broker Company

Dated: 9/22/80 Time:

In response to the offer to purchase the real property commonly known as 54 South Jeremy

MLS # 23996

made by COMBS INVESTMENT CORPORATION

dated 9/17/80, the following counter offer is hereby submitted:

DATE OF CLOSE AND POSSESSION TO BE CHANGED FROM
OCTOBER 30, 1980 TO NOV 10, 1980

OTHER TERMS: All other terms to remain the same.

RIGHT TO ACCEPT OTHER OFFERS: Seller reserves the right to accept any other offer prior to purchaser's written acceptance of this counter offer. Acceptance shall not be effective until personally received by

[Signature]

(Listing Agent)

EXPIRATION: This counter offer shall expire unless a copy hereof with purchaser's written acceptance is delivered to seller or his agent within 1 days from date.

[Signature] Seller

Seller

Dated: Time:

The undersigned purchaser accepts the above counter offer.

ADDENDUM III, COUNTEROFFER

IN ORLAKE THURST

20362-0	29	HYUNDAI SONATA 2.0L 4-DR	10-29-80	12850.00
CO-DEBTOR'S INVESTMENT INC		HOUSE/	34123.26	12.00
1473 SOUTH 1100 EAST		HOUSE	HOUSE	HOUSE
SALT LAKE CITY, UT 84103		HOUSE	HOUSE	HOUSE
20362-0		ANNUAL PERCENTAGE RATE	10.00	10-29-80
CO-DEBTOR'S Personal Guarantee by Dick E. and Ruth Coombs				

The following additional information is furnished pursuant to Utah State Law, and is in accordance with the disclosure requirements of the Truth-in-Lending Act.

This loan is: ☒ Interest bearing at 18.00% per annum ☐ Interest bearing at the rate set by Utah Uniform Consumer Credit Code as disclosed immediately below.

MAXIMUM CHARGES PERMITTED UNDER THE UTAH UNIFORM CONSUMER CREDIT CODE are as follows: 36% per year on that part of the unpaid balance of principal which is \$600 or less, 21% per year on that part of the unpaid balances of the principal which is more than \$600 but does not exceed \$2700 and 18% per year on that part of unpaid balances of principal which is more than \$2700 or, 18% per year on the unpaid balances of the principal.

FOR VALUE RECEIVED, on the above indicated date, the undersigned, jointly and severally, promise to pay to the order of Lender named above, at its office above stated, the Amount Financed as stated above together with Finance Charge computed on outstanding balances at the rate checked above until paid in full. Finance Charge after final payment date shall be at the same rate as checked above on the unpaid Amount Financed, both before and after judgment.

Payments of Amount Financed and Finance Charge shall be made in consecutive monthly payments as indicated above beginning on the first Payment Due Date stated above and continuing on the same day of each succeeding month to and including the final Payment Due date stated above. If the Amount Financed or any payment is not made when due, the unpaid Amount Financed shall bear Finance Charge at the rate of charge checked above, however, not less than the amount of any payment, when due, of the Amount Financed or Finance Charge hereof, or any part of either or any violation of the Security Agreement/Deed of Trust/Mortgage shall at the option of the Lender and without notice or demand, render the then unpaid Amount Financed hereof, and accrued Finance Charge hereof, immediately due and payable. Every payment made hereon shall be applied first to Finance Charge and the remainder to the unpaid Amount Financed until paid. The unpaid Amount Financed, or any part thereof, plus accrued Finance Charge may, at the option of the undersigned be paid at any time, subject to a minimum Finance Charge of \$7.50 where Amount Financed is more than \$75.00, or a minimum Finance Charge of \$5.00 where Amount Financed is \$75.00 or less.

Debtor(s) agree to pay a reasonable attorney's fee should the Note be referred after default to an attorney not a salaried employee of the Lender.

Extension of the time of payment of all or part of the Amount Financed hereon, or any variation, modification or waiver of any term or condition hereof at any time or times shall not affect the liability of any party hereto as co-debtor, endorser, guarantor, or surety thereof, it being the intent of all parties to this Note that they shall continue, jointly and severally, absolutely liable for the payment of the aforesaid indebtedness until the same is actually paid in full. Co-debtors, endorsers, guarantors, sureties and all parties hereto severally waive notice of acceleration, presentment for payment, demand, and notice of demand, nonpayment, and protest of this Note. The parties hereto agree that this loan is subject to the provisions of the Uniform Consumer Credit Code applicable to consumer loans.

Each part of this instrument, including the caption hereof, is a part of this Note.

SECURITY: ☐ This loan is unsecured
☐ This loan is secured by the Security Agreement on:
☐ The following described motor vehicle(s):

YEAR	MAKE	BODY TYPE	MODEL NO.	SERIAL NO.	NO. CYL.

together with all the equipment of every kind now on said automobile or which may be hereafter attached, and all replacements made by the Debtor or any of his agents during the life of the security agreement.

☐ All consumer goods now owned by the Debtor and kept or used in or about the Debtor's place of residence, or acquired within 10 days hereafter, including but not limited to the items listed here:

INTERLAKE THRIFT

100 INTERLAKE BUILDING 1025 EAST 2100 SOUTH
SALT LAKE CITY, UTAH 84106 PHONE 487-0653

October 30, 1980

Guarantee Title Company
4525 South 2300 East
Salt Lake City, Utah 84117

R.E: Coombs Investment Corporation:
Committment No. C-1730

Dear Mark,

Enclosed is our Trust Deed and our checks in the following amounts.

1. \$	7.00	Recording Fee
2. \$	62.00	Title Policy Premium
3. \$	\$19,350.76	See Below

Check Number 3:

Proceeds are to be disbursed by Guarantee Title.

1. Pay to Coombs Investment all remaining monies when Interlake Thrift is in a first mortgage position on this property wested under Coombs Investment Cop. with no other tax liens or any other liens ahead of Interlake Thrift.

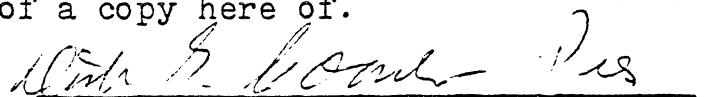
Thank you.

Very truly yours,



Ronald D. Adams
Branch Manager

I agree to the term and conditions set forth in this letter and acknowledge receipt of a copy here of.



Dick E. Coombs, President

ADDENDUM V.

INTERLAKE THRIFT

100 INTERLAKE BUILDING 1025 EAST 2100 SOUTH
SALT LAKE CITY, UTAH 84106 PHONE 487-0653



December 30, 1981

George S. Perkins
Lillie Perkins
Bob Knight, Attorney at Law

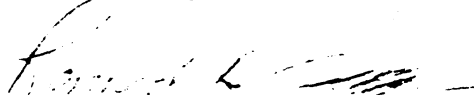
R.E.: Property Located at 54 South Jeremy Street

On November 27, 1981, Interlake Thrift agreed to rewrite the loan of Coombs Investment Corporation. This rewrite was done to avoid foreclosure proceedings.

The subordination agreement from Mr. and Mrs. Perkins is necessary to keep Interlake Thrift in a first mortgage position. Also, had the subordination agreement not been done, Interlake Thrift would foreclose on subject property and, to protect their interest Mr. and Mrs. Perkins would have to payoff Interlake Thrift.

The new account with Interlake Thrift will be larger than the original loan with interest due, costs and charges.

Yours truly,


Ronald D. Adams
Branch Manager

RDA/hd

ADDENDUM VII
STATUTES CITED IN BRIEF

25-5-1. Estate or interest in real property. No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

25-5-3. Leases and contracts for interest in lands. Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

57-3-3. Effect of failure to record. Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.

70B-3-205. Loan finance charge on refinancing. With respect to a consumer loan, refinancing or consolidation, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the principal resulting from the refinancing at a rate not exceeding that permitted by the provisions on loan finance charge for consumer loans (section 70B-3-201) or the provisions on loan finance charge for supervised loans (section 70B-3-508), whichever is appropriate. For the purpose of determining the loan finance charge permitted, the principal resulting from the refinancing comprises the following:

- (1) if the transaction was not precomputed, the total of the unpaid balance and the accrued charges on the date of the refinancing or, if the transaction was precomputed, the amount which the debtor would have been required to pay upon prepayment pursuant to the provisions on rebate upon prepayment (section 70B-3-210) on the date of

refinancing, except that for the purpose of computing this amount no minimum charge (section 70B-3-210) shall be allowed; and
(2) appropriate additional charges (section 70B-3-202), payment of which is deferred.

70B-3-206. Loan finance charge on consolidation.

(1) If a debtor owes an unpaid balance to a lender with respect to a consumer loan, refinancing, or consolidation, and becomes obligated on another consumer loan, refinancing, or consolidation with the same lender, the parties may agree to a consolidation resulting in a single schedule of payments. If the previous consumer loan, refinancing, or consolidation was not precomputed, the parties may agree to add the unpaid amount of principal and accrued charges on the date of consolidation to the principal with respect to the subsequent loan. If the previous consumer loan, refinancing, or consolidation was precomputed, the parties may agree to refinance the unpaid balance pursuant to the provisions on refinancing (section 70B-3-205) and to consolidate the principal resulting from the refinancing by adding it to the principal with respect to the subsequent loan. In either case the lender may contract for and receive a loan finance charge based on the aggregate principal resulting from the consolidation at a rate not in excess of that permitted by the provisions on loan finance charge for consumer loans (section 70B-3-201) or the provisions on loan finance charge for supervised loans (section 70B-3-508), whichever is appropriate.

(2) The parties may agree to consolidate the unpaid balance of a consumer credit sale. The parties may agree to refinance the previous unpaid balance pursuant to the provisions on refinancing sales (section 70B-2-205) or the provisions on refinancing loans (section 70B-3-205), whichever is appropriate, and to consolidate the amount financed resulting from the refinancing or the principal resulting from the refinancing by adding it to the amount financed or principal with respect to the subsequent sale or loan. The aggregate amount resulting from the consolidation shall be deemed principal, and the creditor may contract for and receive a loan finance charge based on the principal at a rate not in excess of that permitted by the provisions on loan finance charge for consumer loans (section 70B-3-201) or the provisions on loan finance charge for supervised loans (section 70B-3-508), whichever is appropriate.

70B-3-508. Loan finance charge for supervised loans.

(1) With respect to a supervised loan, including a loan pursuant to a revolving loan account, a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section.

(2) The loan finance charge, calculated according to the actuarial method may not exceed the equivalent of the greater of either of the following:

- (a) the total of
 - (i) 36 per cent per year on the part of the unpaid balances of the principal which is \$300 or less;
 - (ii) 21 percent per year on that part of the unpaid balances of the principal which is more than \$300 but does not exceed \$1,000; and
 - (iii) 15 per cent per year on that part of the unpaid balances of the principal which is more than \$1,000; or
- (b) 18 per cent per year on the unpaid balances of the principal.

(3) This section does not limit or restrict the manner of contracting for the loan finance charge, whether by way of add-on, discount, or otherwise, so long as the rate of the loan finance charge does not exceed that permitted by this section. If the loan is precomputed,

- (a) The loan finance charge may be calculated on the assumption that all scheduled payments will be made when due, and
- (b) the effect of prepayment is governed by the provisions on rebate upon prepayment (section 70B-3-210).

(4) The term of a loan for the purposes of this section commences on the date the loan is made. Differences in the lengths of months are disregarded and a day may be counted as 1/30th of a month. Subject to classifications and differentiations the lender may reasonably establish, a part of a month in excess of fifteen days may be treated as a full month if periods of fifteen days or less are disregarded and that procedure is not consistently used to obtain a greater yield than would otherwise be permitted.

(5) Subject to classifications and differentiations the lender may reasonably establish, he may make the same loan finance charge on all principal amounts within a specified range. A loan finance charge so made does not violate subsection (2) if

- (a) when applied to the median amount within each range, it does not produce a rate of loan finance charge exceeding the maximum permitted in subsection (2), and

(b) when applied to the lowest amount within each range, it does not produce a rate of loan finance charge exceeding the rate calculated according to paragraph (a) by more than 8 per cent of the rate calculated according to paragraph (a).

(6) The amounts of \$300 and \$1,000 in subsection (2) are subject to change pursuant to the provisions on adjustment of dollar amounts (section 70B-1-106).