

2001

# John Price v. Research Industries Corporation : Brief of Appellant

Utah Supreme Court

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**BRIGHAM YOUNG UNIVERSITY**  
**J. Reuben Clark Law School**

IN THE SUPREME COURT  
OF THE STATE OF UTAH

JOHN PRICE, an individual,  
Plaintiff-Appellant,  
vs  
RESEARCH INDUSTRIES CORPORATION,  
a corporation,  
Defendant-Respondent.

Civil No. 14230

APPELLANT'S BRIEF

Response from an order of the Third Judicial  
District Court for Salt Lake County, State of Utah  
Honorable Marcellus K. Snow

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FILED

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## STATEMENT OF CASE

This action arose out of an alleged breach of contract. The parties entered into a contract dated the 31st day of October, 1968, wherein Research agreed to construct certain improvements such as sewer, water, curb and gutter and streets as per Salt Lake County standards for a subdivision. Price complained the improvements did not timely comply with the Salt Lake County standards, and because of the delay, Price was damaged in the amount of \$3,338.95, which amount represents the cost of constructing a holding tank which was required in order to obtain a building permit.

## DISPOSITION IN LOWER COURT

The matter was tried before the Honorable Marcellus K. Snow without a jury. The Court heard oral testimony and received into evidence exhibits offered by the respective parties and at the conclusion of the trial the Court took the matter under advisement. Thereafter, the trial court ruled in favor of Research, no cause of action. Price made a motion for a new trial, which motion was denied July 28, 1975, and a Notice of Appeal was filed August 21, 1975.

## RELIEF SOUGHT

Appellant, Price, seeks a reversal of the trial court and entry of judgment in favor of Price in the amount of \$3,338.95 damages together with interest, attorney's fees in the amount of \$1,787.50, and costs.

## STATEMENT OF FACTS

Plaintiff-Appellant, John Price, hereinafter referred to as "Price", and Defendant-Respondent, Research Industries Corporation, hereinafter referred to as "Research", entered into a written contract dated October 31, 1968 (Exh. P-1), wherein Price purchased, and Research sold certain land. Research further covenanted and contracted to place at its expense, the offsite improvements per Salt Lake County standards for a subdivision, including but not limited to curbs, gutters, paving, water and sewer, all of which shall be approved and accepted by Salt Lake County (Ex. 1-P).

Oral demand was made upon Research to dedicate the street pursuant to paragraph 7 of the contract, on Friday, June 13, 1969 (Ex. P-2). Thereafter Price followed up the oral notification by written demand dated July 10, 1969 (Ex. P-3), which demand included notifying Research to complete the offsite improvements.

Research, by the terms of the agreement, had a total time period within which to dedicate the street and make the improvements of 120 days after request (Ex. P-3). The street, 2300 South, was dedicated and Research put into place a sewer line, the time of which is uncertain. However, a lift station was necessary to be constructed in order to pump the sewage so the waste material would flow south through the main lines (R. 92). Without the lift station, the sewer line did not meet Salt Lake County standards for a subdivision (R. 98, 99).

In the latter part of the fall of 1973, almost fifteen months after demand had been made upon Research to perform, Price was unable to obtain a building permit for the construction of a building known as the Dow Richardson Building. The building permit was denied Price because the offsite improvements, specifically the sewer, did not meet Salt Lake County standards for a subdivision. While it is true that the sewer line had been placed in front of the property in question, the sewer was only approved for limited use and Price was specifically denied approval for sewage use to the Dow Richardson Building (R. 94).

Notice was finally received by Price that a temporary lift station had been completed on March 20, 1975 and that the Dow Richardson Building would be allowed to hook into the sewer system (Ex. P-7). It was conceded by Research's own witness, who was uncontroverted, that the sewer system without the lift station, did not meet Salt Lake County standards for a subdivision (R. 98).

A building permit for the Dow Richardson Building could be issued only upon Price placing a holding tank and providing a guaranteed contract for pumping and hauling the sewage until the lift station was completed (R. 57, 58 and Ex. P-6).

Notice of the breach of the contract was sent to Research, dated November 28, 1973 (Ex. P-4). The notice specifically recited the costs which would be incurred because of Research's failure to comply with the terms of the contract as well as inviting Research

for alternate solutions to incurring the damages. Research's counsel acknowledged receipt of the notice, but Research failed to even respond (R. 53, 54).

Uncontroverted evidence of the costs, both for material and labor, for the installation of the holding tank, the hauling of sewage, and the relocation costs was introduced (Ex. P-5). The costs totalled \$3,338.95. A stipulation between counsel in open court was entered into regarding the testimony showing a reasonable attorney's fee of \$1,787.50.

## ARGUMENT

### I

#### RESEARCH BREACHED THE CONTRACT

Paragraph 7. of the contract provides in part:

"Seller agrees to . . . complete at its expense as per Salt Lake County Standards for a subdivision, . . . curbs, gutters, asphalt paving, water, sewer . . . all of which shall be approved and accepted by Salt Lake County. Seller agrees to obtain dedication of 2300 South Street within sixty (60) days after request for said dedication is made by Buyer to Seller and to construct and complete the improvements . . . within sixty (60) days after obtaining such dedication subject to climate conditions." (R. 4-5 emphasis supplied)

Price made request on Research to perform pursuant to this provision of the contract on June 13, 1969 and again on July 10, 1969 (Ex. P-2, P-3). Mr. Price testified:

"Q. I show you what has been marked as Exhibit 3-P



and ask you if you can identify that, sir?

A. Yes. This letter was written July 10, 1969, again making demand as per Article 7 and 8 also. And I didn't receive any response to this.

Q. Did you mail the original to Mr. Haynie of this?

A. Yes, I sure did." (R. 50)

Exhibit 3-P specifically informs Research of the concern of Price by the following language:

"Official notice was given you on Friday, June 13, 1969 by your being signatory to a short memorandum on my calendar. This letter is being written to reiterate our desire to complete the improvements as required under Article 7. . . . We are in the process of completing Plans and Specifications for a client and as such must be under construction within two weeks. Hence completion will take place 90 days thereafter, at which time we must deliver to our client a completed building with all improvements and utilities connected to a public street. I am concerned at this point at the rate of progress on your part and sincerely hope that we will not have any problems arise as a result of your not completing the requirements under Articles 7 and 8."

In the fall of 1973, a period in excess of two years from the date of notification, Price was unable to obtain a building permit for a building known as the Dow Richardson Building. John Hampshire, Vice-President in charge of Planning and Development testified:

Q. So you did not personally apply for sewer for this building on behalf of your company?

- A. We provide for a building permit and automatically when you apply for a building permit you have to have clearances by a number of other agencies, and we were immediately turned down for the building permit because of the inadequacy of the sewer." (R. 54, 55).

On November 28, 1973, as per Exhibit P-4, Research was notified that Price could not get a building permit for the Dow Richardson Building because the sewer did not meet Salt Lake County Standards for a subdivision. The Granger-Hunter Improvement District, the district in which the property in question lies, refused to approve the plans and specifications because they would not allow the building to be hooked onto the sewer line without a lift station being completed. A temporary holding tank, together with a verified contract to haul the sewage was required for Price to obtain a building permit. Mr. Gerald L. Larson, Manager of the Granger- Hunter Improvement District testified:

- "Q. (By Mr. Haynie) All right. Now sewage normally goes out of buildings by gravity does it not?
- A. That is correct.
- Q. And how does it get to the treatment plant usually within your district?
- A. Gravity flow, except where there is occasions the lines go too deep to make it to the plant and then they are lifted by pump stations.  
(R. 91)"

At pages 92 and 93 of the record:

"Q. (by Mr. Haynie) All right. Now, Mr. Larson, are you familiar with the manner in which the Dow Richardson Building has been handling its sewer?

A. You mean personally, personal opinion?

Q. Do you know or don't you know? First of all, are they connected to the system?

A. They are not connected to the system.

Q. And have they ever made formal application for connecting to your system?

A. Could you define formal for me?

Q. Written.

A. Written no.

Mr. Haynie: Your witness."

#### CROSS EXAMINATION

BY MR. BROWN:

"Q. Have they ever made oral?

A. Yes.

Q. What was the response to that?

A. Told them we didn't have capacity in the line or tank truck couldn't handle more sewage.

Q. So if they had made a formal written one it wouldn't have been any different, would it?

A. No.

Q. As a matter of fact, they weren't able to hook onto the sewer line until the lift station was completed, isn't that true?

A. That is true.

Q. And hadn't the plans been drawn for the preparation of that lift station for some years?

- A. The drawing as I, well, let's go back. They were accepted by HUD back in 1973. The initial project started before then, however.
- Q. Hadn't the district given notification to Research that they were to assist in the cost of this matter of a lift station some years before '73?
- A. Yes." (Emphasis supplied)

Again on page 94 of the record Mr. Larson stated:

- "Q. When did work actually start on the lift station?
- A. The contract was let in October.
- Q. Of what year?
- A. October of 1973.
- Q. I see. October of '73 was when the contract was let. Prior to that time there was, had the sewer lines been approved by the County and by the district for occupancy and use by people in this area?
- A. Limited use.
- Q. And was there approval for the use of the Dow Richardson Building?
- A. No."

Mr. Haynie then examined Mr. Larson further at pages 96 and 97 of the record:

- "Q. All right. So Research Industries Corporation,

the defendant in this case, was not responsible for any installation into this system whatsoever, is that correct?

A. Well, only as partnership in the total contract.

Q. All right. But all the lines on 2300 South had been installed and any further lines or hauling it or whatever was your problem?

A. I would prefer our problem.

Q. All right. Tell me how it is our problem. Tell me what you expected Research Industries Corporation to do to implement your system?

A. Research Industries, I guess, when I said our problem, was co-contractor, prime contractor in the over-all contract.

Q. All right. Who owns the line?

A. For eight years, it is a joint ownership.

Q. Between whom?

A. Research Industries and Salt Lake County, Granger-Hunter.

Q. You mean you think that Research Industries owns an interest in a sewer line?

A. I guess it would be better to put it this way, that we protect any connections to that line on behalf of Research Industries."

And finally, under questioning by Mr. Brown, Mr. Larson declared:

"Q. Without the lift station would the lines be adequate?

A. No.

- Q. Would they meet the requirements of a subdivision of Salt Lake County without the lift station?
- A. I believe had Granger-Hunter indicated they had capacity to haul, I think the Board of Health would have given the okay on it.
- Q. Okay. Without the lift station or without the capacity to haul, would they have met the Salt Lake County requirements for a subdivision?
- A. No.
- Q. And since the completion of the line or of the lift station, I assume that the line now meets the Salt Lake County standards for subdivisions, is that true?
- A. This is true.
- Q. But prior to this time, the completion, did not?
- A. No. (R. 98, 99)."

## II

### DAMAGES ARE UNDISPUTED

Price notified Research that damages would be incurred because of Research's failure to perform timely on the proper installation of the sewer to meet Salt Lake County Standards. Exhibit P-4, a

copy of which was acknowledged to be received by Research, specified damages of approximately \$1,900.00. It also gave Research an opportunity to respond to other alternatives rather than incur the costs contemplated therein. No response or alternate suggestion was ever received. Mr. Price testified:

"Q. (By Mr. Brown) Did you cause your legal counsel to serve notice upon the defendant through Mr. Haynie relative to the necessity of making a holding tank for the Dow Richardson Building?

A. Yes. When I received very little satisfaction, and when we say Lou Haynie, as far as I am concerned, Lou Haynie is the person I dealt with, he represented Research Industries as a developer and I dealt with Lou Haynie on the premise that he was the developer, and Hank Moyle both were the developers, and so I don't know what he meant when he wasn't a defendant. But I talked to Lou Haynie a number of times, received no satisfaction. I then called Bob Baldwin of your office and had Bob prevail on Lou Haynie, and Lou Haynie also gave Bob the same story he gave me, that he would not perform. And Bob served notice on Lou Haynie in writing. And then subsequently because we were under a lease obligation we had to perform and building the building and do whatever was necessary. And Lou was put on notice that we were going to do this.

Q. (By Mr. Brown) I show you what has been marked as Exhibit P-4 and ask you if you have received a copy of that?

A. Yes. This was before the fact.

MR. BROWN: I would ask for the admission of P-4, Your Honor, and refer the court to the answer to interrogatories in which counsel for the defendant admits receiving

the original of that.

MR. HAYNIE: No objection.

THE COURT: It may be received.

Q. (By Mr. Brown) Subsequent to that letter of November 28, 1973, to your knowledge has ever a reply been received by you or by your legal counsel, if you know, as it relates to the demand contained in Exhibit P-4?

A. No. I had no further contact with Mr. Haynie."  
(R. 52-54)

Mr. John Hampshire, Vice President of Planning and Development for Price testified to his efforts in resolving the problem of meeting the obligation of building the Dow Richardson Building without being able to hook onto the sewer line because of the lack of the lift station. Mr. Hampshire and Mr. Martineau, the controller, accounted for the work sheets, the costs of materials, and bids for the final hook-up. Mr. Hampshire testified:

"Q. What specific steps did you take relative to obtaining the building permit?

A. I contacted the sewer improvement district initially to see what the difficulty was.

Q. And did you determine what the difficulty was?

A. Yes. Basically, there is a sewer line in the street, but apparently farther on down the line the capacity could not be handled and apparently a lift station was required, as well as additional pipe, that it be prepared, the document had been prepared and



ready for bidding apparently for some time, what the district's information gave me, and as of that date they hadn't all their funds and hadn't installed it and were refusing their stamp of approval for future building permits based on public health until it was installed.

Q. Did the district make any requirements upon you for the issuance of a provisional building permit?

A. No. I requested that there could be one issued and what we should do or provide to achieve that end. He referred me to Mr. Lee Hoffman of the Salt Lake County Board of Health, and who does have jurisdiction over Granger-Hunter and Mr. Hoffman after several conversations indicated if I could prove or supply proof that we could have a holding tank pumped and had the sewage hauled they would accept that on a temporary basis until such time as a sewer was adequate.

Q. (By Mr. Brown) Okay. And was a building permit issued on that basis, sir?

A. Yes, there was.

Q. Mr. Hampshire, in that regard did you receive a copy of or did you receive what has been marked as Exhibit P-6? Let me ask you that.

A. Yes. As a matter of fact, I directed Mr. Hoffman to send that to Salt Lake County so that we could achieve our permit.

Q. And that is a copy you received in the normal course of your employment, sir?

A. That is right. (R. 57, 58)"

Mr. Hampshire testified about the costs summarized in Exhibit 5-P by the following:

"Q. (By Mr. Brown) Mr. Hampshire, who actually approved the -- well, strike that. Was there a holding tank placed in the vicinity of the Dow Richardson Building for the use of the Dow Richardson Building?

A. Yes, there was.

Q. Under whose supervision and direction was this taken care of?

A. Well, the initial direction was mine, and then, of course, Mr. Hollingsworth who is our vice president of construction, actually directed the physical work and had the tank installed.

Q. All right. I am going to ask you if you have ever seen Exhibit P-5?

A. Yes, I have.

Q. Would you describe what P-5 is?

A. It is a summary of costs involved with the installation of the holding tank and connections involved.

Q. All right. Did you prepare that P-5 from the records of the company?

A. Yes, I did.

Q. And did you personally approve the payment for the matters listed in the first portion of that summary?

A. Yes. There are, there are a group of costs that are referred to as relocation costs, which are costs to in turn abandon the tank and hook it up to the street, and that was a guaranteed figure from a sub-contractor. Would be the only difference. (R. 63)."

Exhibit 5-P spells out the costs incurred by Price to be \$3,338.95. No testimony was ever offered to refute, rebut or

discredit these costs.

Counsel for Price offered to be sworn and to testify to the attorney's fees and counsel for Research stipulated to the proposed testimony in the following manner:

"MR. BROWN: I am going to testify that the attorney's fees are a total of \$1,787.50.

MR. HAYNIE: Let me see it. I will stipulate that if Mr. Brown were to testify that his reasonable fee is \$1,787.50.

THE COURT: All right. The record may so show."

Paragraph 14 of the Contract (Exhibit P-1) states:

"14. Should either party default in any of the terms or covenants herein contained, the defaulting party shall pay all costs and expenses, including the reasonable attorney's fees, which may arise from or accrue from the enforcement or the cancellation of this Agreement. (Exh. P-1)."

Price's damages therefore total \$3,338.95 for labor and materials, \$1,787.50 attorney's fees plus costs of this action.

### III

#### THE TRIAL COURT ERRED IN NOT APPLYING THE LAW TO THE UNCONTROVERTED EVIDENCE

The trial court, the Honorable Marcellus K. Snow, sitting without a jury heard the uncontroverted evidence which discloses

the following:

- A. There was a contract between the parties, that among other requirements, required Research at its expense to install a sewer that would meet Salt Lake County standards for a subdivision within 120 days after demand.
- B. Price gave notice to Research to complete the sewer and other improvements in July, 1969.
- C. November, 1973 notice and demand was made upon Research that because of Research's failure to perform the conditions of installing an adequate sewer system that would meet Salt Lake County standards, a holding tank operation, together with a hauling commitment would be necessary in order to obtain a building permit for the construction of the Dow Richardson Building.
- D. The sewer system did not meet the Salt Lake County standards for a subdivision until March 20, 1975.
- E. The direct costs of labor, the holding tank, the hauling of sewage and the hook up costs totalled \$3,338.95.

F. Price has reasonably incurred attorney's fees in the amount of \$1,787.50, for which the contract provides the assessment of against a defaulting party.

The general law as to a breach of contract is concisely stated in 17AmJur 2d 897, § Contracts 441 by the following language:

"The law will not permit a party to violate his solemn contract with impunity, nor will the law sanction a breach of contract as a means of escaping its burdensome terms. The word "breach" as applied to contracts, is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract, . . .

In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes the breach. Upon an obligation to do a particular thing, to pay a debt for which the covenantee is liable, or to indemnify against liability, there is a breach and the right of action is complete on the defendant's failure to do the particular thing he agreed to perform, to pay the debt, or to discharge the liability."

Research failed to construct at its expense, a sewer which met the standards of Salt Lake County until March 20, 1975. Price was only able to honor its commitment to construct the Dow Richardson Building by taking the stop gap measure of a holding tank and hauling sewage. As stated in the clear concise language of the Restatement of Contracts § 312:

"A breach of contract is a nonperformance of any contractual duty of immediate

performance. A breach may be total or partial, and may take place by failure to perform acts promised, by prevention or hindrance, or by repudiation." (Emphasis supplied).

This Court declared in Jensen's Used Cars v. Rice, 7 Ut 2d 276, 323 P2d 259 (1958) at pages 260 and 261 of the Pacific Reporter:

"Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purposes of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language."

The language of the contract is clear and understandable and deliberate in using terms understood by all. This Court has frequently held parties to the meaning of specialized terms such as used in this contract. See Holland v. Brown, 15 Ut 2d 422, 394 P2d 77 (1964). The condition of requiring Research to install, at Research's expense,

a "sewer per Salt Lake County standards for a subdivision" has an established meaning. Price was denied the use of the sewer because of lack of capacity without the lift station. The sewer without the lift station did not meet the standards for a subdivision for Salt Lake County.

The following declaration of law found in Corbin on Contracts § 954 accurately reflects the present case:

"The unexcused failure of a contractor to render a promised performance when it is due is always a breach of contract for which an action for an appropriate remedy can be maintained."

Research's only "excuse" was that they had performed. The uncontroverted evidence clearly discloses they did not perform until March 20, 1975. A period which exceeds the contract provisions by over four years!

#### CONCLUSION

Research's only defense is that of alleged performance. It is clear by the testimony of all the witnesses that the sewer did not meet the standards set by Salt Lake County for a subdivision until March 20, 1975. The decision by the trial court discloses a complete disregard of the facts.

A motion for a new trial was made together with an accompanying affidavit of counsel for Price. The affidavit asserted that the

trial judge failed to give the necessary consideration required to make a proper ruling on the uncontroverted and un rebutted facts. It becomes even more apparent that the trial judge did not apply the law to the uncontroverted evidence and Appellant-Price is entitled to a judgment of \$3,338.95 damages, \$1,787.50 attorney's fees and cost.

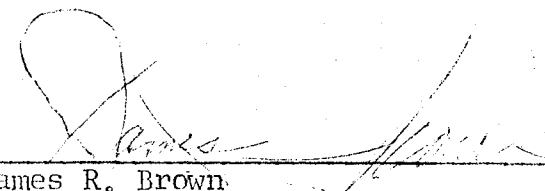
Respectfully submitted,

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