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Steven H. Stewart; Stewart, Young, Paxton & Russell; Attorney for Appellants;
Kent B. Scott; Senior & Senior; Attorney for Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * *

MANAGEMENT SERVICES CORP., a Utah corporation, TRANS-WEST PROPERTIES INC., a Utah corporation,	*	
Plaintiffs-Respondents,	*	
vs.	*	Case No. 16341
DEVELOPMENT ASSOCIATES, a Utah corporation, and JOHN and JANE DOES One through Eight,	*	
Defendants-Appellants.	*	

* * * * * * *

BRIEF OF APPELLANTS

* * * * * * *

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE PETER F. LEARY, JUDGE

* * * * * * *

STEVEN H. STEWART
STEWART, YOUNG, PAXTON & RUSSELL
220 South Second East, Suite 450
Salt Lake City, Utah 84111
Attorney for Appellants

KENT B. SCOTT
SENIOR & SENIOR
1100 Beneficial Life Tower
Salt Lake City, Utah 84111
Attorney for Respondents

FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MANAGEMENT SERVICES CORP., a Utah corporation, TRANS-WEST PROPERTIES INC., a Utah corporation, Plaintiffs-Respondents,	*	
vs.	*	Case No. 16341
DEVELOPMENT ASSOCIATES, a Utah corporation, and JOHN and JANE DOES One through Eight, Defendants-Appellants.	*	

* * * * * * *

BRIEF OF APPELLANTS

DEVELOPMENT ASSOCIATES

* * * * * * *

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STATEMENT OF THE NATURE OF THE CASE

This is an action commenced by Plaintiff-Respondent Management Services Corporation ("Management Services"), purchaser, against Development Associates ("Development Associates"), seller, for the alleged breach of a Uniform Real Estate Contract dated December 7, 1976 ("the contract"), wherein Management Services agreed to purchase eight (8) lots in the Daybreak Phase III Subdivision for $80,000.00.

DISPOSITION IN LOWER COURT

At the trial of this matter, the Honorable Peter F. Leary, sitting without jury, held that the contract was divisible; that Management Services defaulted with respect to an installment payment of $19,800.00 due on or before March 1, 1977; that Development Associates properly forfeited Management Services' interest in two of the eight lots purchased under the contract; and that Development Associates wrongfully terminated the contract with respect to the remaining six lots. The Court awarded judgment to Management Services on its Third Cause of Action for the amount of $7,700.00 in lost profits; $2,438.00 lost commissions; $600.00 in earnest money; and attorney's fees in the amount of $1,850.00.

RELIEF SOUGHT ON APPEAL

Development Associates seeks reversal of the Court's judgment in favor of Management Services, together with

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reasonable attorney's fees incurred by Development Associates in the defense of this action.

STATEMENT OF MATERIAL FACTS

On December 7, 1976, Management Services entered into a Uniform Real Estate Contract with Development Associates for the purchase of eight (8) lots in the Daybreak Phase III Subdivision in Salt Lake County, Utah (R. 129, 266). The following language appears on the face of the contract:

> "2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the County of Salt Lake, State of Utah, to-wit: More particularly described as follows:
>
> Lots #309, #310, #311, #312, #313, #314, #315, #316 Daybreak Phase III Subdivision as recorded in the Salt Lake County Recorders Office.
>
> 3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Eighty Thousand Dollars ($80,000.00) payable at the office of Seller, his assigns or order 307 W. 200 S., SLC, Utah 84101 strictly within the following times, to-wit: Eight Hundred Dollars ($800.00) cash, the receipt of which is hereby acknowledged, and the balance of $79,200.00 shall be paid as follows:
>
> Beginning March 1, 1977, buyer to complete payment on two (2) lots ($19,800.00) and thereafter to close two (2) lots on the first of each month. Total amount to be paid on or before June 15, 1977.
>
> Possession of said premises shall be delivered to buyer on the 7th day of December, 1976."

(R. 9, 10).

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The contract does not specifically state which particular lots Management Services intended to pay for on March 1, 1977 or any subsequent month (R. 9).

Management Services never made the $19,800.00 payment which was due on or before March 1, 1977. On March 19, 1977, Development Associates caused a contract forfeiture notice to be served upon Edward A. White ("Mr. White"), President of Management Services (R. 4, 11). On March 25, 1977, Development Associates received a letter from Management Services dated March 23, 1977, signed by Mr. White, President, stating in part as follows:

> "(2) We are ready to take title to lots 311 and 312 immediately. The funds are now in escrow at Western States Title Insurance Co. for Lot 311. The funds will be deposited with them immediately for Lot 312 upon their notification that they have all of the closing documents ready." (R. 13, 251).

Paragraph 16 of the contract provides in part that in the event Management Services fails to comply with the terms of the contract, or upon their failure to make payments when due or within fifteen days thereafter, Development Associates has the option to be released from all obligations in law and equity upon Management Services' failure to remedy the default within five days. The contract further provides that all payments made by Management Services prior to that time would be forfeited to Development Associates as liquidated damages for non-performance of the contract (R. 10).

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Mr. White was very familiar with real estate transactions generally, having been involved in the real estate business either as an agent or broker since 1961 (R. 153). Mr. White further testified that between 1961 and 1976, he had participated in at least two or three hundred transactions involving Uniform Real Estate Contracts similar to the one here at issue (R. 154, 155). Indeed, shortly before Management Services filed this action against Development Associates, Mr. White was a party in another action wherein default was alleged under Paragraph 16 of a Uniform Real Estate Contract. Mr. White testified that he was thoroughly familiar with the language of Paragraph 16 and the basic idea of forfeiture (R. 155, 156).

Development Associates refused to accept the conditions imposed by Mr. White in his response to the contract forfeiture notice; deemed Management Services' interest in the subject lots forfeited; and retained $800.00 in earnest money as liquidated damages. Management Services subsequently commenced this action, seeking title to the eight lots in question, or in the alternative, damages for breach of contract.

ARGUMENT

THE PARTIES INTENDED THE CONTRACT TO BE "ENTIRE" AND THAT ANY DEFAULT WOULD APPLY TO ALL EIGHT LOTS

The pivotal issue in this appeal is primarily an issue of law and can be stated as follows: Did the trial

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court err in concluding that the Uniform Real Estate Contract dated December 7, 1976 was a "divisible" contract? More specifically, did Management Services default with respect to all eight lots, or, as the trial court concluded, just "the first two lots"?

An analysis of the general rules regarding divisibility or severability of contracts is appropriate.

> "No formula has been devised which furnishes a test for determining in all cases what contracts are severable and what are entire. The primary criterion for determining the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question. Whether a contract is entire or divisible cannot be determined by a single term, phrase, or sentence, even though it is broad enough to include such meaning, unless, throughout the whole agreement and from the surrounding circumstances, it definitely appears either that it was or that it was not the intention of the parties that the contract should be entire and indivisible. If, in this respect, the parties themselves have placed a certain construction on the contract, that is to be considered, and acts of the parties in treating the contract as entire or severable have an important bearing on its construction. A factor in determining whether a contract is entire or severable is whether the parties reached an agreement regarding the various items as a whole or whether the agreement was reached by regarding each item as a unit. A contract to do several things at several times is divisible in its nature if there is no manifestation of a contrary intent. Obviously, however, if the intention is expressly stated in the contract,

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there is no room for construction. A contract may, both in its nature and by its terms, be severable and yet be made entire by the intention of the parties.

As a means of ascertaining the intention of the parties, various tests have been adopted. According to some authorities, the criterion is to be found in the question whether the quantity, service, or thing as a whole is of the essence of the contract. If it appears that it is to be performed only as a whole, the contract is entire. Thus, the best test is said to be whether all of the things, as a whole, are of the essence of the contract: that is, if it appears that the purpose is to take the whole or none, the contract is entire; otherwise, it is severable. Another test supported by a number of authorities is that a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable, when, in its nature and purpose, it is susceptible of divisions and apportionment, and has two or more parts in respect to matters or things contemplated and embraced by the contract which are not necessarily dependent upon each other. Still another test that has been suggested is the possibility or impossibility of a certain apportionment of benefits, according to the compensation in the contract, in case of part performance only.

* * *

In construing a contract to determine whether it is entire or severable, many of the courts have regarded the singleness or apportionability of the consideration as an important test--that is, if the consideration is single, the contract is entire, but if the consideration is expressly or by necessary implication apportioned, the contract is severable. Thus, where several things are to be done

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under a contract, and the money consideration to be paid is apportioned to each of the items, the contract is ordinarily regarded as severable. On the other hand, if the consideration to be paid is single and entire, the contract will ordinarily be held to be entire, although the subject thereof may consist of several distinct and wholly independent items. The principle by which the courts are governed when they declare that a contract about several things but with a single consideration in gross is entire and not severable is that it is impossible to affirm that the party making the contract would have consented to do so unless he had supposed that the rights to be acquired thereunder would extend to all the things in question. However, the singleness or apportionability of the consideration, although important, is only one of the essential facts to be considered, and will not necessarily prevail over other factors, or provisions of the contract, indicating a contrary intent.

* * *

An agreement which embraces a number of distinct subjects that admit of being separately executed and closed is, as a general rule, to be taken distributively or severally as to each subject. A contract is severable where the part to be performed by one party consists of several distinct and separate items and the price to be paid by the other is apportioned to each item or is left to be implied by law. But this method of determining whether a contract is entire or severable will not override the clear intention of the parties, if such intention can be gathered from the whole subject matter of the contract. While the severable nature of the subject may often assist in determining the intention, it will not overcome the intent to make an entire contract when that is shown. Ultimately, the entirety of a contract depends upon the intention of the parties, and not upon the divisibility of the subject or the number of distinct subjects.

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* * *

> The fact that a contract calls for performance in instalments does not necessarily make it a divisible contract. Whether such a contract is divisible or entire generally depends upon the intention of the parties ascertained by a construction of the contract. A provision in an entire contract for payment in instalments, which instalments are not referable to severable items or portions of the performance but are referable to the performance of the whole, does not render or characterize such contract severable. Although, in some cases, contracts to pay for work in instalments have been declared to be severable, there are many others in which such contracts have been held to be entire and indivisible.
>
> Similar principles control with regard to whether a contract in which the compensation is fixed at a certain amount per unit of work done is entire or severable. Whether such a contract is entire or severable depends upon the intention of the parties as ascertained from a construction of the contract as a whole and also, where it is necessary in order to determine that intention, from the surrounding circumstances. Applying these principles the courts in some cases have reached the conclusion that the contract being construed was entire, and in others that it was severable." 17 Am Jur 2d, Contracts, Sections 325-328 at pages 758-763 (emphasis added)

In Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 446 (1973), this Court upheld as "entire" the lower court's construction of a lease agreement and separate option, observing as follows:

> "In attempting to overturn the trial court's ruling that the lease and the "Added Option" were intended to be one integrated transaction the defendant argues for application of the principle

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> that if the two agreements can be segregated and carried out separately, that should be done. The soundness of that doctrine in appropriate fact situations is not doubted. But the trial court appears to have been concerned with other basic principles of contract law, which have more specific application to the instant fact situation. The most fundamental of these is that the meaning and effect to be given a contract depends upon the intent of the parties, and that this is to be ascertained by looking at the entire contract, and all of its parts in their relationship to each other; and this principle applies to whether they intended separate aspects of their contract to be severable, and that if this results in uncertainty, he may and should look to extraneous evidence concerning the background and surrounding circumstances in order to make that determination."
> 515 P.2d at 448. (emphasis added)

Boesiger v. DeModena, 88 Idaho 337, 399 P.2d 635 (1965) is an action by vendors for breach of a contract to convey several lots to vendee at $2,000.00 each, three lots of which would later be reconveyed from vendee to vendor for $1,500.00 each. The contract also involved several agreements, one of which was that vendor should make certain off-site improvements on the lots, such as sidewalks, curb and paving, irrigation pipe, and water pipe, before a given date. In his motion to dismiss on grounds that seller failed to state a claim on which relief could be granted, buyer filed an affidavit stating that on the date of the contract, buyer had been and was married, and that all property acquired by him became community property. The trial court treated the motion as one for summary judgment and dismissed the action. On appeal, the issue of severability arose in conjunction with the

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issue of whether buyer, as a married person, could be constrained to reconvey the three lots in question since after the initial conveyance they became community property of him and his wife. Because she was not a party to the contract, claimed by buyer, the clause of the contract requiring reconveyance of the lots could not be upheld.

In reversing and remanding the case, the Idaho Supreme Court stated that apportionment of consideration was a question to be resolved but that this was only one factor to be considered in the divisibility question.

> "A contract may both in its nature and by its terms be severable and yet rendered entire by the intention of the parties. We think that perhaps the best test is whether all of the things, as a whole, are of the essence of the contract. That is, if it appeared that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734, 736.
>
> The divisibility of the subject matter, or the apportionment of the consideration, while they are both items to consider in determining whether a contract is entire or severable, are not conclusive." 399 P.2d at 641.

Analyzing the facts of the instant case in light of the rules of law applicable to divisibility of contracts, the Uniform Real Estate Contract here at issue clearly requires Management Services to purchase lots 309, 310, 311, 312, 313, 314, 315, and 316 of the Daybreack Phase III Subdivision for $80,000.00 (R. 3). Although the language of the contract speaks for itself, both Mr. White and Marvin A. Kirkham, Vice

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President of Development Associates, testified that Management Services agreed to purchase eight lots in the Daybreak Phase III Subdivision:

> Q. (By Mr. Scott) I'm showing you here what's marked as Exhibit Plaintiff's 2, would you identify that document please?
>
> A. (By Mr. White) Yes. It's a Uniform Real Estate contract dated December 7th, 1976 wherein Management Services Corporation agrees to purchase eight lots in Daybreak III Subdivision from Development Associates.
>
> Q. And what was to be the purchase price on those lots?
>
> A. The purchase price was to be $10,000 per lot.
>
> Q. And the contract totalled $10,000 per lot or $80,000?
>
> A. $80,000.
>
> * * *
>
> Q. (By Mr. Scott) Okay. Now, could I refer you to Paragraph 19 of the Uniform Real Estate Contract. Well, before I do, now it's my understanding from your testimony--and please correct me if I'm wrong--that under this Uniform Real Estate Contract you were to sell eight lots to Ed White; is that correct?
>
> A. (Mr. Kirkham) We agreed to convey eight--
>
> Q. Management Services?
>
> A. --eight lots to Management Services Corporation upon their payment.
>
> Q. And they were to pay $80,000?
>
> A. Total payment. (R. 129, 266)

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In its Findings of Fact and Conclusions of Law, the Court held:

> "2. Plaintiff defaulted with respect to the purchase of the first two lots, payment for which was due in March of 1977, thereby forfeiting all of his right, title and interest therein.
>
> 3. Defendant wrongfully terminated the contract with respect to the remaining six lots which were to be paid in full by plaintiff in April, May and June of 1977." (R. 100).

A careful analysis of the language of the contract, trial transcript, depositions, and pleadings in the instant case reveals the true intent of the parties and the inconsistency of the trial court's conclusion that the contract was divisible. Paragraph 3 of the contract states:

> "3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Eighty Thousand Dollars ($80,000.00) payable at the office of Seller, his assigns or order 307 W. 200 S., SLC, Utah 84101 strictly within the following times, to-wit: Eight Hundred Dollars ($800.00) cash, the receipt of which is hereby acknowledged, and the balance of $79,200.00 shall be paid as follows:
>
> > Beginning March 1, 1977, buyer to complete payment on two (2) lots ($19,800.00) and thereafter to close two (2) lots on the first of each month. Total amount to be paid on or before June 15, 1977.
>
> Possession of said premises shall be delivered to buyer on the 7th day of December, 1976.

If in fact plaintiff defaulted with respect to the purchase of the first two lots, a finding which Management Services did not appeal, the "first two lots" listed in the contract are lots

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309 and 310. The undisputed fact is, however, that Management Services did not intend to "close" lots 309 and 310 on or before March 1, 1977, as evidenced by Mr. White's letter dated March 23, 1977:

> 2) We are ready to take title to <u>Lots 311 and 312</u> immediately. The funds are now in escrow at Western States Title Insurance Co. for Lot 3311. The funds will be deposited with them immediately for Lot 312 upon their notification that they have all of the closing documents ready. (R. 13). (emphasis added)

It is also clear from the record that the reason for allowing Management Services to take title to any two lots upon payment of $19,800.00 on or before March 1, April 1, May 1 and June 1, 1977, was because Mr. White intended to make all the contract installment payments with proceeds from the sales of the lots (Depo. of Mr. White at 23). If the parties had not agreed that Management Services would receive title to any two lots upon payment of $19,800.00 when due, title to all eight lots would have remained in Development Associates because of the following language which appears in Paragraph 19 of the contract:

> 19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned* * * (R. 10).

Moreover, there is no evidence in the record to indicate that Development Associates knew which were the first two lots

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Management Services intended to close until March 25, 1977, twenty-five days after payment was due, and seven days after the contract forfeiture notice was served upon Management Services (R. 11-13). For these reasons, the lower court should have concluded that Management Services defaulted with respect to all eight lots, not just "the first two lots".

What the lower court accomplished by its Findings of Fact, Conclusions of Law, and Judgment in the instant case was to rewrite the contract in favor of Management Services. But, as the Idaho Court observed in Boesiger, supra, "* * * by enforcing less than the whole, the Court imposes upon the parties a contract to which they would not have assented, and which in all likelihood they would not have voluntarily made. The Court should not infringe the freedom of contract by construction." 399 P.2d 641 (citation omitted).

Development Associates respectfully submits that by severing the contract in the instant case, the lower Court imposed upon the parties a contract to which Development Associates would not have assented; that the judgment of the lower court should be reversed; and that Development Associates should be awarded reasonable attorney's fees in the amount of $1,485.00 incurred in connection with the defense of this action (R. 276).

CONCLUSION

The undisputed facts of the instant case reveal that Management Services agreed to purchase eight lots from Development

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Associates for $80,000.00; that an instalment payment of $19,800.00 was due on or before March 1, 1977; that Management Services never made the payment; that a contract forfeiture notice was served upon Management Services March 19, 1977; that Mr. White's response to the contract forfeiture notice imposed conditions not contained in the contract and not contemplated by the parties; and that the default was never remedied. Because the total purchase price for all eight lots was $80,000.00, and since the contract does not specifically designate which lots were to be closed on the dates the instalment payments of $19,800.00 were due, it is respectfully submitted that Management Services defaulted with respect to all eight lots, not just "the first two lots". Therefore, the contract must be construed as "entire" rather than divisible, and the judgment of the lower court should be reversed.

Respectfully submitted,

STEWART, YOUNG, PAXTON & RUSSELL

By: ______________________
Steven H. Stewart
Attorneys for Defendant and Appellant
220 South Second East, Suite 450
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served upon the Respondent by mailing the same, postage prepaid, to Kent B. Scott of Senior & Senior,

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Attorneys for Respondent, 1100 Beneficial Life Tower, Salt Lake City, Utah 84111, this 18th day of July, 1979.

Steven H. Stewart

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