

1978

# Steve Eliason And Marilyn Eliason Husband & Wife v. Richard C. Watts : Respondent And Cross Appellant Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Lyle W. Hillyard; Attorney for Defendant, Appellant

---

## Recommended Citation

Brief of Respondent, *Eliason v. Watts*, No. 16402 (Utah Supreme Court, 1978).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1700](https://digitalcommons.law.byu.edu/uofu_sc2/1700)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE  
STATE OF UTAH

\* \* \* \* \*

STEVE ELIASON and MARILYN  
ELIASON, husband and wife,

Plaintiffs and  
Appellees,  
(Respondents)

vs.

RICHARD C. WATTS,

Defendant and  
Appellant.

\* \* \* \* \*

RESPONDENT AND CROSS-APPEAL

\* \* \* \* \*

A APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT FOR CACHE COUNTY,  
VENOY CHRISTOFFERSON, JUDGE

\* \* \* \* \*

Lyle W. Hillyard  
HILLYARD, LOW & ANDERSON  
175 East First North  
Logan, Utah 84321  
Attorney for Defendant,  
Appellant

IN THE SUPREME COURT OF THE  
STATE OF UTAH

\* \* \* \* \*

STEVE ELIASON and MARILYN  
ELIASON, husband and wife,

Plaintiffs and  
Appellees,  
(Respondents)

vs.

RICHARD C. WATTS,

Defendant and  
Appellant.

No. 16402

\* \* \* \* \*

RESPONDENT AND CROSS-APPEAL BRIEF

\* \* \* \* \*

APPEAL FROM THE JUDGMENT OF THE FIRST  
DISTRICT COURT FOR CACHE COUNTY, HON.  
VeNOY CHRISTOFFERSON, JUDGE

\* \* \* \* \*

David R. Daines  
DAINES & DAINES  
128 North Main  
Logan, UT 84321  
Attorney for Plaintiff,  
Respondent and Cross-  
Appellees

Lyle W. Hillyard  
HILLYARD, LOW & ANDERSON  
175 East First North  
Logan, UT 84321  
Attorney for Defendant,  
Appellant

# TABLE OF CONTENTS

NATURE OF THE CASE . . . . .	Page 1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF THE FACTS . . . . .	1
ARGUMENT	
POINT 1. APPELLANT'S STATEMENTS AND ARGUMENTS ARE NOT REFERENCED TO LOWER COURT FINDINGS . . . .	4
POINT 2: THE APPELLANT'S ALLEGATIONS OF ABSENCE OF ELEMENTS NECESSARY FOR SPECIFIC PERFORMANCE ARE WITHOUT FOUNDATION IN FACT OR LAW . . . . .	5
POINT 3: THE LOWER COURT PROPERLY ALLOWED PAROL EVIDENCE TO INDENTIFY DESCRIPTION CONTAINED IN THE WRITING WITH ITS LOCATION UPON THE GROUND . .	11
POINT 4: THE CONTRACT PRICE WAS NOT AN INDEFINITE "CARPETING PLUS CASH", BUT RATHER A DEFINITE FIXED PRICE . . . . .	12
POINT 5: THE SEPTIC TANK PERMIT PROVISION WAS PROPERLY FOUND TO BE OUTSIDE THE CONTRACT AND BUYER'S SOLE RISK . . . . .	13
POINT 6: COURT IN EQUITY PROPERLY REFUSED TO CREDIT APPELLANT WITH INTEREST ON PURCHASE MONEY WHERE REFUSAL TO CONVEY WAS WRONGFUL BREACH OF CONTRACT . . . . .	14
CROSS APPEAL, POINT A: THE LOWER COURT'S AWARD OF ACCOUNTING "DAMAGES" WAS INADEQUATE AS A MATTER OF LAW TO RESTORE APPELLEES TO THEIR POSITION AT TIME OF APPELLANT'S BREACH.	
CROSS APPEAL, POINT B: THE COURT SHOULD NOT HAVE CONSIDERED INCREASE IN VALUE OF PROPERTY AS GROUNDS FOR REDUCTION OF AWARD OF ATTORNEY'S FEES . . . .	21
CROSS APPEAL, POINT C: DELAY DAMAGE SHOULD NOT HAVE BEEN INTERRUPTED DURING A TRIAL DATE CON- TINUANCE. . . . .	21
CONCLUSION . . . . .	22

# TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<u>Brady v. Fausett</u> , 546 P2d 246, 248 (Utah 1976) . . .	.5, 12
<u>Hadley v. Baxendale</u> , 9 Exch. 314 (1854) . . . . .	.20
<u>Johnson v. Jones</u> , 109 U 92; 164 P2d 893 . . . . .	.12, 18
<u>Levine v. Whitehouse</u> , 37 U 260. . . . .	.14
<u>Nielsen v. Rucker</u> , 8 U2d 302; 332 P2d 302 . . . . .	.11
<u>Northeast Theater Corp v. Westsman</u> , 493 F2d 311 (6th Cir. 1974). . . . .	.18
<u>Pitcher v. Lauritzen</u> , 18 U2d 368, 423 P2d 491 (1967) . . . . .	.5
<u>Regan v. Lance</u> , 366 N.Y.S. 2d 512, (N.Y., 1975). . .	.20
<u>Wagner v. Anderson</u> , 250 P2d 577 (Utah 1952) . . . .	.20, 22

## Encyclopedias

5 Am Jur 2d, Appeal and Error §823 at page 264 . . .	.4
17 Am Jur 2d, Contracts §244, 245, 254, 255, 276, 280 . . . . .	8
71 Am Jur 2d, Specific Performance, § 35 . . . . .	10
81 C.J.S. 396, Specific Performance, §35 . . . . .	10

## NATURE OF CASE

This action arises out of an Earnest Money Receipt and Offer to Purchase which Appellant wrongfully refused to perform after a timely tender of the purchase price by the Respondent herein called Appellee.

## DISPOSITION IN LOWER COURT

The case was tried to the Court. The Court granted specific performance for Appellees plus delay damages based on rental value of unimproved land, some attorneys fees and costs.

## RELIEF SOUGHT ON APPEAL

The Appellee seeks a sustaining of the decree of specific performance and a reversal of the lower courts measure of damages for delayed performance. Appellees seek on cross appeal restoration in damages to their position at time of Appellant's breach, plus added reasonable costs, attorneys fees on appeal and reasonable attorneys fees per the agreement; also, all delay damages to be calculated to future date on which marketable title is conveyed to Appellees.

## STATEMENT OF FACTS

The subject EARNEST MONEY RECEIPT AND OFFER TO PURCHASE, Plaintiff's Exhibit #1, was finally executed on or before October 4, 1976 by Appellee Buyer's acceptance of Appellant-Sellers counter offer. Appellees paid \$100.00 down (Ps Exhibit 2) on October 15 tendered a cashiers check (Ps Exhibit 3) for the entire balance of \$29,900.00. Appellant

refused to convey and rejected the tender (Ps Exhibit #5).  
This lawsuit followed.

The agreement's (P. Ex #1) wording was chosen and selected and written by the Appellant's co-defendant partner (not appeal Kerr. Kerr's multiple capacities in this transaction were: A partner of Appellant and co-seller; He was the actual listing agent to receive a commission as such; He was the scribe of the accepted counter-offer; He dictated to his co-agent and scribe, Fife, the handwritten portions of the original offer. He was the supervisor of Fife, another agent for the Broker, Sierra West. Appellees were inexperienced in real estate transactions and were not represented in the preparation or execution of Exhibit 1 (Finding 12 on Record pages 194 and 195). All of the descriptive information was supplied by Appellant partner and agent Kerr and provided lot "#4" and other locating information which tied directly to the recorded deed by which Sellers had received title (Ps Ex. #9). This deed provided detailed meets and bounds description (Finding #8 Record page 193 and 194).

The court made no finding as to the precise motivation for Appellant's breach. There is evidence that the motivation was a hindsight feeling that he sold to cheaply (Fife May 25 Tr. at 137 and 138).

Appellant's statement in his brief that he was motivated by the discovered drafting errors made by his own partner and agent is not supported by the record.

Finding 11 classifies Appellant's breach as "wrongful".

The purchase price for the highway frontage was definite and certain at \$30,000.00 cash, (P.Ex. #14) Finding 7, 8) and the tendered amount conformed (Finding 5). The carpet provision was not a "contingency of the contract" as claimed by Appellant.

The Appellee was purchasing the property for the single purpose of constructing and operating a carpet retail store warehouse for his existing business operated then from an inadequate main street location on a precarious lease. All the parties knew this was the purpose of his purchase. Appellee moved rapidly toward accomplishing this goal after the agreement was signed and until Appellant repudiated the same. He obtained a builder's sketch and rough specifications, contacted an architect, developed a cost estimate on building and fill, and obtained a loan commitment from First Security Bank. The estimates were that he would have occupied the same within 6 months. The continuing refusal of Appellant to convey continues to prevent Appellees building and continues to result in escalating building costs, interest costs and other direct damages. The Appellants knew Appellees intent to build and were aware of escalating building costs and fluctuating interest rates. The facts in this paragraph are referenced to the record in the body of the Cross Appeal Points.

The court granted specific performance but limited delay damages to rental value of the unimproved property and even interrupted that measure of damages for a period after a continuance of trial was granted, (Finding 13 at R 195) and reduced the requested attorneys fees and court costs (Finding 15 at R 195).

POINT NO. 1

(ANSWER TO ALL OF APPELLANT'S POINTS)

APPELLANT'S STATEMENTS AND ARGUMENTS ARE NOT REFERENCED TO LOWER COURT FINDINGS.

Appellant's brief is replete with factual statements as the basis for their arguments which do not address the lower court findings nor the evidence or lack of evidence to support those findings.

Many of the factual statements in the brief are not even supported by a selective piecemeal trial de novo approach which Appellee takes in its brief and impliedly urges on this Court.

This approach gives no credence to the fundamental appellate review process which gives to the judge who heard and observed the three and one half days of oral testimony the right to sift conflicting testimony and documentary evidence. Such a trial de novo approach would cast this Court adrift in an interminable sifting and weighing process not consistent with appellate review.

5 Am Jur 2nd Appeal and Error §823 page 264.

"The rule that appellate courts will not ordinarily review fact issues decided below is probably based largely on the advantage which the trier of fact below has in observing the demeanor of the testifying witness while the testimony is being given, the idea being that such observation permits a more informed judgment of veracity and capacity than can be made by the appellate court from the cold pages of the record"

Appellant's aimless wandering in its brief through self-serving unsupported factual statements is compounded in its gross error by its failure to specifically attack the record basis for the lower court's findings of fact. There is not one reference in Appellant's brief to the Findings of Fact and Conclusions of Law and very few references to isolated testimony.

The Utah Supreme Court in a similar specific performance case aptly reflected the correct approach that should be taken when appealing a lower court decision in Brady v. Fausett, 546 P. 2d 246, 248 (Utah 1976).

"Suffice to say that an examination of the record here does not impress us with any conviction that the evidence is so substantial in favor of appellant as to require reversal of the trial court's deliberations on the ground of caprice or arbitrariness, nor to say the description (supplied by supplementary identification in the record) was uncertain.

"In appealing this case, Brady seems to enjoin this court with a principle to the effect that the evidence should be reviewed by taking as true everything he adduced, to the exclusion of any evidence admitted at the behest of his opponents, irrespective of its weight, credibility, or admissibility - to which thesis we cannot prescribe."

In the present case, Appellant takes the same approach as Brady in that he adduces evidence with no reference to sufficiency of evidence to sustain trial court findings.

## POINT 2

### (REPLY TO ALL OF APPELLANT'S POINTS)

THE APPELLANT'S ALLEGATIONS OF ABSENCE OF ELEMENTS NECESSARY FOR SPECIFIC PERFORMANCE ARE WITHOUT FOUNDATION IN FACT OR LAW.

#### A. Appellant's "Leading" Utah Case supports Appellee's Position:

The so called "leading" case of Pitcher v. Lauritzen, 18 Utah 2nd, 368, 423 P2d 491 (1967), supports the Appellee's position in various respects and not the Appellant's. The following points are significant:

1. The discussion on specific performance is dictum.
2. The Court refused to overrule the findings of the trial court.
3. The court in dictum only generally addressed

requirements of certainty for specific performance couched in terms of "sufficiently certain and definite as to leave no reasonable doubt and sufficiently certain" to be enforceable.

4. The court then in dictum addressed two areas of uncertainty in the subject tract which support Appellee and the lower court's determination in this case on descriptions.

"First, it was not certain which 30 acres out of the 189 acres owned by the defendant were to be conveyed to plaintiff. The document says, "as indicated by map", but no map was ever shown to the plaintiff. Second, the final balance of \$25,000.00 was to be carried by the seller on contract or second mortgage".

Neither of these "unreasonable uncertainties" existed in this case. Here it was a cash sale of a "lot" described by meets and bounds on the public record and no uncertainty existed in the minds of any of the parties. (See Point # 3).

- B. Appellant's eleven cited errors have no foundation in fact or law.

The appellant's first four claims to descriptive errors or inadequacies are patently erroneous. All of the descriptive information on lines 5 and 6 on Exhibit 1 of which appellants complains were expressly superceded by appellant's own counter offer between lines 52 and 53, which became the contract.

Lines 23 and 24 of the offer were also superceded by the counter-offer and the court necessarily found that line 25 of the offer, requiring seller to accept carpet as bid, was also superceded by the specific unqualified cash payment requirements in the counter-offer. This disposes of Appellant's item 7.

The court after hearing testimony in aid of construction of the contract entered Finding No. 9 on page 194 of the record

"The question raised in pleadings and testimony by defendant partners regarding culinary water supply, septic tank permits, street access and availability of building permits are all issues outside of the contract and are contingencies that the plaintiffs are responsible for if they chose to develop the property."

The appellant's have wholly failed to demonstrate from the record that such finding is unsupported by the evidence. The record is repleat with supporting evidence for the finding. This disposes of appellant's claims 6 and 8 on page 6 of his brief.

Likewise, the court's findings 7 and 8 at page 193 of the record bear directly on appellant's claimed points. These findings were not specifically attacked by reference to absence of supporting evidence. They are supported by evidence and frequently uncontroverted. Those findings are:

- "7. That the contract is definite and certain in its essential terms."
- "8. That the contract wording and the understanding of all parties was clear as to all of the essential contract terms including the indentification of the specific land to be sold, the purchase price, and the time for conveyance and the parties knew the exact tracts of land to be transferred and the purchase price."

This disposes of appellant's remaining claims number 4, 9, 10 and 11.

C. The Court's Findings and Conclusions were based on application of Rules of Construction.

The following rules of construction were properly applied by the court in resolving appellant's claimed omissions and ambiguities: (all references are to sections in 17 Am Jur

2nd Contracts):

1. §§ 244 and 245 Intent of the Parties: The cardinal rule is that ambiguities should be construed or resolved by inquiry as to the intent of the parties as illuminated by the circumstances under which the contract was made.

All witnesses concurred in their testimony with regard to:  
a) description of land, b) intended closing date, c) sellers freedom from responsibility for improvements and, d) who the buyers were.

- "2. §254 Construction in favor of validity or legality.

It is the general principle that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful the former will be adopted. Thus, if a contract is capable of a construction which will make it valid, legal, effective, and enforceable, it will be given that construction if the contract is ambiguous or uncertain. A construction which renders the contract valid is preferred to one which renders it invalid, and it will not be construed so as to be invalid unless that construction is required by the terms of the agreement in the light of the surrounding circumstances.

When parties have entered into a contract, it is to be presumed that their intention was to make an effective rather than a nugatory, agreement, and therefore, unless such construction is wholly negatived by the language used, the agreement should be construed in such a way as to make the contract effective and the obligations imposed by it binding upon the parties. The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.

Appellant's sole purpose in his shot gun approach is to defeat the validity and enforceability of the very contract he and his agents wrote. Appellees seek to uphold it.

3. § 255 Implication of unexpressed terms, promises, or obligations.

The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair and just men they ought to have made. Therefore, whatever may fairly be implied from the terms of nature of an instrument is, in the eyes of the law, contained in it...

This supplies the missing closing dates, the 0's in improvements and feet in place of inches.

"4. \$276 Against one drawing contract or selecting its language.

It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation. . . . "

Here the contract was drafted by Appellant's partner and agent Kerr and his agent Fife and should be construed against him as to any doubtful language.

"5. \$280 Errors or omission, blanks.

A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein which can be corrected by perusing the whole instrument. If an improper word has been used or a word omitted, the court will strike out the improper word or supply the omitted word if from the context it can ascertain what word should have been used. Obvious mistakes in a contract may always be supplied if from the context it appears with certainty what word or words were inadvertently omitted. Furthermore, an omission from a contract of what is necessarily implied is immaterial. But where the contract is entirely silent as to a particular matter, the court will exercise great caution not to include by construction something which was intended to be excluded. Where there is simply no manifestation of intent as to some matter, the deficiency cannot be remedied. In such a case there is no room for the construction of doubtful words inasmuch as there are no words whatever.

Unfilled blanks in a contract may be rejected as suplusage if the parties so intended. "

This rule covers many of Appellant's cited errors including closing dates, no X's or O's in squares, name of grantee for deed and no real estate commission.

These rules reflect the proper approach taken by the lower court.

6. Definiteness of Time for Performance.

In finding #8, the lower court found that among other essential terms, time for conveyance was clear. By so doing, the lower court supplied the omitted, but intended date of performance. As mentioned above, Appellant's brief fails to attack any lack of substantial evidence for that finding. Besides being supported by the evidence, and following the general rule of construction for omissions mentioned above, finding 8 accords with other recognized rules of construction particularly applicable to definiteness of time for performance.

81 C.J.S. 396 Specific Performance §39 C., discusses an approach that conforms well with this case:

"A party may waive, or become estopped to assert, indefiniteness with respect to time of payment; failure to fix any time for payment may be cured by... a tender of the purchase price within a reasonable time where there is no intent to defer payment..."

This "estoppel" rule can be appropriately applied to the facts of this case to sustain the conclusion reached in finding 8 of the lower court's opinion. See also, 71 Am Jur 2d, Specific Performance §35.

POINT 3

(REPLY TO APPELLANT'S POINT III)

THE LOWER COURT PROPERLY ALLOWED PAROL EVIDENCE  
TO IDENTIFY DESCRIPTION CONTAINED IN THE WRITING  
WITH ITS LOCATION UPON THE GROUND.

Exhibit #1 contains the following property descriptonal material on its face, all placed there by appellant's partner or agent Fife; (a) accepted counter-offer between lines 52 and 53... "lot #4" with option on land immediately behind approximately 208' X 165" ... (b) the offer, line 10 placed the property at: "No. Logan City, Cache County, State of Utah (c) Line 5 approximately located the property at: "approx 1860 No. Main; (d) line 45, the property was owned by Sellers; and lot #4 was adjacent to #3 lot from South corner." "See line 6 and 52 and 53 of offer; (e) clearly 165 feet frontage and approximately 385 feet depth (f) with an option on the rear piece of 208 feet X 165 feet, lines 52 to 53.

There is no reported case with this much detail in the description holding that the court could not admit parol evidence on "locating the description on the land." Especially so where the Seller's themselves had previously filed for record a deed which described the same property as "3rd Lot North" and "4th Lot North" and giving detailed conforming meets and bounds lot descriptions. ( Ps. Ex. #9).

This court has consistently held descriptions adequate for specific performance which fell far short of the specificity contained in Exhibit #1.

In Nielsen v. Rucker, 8 U 2d 302; 332 P2d 302, this court held that a description "The dairy farm owned by Glen

Nielson and wife" was alone adequate to allow a parol evidence. That case sums up the case law to that point with the following statement:

"In the recent case of Johnson vs. Jones, 109 Utah 92, 97, 164 P.2d 893, 895, we quoted with approval from Cummings vs. Nielson, 42 Utah 157, 129 P. 619, 622, as follows:

"It is elementary that in equity that is certain which can be made certain. In case \*\*\* certain lands are mentioned by name merely in a contract, without giving a definite description, the \*\*\* lands intended in the contract may always be shown by extrinsic, parol, or documentary evidence."

The cited Johnson v. Jones case holds that an apartment house street address description was not inadequate for specific performance though the City and State were omitted.

In Brady v. Fausett. (Utah 1976) 546, P. 2d 246, this court held that a lease of lands with option to buy was not unenforceable where it was prepared by vendor in which document stated "description will be placed here."

#### POINT 4

(ANSWERS TO APPELLANT'S POINTS III & IV)

THE CONTRACT PRICE WAS NOT AN INDEFINITE "CARPETING PLUS CASH", BUT RATHER A DEFINITE FIXED PRICE.

Both of appellant's points III and IV are clearly without merit and none of the cited cases apply to this case. Appellant's factual assumptions have no foundation in the record. Appellant states on page 13 "where the contract called for carpeting plus cash". Appellant's counter-offer was couched expressly in a lump sum of \$30,000 cash for the front piece and \$7,500 cash for the

the option piece, (See Exhibit #1). The tender was for the full amount and the court refused appellees' claim for lost profits on the superceeded carpet provision. Appellee would mislead the court into a construction without any factual substance that the price or time for payment was indefinite in that it was some indefinite carpet sales arrangement plus \$30,000 cash. Since factually Exhibit #1, and the record fix a definite price without equivocation, as provided in the findings, the cited cases have no application here.

POINT 5

(REPLY TO APPELLANTS' POINT V)

THE SEPTIC TANK PERMIT PROVISION  
WAS PROPERLY FOUND TO BE OUTSIDE  
THE CONTRACT AND BUYER'S SOLE RISK.

The offer, not the contract was subject to the septic tank permit. The wording of the provision (Exhibit #1, line 21,)), chosen by appellant's agents and partner, Fife and Kerr, expressly stated that the "offer (was) subject to the Buyers obtaining a septic tank permit." Thus, the court's finding #9 at page 194, that the provision was outside the contract, was proper. Thus, by the offeror tendering the price he was deemed to have waived that condition, which, by the express wording of the contract, was for Eliasons'- Offeror's benefit. The point is further made moot by the fact that both Fife and Eliason called the Health Department who assured them that a permit would issue and Willard Hill, the issuing officer, testified that at all times such a permit would have issued at that location for the type use contemplated.

(cross-exam - Willard Hill June 5, 1971 at 56). Again,

the appellant has strayed from the findings, the record and the law. See also Point 4(C), on the rules of construction as they apply to this point.

POINT 6

(REPLY TO POINT VII)

COURT IN EQUITY PROPERLY REFUSED  
TO CREDIT APPELLANT WITH INTEREST  
ON PURCHASE MONEY WHERE REFUSAL TO  
CONVEY WAS WRONGFUL BREACH OF CONTRACT.

The court expressly found that Appellant's breach was a wrongful breach of contract (Finding #11). The following case clearly holds that a denial of credit for interest on a refused tender is proper under these circumstances. Levine v. Whitehouse, 37 UT 260, 109 P2d, Am Jur, Tender §32.

CROSS APPEAL

POINT A

THE LOWER COURT'S AWARD OF ACCOUNTING  
"DAMAGES" WAS INADEQUATE AS A MATTER  
OF LAW TO RESTORE APPELLEES TO THEIR  
POSITION AT TIME OF APPELLANT'S BREACH.

The court properly determined the contract to be specifically enforceable and found that the appellant and his partner - agent - co-defendant, had wrongfully refused to convey the property (Finding 11, R194). However, the court, in awarding damages in the nature of an accounting erred in that the award materially fell short of "restoring him to the position he would have been in had a timely conveyance been made" on October 16, 1976, as per the contract and tender of payment. Two fundamental errors are alleged here with respect to the award of damages.

A. The court awarded damages on the implied

theory that appellee would have held the land without improving or building on the same had a timely conveyance been made, either for resale or that something would have prevented his building thereon as he clearly intended. The damages as awarded were "reasonable rental value of unimproved land."

The extensive, detailed and uncontroverted evidence established the following facts.

1. Appellees sole purpose was to build and operate a retail carpet outlet and warehouse to move his established carpet business into operation as quickly as possible and all parties and their agents knew that purpose during the negotiations and at the time of execution of the contract: See appellant - May 24 Tr. at 32, 33; co-defendant Kerr, May 25 Tr. at 39, 40; agent Fife May 25 Tr. at 144; appellee, June 14 Tr at 13.

2. The appellee on signing the counter-offer and within the short time before being notified of appellants repudiation took the following affirmative steps toward building under those conditions (a) made agreeable preliminary arrangements with First Security Bank, Fred Hunsaker, June 15 Tr. at 120, 121, for a long term commercial building loan (appellee, June 15 Tr. at 18-20); Bailey, May Tr. at 193, 194); (c) called the Cache County Health Inspector on the telephone and was told he could have obtained a septic tank permit at that location; (Appellee May 25 Tr. at 34, 35, 36; Fife May 25 Tr. at 132, 133; Hill, June 15 Tr. at 5, 6. The sole obstacle to building according to appellees plans was the wrongful breach by appellants of their contract to convey the property.

3. The necessary building permit would have in fact issued per testimony of Vance Waite the North Logan Town Recorder and issuing officer, had appellee applied. Waite 1, 51, day 4.

4. The necessary septic tank permit would have issued from the Cache County Health Office, Willard Hill, Director on formal application. (Hill, June 15 Tr. at 56).

5. Contractors best estimate was that the building would have been ready for occupancy within six months. (Bailey, May 25). The above facts are uncontroverted.

The court nevertheless, erroneously found that damages or accounting based on assumptions that appellee would have built on the property were speculative.

It is appellees position that the test of award of damages on accounting should be restoration of appellee to the position he would have been in had there been a timely conveyance. Thus, the position to which he should be restored in his position before the delay in conveyance as established by a preponderance of the evidence. Though the future cannot ever be predicted with absolute certainty, it is submitted that the evidence as to Seller's knowledge of building intentions; plans; capability and legality rises to the level of "beyond a reasonable doubt" and is specific and uncontroverted.

It is also submitted that the courts limiting the appellee to vacant land rental is a denial of the fundamental contract right to a full accounting for damages flowing from delayed performance of a contract. There is no case law cut off accounting for time delay losses under contract performance

breaches which uses the tort phrase "speculative" as used here by the Court.

The only fair questions in contract should be (1) was there a wrongful breach of promise to convey? and (2) what were the losses resulting therefrom to the appellee as established by a preponderance of the evidence?

If there had been a preponderance of evidence or any evidence whatsoever that appellee either did not intend to build (was buying for speculation) or could not have built as planned because of legal, economic or other reasons, then the court might have found some justification for limiting accounting (damages) to raw land rental value. But here the justification for basing losses on appellees' building plans and intent is further buttressed by the following facts: Both vendors knew, (1) that appellee was buying to build his own business facility on the land, (2) building costs were escalating during the delay, and (3) interest rates on buildings were subject to fluctuations which created risks of interest increases in delaying conveyances of land to vendees who were going to build.

These well established and uncontested facts indicate that delay damages were foreseeable from the vendor's point of view, as well as from the purchaser's point of view. Delay damages which are reasonably foreseeable from both parties perspectives can hardly be deemed "speculative".

Based on the aforementioned evidence, two alternative measures of damages were presented at trial which were not accepted by the Court:

1. Appellee urged that the rental value of the land with the planned building thereon be used to gauge the loss suffered by appellee as a result of the delay caused by appellant's breach.

This theory revolves around the basic notions of the restoration aspect of an award for delay damages in an equitable action. Through appellant's breach, appellee lost not only the use of the unimproved land, but also the opportunity to improve the land and use it as he had intended.

In Johnson v. Jones, 164 P2d 893 (1946) the Utah Supreme Court was squarely confronted with the issue of whether compensatory damages were proper in a specific performance action. The court held the value of use of the property was recoverable:

"The third general argument is that the Court erred in awarding damages for loss of rentals in an amount of the entire rental value of the property, even if specific performance could be decreed. In view of what we have said hereinabove, this contention is unsound, for if appellant had performed, the respondents would either have enjoyed the actual possession of the apartment occupied by appellant and collected the rent from the tenants occupying the other apartment, or if both apartments had been rented they would have collected the rent on both."

The value of the land to the appellee would have been reflected in profits made on the improvements. Admittedly, profits from a nonexistent business, or a new operation would be difficult to calculate. In Northeast Theatre Corp. v. Wetsman, 493 F2d 311 (6th Cir 1974), this figure was arrived at by substituting profits from a similar operation for the period in question. Because of the unavailability of data from an operation comparable to that contemplated by appellee, the rental value of the improved property as planned should

be used a substitute measure of damages.

The trial courts award of unimproved rental value fell far short of restoring appellee to his pre-breach position, which should be the basis of an award for damages in a specific performance action. The case law overwhelmingly supports the principal that the non-defaulting party should be restored to his pre-breach position and thus, should be awarded damages for losses flowing from the delayed conveyance.

The evidence introduced at trial showing the rental value of the land after improvements, was uncontested, as was the evidence showing appellee's intent to improve the land and appellant's knowledge of appellee's intent.

2. Another measure of damages presented to the lower court is fashioned in a more direct manner. This method involves calculating the increased interest expense and increased building costs incurred by appellee in direct consequence of appellant's breach. That these damages were actually suffered by appellee is evident and uncontested in the record. Testimony regarding the increased interest expense and the increased cost in construction materials was uncontested; Durtschi, June 15, Tr. 130-135; Hunsaker, June 15 Tr. 118-124; Bailey, Ps.Ex.15. Also, the foreseeability of these delay damages was clearly established at trial as earlier referenced.

Increased interest costs and increased building costs were foreseeable by appellees, and suffered by appellants. No testimony was given either as to the inappropriateness of this measure of damages, or as to the inaccuracy of the calculations used by appellee.

This approach more fully restores appellee to the position he would have been in had appellants not breached. The measure of damages used by the court below was inadequate to this restoration.

In Wagner v. Anderson, 250 P2d 577 (1952) the Utah Supreme Court held special damages were recoverable in a specific performance action even when the land had been conveyed pursuant to a pretrial settlement of that part of the action.

"Assuming that the respondent's refusal to perform on time was wrongful, there arose in favor of the appellants a cause of action for specific performance and also any special damages occasioned by the delay which the appellants can prove."

250 P2d at 580, (citing 49 Am Jur 198 and 95 A.L.R. 228).

Any effort to place the Appellee in the position he would have been in should take account of the increased costs which will burden the Appellee. Otherwise, the decree of specific performance will not render full relief. In Regan v. Lance, 366, N.Y. S2d 512, 516 (1975) increased mortgage expenses were awarded as consequential damages along with other "costs directly attributable to defendant's delay." Predictability of the damages was used as a test of the appropriateness of awarding the increased mortgage expenses. Predictability of foreseeability of consequential damages as a condition to reconvey was first introduced in the ancient case of Hadley v. Baxendale, 9 Exch. 341 (1854).

Again, in the present case, it was shown these damages were foreseeable by both appellants and appellees. There are no cases which deny delay damages comparable to those actually suffered by appellee in the present case proved

by uncontroverted evidence.

## CROSS-APPEAL

### POINT B

THE COURT SHOULD NOT HAVE CONSIDERED  
INCREASE IN VALUE OF PROPERTY AS GROUNDS  
FOR REDUCTION OF AWARD OF ATTORNEY'S FEES.

The court cut in half the hourly billing rate for attorney's fees and cited one reason therefore in Finding #15, that the reduction in part was attributed to the increase in the value of the land. Appellants do not dispute that such a determination is within the discretion of the court where the purchase was for speculation. However, here, where the undisputed evidence is, as pointed out previously, that the purchase was for holding, building and operation of a business by appellee, buyer will realize no gain to share with his lawyer and the court should recalculate the awardable attorney's fees excluding the profit sharing concept.

## CROSS APPEAL

### POINT C

DELAY DAMAGE SHOULD NOT HAVE BEEN  
INTERRUPTED DURING A TRIAL DATE  
CONTINUANCE.

The court found that appellees failure to convey on October, 1976, was wrongful, (finding 11, R, 194). Appellants could have purged themselves of the risk of continuing damages by conveying title even prior to a trial. The Court also expressly found that at all pertinent times the appellant could have conveyed as required by his contract and mitigated the appellees delay damages. (Finding #10, Record at 194)

The Courts later finding (Finding #13, Record at 195)

arbitrarily terminating the damages because of a continuance of the trial is entirely inconsistent with the earlier finding of a continuous wrongful refusal of appellant to convey.

In Wagner v. Anderson, 250 P2d, 577, UT, this Court has held that where respondents refusal to perform on time was wrongful that the purchaser has a cause of action for any special damages occasioned by the delay which can be proved. This was so even though there was a conveyance prior to the trial. In this case, there still is no conveyance. There is no justification for denying appellee damages because the case is continued. The appellant should have to pay for the consequent damages where his breach is determined to be wrongful.

#### CONCLUSION

Appellant seeks here to escape the consequences of a contract in which he and his partner and real estate agents selected the form, dictated the terms and delivered up as a LEGALLY BINDING CONTRACT to an unrepresented, good faith purchaser who was not experienced in real estate transactions. The method chosen to evade this responsibility is (1) ignore the lower courts finding or the basis therefore, (2) to compound this error by misapplying the law of construction and specific performance to erroneous factual assumptions (3) all calculated to result in the destruction of the validity of a contract in every respect of Appellant's own making.

The fundamental principle of law and fabric of society sustaining and enforcing voluntary and valid contrac-

tual obligations is at stake here. To disallow specific performance in this case would open the flood gates to contractual anarchy, inviting professional real estate salesman and their principals to play a "head, I win, tails you loose game". Thus, on the one hand, drawing up and representing to the public "LEGALLY BINDING" contracts but affording to them a privileged escape from the consequences if by hindsight it suited their purposes or pocketbooks.

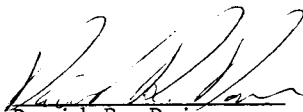
The lower court, however, erred in failed to grant delay damages proved by specific and uncontroverted evidence.

This case should be remanded and delay damages recomputed and also updated during the pendency of this appeal. Attorney's fees and costs as per the contract should be recomputed and those costs and fees related to the appeal should be added into the calculations of the court.

To free the appellant from responding to the full consequential damages from his wrongful delay would be an affront to the rule of law.

RESPECTFULLY SUBMITTED this 18th day of September, 1979.

DAINES & DAINES

  
David R. Daines

# MAILING CERTIFICATE

I hereby certify that I mailed 11 copies of the foregoing Brief of Respondents to the Supreme Court and that I mailed a copy to Lyle W. Hillyard, 175 East 100 North, Logan, Utah, this 21st day of September, 1979.

Jayne Christensen