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Utah Farm Production Credit association v. Cox,
Jeffrey J. and Elliott J. A Co-Partnership, Elliott J.
Cox, Jeffery J. Cox, Yvonne Cox, Blanche. Cox,
United States of America, Tracy-Collins Bank and
Trust Company, Bank of Ephraim : Brief of
Defendants-Respondents Cox

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION
CREDIT ASSOCIATION,

Plaintiff-Appellant,

vs.

COX, JEFFREY J. and ELLIOTT J.
a co-partnership, ELLIOTT J.
COX, JEFFERY J. COX, YVONNE
COX, BLANCHE COX, UNITED STATES
OF AMERICA, TRACY-COLLINS BANK
AND TRUST COMPANY, BANK OF
EPHRAIM,

Defendant-Respondents.

Case No. ~~7588~~ 16885

BRIEF OF DEFENDANTS-RESPONDENTS COX

Appeal from Judgment
in favor of Defendants in the
District Court of Sanpete County, Utah
Honorable Don V. Tibbs

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Defendant-Respondents.

Case No. 7588-16885

BRIEF OF DEFENDANTS-RESPONDENTS COX

STATEMENT OF FACTS

Defendants-Respondents Cox do not agree with the statement of facts set forth in the brief of Plaintiff-Appellant and therefore, set forth the following statement of facts.

Utah Farm Production Credit Association (hereinafter PCA) finances the turkey business of certain turkey growers in Sanpete County (Findings of Fact 15). At the times relevant hereto Jeffery J. Cox was in the business of raising turkeys

in Sanpete County, Utah, and was one of the growers financed by PCA.

In February of 1973, Jeff Cox (hereinafter Cox) opened a line of credit with PCA which continued through 1975 (Tr. 25, 329). During this period his indebtedness increased, and each year PCA renewed his loan for a year and financed his operation for the following year (Tr. 47). Jeffer Cox and his wife Yvonne signed promissory notes and security agreements in favor of PCA as did his parents Elliott and Blanche Cox. In the fall of 1976 Jeff Cox evaluated his debt with PCA and decided to withdraw from the turkey growing business and put his farm and "retains" from Moroni Feed Company up for sale to pay off his debt with PCA.

When Cox informed PCA of his intent to get out of the business of raising turkeys, PCA felt that it was under-collateralized on its loan to Cox (Tr. 216-220, 247-250). In an attempt to improve its security margin Stephen L. Adamson, a PCA loan officer, met with Jeff Cox on January 17, 1977. At this meeting, Adamson said PCA would be willing to finance Cox' turkey business for another year (1977) if Cox would agree to pledge his stock in Moroni Coal Company as security (Findings of Fact 17). Cox agreed, but stated that his father who held a controlling interest in the coal company would not

pledge his stock. Adamson authorized Cox to purchase 60,000 turkey poults and released Cox' 1977 "retains" (dividends payable from Moroni Feed Company and which were covered by a security agreement in favor of PCA) toward the delivery of the first 20,000 poults (Findings of Fact 17, 19). Also, based on PCA's loan commitment, Cox took his farm and Moroni Feed Company dividends off the market (Findings of Fact 19).

PCA's course of dealing and performance was such that Adamson had apparent and express authority to make a loan commitment to Cox (Findings of Fact 16, 18; Tr. 118).

At a second meeting, approximately one week later, Cox delivered his Moroni Coal Company Stock to PCA and Adamson drafted a budget with Cox covering operating expenses for the year (Tr. 96, Defs'. Exh. 30). It was agreed that these expenses were to be covered by a loan that would be due one year from the day the promissory note was to be signed (Tr. 271 A, 127, 128). The possibility of obtaining a government guaranteed loan covering the outstanding debt to date was also discussed (Tr. 271 and 271A). Government guaranteed loans had not been available in the past (Tr. 170-171).

On February 12, 1977, Cox took delivery of the first 20,000 turkeys (Tr. 98). Cox repeatedly called PCA about receiving the loan proceeds and was repeatedly put off (Tr. 100, 101). Finally, at PCA's suggestion, Cox took out a personal loan with the Bank of Ephraim for \$2,500 to pay some

of his current turkey expenses (Tr. 101, 102). He still owed Moroni Feed Company about \$34,000 for turkey poults and feed (Tr. 106).

Approximately seven weeks following the delivery of the first brood of turkeys, PCA again met with Defendants (Tr. 104). At this meeting PCA added a new demand requiring that in addition to Jeff Cox' stock, Elliot Cox' stock in Moroni Coal Company would also be required as additional collateral on the loan (Tr. 102-106, 254, 258). As he had done in the past, Elliot Cox refused; whereupon PCA retracted their commitment on the loan and said it would immediately foreclose on Defendant's security including the turkey farm (Findings of Fact 21 Tr. 105). Having no way to forestall the imminent foreclosure action, Cox sold the 20,000 turkeys and went to work as a truck driver at Moroni Coal Company (Findings of Fact 22, Tr. 138-140).

At the conclusion of the evidence, the trial court entered judgment in favor of PCA with an offset representing Cox' loss of profits suffered from the recision of PCA's loan commitment (Tr. 332). In computing the amount of the offset the court considered the average profit per pound made by growers participating in the Moroni Feed Company cooperative program which was four cents per pound for the year 1977. (Tr. 199-200). The final production poundage of Cox' first brood of 20,000 turkeys (which had been sold to one of the Moroni Feed Company growers) was 321,560 Pounds (Tr. 191).

turkeys which would have been raised and at four cents a pound found Cox' profit to be \$38,587.20. The court then added "retains" at six cents a pound which were to be retained by the cooperative and paid in five years and reduced this figure to present value — (\$28,940.40) to find a gross lost profit figure of \$57,527.60. From this figure the court subtracted certain sums for expenses which were saved by Cox because he was out of the turkey business and the wages Jeff Cox was able to earn as a truck driver to find a net lost profit total of \$40,927.60. Finally, the Court added \$4,000.00 as an offset against the interest Cox had been charged by PCA on the \$40,927.60 which PCA was not entitled to recover and found Cox' total offset to be \$44,927.60 (Findings of Fact 23-28, Tr. 330-332).

A profit of four cents per pound was conservative because the evidence showed that for the type of turkeys Cox had the profit would have probably been greater (Tr. 202, 204). Moreover, it was shown that to use the first 20,000 brood of turkeys to estimate the poundage for the entire year was also conservative because the first brood is the least productive (Tr. 327). The trial court reduced the offset by the amount Cox made as a truck driver after the turkeys had been sold (Tr. 331). This was conservative because in past years he had been paid nearly the same amount by the coal company while spending nearly full time with the turkey operation. (Tr. 141).

POINT I

DEFENDANTS PROPERLY MITIGATED THEIR DAMAGES

PCA relies upon the general rule of determining damages for a breach of contract to lend money, i.e., the difference between the cost of borrowing money from the Defendant as opposed to the cost from an alternative source. Appellant has conceded, however, that the rule is not absolute (App't Brief, 7). Virtually all the authorities recognize the need for an alternate form of damages when the borrower is unable to mitigate by obtaining alternative financing and suffers unavoidable harm. See Restatement (Second) of Contracts §343 (1932); Williston On Contracts §1411, at 614 (1968); 22 Am.Jur. 2d Damages §69 (1965). In such situations the courts have awarded special damages. See Bank of New Mexico v. Rice, 78 N.M. 170, 429 P.2d 368 (1967); Price v. Van Lint, 46 N.M. 58, 120 P.2d 611 (1941); 36 A.L.R. 1409 at 1414-1426.

For example in Cox Corp. v. Dugger, 583 P.2d 96 (Ut. 1978)^{1/} plaintiff sought damages for breach of an oral contract to lend money. The trial court awarded plaintiff damages in the amount of the promised loan. In reversing the lower court on other grounds the Court stated that damages, if allowable, would not be the amount of the loan as granted by the trial court but rather "the difference between the reasonable value of the property and the amount of money required

^{1/} There is no connection between the parties or events in Cox Corp. v. Dugger and the parties to this case.

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to be paid by the option contract." Cox v. Dugger, supra, at 96. In Cox Corp. v. Dugger, Justice Maughan dissented, stating that the trial court should not be reversed. Nevertheless he agreed with the majority as to the measure of damages:

...where the borrower is unable to obtain money elsewhere, and the defendant knew of the particular purpose for which the money was needed, special damages may be recovered, provided they are not speculative or remote. Cox, supra at 100.

It is apparent from Cox that Utah Follows the rule to the effect that if the borrower is unable to obtain alternative financing, if the lender knew of the purpose for which the money was being borrowed, and the damages are not speculative or remote, special damages may be awarded. Defendants Cox have met all of these criteria in the instant case.

A. Defendants Cox were unable to borrow money elsewhere.

The evidence disclosed there were two sources of financing available to finance current turkey raising operations in the Moroni area. Moroni Feed Company and PCA. Appellant briefly argues that Cox made no effort to obtain alternate financing even though he could have received financing from the Moroni Feed Company for 1977." (Appt's Brief, 7). In so arguing, Appellant ignores certain facts central to Cox' decision to sell the initial 20,000 turkey poults and arrange not to take delivery of the remaining 40,000. At

the time PCA refused to honor its commitment to finance the raising of 60,000 poults, Defendants Cox owed over \$150,000.00 for past years. At the meeting where PCA announced that it would not honor its loan commitment, Jeff and Elliott Cox were told that PCA would take immediate steps to foreclose on the Cox properties (Tr. 105). Among these properties was Cox' turkey farm. Cox understood the futility of trying to finance the 1977 turkey operation through Moroni Feed Company if there was no place to raise them. In fact, Cox testified of an offer by Moroni Feed Company to finance the 1977 operation following PCA's breach. But Cox replied:

Well that'd be fine by me but Utah Farm Production, Vaughn Mills said he would be down here with his foreclosure in a week and-a-half and I'll have no place to run them [the turkeys]. ...I don't have any alternative but to get rid of them. (Tr. 106).

Following PCA's announcement that it would immediately foreclose, Cox was fortunate enough to find a third person to purchase the 20,000 turkeys and obtain a release on his commitment to take 40,000 more turkey poults thereby minimizing his damages. If he had waited for alternate financing on the delinquent past due balance for even a week these arrangements may not have been possible. Moreover, the reason PCA was foreclosing was due to Cox' difficult financial situation. It is doubtful, therefore, that such a delay would have been justified in light of poor prospects in obtaining such a large loan.

PCA's threat to Cox of immediate foreclosure made it foolhardy to remain in the turkey business having incurred the expense of 20,000 poults and an obligation to take 40,000 more. The total budget for the 1977 operation had been estimated at \$368,000.00 (Exh. 30, page 1). Because Cox had already incurred approximately \$34,000.00 of indebtedness to Moroni Feed Company, by selling out when he did, Cox reduced his his potential damages by this amount plus any additional amounts incurred for additional feed and poults. PCA's only suggestion was to let the poults die (Tr. 105).

B. PCA knew of the purpose of the 1977 Cox financing and the damages could have been contemplated.

The second requirement for an award of lost profits in the case of a breach of a loan commitment is that the breaching party "must know of the particular purpose for which the money was needed." Cox Corp. v. Dugger, supra at 100. See also, Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620 (Utah 1979). Obviously the parties herein knew of the particular purposes for which the money was needed (Tr. 93-100, 225-227).

Both parties contemplated the expectation of a profit in Cox's operation in at least the amount of the damages awarded by the lower court. Appellant argues that PCA expected Cox to only break even -- that no profit was expected at all during 1977 (Appt's Brief, 11). In fact, PCA and Cox did sit down and together calculate Cox' expected profits for 1977 during the January 7, 1977 meeting (Tr. 224-227). In that meeting,

Steve Adamson for PCA filled out a form detailing estimated operation expenses and a second form detailing the estimated gross profit from Cox' operation (Defs' Exh. 30, pp. 1 and 4). Expenses were estimated at \$368,100 and gross profits at \$471,648 — a difference or net profit of \$103,548.

PCA's position that no profit was expected is apparently based upon Mr. Adamson's testimony at a later date he privately figured a separate more conservative estimate that greatly reduced Cox' expected profits (Tr. 227, Defs' Exh. 30, p. 15). However, this was a secondary, unofficial, private estimate — one obviously not shared, or even known, by both parties. Regardless of what Adamson thought later, PCA cannot claim that it did not contemplate that Cox would make a profit with the help of its financing.

Moreover, the very nature of the turkey industry and PCA's business is based on a contemplation of profits by both parties. The turkey industry is cyclical (Tr. 157). The two or three years prior to 1977 had been bad years for turkey growers (Tr. 219). PCA was financing many of these growers (Tr. 219). It is clear that lending institutions are not in the business of foreclosing their client's property, but rather they expect their client will be ultimately successful in his venture and be able to repay the loan principal with interest. This is the essence of PCA's dealings with Cox. Cox accepted the opportunity offered by PCA to go another year with the turkey business -- both parties expecting the next year to be profitable. Thus the possibility of profits were necessarily in the contemplation of both parties.

C. The contemplated lost profits are neither speculative or remote.

Lost profits are a recognized measure of damages in Utah. Winsness v. Conoco Distributors, Inc., 593 P.2d 1303 (Utah 1979); Box Corp. v. Dugger, 583 P.2d 96 (Utah 1978); Howarth v. Ostergaard, 10 Utah 2d 183, 515 P.2d 442 (1973); Gould v. Mountain States Telephone and Telegraph Co., 6 U.2d 187, 309 P.2d 802 (1957). In Winsness v. Conoco Distributors, Inc., supra, for example, the Utah Supreme Court expressed its acceptance of lost profits as a measure of damages as follows:

In this case, the evidence as to damages is not so meager as to invite sheer speculation; imprecise it is, but counsels' arguments, the court's instructions, and the common sense of the jury will, no doubt, place the evidence in perspective for proper resolution of the damage issue. 593 P.2d at 1306.

In explanation, the court in Winsness cited Professor Corbin's discussion on this point as consistent with Utah law.

. . . There is little that can be regarded as "certain," especially with respect to what would have happened if the march of events had been other than it in fact has been. Neither court nor jury is required to attain "certainty" in awarding damages; and this is just as true with respect to "value" as with respect to "Profits." Therefore, the term "speculative and uncertain profits" is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not committed a breach of contract. The law requires that this evidence shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone. The amount of evidence required and the degree of its strength as a basis of inference varies with circumstances. A greater amount and a higher degree are required in those cases in which it is usually possible to produce it than in cases where it is usually impossible or difficult and the defendant had reason to know it. . . . Winsness, supra, at 1306, citing Corbin on Contracts, Vol. 5, §1022.

In Utah, therefore, a plaintiff who has proved liability

should be compensated so long as the evidence of his damage is not so meager or uncertain as to afford no reasonable basis for inference. Moreover, on appeal this Court should give great weight to the lower court's findings concerning lost profits. See Monter v. Kratzner's Specialty Bread Company, 29 Utah 2d 18, 504 P.2d 40 (1972); Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961).

The trial court in this case found the evidence to be sufficient. Respondents Cox submit that the evidence is sufficient to support the findings and conclusions below to the effect that Cox would have raised 60,000 turkeys and made a profit equal to at least 4¢ per pound and retains of 6¢ per pound on over 900,000 pounds. (Findings of Fact 20-26, Conclusions of Law 6).

I. C. 1. It is reasonably certain that the Respondents could have acquired the last 40,000 poults.

Respondents introduced testimony from Moroni Feed Company that PCA had called the hatchery and was certain enough of the delivery of the total 60,000 poults that the budget sheets were based on that figure, not just 20,000 poults. (Def's Exh. 30) The hatchery manager stated that the 40,000 poults would have been delivered. (Tr. 175-176). No evidence was introduced to the effect that the Moroni Feed Company would have been unable to meet its commitment to deliver the poults as ordered. The trial court had adequate

evidence to reasonably conclude that the remaining 40,000 poultts would be delivered as ordered.

I. C. 2. The amount of retains or dividends Cox would have received was not speculative.

Moroni Feed Company is a farmers cooperative on a very firm financial standing. As part of its program, it withholds a portion of the proceeds from the sale of the turkeys and pays it to the grower five years later. These retains, therefore, represent money contractually owed the turkey grower by Moroni Feed Company. (Tr. 155) The testimony at trial made it clear that the receipt of these is not speculative. (Tr. 88-90) No evidence was introduced that Moroni Feed Company had ever failed to pay the retains in full on the date promised. Therefore, the lower court had sufficient reason to find that Moroni Feed Company would pay retains or dividends in the instant case.

The evidence of a 10% per year discount rate for these retains was undisputed. PCA presented no evidence that the rate was inappropriate to apply in determining present value. Jeff Cox had found a buyer willing to purchase his future retains at a 10% per year discount just before PCA encouraged him to take his farm off the market. (Tr. 88-90) Obviously, those in the turkey growing industry believed the 10% rate was appropriate. (Tr. 115-117) The lower court acted reasonably in applying the 10% discount formula.

I. C. 3. The evidence supports Plaintiffs' lost profits.

Cox was an experienced turkey grower who had been in the business for 11 years. (Tr. 152) He had experienced growth and profits in his business. (Tr. 152, 153) There is no evidence that Cox lost money during any year that another grower made money. (Some of the losses Cox had incurred were from his cattle operations. Tr. 162-166, 219 and 322)

POINT II

RESPONDENTS' BUSINESS HISTORY DOES NOT PRECLUDE AN AWARD OF DAMAGES.

Appellant argues that the Cox turkey raising operation had been unsuccessful and that, therefore, they should be denied special damages. (Appts' Brief 18) The record, however, does not support this contention. There was no evidence as to what amount that Cox's turkey operation had lost during the previous four years. (Tr. 162-166) The turkey growing business is cyclical and, hence, profit cannot be shown every year. (Tr. 157) If Cox had done poorly during the previous four years, it was because the industry did poorly those years. (Tr. 219, 322) There is no evidence that other growers made a profit during these years. The record indicates that Cox's business had been successful in the past. (Tr. 152, 153) PCA offered no credible evidence to indicate that the Cox operation would not have realized the profits found by the court in 1977. There was no dispute but that the profitability of the turkey business is

POINT III

APPELLANT'S LOAN COMMITMENT IS NOT VOID
UNDER THE STATUTE OF FRAUDS.

According to the evidence, the loan committed to Cox was to be paid back to PCA approximately one year later. (Tr. 128, 249, 271 A-271) It is well settled in Utah that if performance on an oral contract could be performed within one year, the contract is outside the statute of frauds. Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 (1959); see Keith Gas Co., Inc. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977); Howarth v. First National Bank of Anchorage, 540 P.2d 486 (Alaska 1975), aff'd 551 P.2d 934 (1975); see generally 72 Am. Jur. 2d, Statute of Frauds, §9 (1974). Obviously, Respondents could have repaid the loan within one year. Indeed, they would have been required to repay the loan no later than one year after receipt of the money. Even if there was no agreement as to the repayment date, the loan still could have been repaid within one year. Such oral contracts are not affected by the Statute of Frauds. The fact that the parties had discussed a government guaranteed loan which would have spread the old balance over seven years does not invoke the statute of frauds. In the past the loans had been for one year only. (Tr. 26) PCA's commitment was not contingent upon obtaining a government guaranteed loan. (Tr. 96)

Also, the doctrine of promissory estoppel takes Appellant's oral commitment outside the Statute of Frauds. See

Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953); Annot., 56 A.L.R. 3d 1037, 1050 (1974). Section 217A of the Retatement (2d) of Contracts lists the elements of promissory estoppel as follows: (1) a promise; (2) which the promisor should reasonably expect to induce action or forbearance on the part of the promisee; (3) and which does induce such action or forbearance, is enforceable notwithstanding the statute of frauds; (4) if injustice can be avoided only by enforcement of the promise.

The trial court found a promise or commitment on the part of Appellant. (Findings of Fact 17) Based on this promise Respondents took their farm and retires off the market, ordered 60,000 poults, took delivery of 20,000 poults and started up his turkey operation. (Findings of Fact 19) Appellant knew his promise to loan the money induced Respondent's actions. (Findings of Fact 20) Injustice in this case can be avoided only by enforcement of Appellant's commitment.

Even if the agreement had been for more than one year therefore, Appellant PCA would be estopped from asserting the Statute of Frauds as a defense.

POINT IV

APPELLANT'S LOAN OFFICER HAD APPARENT AUTHORITY TO AUTHORIZE THE LOAN.

In Malia v. Giles, Utah, 114 P.2d 208 (1941), the Utah Supreme Court outlined the law of apparent authority:

. . . Either by action or by inaction where there is a duty to act, the principal may create a situation the reasonable interpretation of which, by a third party with whom the agent is about to deal, is such as to lead that third party to believe that the agent has authority to deal with him as contemplated. Under such circumstances the law will hold the principal responsible to that third party for the results of that deal with the agent. But the conduct of the principal must be such as occurs prior to the deal, and not subsequent thereto. . . . (Emphasis added) Malia v. Giles, supra, at 211.

The Restatement (2d) of Agency, §27, Comment, explains:

. . . Third persons who are aware of what a continuously employed agent has done are normally entitled to believe that he will continue to have such authority for at least a limited period in the future, and this apparent authority continues until the third person has been notified or learns fact which should lead him to believe that the agent is no longer authorized. (Emphasis added)

The trial court's finding that the loan officer had apparent authority is supported by the evidence. (Findings of Fact 18) First, Cox was not aware that the loan officer had no authority to commit the loan. He reasonably thought his commitment was final. (Tr. 117-120) Second, it was Cox's past experience that the loan officer alone approved the loan. (Tr. 117-120) Third, PCA was aware of its agents' practices of committing loans before final approval. (Tr. 252, 308, 322) PCA may have informed its agents of a policy against committing loans without the loan board's approval, but it never gave its customers notice of this procedure. As far as Cox was concerned, the loan officer had authority to commit loans.

Thus, Cox has satisfied the Malia requirements of apparent authority. PCA failed to act when it had a duty to

do so and is, therefore, responsible to Respondents Cox for its agent's promise.

POINT V

PLAINTIFF ADEQUATELY PROVED NET PROFITS
AS PART OF THEIR DAMAGES.

PCA claims that in arriving at net profits, Cox failed to show how much was realized from the sale of the 20,000 turkeys, how much was spent on fuel, real estate, taxes, rent and interest. (Applt's Brief at 19-20)

A. Sale of turkeys.

When the 20,000 turkeys were taken over by Chad Blackham, he did so by assuming the poult and feed bill at Moroni Feed Company. In addition, Cox received 20¢ per poult for brooding (Tr. 107) At this point about 17,000 to 18,000 birds had survived. (Tr. 107) Cox would have, therefore, received a maximum of \$3,600.00. Some of this money was used to pay the Bank of Ephraim who had loaned \$2,500.00 toward the turkey operation and the balance was applied toward obligations at Moroni Feed Company. (Tr. 107) As to the expenses not advanced by Moroni Feed Company, Cox's evidence showed these separately. (Tr. 109, 111-112)

B. Fuel expense.

PCA claims that only the fuel expense for heat to the turkey poults was included to reach net profits and that gasoline for trucks was omitted. (Applt's Brief at 19) This argument is apparently based upon Jeff Cox's testimony when he

identified the expenses which were advanced by Moroni Feed Company on its 70-30 financing program. Because the profit of 4¢ a pound given by the Moroni Feed Company accountant was net of expenses advanced by the cooperative, it was necessary to identify these types of expenses so they would not be deducted again from the 4¢ per pound figure. In identifying such advanced items advanced by the cooperative, Mr. Cox included "the fuel. And when I say fuel, this would be coal or propane, whatever it takes to brood those turkeys." (Tr. 111)

PCA claims, therefore, that gasoline for trucks was not deducted. What gasoline expense is meant is vague. The evidence showed that the turkeys are trucked by the cooperative, not the grower. (Tr. 186) Moreover, the evidence indicates that gasoline was advanced by the cooperative through its service station. (Tr. 107) It would appear, therefore, that truck expense as used by Mr. Cox refers to the actual expense of owning the truck (depreciation). He would not have been able to save this by selling his turkeys. The amount involved in any event is small. Page 10 of Exhibit 30 lists farm, auto and truck expense at \$500.00.

C. Real estate taxes and payments.

PCA admits that real estate payments and taxes were incurred despite Cox's efforts to minimize his damages. (Applt's Brief at 19) These were obviously fixed expenses. For this reason, the court did not take them into account--either for or against either PCA or Cox. Frankly, counsel for Respondents does not understand any theory that could have required the trial

court to consider these taxes for any purpose.

D. Rent.

PCA claims that Exhibit 30, page 1, shows a projected expense that was not deducted from Cox's profits to arrive at a net figure. (Applt's Brief at 20) This argument is made in one sentence. There was no evidence, however, to establish that Cox actually would have incurred this expense in connection with his turkey operation had PCA honored its commitment. It was, therefore, not proper for the lower court to deduct it.

PCA has not been prejudiced in any event. The trial court did deduct a \$500.00 expense in arriving at a net figure. (Tr. 330) In doing so, the court referred to page 1 of Exhibit 30. (Id.) On that page there are two \$500.00 items listed--one for rent, the other for insurance. Cox would have incurred the insurance cost on his turkey raising facilities whether he was using them or whether they were leased out. (The coops were leased out after he sold out and the rental income was deducted from his offset. Tr. 331) There was no evidence that Cox was able to save the other \$500.00 either. Nevertheless, the trial court did deduct one \$500.00 amount from the offset.

E. Interest.

PCA claims that the trial court erred when only a \$9,000.00 credit was given as a deduction against Cox's offset for interest he would have paid if the loan commitment had been honored.

Cox presented evidence at trial to show that PCA's

ion of the loan to be \$9,000.00. (Exh. 30, p. 15) No rebutting evidence was furnished by PCA.

Moreover, the figure PCA has stated to be the amount of the loan was \$368,100.00. (Applt's Brief at 20) This figure is incorrect. PCA's reference to \$368,100.00 does not refer to the loan. (Tr. 124)

Q. [By Mr. Boyce] And it would be a fair statement; would it not, to say that the bottom line on that, which in the case is what?

A. Well, its--

Q. What's the amount of the bottom line, three hundred and seventy-one--

A. \$368,100.00.

This figure does not represent the amount of the loan but rather the Estimated Operating Expenses. (Exh. 30, p. 1) It was well established at trial that the cooperative advanced the feed and other items. The estimated amount of the feed alone was \$288,000.00 (Exh. 30, p. 1) Even if this feed were paid for by PCA, it would not have been paid for until it had been acquired. It would not have been necessary to acquire most of the feed until late in 1977 when all 60,000 turkeys had been obtained and they were of a size to require a lot of feed. Thus, most of the loan would have been for only a fraction of a year.

Had the interest offset been other than \$9,000.00, PCA should have presented evidence that its own loan officer's estimate of the interest was inaccurate.

In any event, PCA has suffered no prejudice. First,

the court did not take into consideration the fact that the type of turkey raised by Cox would have yielded a profit after feed and other cooperative advanced expenses were deducted of between 2¢ and 13¢ more per pound than the 4¢ average. On 900,000 pounds, this would be between \$18,000.00 and \$117,000.00. (Tr. 200-204)

Second, the trial court added an additional \$1,000.00 worth of expense to be deducted from Cox's offset as miscellaneous expense. It is not known whether \$1,000.00 in miscellaneous expenses would have ever been incurred.

POINT VI

ATTORNEYS' FEES CANNOT BE ALLOWED

Plaintiff raises on appeal the question of attorneys' fees. The parties stipulated at trial that counsel for Defendant would testify that Plaintiff had incurred \$15,000.00 as attorneys' fees in the prosecution and defense of the case. Plaintiff claims that its attorneys' fee should be reduced only by the same ratio that the counterclaim offsets against the complaint. Thus, Plaintiff argues, it should be awarded \$10,988.50. (Defendants did not stipulate that \$15,000.00 was a reasonable amount).

In support of its position that the attorneys' fees should only be reduced by the same ratio as its judgment bears to the offset, Plaintiff cites several cases — none of them from Utah. There is a Utah case on point.

In Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977) the Utah Supreme Court, in a foreclosure action held that the trial court had properly awarded plaintiff its fees for the foreclosure (3-3/8 hours) and that because the remainder of the attorney time involved defense of the Counterclaim, the lower court had correctly ruled that Plaintiff was not entitled to reimbursement for that portion of the fee.

Similarly in the instant case, the vast bulk of the legal fees would have been incurred with respect to the Counterclaim. Plaintiff presented no testimony which would enable the Court to determine how much time was incurred on the Complaint portion of the case. The Court had no choice but to deny attorneys' fees.

Moreover, attorneys' fees are in the sound discretion of the trial court. In the instant case, it is evident that in all probability, but for Plaintiff's breach, there would have been no foreclosure (an interested buyer for Defendants' farm had been found). It would be inequitable, therefore, to award attorneys' fees to Plaintiff.

POINT VII

REBUTAL TO APPELLANT'S CONCLUSION

Appellant's conclusion portion to its brief contains some new arguments. For this reason the arguments are responded to as follows:

1. PCA claims Cox should have sought a loan elsewhere in order to minimize his damages despite the fact that each day Cox delayed in selling out he would have continued to incur very large obligations. (See Exh. 30 page 1) PCA did not give Cox this option. He was told he could shut the heat off and let the poultts die; PCA was foreclosing within a week.

2. PCA claims that no authority existed to make the loan by the loan officer. This argument is inconsistent with the course of dealing and course of conduct of the parties. There is no evidence that Cox knew or should have known that the loan officer was not authorized. On the other hand, the fact that a commitment was made is undisputed on appeal.

3. PCA claims that profits were not contemplated by the parties. This is absurd. Both parties knew that the purpose of the turkey operation was the expectation of the profit.

4. PCA claims the agreement was not performable within one year, despite the fact that it had previously made all of its loans to Cox on a one year renewal.

5. PCA claims that Cox did not prove he was an average grower or that he would have earned an average profit. Cox submits that based upon the turkeys he had, he would have earned a greater than average profit — as much as 2 to 13 cents per pound more.

6. PCA claims that there was no history of profit and that damages were speculative. This fails to take into

account the fact that Cox had made a profit in some years, but that during the time he financed with PCA the market was depressed. The offset is not speculative, however, because 1977 was a very profitable year.

POINT VII (Continued)

PCA'S CLAIMED REDUCTIONS

1. PCA claims the counterclaim should be reduced by \$800.00 but does not state how it calculated this amount. Cox stopped working with the turkeys the first of April, 1977. It was not necessary for him to work with the turkeys in December. For this reason no living expense was allocated to him as a living expense on the operating expense schedule made out by PCA (Exh. 30, p.1) The first of April was a Friday so Cox would have started at the Coal Company on Monday April 4. This would have given Cox 36 work weeks plus three days if holidays were not considered. The Court found 36 weeks even. There was no error in the calculation ($36 \times 200 = \$7,200.00$)

2. PCA claims the remaining 40,000 poults could not have been obtained. There is no evidence to support his conclusion. The hatching manager testified as follows:

Q. Were you able to accommodate Mr. Cox with respect to the requests on the initial 20,000?

A. Yes, we were.

Q. Would you have been able to accommodate him with respect to the remaining 40,000?

A. Yes, we probably could.

3. PCA claims that the payment of the retains dividend by Moroni Feed Company in 1982 would have been uncertain and, therefore, speculative. PCA, however, failed to introduce any evidence to the effect that the cooperative had ever failed to timely pay "retains" to a grower during its entire history, or to show any other reasonable ground to question payment.

4. PCA claims that all of the expenses were not deducted to arrive at a net figure. PCA failed, however, to show one single expense which would have been incurred, which had not otherwise been deducted or which was not saved when Cox mitigated by selling out.

5. PCA claims that an award of \$4,000.00 toward the offset as prejudgment interest was improper. This award only prevented PCA from charging interest on the amount of the offset for the year 1978 - after the 1977 profits would have been realized if PCA had honored its commitments.

CONCLUSION

The fact that PCA breached a commitment to Cox to finance his turkey operation for 1977 after inducing him to remove his farm properties and Moroni Feed Company retains from the market is not disputed on appeal. Appellant PCA should, therefore, not be afforded the advantage and benefit of compelling Respondents Cox to prove damages beyond a reasonable certainty.

Respondents Cox have presented credible evidence to establish each element of their damages. Appellant PCA has failed to meet its burden of appeal and the court below should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Earl Jay Peck", written over a horizontal line.

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