

1988

# Vivian M. Scheller and Steven D. Tollstrup v. Dixie Six Corporation : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

UTAH  
SUPREME COURT  
KID  
451  
DOCKET NO. **880207**

IN THE SUPREME COURT  
OF THE STATE OF UTAH

|                          |   |                          |
|--------------------------|---|--------------------------|
| VIVIAN M. SCHELLER       | ) |                          |
| and STEVEN D. TOLLSTRUP, | ) |                          |
|                          | ) | Supreme Court No. 880207 |
| Plaintiffs-Appellants,   | ) |                          |
|                          | ) |                          |
| vs.                      | ) | Priority No. 13          |
|                          | ) |                          |
| DIXIE SIX CORPORATION,   | ) |                          |
|                          | ) |                          |
| Defendant-Respondent,    | ) |                          |
| Petitioner.              | ) |                          |

OPPOSITION TO THE PETITION OF DIXIE SIX  
FOR A WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS

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FILED

JUN 17 1988

Clerk, Supreme Court, Utah

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## RULE

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| Rule 43 of the Rules of the Utah Supreme Court . . . | 1, 3, 10 |
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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|                          |   |                          |
|--------------------------|---|--------------------------|
| VIVIAN M. SCHELLER       | ) |                          |
| and STEVEN D. TOLLSTRUP, | ) |                          |
|                          | ) |                          |
| Plaintiffs-Appellants,   | ) | Supreme Court No. 880207 |
|                          | ) |                          |
| vs.                      | ) |                          |
|                          | ) |                          |
| DIXIE SIX CORPORATION,   | ) |                          |
|                          | ) |                          |
| Defendant-Respondent,    | ) |                          |
| Petitioner.              | ) |                          |
|                          | ) |                          |

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STATEMENT OPPOSING DIXIE'S QUESTIONS  
PRESENTED FOR REVIEW

Dixie's questions for review in its brief do not accurately state the case and do not present a situation in which a writ of certiorari should be issued. Rule 43 of the Rules of the Utah Supreme Court state the character of reasons that will be considered before granting a writ of certiorari. It is submitted that no such reasons are presented by Dixie. A copy of Rule 43 is included in the appendix hereto.

I. Dixie's first question is founded principally on the argument that Scheller's remedy is contained in the contract provision for dissolution of the partnership.

That argument is contrary to the trial court's judgment which specifically states that the partnership "continues in force." A copy of the trial court's judgment, which was prepared by Dixie, is included in the appendix. There has never been an issue as to partnership dissolution. Because the partnership remains in existence, the Court of Appeals properly determined that the contract between Dixie and Scheller did not contemplate a situation where Dixie would sell the unimproved property, and because there was no applicable contract provision, the doctrine of quantum meruit should be applied to determine any division of profits after Dixie had already been reimbursed for its expenses and received a sales commission of six percent. The Court of Appeals stated at 81 Utah Adv. Rep. 27, 30 (Utah Ct. App. 1988) that:

. . . In this case, while the parties entered into a contract, no contract existed as to the allocation of proceeds in the event the property was sold undeveloped. . . .

A copy of the opinion of the Court of Appeals is included in the appendix.

It is submitted that Dixie's position in its first question does not accurately represent the facts or law, and there is no conflict with previous decisions of the

Supreme Court or the Court of Appeals which would justify issuing the writ under the circumstances of this case.

II. Dixie's second question proposes that Scheller was estopped or had waived her right to object to the allocation of proceeds from the sale of the undeveloped property. Dixie does not cite any conflicting decision or other reason for issuance of the writ under Rule 43.

III. Dixie's third question asks that this court review the Court of Appeals' interpretation of the meaning of the words "subdivide, develop and market" repeatedly used in the contract. Dixie cites no case in conflict with the Court of Appeals' right to interpret the meaning of the words in the contract as a matter of law in a situation where the trial court did not make any determination of fact concerning the intent of the parties as to those words at the time the contract was made.

#### STATEMENT OF THE CASE

Dixie and Scheller entered into a written contract in which several separate provisions required Dixie to "subdivide, develop and market" the property contributed by Scheller. Although those words were not defined in the contract, they were taken from Dixie's own agreement from a prior transaction. Dixie constructed no improvements

on the property and sold the unimproved property to Busch. Dixie was reimbursed for all of its expenses plus a sales commission of six percent of the total sales price. The issue before the Court of Appeals was whether the trial court had properly determined that after payment of the expenses and commission Dixie should also share in the sale profits as though Dixie had constructed improvements on the property. The Court of Appeals held that the contract did not contemplate a situation where Dixie did not build improvements on the property and therefore the doctrine of quantum meruit should be applied. The Court of Appeals also held that Scheller could not be estopped to object to the division of proceeds even though Scheller had agreed to a sale because Dixie had the independent power to sell the property under the contract without Scheller's permission.

#### STATEMENT OF THE FACTS

It is submitted that the following facts apply to the questions stated in Dixie's petition.

1. The Dixie-Scheller contract does not define the words "subdivide, develop and market". A copy of the contract (Trial Exhibit 5) is included in the appendix.

2. Those words or substantial equivalents thereof are used nine times throughout the contract. See Articles II, VI, IX, XIV and XV.



3. The words "subdivide, develop and market" and the context thereof were taken substantially verbatim from Dixie's own contract from a prior transaction which contract was used as a model for the Dixie-Scheller contract. A copy of Dixie's contract (Trial Exhibit 4) is included in the appendix.

4. The trial court made no determination of the parties' intent as to the meaning of those words at the time the contract was made. See Findings of Fact and Conclusions of Law, a copy of which is included in the appendix.

5. Under the contract Dixie had the power to sell the property and also had the obligation to obtain financing and to "subdivide, develop and market" the property. For example, in regard to Dixie's obligation, Article XIV includes the following sentence which was taken verbatim from paragraph 4 of Dixie's prior contract:

It is understood by the parties that the property shall be utilized by the partnership to obtain a loan, the proceeds thereof to be used for the subdivision, development and marketing of the property by Dixie.

6. Shortly after the contract was signed in 1980 and then again in the fall of 1982 Dixie had the unimproved property appraised. Both appraisals showed substantially the same value. (Trial Exhibits 8 and 34; also see R. 212-13).

7. Dixie told Scheller in early 1983 that in addition to reimbursement for expenses and receiving a six percent sales commission, Dixie was also entitled to fifty percent of the profit on any sale whether or not the property was sold without development thereon. (Trial Exhibit 14; R. 294-95).

8. Also in early 1983 and prior to the sale of the unimproved property to Busch, Scheller objected orally and in writing to the proposed allocation to Dixie of any expected sales proceeds above the reimbursement and commission. (Trial Exhibit 15; R. 295-96).

9. Thereafter, on June 30, 1983 Dixie sold the unimproved property to Busch. (Trial Exhibit 16).

10. Although Dixie now argues that Scheller is limited to remedies for dissolution or breach of contract, the trial court's judgment (prepared by Dixie) specifically states that the partnership between Dixie and Scheller continues.

#### ARGUMENT

POINT I. WHERE THE CONTRACT GAVE DIXIE THE SEPARATE POWER TO SELL THE PROPERTY UNDEVELOPED WHICH POWER DIXIE CHOSE TO EXERCISE IN SPITE OF DIXIE'S SEPARATE CONTRACT OBLIGATION TO SUBDIVIDE, DEVELOP AND MARKET THE PROPERTY, THE CONTRACT DID NOT CONTEMPLATE THE OCCURRENCE OF SUCH A SITUATION AND THE COURT OF APPEALS PROPERLY APPLIED QUANTUM MERUIT.

There was never an issue as to dissolution or that Dixie breached the contract by exercising its power to sell the undeveloped property. Neither the trial court's nor the Court of Appeals' decision mentions any issue of dissolution or breach. For the first time Dixie now argues that Scheller is limited to specific remedies for dissolution or breach of contract which arguments are contrary to the trial court's judgment that "the limited partnership between the parties continues in force under its specific terms."

The problem occurs since Dixie had the separate contract obligation to build on the property the fulfillment of which obligation was in substance a condition precedent which needed to be performed before Dixie could share in profits of sale. Because Dixie chose not to build on the property but to sell it unimproved, Dixie was not entitled to share in the so-called profits as though Dixie had built on the property. The Court of Appeals correctly interpreted the contract to provide first for reimbursement of expenses and payment of the commission to Dixie and then for a division of profits only if Dixie performed its contract obligation to subdivide, develop and market. The court held that there was no provision in the contract providing for such allocation of profits to Dixie if Dixie sold the property unimproved.

Thus, there was no written contract covering that circumstance, and the application of quantum meruit was proper.

None of the cases relied on by Dixie dealt with the situation present in this case. In Mann v. American Western Life Insurance Co., 586 P.2d 461 (Utah 1978), the issue was whether there was an oral modification of a written contract and not whether the written contract did not contemplate a particular situation which later occurred. In Jaye Smith Construction Co. v. Board of Education, Granite School District, 560 P.2d 320 (UT 1977), the issue was whether a separate letter was a limiting condition to an unequivocal construction bid and not whether the bid did not contemplate a later circumstance that was unanticipated. In Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497 (UT 1980), the contract specifically covered the fact situation therein and did not deal with an eventuality not anticipated or covered by the contract such as is present in this case.

Dixie implies that the Court of Appeals' holding in this case is contrary to the prior Court of Appeals' decision in Davies v. Olson, 70 Utah Adv. Rep. 42, 746 P.2d 264 (UT Ct. App. 1987). The same panel of the Court of Appeals which decided the Davies case decided this case only five months later and cited the Davies opinion. In

Davies the panel discussed the doctrine of quantum meruit at length but did not restrict its application to a situation where a written contract exists but is silent as to an un-  
contemplated circumstance which occurs thereafter. In this case the parties obviously anticipated that subdividing, developing and marketing was a condition precedent to the payment to Dixie of fifty percent of the profits. Thus, there was no contemplation that Dixie would claim that profit without improving the property and there was no written provision applying to such a circumstance. The Court of Appeals correctly applied quantum meruit to that situation where the contract did not expressly cover the un-  
contemplated circumstance that later occurred.

POINT II. BECAUSE DIXIE HAD THE RIGHT TO SELL THE PROPERTY, NEITHER SCHELLER'S CONSENT NOR LACK OF OBJECTION TO A SALE CAN BE THE BASIS FOR ESTOPPEL.

Dixie's argument is based on several assertions which are demonstrably wrong. First of all, Scheller objected to Dixie's proposed allocation of profits both orally and in writing before the sale to Busch. Secondly, Scheller has never pleaded or argued that Dixie breached the contract. Scheller's consistent position has been that the contract provided that Dixie was entitled to be reimbursed for its expenses plus a commission but the contract did not provide

that Dixie was entitled to take an additional fifty percent if Dixie did not go forward and subdivide, develop and market the property.

POINT III. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT WRONGLY DECIDED THE CASE ON THE BASIS OF ESTOPPEL AND THEN FAILED TO GO FURTHER AND DEFINE THE PIVOTAL WORDS "SUBDIVIDE, DEVELOP AND MARKET."

Contrary to the assertion in Dixie's third point that the Court of Appeals wrongly substituted its judgment on the facts for that of the trial court's, the trial court never defined the words "subdivide, develop and market" in its Findings of Fact, Conclusions of Law and Judgment and never determined the parties' intention as to the meaning of those words at the time the contract was executed. It is clear that the words "subdivide, develop and market" come from Dixie's prior agreement and should have been construed against Dixie. Dixie again asserts in its third point that Scheller's remedy is one for breach. That assertion has no merit as Dixie well knows because the partnership was specifically held by the trial court to continue in existence.

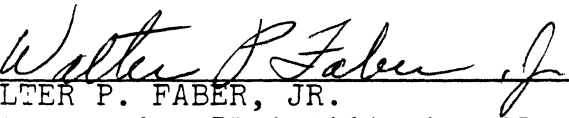
#### CONCLUSION

Dixie does not present a reason under Rule 43 that justifies granting a writ of certiorari. There was

-11-

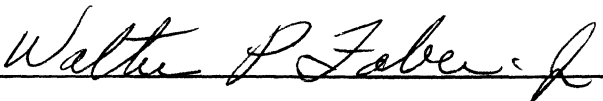
never an issue as to remedies for breach of contract or dissolution, and the trial court specifically held that the partnership continued. The contract did not contemplate a situation where Dixie would sell the property undeveloped and then also share in the profit even though Dixie had not fulfilled its obligation to subdivide, develop and market the property. The Court of Appeals properly applied quantum meruit where the contract did not contain a remedy for that circumstance. Dixie's petition should be denied.

DATED this 17th day of June, 1988.

  
WALTER P. FABER, JR.  
Attorney for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing to CRAIG G. ADAMSON and MARK A. LARSEN, attorneys for petitioner, 310 South Main, Suite 1330, Salt Lake City, UT 84101, postage prepaid, this 17th day of June, 1988.



A P P E N D I X

1. Scheller v. Dixie Six Corp., 81 UT Adv. Rep. 27  
(UT Ct. App. 1988)
2. Davies v. Olson, 70 UT Adv. Rep. 42, 746 P.2d 264  
(UT Ct. Appl. 1987)
3. Jaye Smith Construction Co. v. Bd. of Ed., Granite  
School District, 560 P.2d 320 (UT 1977)
4. Mann v. American Western Life Ins. Co., 586 P.2d  
461 (UT 1978)
5. Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497  
(UT 1980)
6. Rule 43, Rules of the Utah Supreme Court.
7. Trial Court's Findings of Fact and Conclusions  
of Law.
8. Trial Court's Judgment.
9. Dixie's Prior Model Agreement.
10. Dixie-Scheller Limited Partnership Contract.



**THIRD DISTRICT**

Honorable Dean E. Conder

**ATTORNEYS:**

Walter P. Faber, Jr. for Appellants.

Craig G. Adamson, Mark A. Larsen,  
Lawrence k. Hurless for Respondent.

**OPINION**

**ORME, Judge:**

Appellants Scheller and Tollstrup appeal from a judgment awarding defendant Dixie Six Corporation what they contend is an excessive distribution pursuant to a limited partnership agreement between the parties. We reverse in part and remand.

**Facts**

Vivian Scheller and her son Steven Tollstrup ("Scheller"), owned approximately twenty-four acres of property in Salt Lake County which they intended to have developed to produce long-term income. In the spring of 1979, Mrs. Scheller approached Hal Larsen, an officer of Dixie Six Corporation, about working with her and her son to develop the property. On March 3, 1980, the parties formed a limited partnership known as D.S.T., Ltd., with Dixie Six as the general partner and Mrs. Scheller and her son as limited partners. Pursuant to the limited partnership agreement, Dixie Six contributed \$10,000 toward the initial capital and Scheller conveyed the property to D.S.T.

The partnership agreement provided that the purpose of the partnership was to "subdivide, develop and market" the property. The words "subdivide, develop and market" were left undefined. The agreement contained a formula for the allocation of the partnership's receipts, which may be summarized as follows:

- (a) First, to reimburse the actual expenses relative to the subdividing, development, improvement and sale of the property,
- (b) Second, to payment to the Limited Partners for the real property, calculated at \$30,000 per acre.
- (c) Third, one-half of the remainder to Dixie Six and one-half of the remainder to the Limited Partners.

In addition, the agreement provided that Dixie Six could charge the partnership a real estate commission not exceeding 6% of the sales price of the property and, further, that Dixie Six had the unqualified right to sell the property at any time.

Following the signing of the agreement, Dixie Six hired Western Design, which began preparing plans, plats, and studies, and sought

Cite as  
**81 Utah Adv. Rep. 27**

**IN THE  
UTAH COURT OF APPEALS**

**Vivian M. SCHELLER and Steven D.  
Tollstrup,**

**Plaintiffs and Appellants,**

**v.**

**DIXIE SIX CORPORATION,  
Defendant and Respondent.**

**Before Judges Billings, Garff, and Orme.**

**No. 860147-CA  
FILED: April 25, 1988**

governmental approval to build an apartment and commercial complex on the site.

In April 1981, D.S.T. sold 1.2 acres of the property to Marvin Hendrickson, an officer and shareholder in Dixie Six, for \$36,000.00 and in February 1982, D.S.T. sold an additional 0.75 acres to Hendrickson. In both transactions, D.S.T. took no sales commission or other distribution and paid all of the proceeds to Scheller.

Once the plans for improvement on the site were completed in the fall of 1982, Dixie Six attempted to get financing for the project but was unsuccessful.<sup>1</sup> During this time, D.S.T. received an offer from P.F. West to purchase the remaining property. Dixie Six sought Scheller's consent to the proposed sale to P.F. West and Scheller consented, but the sale was never completed. Dixie Six subsequently discontinued its efforts to locate and obtain financing. Dixie Six then caused the remaining partnership property to be sold to Busch Development on June 30, 1983, for a sum in excess of \$1.2 million.

Prior to the sale of the property, Dixie Six informed Scheller that it intended to divide the proceeds from the sale according to the formula set forth in the partnership agreement.<sup>2</sup> Scheller objected to allocation of the proceeds on that basis. The sale was concluded without the allocation issue having been resolved. On September 23, 1983 Scheller filed suit in district court seeking a declaratory judgment limiting Dixie Six to the recovery of its expenses plus the 6% sales commission for the sale of the property and to prohibit Dixie Six from sharing in the profit of the sale as set forth in the partnership agreement.

The trial court found that the partnership agreement did not define the words "subdivide, develop, and market" and concluded that Dixie Six did not violate the agreement by selling the property. The court also concluded that Scheller was estopped from claiming that Dixie Six had not performed in accordance with the contract because Scheller had knowledge of, and in fact acquiesced and approved of, all sales of the property. In addition, the court found that it would be inequitable to allow Scheller to accept the efforts of Dixie Six without allowing Dixie Six to recover as provided in the contract. Since the parties had expressly provided no alternative method of compensating Dixie Six for its services, the court found the formula as set forth in the partnership agreement to be enforceable.

Scheller argues that Dixie Six was not entitled to a full share of the profits from the sale of the property because it sold the property without "developing" it as required by the agreement. Scheller acknowledges that, while Dixie Six had the unqualified right to sell the property at any time, a right Scheller contends was given primarily for tax purposes, it had

the obligation to "subdivide, develop and market" the property. Thus, Dixie Six's right to share in the proceeds according to the formula set forth in the agreement was contingent upon its fulfilling its obligation to "subdivide, develop and market" the property.

The trial court did not reach the issue of the meaning of the term "develop" as used in the agreement because it determined that Scheller was "estopped" from taking the position that Dixie Six had not performed as provided in the contract. We find Scheller's conduct does not constitute estoppel.

#### Estoppel

The elements of estoppel are: "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *Barnes v. Wood*, 75 Utah Adv. Rep. 62, 64 (Ct. App. 1988) (quoting *Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688, 691 (Utah 1985)). The trial court concluded that appellants were estopped from asserting that Dixie Six could not sell the property unless it was "developed" because Scheller had knowledge of, acquiesced in, and approved of the two minor sales of property to Marvin Hendrickson and the proposed sale to P.F. West, all without any development having taken place. However, the trial court's conclusion confuses Scheller's position concerning sale of the property with Scheller's position concerning the allocation of proceeds upon sale.

Scheller has not asserted that Dixie Six could not sell the property unless it was "developed" as anticipated under the agreement but only that Dixie Six was not entitled to a full share of the proceeds for the sale of property unless it satisfied its obligations under the contract. Scheller's approval of the first two sales of property do not constitute an estoppel from objecting to the allocation of proceeds from the Busch sale for two reasons. First, the earlier sales of property, combined, constituted only 1.95 acres out of the total 24 acres owned by D.S.T. and involved land that was never intended for development. Second, Dixie Six took no sales commissions on these transactions and paid all the proceeds to Scheller. Therefore, Scheller had no reason to complain about the allocation of proceeds.

Nor can Scheller's approval of the proposed P.F. West sale form the basis of an estoppel from objecting to the allocation of proceeds from the Busch sale. The P.F. West sale was never completed and there were no proceeds to allocate. Thus, Scheller's failure to object to the allocation of proceeds from two sales in which Dixie Six took no proceeds and one proposed sale which never reached the point of allocation, is not conduct that could reasonably lead Dixie Six to believe that Scheller would not object to its claiming a full share of

proceeds in the event of a consummated sale of undeveloped property. Any uncertainty in this regard was resolved when, nearly two months prior to closing of the Busch sale, Scheller's counsel wrote Dixie Six objecting to use of the agreement's formula for allocating sale proceeds if the property were sold undeveloped.

We hold that the trial court erred in concluding that Scheller was estopped by its own actions from asserting that Dixie Six did not perform as provided in the contract. Because the trial court decided the case on a theory of estoppel, it was not necessary for it to reach what we view as the pivotal issue in this case, namely the meaning of the term "develop" as used in the agreement. Since we find that Scheller's conduct did not give rise to an estoppel, the exact meaning of the term is critical.

#### "Subdivide, Develop and Market"

Generally, the term "develop," when used in connection with real estate, is interpreted to mean "the converting of a tract of land into an area suitable for residential or business uses." *Prince George's County v. Equitable Trust Co., Inc.*, 44 Md. App. 272, 408 A.2d 737, 742 (1979). Accord, *Muirhead v. Pilot Properties, Inc.*, 258 So.2d 232, 233 (Miss. 1972). Similarly, the word "developer," in common parlance, means "a person who develops real estate; often: one that improves and subdivides land and builds and sells residential structures thereon." Webster's Third New International Dictionary 618 (1986).

The parties' agreement states in Article II that the purpose of the partnership is to "subdivide, develop, and market" the property. The use of these terms, or some variation, throughout the agreement, is consistent with the interpretation that "develop" means to build. For example, Article VI, with our emphasis, states as follows:

In addition thereto, Dixie shall contribute its expertise for the purpose of subdividing, developing and marketing the property; shall provide or obtain all *equipment, machinery* and personnel necessary for such subdivision, development and marketing; and shall obtain the necessary and sufficient *financing* for such subdivision, development and marketing, *using the property as security* thereof.

Viewing the contract as a whole, we would have little difficulty in concluding, as a matter of law, that the term "develop" as used in this agreement means "build."<sup>3</sup> Equipment, machinery, and secured lending suggest construction, not the mere planning, surveying, studying, and appraising which Dixie Six contends satisfied the obligation to "develop" the pro-

perty. However, even if there is some ambiguity concerning what the parties intended when using the term "develop," the evidence compels the conclusion that the parties intended to mean "build." The formula allocating a full 50% of the net proceeds to Dixie Six is itself indicative of that result. If all Scheller anticipated was the sale of the property, it would have hired a real estate agent and paid the standard real estate commission. Common sense dictates that one does not offer someone half of the net profit on the sale of property for simply serving as an agent to sell property.

More importantly, the prior discussions and negotiations between the parties and their course of conduct assumed actual building on the property. The trial court found that Dixie Six sought government approval for "the building of an apartment and commercial complex on the site." The court also found that prior to forming the partnership, the parties met on the site of the property and "discussed possible types and configurations of buildings which might fit on the land."

The parties' agreement contemplated the development of the property and did not anticipate the sale of the property undeveloped. Accordingly, the payment formula was premised on the sale of developed property. So certain were the parties that the property would be developed that they never contemplated a formula for the allocation of proceeds in the event of a sale of undeveloped property. Thus, there was simply no agreement between the parties as to the allocation of proceeds in the event that Dixie Six failed to develop the property as required by the agreement.

Absent a meeting of the minds on how to divide the proceeds in the event of sale without development, Dixie Six has no clear contractual right to recover anything in excess of the agreed commission and expense reimbursement. Nonetheless, Scheller concedes that Dixie Six may be entitled to some sort of equitable remedy.

#### Quantum Meruit

The trial court, considering it had no alternative method of compensation, determined it had to either award Dixie Six no additional compensation whatsoever or a full 50% of the profit from the sale of the property. It chose the latter rather than leave Dixie Six uncompensated for its efforts. While we agree with the trial court that it would be unfair to allow Scheller to profit from the work done by Dixie Six in anticipation of development, we do not agree that the only alternative is to give Dixie Six a 50% share of the net proceeds from the sale.

When a party, for some reason, is not entitled by the express terms of a contract to recover payment for services rendered, he or she might nonetheless be entitled to recover in quantum meruit. *Davies v. Olson*, 746 P.2d

264, 268 (Utah Ct. App. 1987). Recovery under quantum meruit presupposes that no enforceable contract exists. *Id.* In this case, while the parties entered into a contract, no contract existed as to the allocation of proceeds in the event the property was sold undeveloped.

Quantum meruit has two distinct branches, both rooted in justice to prevent one party's enrichment at the other's expense. *Id.* at 269. The first branch, contract implied in law or "quasi-contract," is really not a contract at all, but rather an action in restitution. *Id.* "The elements of a quasi-contract, or a contract implied in law are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." *Id.* Recovery under quasi-contract or contract implied in law is measured by the value of the benefit conferred on the defendant and not by the detriment incurred by the plaintiff or, necessarily, the reasonable value of the plaintiff's services. *Id.*

The second branch of quantum meruit, contract implied in fact, is an actual contract established by conduct. *Id.* The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation. *Id.* Recovery in such cases is for the amount the parties can be said to have reasonably intended as the contract price. When the parties have left that amount unexpressed, courts will infer the amount to be the reasonable value of the plaintiff's services. *Id.*

The conduct of the parties in this case established a contract implied in fact as to the allocation of proceeds if the property was sold prior to development. Scheller requested Dixie Six to perform the work of developing the property which necessarily involved the work of preparing plans, plats, and studies and securing governmental approval for construction on the site. Likewise, Dixie Six clearly expected to be compensated for these services. Finally, Scheller knew or should have known that Dixie Six expected compensation for these services beyond the 6% sales commission it would receive for just selling the property.

It is reasonably clear that, in agreeing to the payment formula prescribed in the agreement, the parties contemplated that Dixie Six's 6% commission, a standard commission rate in the real estate industry, would compensate it for its efforts in marketing the property while the 50% share in the net profits would reward it for its efforts in subdividing and developing the property. Thus, if there had been a mere sale, 6% of the selling price would represent an appropriate allocation to Dixie Six.

However, while it cannot be said that Dixie Six satisfied its obligation to develop the property, the trial court nonetheless found that Dixie Six had expended efforts which enhanced the property, including acquiring plans for development of the property and obtaining governmental approval for development in accordance with the plans. As explained above, Dixie Six is entitled to a recovery in quantum meruit for the reasonable value of its non-sale efforts.

Accordingly, we affirm the judgment insofar as it awards Dixie Six the reimbursement of its expenses and a sale commission of 6%. The judgment is reversed insofar as it also allowed Dixie Six 50% of the net sale profits, with remand for a determination of the amount of additional compensation to which Dixie Six is entitled under a theory of quantum meruit. The parties shall bear their own costs of appeal.

Gregory K. Orme, Judge

WE CONCUR:

Judith M. Billings, Judge

Regnal W. Garff, Judge

1. Articles IV and XIV of the agreement required Dixie Six, as one of its obligations, to obtain financing.
2. In their complaint, Scheller also claimed that Dixie Six had demanded a commission of 19% rather than the 6% provided in the agreement.
3. Assuming that "develop" means "build," uncertainty remains as to what was to be built: a church, a race track, homes, a laundromat, or even roadways, curbs, and gutters? Such uncertainty is inconsequential in adjudicating the parties' rights where nothing whatever was built.

Cite as  
81 Utah Adv. Rep. 30

IN THE  
UTAH COURT OF APPEALS

Darwin DIRKS and Jacquelyn Dirks,  
Plaintiffs and Respondents,

v.

Paul S. Cornwell, Catherine L. Cornwell,  
Wilford W. GOODWILL, Dorothy P.  
Goodwill, Clearfield State Bank, Small  
Business Administration, Western Bonded  
Collections, Stewart Title Company of Ogden,  
and Ogden First Federal Savings and Loan  
Association and all other persons unknown  
claiming any right, title, estate, lien, or  
interest in the real property described in  
plaintiff's ownership or any cloud upon  
plaintiff's title thereto,  
Defendants and Appellants.

Ron DAVIES and Dan Mehr, dba  
Davies & Mehr Construction,  
Plaintiffs and Respondents,

v.

Timothy R. OLSON, William S. Lund,  
Wasatch Bank, Utah Valley Bank, and  
Household Finance Corporation, De-  
fendants and Appellants.

Ron DAVIES and Dan Mehr, dba  
Davies & Mehr Construction,  
Plaintiffs and Appellants,

v.

Timothy R. OLSON, William S. Lund,  
Wasatch Bank, Utah Valley Bank, and  
Household Finance Corporation, De-  
fendants and Respondents.

Nos. 860145-CA, 860146-CA.

Court of Appeals of Utah.

Nov. 24, 1987.

Construction company brought action against owners seeking recovery for services in constructing duplexes. The Fourth District Court, Utah County, Robert J. Bullock, J., found in favor of construction company, and both parties appealed. The Court of Appeals, Billings, J., held that: (1) there was no enforceable written or oral contract absent meeting of minds as to contract price; (2) owners were not denied due process due to fact that judgment was based on quantum meruit, theory which was not pled; and (3) statutory interest was calculable from date on which owner signed settlement statement used for closing on financing.

Affirmed in part, reversed in part and remanded.

#### 1. Contracts ⇐28(3)

Finding that there was no enforceable written or oral contract between owner and contractor was supported by evidence that parties did not agree on contract price and that contractor never signed proposed contract.

#### 2. Accord and Satisfaction ⇐4

Settlement statement fixing sale under construction contract which was used for closing on financing did not constitute "executory accord," because there was no meeting of the minds.

#### 3. Trial ⇐6(1)

Hearing in civil action must be prefaced by timely notice which adequately informs parties of specific issues they must be prepared to meet.

#### 4. Pleading ⇐427

Issues not expressly raised in pleadings may be tried by implied consent of parties.

#### 5. Constitutional Law ⇐310

Proof of quasi-contract under allegation of breach of express contract does not violate due process, absent surprise or prejudice. U.S.C.A. Const.Amend. 14.

#### 6. Constitutional Law ⇐310

##### Pleading ⇐427

Defendants in breach of contract action were not denied due process due to trial court's award of damages based on unpled theory of quantum meruit, where supplemental hearing focused on plans and specifications underlying cost breakdown under construction contract, and on additional costs plaintiffs incurred because of defendant's requested changes in specifications. U.S.C.A. Const.Amend. 14.

#### 7. Appeal and Error ⇐1178(6)

In contractor's action to recover for costs incurred in constructing duplexes, judgment which awarded contractor damages based on theory of quantum meruit, but which gave owner credit for prior judgment based on initial cost breakdown was inconsistent, and required remand for determination of damages under quantum meruit.

#### 8. Implied and Constructive Contracts ⇐55

Recovery under quantum meruit presupposes that no enforceable written or oral contract exists.

2

### 9. Implied and Constructive Contracts ⇐2

Elements of "quasi-contract," or contract implied in law, are: defendant received benefit; appreciation or knowledge by defendant of benefit; under circumstances that would make it unjust for defendant to retain benefit without paying for it.

See publication Words and Phrases for other judicial constructions and definitions.

### 10. Implied and Constructive Contracts ⇐110

Measure of recovery under quasi-contract, or contract implied in law, is value of benefit conferred on defendant, and not detriment incurred by plaintiff, or necessarily reasonable value of plaintiff's services.

### 11. Contracts ⇐27

Elements of "contract implied in fact" are: defendant requested plaintiff to perform work; plaintiff expected defendant to compensate him or her for those services; and defendant knew or should have known that plaintiff expected compensation.

See publication Words and Phrases for other judicial constructions and definitions.

### 12. Interest ⇐37(1)

Statutory legal rate of interest is applied from date payment is due to judgment date. U.C.A. 1953, 15-1-1.

### 13. Interest ⇐39(2.30)

Day on which settlement statement was signed which was used at closing on financing for construction project was day that owner acknowledged obligation to pay contractor for services in constructing duplexes, and determination of interest due thus began on that date. U.C.A. 1953, 15-1-1.

Dallas H. Young, Jr., Jerry L. Reynolds, Provo, for defendants and appellants.

Gary D. Stott, Lynn S. Davies, Salt Lake City, for defendants and respondents.

1. The first trial was held on August 2, 1982 and September 13, 1982. The supplemental hearing was held on April 4, 1985, April 10, 1985, and

Before GARFF, ORME and BILLINGS, JJ.

BILLINGS, Judge:

Both parties appeal from the trial court's May 17, 1985 judgment against defendant Olson, purporting to award plaintiffs their reasonable costs (plus interest) incurred in constructing four duplexes for defendants. We affirm the trial court's finding that there was no contract, and the court's conclusion that *quantum meruit* was, therefore, the proper theory of recovery. We, however, reverse the finding of no liability on the part of defendant Lund. We remand for findings as to whether he (1) requested plaintiffs to perform work and if so, to what extent, and/or (2) received any benefits as a result of plaintiffs' construction of the duplexes, and an entry of a judgment consistent with those findings and our opinion. We further reverse the trial court's calculation of damages against defendant Olson and remand for a determination of the reasonable value of plaintiffs' services in constructing the duplexes, and an entry of a judgment in that amount against defendant Olson.

### FACTS

The following facts were developed in a bifurcated trial held on five nonconsecutive days over a two-year eight-month period.<sup>1</sup> Plaintiff Davies and defendant Olson orally agreed that Davies would construct four duplexes for Olson. The parties originally agreed that plaintiff Davies would construct the duplexes for "cost plus \$6,000 builder's profit per duplex." Based on this oral agreement, plaintiff Davies prepared a cost breakdown and submitted it to Wasatch Bank for acquisition of long-term financing, and to defendant Olson. Subsequently, defendant Olson requested numerous changes and additions to the original specifications for the duplexes.

Soon thereafter, defendants, in an attempt to establish a ceiling price on the

April 16, 1985. The confusion and inconsistencies in the judgment are largely attributable to the unfortunate interruptions in the trial.

cost of construction at \$72,070 per duplex, prepared a contract and submitted it to plaintiffs. In his letter to plaintiffs, defendant Olson stated that the purpose of the proposed contract was "mainly to satisfy [defendant] Lund" as he was concerned about fixing a ceiling price. This contract, however, was never executed.

A settlement statement, dated July 7, 1981 and signed by defendant Lund, fixed the contract sales price at \$128,500. This settlement statement was used at the closing with Wasatch Bank. Wasatch Bank provided permanent financing, which was insufficient to cover plaintiffs' construction expenses. Consequently, plaintiffs initiated an action against, among others, defendants Olson and Lund, alleging claims of fraud, breach of contract, and foreclosure of mechanics' liens. (The foreclosure claim was resolved).

After the initial trial on August 2, 1982 and September 13, 1982, the trial court entered judgment on August 4, 1983 against defendants Lund and Olson for \$23,741.54<sup>2</sup> plus 12% interest accruing from July 7, 1981. The court found there was no agreement among the parties as to the total price to be paid for the construction of the duplexes. The court, however, based on the initial cost breakdown prepared by plaintiff Davies, found defendants jointly liable for \$23,741.54. The court then found that plaintiffs were additionally entitled to recover from defendant Olson the reasonable costs incurred because of defendant Olson's requested changes in the duplex specifications.<sup>3</sup> The court then directed counsel to negotiate and submit a figure as to the reasonable costs plaintiffs incurred because of defendant Olson's requested changes. The parties failed to reach an agreement. Consequently, a supplemental hearing was held on April 4, 1985, April 10, 1985, and April 16, 1985,

2. The court found the cost per duplex to be \$78,395. Multiplying that figure by the number of duplexes built (4), and subtracting the construction costs paid by defendants, \$289,838.46, yielded a judgment in the amount of \$23,741.54.

3. The court did not enter judgment against defendant Lund for this additional recovery, find-

focusing on the following issues previously reserved by the trial court:

1. What were the plans and specifications upon which plaintiffs and defendants relied in the cost breakdown?
2. What modifications were subsequently made to those plans and specifications upon defendant Olson's requests?
3. What were the reasonable costs of the requested modifications which were actually made by plaintiffs?

The trial court, in its final judgment of May 17, 1985, found there was no meeting of the minds between the parties "as to plans and specifications which formed the basis of the cost breakdown," and, therefore, that it erred in basing its August 4, 1983 judgment on that document. The court concluded that in order to prevent unjust enrichment of defendant Olson, plaintiffs were entitled to recover their reasonable costs of construction from him. The court, however, was silent as to defendant Lund's liability. The court awarded plaintiffs \$51,773.96 plus interest "at the legal rate of interest," accruing from July 7, 1981, the date the settlement statement was executed. The trial court calculated the May 17, 1985 judgment as follows:

|   |              |
|---|--------------|
| Reasonable cost of construction                       | \$366,708.96 |
| Less adjustment for water meters                      | 1,850.00     |
| NET CONSTRUCTION COST                                 | \$65,858.96  |
| Less the Amount of the August 4 Judgment <sup>4</sup> | \$18,580.00  |
| May 17, 1985 Judgment to Plaintiffs                   | \$51,773.96  |

Both parties appeal from the May 17, 1985 judgment.

# I. SUFFICIENCY OF THE EVIDENCE

[1] On appeal, we are asked to determine whether there is sufficient evidence to support the trial court's finding of no enforceable written or oral contract. The

ing that defendant Lund merely assisted defendant Olson in acquiring long-term financing.

4. The court credited defendant Olson with payment of \$78,395 per duplex, multiplied by the number of duplexes built (4), or \$313,580. See Note 2, *supra*.

trial court's findings of fact will not be set aside unless "clearly erroneous." Utah R.Civ.P. 52(a); *State v. Wright*, 744 P.2d 815 (Utah Ct.App.1987); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). A review of the record amply supports the trial court's findings (1) that there was no meeting of the minds as to the contract price, an essential term of a construction contract; (2) that there was no meeting of the minds as to which plans and specifications formed the basis of the cost breakdown prepared by plaintiff Davies; and (3) that the parties did not intend the settlement statement to constitute an executory accord.

Testimony at trial conflicted significantly as to the contract price. Plaintiff Davies testified that he and defendant Olson orally agreed that plaintiff Davies would construct the four duplexes for cost plus \$6,000 builder's profit per duplex. Defendant Olson, on the other hand, while conceding that cost plus \$6,000 was discussed, denied that he agreed to an open-ended deal. Subsequent to the oral conversation between plaintiff Davies and defendant Olson, plaintiff Davies prepared a cost breakdown and submitted it to Wasatch Bank and to defendant Olson. Thereafter, defendant Olson prepared a written contract with a provision that cost was not to exceed \$72,070 per duplex, evidently attempting to appease defendant Lund's concern about cost. Defendant Olson presented this proposed contract to plaintiff Davies, claiming Davies said that he would sign it. This contract, however, was never executed.

Given the disparity in the testimony regarding the contract price, the trial court's finding that there was no meeting of the minds as to the contract price is not clearly erroneous.

[2] We also affirm the trial court's finding that the settlement statement used for closing on the financing did not constitute an "executory accord," because there was no meeting of the minds. See *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 733 (Utah 1985); *Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1369, 1372 (Utah 1980). The settlement statement lists the contract

price as \$128,500. At trial, conflicting testimony was introduced regarding whether defendant Olson ever agreed to this figure. Defendant Olson testified that he never agreed to a contract price in excess of \$116,000 per unit. Similarly, defendant Lund's position is that he signed the settlement statement merely to assist defendant Olson to acquire long-term financing, but that the settlement statement did not constitute an acknowledgment of specific amounts owed to plaintiffs. After reviewing the record, we do not believe the trial court's finding that the parties did not intend the settlement statement to constitute an executory accord is clearly erroneous.

## II. DUE PROCESS

Defendants contend that they were denied due process of law because the trial court's May 17, 1985 judgment was based on *quantum meruit*, a theory which was not pled, nor reserved by the trial court. We disagree.

[3-5] A hearing must be prefaced by timely notice which adequately informs the parties of the specific issues they must be prepared to meet. *Nelson v. Jacobsen*, 669 P.2d 1207, 1212 (Utah 1983). Issues not expressly raised in the pleadings, however, may be tried by the implied consent of the parties. *General Ins. Co. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976). Implied consent may be found where evidence is introduced without objection. *Id.* Moreover, proof of a quasi-contract under an allegation of a breach of an express contract does not violate due process, absent surprise or prejudice. *North Tillamook County Sanitary Authority v. Great American Ins. Co.*, 46 Or.App. 173, 611 P.2d 319, 321 (1980).

[6] *Quantum meruit* was, at least inferentially, an issue at the supplemental hearing. The supplemental hearing focused on the plans and specifications underlying the cost breakdown and the additional costs plaintiffs incurred because of defendant Olson's requested changes in the duplex specifications. There is no showing that defendants were surprised or prevent-



ed from presenting all evidence pertaining to the reasonable costs of construction or the benefits defendants received, nor that they were prejudiced by the trial judge relying on the theory of *quantum meruit*. Furthermore, any possible prejudice defendants may have suffered is cured by our remand for a new trial on the issue of damages.

### III. DEFENDANT LUND'S LIABILITY

The trial court, in its final May 17, 1985 judgment, without any supportive findings or explanation, relieved defendant Lund of liability. The court did this although it had previously held him liable for the \$23,741.54 judgment. We are unable to ascertain whether the court found that defendant Lund requested plaintiffs to perform services, and if so, to what extent, or whether any benefit was conferred upon defendant Lund by plaintiffs' construction of the duplexes. If defendant Lund requested services and received a benefit which would be unjustly retained, he is liable under *quantum meruit*.<sup>5</sup> Consequently, we remand to the trial court for findings on this issue and an entry of judgment consistent with our opinion.

### IV. MEASURE OF DAMAGES

Despite our approval of the trial court's decision to base recovery on *quantum meruit*, we, nonetheless, reverse the May 17, 1985 judgment because we find that it is legally and factually inconsistent.

In its August 4, 1983 judgment, the trial court based plaintiffs' damages on the cost breakdown and held both defendants liable.

[7] In its May 17, 1985 judgment, the court determined that there was no meeting of the minds as to the plans and specifications underlying the cost breakdown, reversing its prior conclusion. The court, therefore, premised its May 17, 1985 judgment strictly on *quantum meruit*. Nonetheless, in calculating the measure of dam-

ages assessed against defendant Olson, the court gave defendant Olson credit for the August 4, 1983 judgment—a judgment based on a theory that the court had rejected. Further, the court did not indicate whether defendant Lund was still bound by the earlier judgment entered against him. By giving defendant Olson credit for the August 4, 1983 judgment, an earlier judgment which the May 17, 1985 judgment, on its face, seems to supercede, the trial court, in effect, reduced the amount of plaintiffs' recovery. The trial court did not indicate whether it intended the May 17, 1985 judgment to be in addition to the August 4, 1983 judgment, or instead of it.<sup>6</sup> In light of these observations, we find that the May 17, 1985 judgment is internally inconsistent and, if enforced, patently unfair to plaintiffs under any interpretation of the evidence. Therefore, we reverse and remand for a determination of damages under *quantum meruit*.

[8] Because we remand for further proceedings, we attempt to provide some guidance to the trial court. See *Utah Farm Production Credit Ass'n v. Watts*, 737 P.2d 154, 158 (Utah 1987). *Quantum meruit* is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some reason, would not be able to sue on an express contract. Recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists. See *Blue Ridge Sewer Improvement Dist. v. Lowry & Assos., Inc.*, 149 Ariz. 373, 718 P.2d 1026 (Ct.App.1986). Confusion surrounds the use and application of *quantum meruit*, see, e.g., *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir.1978) (attempting to apply Idaho law); *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct.App.1984), because courts have used the terms *quantum meruit*, contract implied in fact, contract implied in law, quasi-contract, unjust enrichment, and/or restitution without analytical preci-

5. Of course, the court, on remand, could find other theories of recovery against defendant Lund based upon the evidence, including partnership or joint venture.

6. The earlier judgment was not made final pursuant to Utah R.Civ.P. 54(b) and therefore would seem to be legally merged into or superceded by the May 17 final judgment.

Cite as 746 P.2d 264 (Utah App. 1987)

sion. See, e.g., *Euramca Ecosys v. Roediger Pittsburgh, Inc.*, 581 F.Supp. 415, 422 (E.D.Ill.1984) (discussing quasi-contract claim in *quantum meruit* litigation); *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647, 655-57 (Ct.App.1985); *Sharp v. Laubersheimer*, 847 N.W.2d 268, 270 (Minn.1984); *Ellis-Jones, Inc. v. Western Waterproofing Co.*, 66 N.C.App. 641, 646-47, 312 S.E.2d 215, 218 (1984).

*Quantum meruit* has two distinct branches. Both branches, however, are rooted in "justice," see *Lakeshore Fin. Corp. v. Comstock*, 587 F.Supp. 426, 429 (W.D.Mich.1984), to prevent the defendant's enrichment at the plaintiff's expense. See *Hazelwood Water Dist. v. First Union Management, Inc.*, 78 Or.App. 226, 715 P.2d 498 (1986).

[9,10] Contract implied in law, also known as quasi-contract or unjust enrichment, is one branch of *quantum meruit*. A quasi-contract is not a contract at all, but rather is a legal action in restitution. See 1 A. Corbin, *Corbin on Contracts* § 19, at 44, 46 (1963). The elements of a quasi-contract, or a contract implied in law, are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it. See *Berrett v. Stevens*, 690 P.2d 553, 557 (Utah 1984) (using the term "unjust enrichment"). The measure of recovery under quasi-contract, or contract implied in law, is the value of the benefit conferred on the defendant (the defendant's gain) and not the detriment incurred by the plaintiff, see *First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980), or necessarily the reasonable value of the plaintiff's services.

[11] A contract implied in fact is the second branch of *quantum meruit*. A contract implied in fact is a "contract" established by conduct. See Restatement (Second) of Contracts § 5 comment a (1981). The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the de-

fendant knew or should have known that the plaintiff expected compensation. See *Kintz v. Read*, 28 Wash.App. 731, 626 P.2d 52, 55 (1981); see also Restatement (Second) of Contracts § 5 comment a (1981) (providing that terms of promise or agreement are those expressed in language of parties or implied in fact from other conduct); 1 S. Williston, *Williston on Contracts* § 3, at 8-10 (1957) (defining implied in fact contracts as obligations arising from mutual agreement and intent to promise where parties do not express agreement and promise in words); 1 A. Corbin, *Corbin on Contracts* § 18 (1963) (noting that implied contracts impose contractive duty by reason of promissory expression and are no different than express contracts, although different in mode of expressing assent). "Technically, recovery in contract implied in fact is the amount the parties intended as the contract price. If that amount is unexpressed, courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff's services." Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am.U.L. Rev. 547, 556 (1986).

In the case before us, the trial court correctly found that there was no express contract, and thus that plaintiffs' recovery must be based on *quantum meruit*. The court further held that plaintiffs should recover their reasonable costs of constructing the duplexes. The court correctly found a contract implied in fact. It is undisputed that defendant Olson orally requested plaintiff Davies to construct the duplexes, that plaintiffs expected Olson to compensate them for those services, and that Olson knew that plaintiffs expected compensation. Thus, we remand as to defendant Olson for a determination of the reasonable value of plaintiffs' services in constructing the duplexes, and an entry of judgment against him for that amount.

We are unable to determine what the court found as to defendant Lund. Thus we remand as to defendant Lund for findings on whether he requested plaintiffs to perform work, and if so, to what extent, or whether he received any unjust benefits as

a result of plaintiffs' efforts. These findings will support the court's conclusion as to whether defendant Lund is liable to plaintiffs under *quantum meruit*—a contract implied in law, or *quantum meruit*—a contract implied in fact, or neither. As is explained more fully *supra*, the measure of damages may differ depending on the theory adopted.

## V. INTEREST

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In awarding damages, the applicable legal rate of interest must also be determined. The 1981 amendment to section 15-1-1 increased the legal rate of interest from 6 percent to 10 percent. Utah Code Ann. § 15-1-1 (1986).

[12] The statutory legal rate of interest is applied from the date payment is due to the judgment date. See *Lignell v. Berg*, 593 P.2d 800, 809 (Utah 1979).

[13] The trial court found July 7, 1981, the date defendant Lund signed the settlement statement, as the due date, as that was the date the benefit was conferred. It was also on this date that defendants acknowledged an obligation to pay plaintiffs for their services in constructing the duplexes. We find that this determination is supported by substantial evidence and therefore will not disturb it on appeal. See *id.* at 810. Based on this factual determination, we find the appropriate rate of interest is 10 percent.

The May 17, 1985 judgment is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion. Each party to bear its own costs.

GARFF, and ORME, JJ., concur.



## **ORTER, 2d SERIES**

though letter from contractor placed in sealed envelope containing \$164,022 bid for construction of school addition stated that bid was contingent on certain price being paid for roof decking material, where letter was not read as part of bid and contractor allowed bid to be accepted without calling attention to such contingency and subsequently entered contract providing for payment of \$164,022 for construction of school addition, contractor was bound to construct school addition for \$164,022 and was not entitled to recover additional costs of roof decking.

Reversed.

Maughan, J., filed a dissenting opinion in which Wilkins, J., concurred.

**JAYE SMITH CONSTRUCTION COMPA-  
NY, Plaintiff and Respondent,**

**v.**

**BOARD OF EDUCATION, GRANITE  
SCHOOL DISTRICT, Defendant  
and Appellant.**

**No. 14497.**

**Supreme Court of Utah.**

**Jan. 26, 1977.**

Appeal was taken from a judgment of the Third District Court, Salt Lake County, Stewart M. Hanson, Sr., J., entered in favor of contractor in action to recover costs of roof decking materials supplied school district under construction contract. The Supreme Court, Ellett, J., held that even

7. *Priestly v. State*, 19 Ariz. 371, 171 P. 137, note 1; *Scrivener v. State*, 63 Okl.Cr. 418, 75 P.2d 1154; *Stevens v. State*, 94 Okl.Cr. 216, 232 P.2d 949.

### **1. Schools and School Districts —86(2)**

Even though letter from contractor placed in sealed envelope containing \$164,022 bid for construction of school addition stated that bid was contingent on certain price being paid for roof decking material, where letter was not read as part of bid and contractor allowed bid to be accepted without calling attention to such contingency and subsequently entered contract providing for payment of \$164,022 for construction of school addition, contractor was bound to construct school addition for \$164,022 and was not entitled to recover additional costs of roof decking.

### **2. Schools and School Districts —80(2)**

Bid submitted by contractor for construction of school addition was merely offer to enter into contract; thus, when written construction contract was agreed to and signed, all prior offers and counteroffers were merged therein.

### **3. Evidence —448**

Where contract for construction of school addition was clear and unambiguous, trial court should not have admitted any

8. 47 Am.Jur.2d, Jury, Sec. 267; 160 A.L.R. 753, 767; *Cwach v. U. S.*, 212 F.2d 520 (8th Cir. 1954); *People v. Franklin*, 56 Cal.App.3d 18, 128 Cal.Rptr. 94 (1976); *State v. Persinger*, 62 Wash.2d 362, 382 P.2d 497 (1963).

evidence of what contractor's intentions were when it made its bid.

#### 4. Schools and School Districts — 86(2)

Requiring contractor to construct school addition for amount of agreed to contract price did not constitute unjust enrichment to school district which learned of additional cost for roofing material prior to completion of school addition.

#### 5. Contracts — 5

There is no unjust enrichment to one who compels other party to live up to his agreement.

Ted D. Smith and M. Byron Fisher, of Fabian & Clendenin, Salt Lake City, for defendant and appellant.

Dwight L. King, Salt Lake City, for plaintiff and respondent.

ELLETT, Justice:

The appellant requested bids from contractors to build an addition to a junior high school gymnasium according to plans and specifications prepared by an architect. The bids were all submitted in sealed envelopes, and on March 6, 1973, at the offices of the Granite School District, a bid-opening session was conducted to determine the low bidder pursuant to Section 53-11-1, U.C.A.1953, which provides:

At the time and place specified in said notice the board shall meet and publicly open and read all proposals received, and, if satisfactory bids have been received, shall award the contract to the lowest responsible bidder.

The bids, which were submitted in sealed envelopes, were opened by Mr. Davidson, Director of New School Facilities, handed to the architect; and then to Dr. Call, superintendent of the Board of Education. The envelope of the respondent contained a letter signed by Mr. Jaye Smith, its president, stating:

Due to the difficulty in determining the price and availability of the three inch roof deck material specified . . . , I have submitted my proposal on the ba-

sis of a cost of 36 cents per square foot of roof area. I use this figure only as a basis for arriving at a total bid price, and stipulate a change in contract price, either higher or lower as the information becomes available.

The letter was not noticed by anyone present and was not read as a part of the proposed bid in ascertaining the low bidder. The bid as made and read was as follows:

Gentlemen:

Having carefully examined the plans, specifications, all documents and addenda entitled: "Physical Education Addition, Kearns Junior High School" Granite School District at 4040 West 5305 South, Kearns, Utah as prepared by ARTHUR K. OLSEN, Architect, 357 East Fifth South, Salt Lake City, Utah, and having examined the site of the proposed construction, and understanding all governing conditions under which the work is to be done, the undersigned proposes to furnish all labor, material, services, utilities, tools, machinery, taxes, insurance and incidentals for the:

#### BID STRUCTURE:

A. Base Bid—Completion Date August 10, 1973: Sum of *One Hundred Sixty Four Thousand Twenty Two Dollars* (\$164,022.00).

*Completion of Work*: If the Undersigned be notified of the acceptance of this proposal within fifteen days after the date hereof, he agrees to execute a contract agreement in the form bound in these specifications for the above work for the above stated compensation, and to guarantee completion of all phases of this work ready for occupancy on or before August 10, 1973 (See Bid Structure). The Liquidated Damages Condition of the "Agreement" form has been considered in making this proposal and will pertain to whichever time is selected in the bid structure.

*Bond*: The Undersigned agrees, if awarded the Contract, to furnish and deliver to the Board bonds subject to the approval of the Board of Education on the bond forms bound in these specifica-

tions, each in the amount equal to 100 percent of the contract sum. The proposed surety company is *United Pacific Insurance* . . . .

The respondent allowed his bid to be read and accepted by the Board of Education without calling attention to the fact that the amount of his bid was not to be the sum which he expected to receive if his bid price was the low figure (\$164,022.00). Had he done so, his bid would not have been considered the lowest bid for no one knew what his ultimate price might be.

The costs of labor and material are always subject to fluctuations, and a contractor who makes a bid takes the risk of a rise in prices and is entitled to the benefits in case of a lowering thereof. As a part of the bid submitted, the respondent made the following paragraphs:

*Agreement*: The Undersigned had read the "Agreement" form thoroughly and hereby agrees with and has included all the costs of all provisions contained therein.

*District Bid Depository*: The Undersigned has abided by the spirit and the letter of the "District Bid Depository" described in the "Addendum to the General Conditions" and "Instructions to Bidders" and the published "Notice to Contractors".

*Errors*: The Undersigned has checked carefully all of the above figures and understands that the Board will not be responsible for any errors or omissions on the part of the Undersigned in making this bid.

*Collusion*: The Undersigned hereby certifies that this bid is genuine and not sham or collusive or made in the interest or in behalf of any person not herein named, and that the Undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

Two days later Mr. Smith, president of the respondent company, met with the representatives of the school board and they formally signed the contract which provided, among other things,

The Board agrees to pay the Contractor for the said work and materials and for the full performance by the Contractor of all covenants and conditions in the manner and form herein set out for the General Contract, including Plans and Specifications, the sum of One Hundred Sixty Four Thousand Twenty Two (\$164,022.) dollars subject to additions and deductions as herein provided, and subject to the provisions of this Agreement.

Nowhere in the contract is there any mention of a contingency in the amount to be paid the contractor. Moreover, by plaintiff's own admission, no mention whatsoever of a contingent bid was made during the meeting in which Mr. Smith signed the contract.

At trial Mr. Smith testified as follows:

Q. On March 8, 1973, was there any discussion at that time with Mr. Davidson as to the contingency in your bid for the roof decking amount?

A. No, there wasn't.

Q. Did you in fact sign the contract on March 8th?

A. Yes.

Q. And did you sign that in the amount of \$164,022.00?

A. I signed the contract with that amount written on it.

It was not until approximately six weeks later that Mr. Davidson discovered the existence of the letter. This occurred after Mr. Davidson heard about the possible contingency and checked the bid envelope where he found the note stashed away among the papers contained therein.

[1, 2] The formal contract signed March 8, 1973, governs the parties hereto; and even if Mr. Smith had his fingers crossed when the bids were opened and read, the signing of the formal contract bound him to construct the addition to the gymnasium according to the plans and specifications for the total sum of \$164,022.00, subject to additions and deductions; and there were no additions or deductions agreed to, save one \$150 item for striping. The bid submitted was merely an offer to enter into a contract

JAYE SMITH CONST. v. BD. OF ED., GRANITE SCH. D. Utah 323

Cite as 540 P.2d 320

and when the written contract was agreed to and signed, all prior offers and counter-offers were merged therein.<sup>1</sup>

[3] The contract was clear and unambiguous, and the court should not have permitted any evidence of what the intentions of plaintiff were when it made its bid. The material thing is what did the parties intend when they signed the contract? The answer to that is clear—they intended that plaintiff construct the building according to the plans and specifications and for the defendant to pay the sum of \$164,022.00.

[4] In its memorandum decision, the trial court said, "However, before the work was completed they did learn of the letter, learned of the extra cost, and to now permit the defendant to take advantage of plaintiff's position would be inequitable and would constitute in effect an unjust enrichment to the defendant . . . ."

[5] Since when have courts rewritten contracts in order to enhance the profits of one of the parties thereto or to prevent loss to the other? There is no unjust enrichment to one who compels the other party to live up to his agreement.

The judgment of the trial court is reversed except as to the award of \$150 made for striping. Costs are awarded to the appellant.

HENRIOD, C. J., and CROCKETT, J., concur.

MAUGHAN, Justice (dissenting):

On appeal is a judgment in an action to recover the cost of certain redwood decking supplied to defendant under a construction agreement. At trial, plaintiff was allowed to amend his complaint to seek recovery of \$150 for extra work performed under the agreement. Judgment was rendered for plaintiff. We should affirm, with costs to plaintiff.

In response to public invitation by defendant, plaintiff submitted a bid for the alteration of a gymnasium in a junior high school. The bid for \$164,022.00 was sub-

mitted with a letter, hereinafter referred to as the contingency letter on March 6, 1973. Plaintiff stated therein:

Due to the difficulty in determining price and availability of the three inch roof deck material specified for the Physical Education addition to Kearns Junior High School, I have submitted my proposal on the basis of a cost of 36 cents per square foot of roof deck area. I use this figure only as a basis for arriving at a total bid price, and stipulate a change in contract price, either higher or lower as the information becomes available.

The bids were opened by a representative of defendant. There was a dispute as to whether the contingency letter was removed at that time; and defendant has vigorously contended it did not have knowledge of the contents of the contingency letter, until four to six weeks later. On the same day, the bids were opened, March 6, 1973, defendant's agent, the Superintendent, recommended plaintiff's bid be accepted; an appropriate motion was made, and defendant accepted plaintiff's bid. On March 8, 1973, a memorandum of this contract was executed by the parties.

The evidence adduced at trial indicated the brand of decking designated, in the plans and specifications, viz., Weyerhaeuser Blue Star and Red Star, was not available, or being manufactured. Consequently, no accurate determination of price could be made at the time of bidding. By a letter dated May 23, 1973, plaintiff informed defendant he had procured the required decking. Plaintiff explained the cost of the decking was \$6,610.98; that he had allocated only \$3,008 in the bid, leaving a difference of \$3,602.98.

His letter concluded:

If you need further information or have questions regarding this matter, please call or write immediately.

Defendant conceded it had knowledge of the contingency letter approximately six weeks after the bid was accepted. Defend-

1. Restatement, Contracts, Sec. 237.

ant refused payment of the additional sum on the ground the written agreement had a contract price of \$164,022.00.

The matter was tried to the court. Plaintiff offered the contingency letter, defendant objected; asserting the parol evidence rule. The letter was admitted, and the court granted defendant a continuing objection.

The court found the contingency letter to be with plaintiff's bid, at the time defendant's representative opened the letter; and the letter was noticed or should have been noticed in the exercise of reasonable care. It was further found the letter was part of plaintiff's bid, and became part of the contract executed on March 8, 1973. Furthermore, before the work was completed, defendant learned of the letter and the extra cost. Under such circumstances, it would have been inequitable, and have constituted an unjust enrichment if plaintiff were required to bear the cost.

On appeal, defendant contends the court erred in finding the contingency letter became part of the contract. The ground asserted is defendant's representatives were not aware of it; therefore they could not have asserted to its terms.

Restatement, Contracts, Sec. 70, provides:

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

Defendant fails to distinguish between mutual assent and the manifestation indicating such assent. The latter is what the law requires.<sup>1</sup> If a misunderstanding is owing to the fault of one party, and the other party understands the transaction according to the natural meaning of the words or other acts, both parties are bound by that meaning.<sup>2</sup>

1. See Restatement, Contracts, Sec. 20, Comment a.

2. See Restatement, Contracts, Sec. 501, Comment b.

Plaintiff presented his contingency letter with his bid and proceeded to give defendant notice of the adjustment in price in a timely manner. Defendant manifested acceptance of plaintiff's offer. It cannot now negate its assent by asserting it was without knowledge of the terms of the offer—when such lack of knowledge was the product of its own negligence.

A further contention is the court erred in admitting the contingency letter. This on the ground it was barred by the parol evidence rule.

The provision in the agreement executed subsequent to the acceptance of plaintiff's bid, is cited:

The Board agrees to pay the contractor for the said work and materials and for the full performance by the Contractor of all the covenants and conditions in the manner and form herein set out for the General Contract, including Plans and Specifications, the sum of One Hundred Sixty Four Thousand Twenty Two (\$164,022.) dollars subject to additions and deductions as herein provided, and subject to the provisions of this Agreement.

Defendant contends this provision represents the final and complete expression of the agreement of the parties, viz., an integrated contract, the terms of which may not be added or varied by prior written agreements relating thereto.<sup>3</sup>

Whenever a litigant insists that a writing that is before the court is an integration and asks the application of the parol evidence rule, the court must determine as a question of fact whether the parties did in fact adopt a particular writing or writings as the final and complete expression of their bargain. In determining the issue of the completeness of the integration in writing, evidence extrinsic to the writing itself is admissible. Parol testimony is admissible to show the cir-

3. See Restatement, Contracts, Sec. 237.



cumstances under which the agreement was made and the purpose for which the instrument was executed.<sup>4</sup> [Emphasis supplied]

The court after evaluating all the evidence, concerning the transaction found the contingency letter to be part of the bid, and to have become a part of the contract.

It was a question of fact whether the agreement of March 8, 1973 was an integrated contract, viz., had the parties manifested assent not merely to its provisions, but as a final statement of the intentions concerning its substance.<sup>5</sup> The question was found adversely to defendant. There is substantial evidence in the record to sustain the finding.

Finally, defendant assigns as error the permission given to plaintiff allowing amendment of his complaint during the trial, to recover \$150 for striping a floor. This work was not included in the contract, but was requested as additional work. Defendant objected to the introduction of evidence establishing this claim on the ground there had been no discovery nor had the Board had the opportunity to look into what work was done.

The work had been set forth in plaintiff's answers to defendant's interrogatories. Plaintiff represented to the court defendant had promised to pay the sum, but had not. A letter in evidence, authorized by defendant's agent, stated there was no objection to the part of the Change Order referring to this work. The amendment was allowed on the ground the claim was not a surprise to defendant.

The relevant provisions of Rule 15(b) state:

. . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved

thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

The action of the trial court when evaluated by the standards set forth in Rule 15(b), does not indicate an abuse of discretion.<sup>6</sup>

WILKINS, J., concurs in the views expressed in the dissenting opinion of Mr. Justice MAUGHAN.



4. *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 266, 501 P.2d 266 (1972).

5. See Restatement, Contracts, Sec. 228, Comment a

not provide as to any obligation plaintiff's ex-husband has to support her. Nor is there any showing as to what the income of the other individuals in the household is, nor whether it is or should be "available to the entire group for their support, care and maintenance", and it is not clear whether the plaintiff is or is not obligated to share in the expenses incurred by others for the common maintenance.

On the basis of what has been said above, it is our conclusion that the motion to dismiss the complaint was not properly granted and that this case should be remanded for further proceedings not inconsistent with this opinion. No costs awarded.

ELLETT, C. J., and MAUGHAN, WILLIAMS and HALL, JJ., concur.



Clealon MANN, Plaintiff and Appellant,

v.

AMERICAN WESTERN LIFE INSURANCE COMPANY, Defendant and Respondent.

No. 15506.

Supreme Court of Utah.

Oct. 26, 1978.

Insurance sales agent brought action against insurer for damages arising out of alleged wrongful termination of agency relationship between himself and insurer. The Third District Court, Salt Lake County, Stewart M. Hanson, Jr., J., directed verdict for insurer, and agent appealed. The Supreme Court, Maughan, J., held that: (1) evidence was insufficient to justify submission to jury issue of whether written contract between parties was orally modified to conform with insurer's contract with a partnership so that insurer should be or-

dered to pay commissions to agent accordingly, and (2) evidence was not sufficient to justify submission to jury issue of whether insurer terminated its agency contract with agent in bad faith and thus should respond in damages for such tortious conduct.

Affirmed.

#### 1. Insurance — 79

In action on insurance sales agent's claims for damages arising out of alleged wrongful termination of agency relationship between himself and insurer, evidence was insufficient to justify submission to jury of issue whether written contract between parties was orally modified to conform with insurer's contract with a partnership so that insurer should be ordered to pay commissions to agent accordingly, since reasonable jurors could not construe parties' conversations on their contract as constituting modification of insurer's rights with respect to termination afforded by parties' contract given fact that such subject did not even arise in course of conversations.

#### 2. Contracts — 324(1)

It is not a general precept of contract law that, whenever one party to a contract can show injury flowing from exercise of a contract right by other, a basis for relief will be somehow devised by courts.

#### 3. Insurance — 79

In action on insurance sales agent's claims for damages arising out of alleged wrongful termination of agency relationship between himself and insurer, evidence that operative agency agreement on date of agency termination provided agency could be terminated by either party on 30 days' written notice to other and provided how premiums paid after termination would be paid, but did not require that a terminating party express or have good cause for termination was not sufficient to justify submission to jury of whether insurer terminated its agency contract with agent in bad faith and thus should respond in damages for such tortious conduct.

#### 4. Contracts ⇐ 5

Recovery in quasi contract is not available where there is an express contract covering subject matter of litigation.

Robert J. De Bry and Valden P. Livingston, Salt Lake City, for plaintiff and appellant.

F. S. Prince, Jr. and Randy L. Dryer of Prince, Yeates & Geldzahler, Salt Lake City, for defendant and respondent.

MAUGHAN, Justice:

Appeal from directed verdict or summary disposition of claims for damages arising out of alleged wrongful termination of agency relationship between appellant and respondent insurance company. Appellant asserts three theories of action, tort, breach of contract, and restitution. We affirm, and award costs to respondent.

This action grows out of the termination of a contract under which appellant acted as an insurance sales agent for respondent, hereafter American. The written instrument appellant, hereafter Mann, concedes to be the foundation of the agency relationship provides for termination by either party on thirty days written notice to the other. It further defines Mann's right to participate in premiums paid after termination, limiting that right to certain renewal premiums. It is not disputed American is paying Mann commissions on renewal premiums as the contract's termination clause provides.

Throughout the period relevant to this litigation, American and a partnership known as "AIM" maintained a "general agency" relationship under a written contract which provided more generous commissions to AIM than Mann's contract provided for him. Moreover, the AIM contract did not treat the subject of its termination, and arguably AIM's right to share in premiums attributable to its sales or the sales of agents it recruited could not be diminished by termination or otherwise.

Mann claims (1) American terminated its agency contract with him in bad faith and

should respond in damages for that tortious conduct, (2) the written contract between the parties was orally modified to conform with the AIM contract, and American should be ordered to pay commissions to Mann accordingly, (3) American has been unjustly enriched at Mann's expense and should be ordered to disgorge its unconscionable profit under equity doctrines of restitution.

The evidence shows Mann last signed an agency contract with American in 1971. In May of 1973, he became a salaried "Director of Agencies" for American, but submitted a formal letter of resignation from that position in September of that year. No written notice of termination of the 1971 agency agreement had ever been given as that agreement contemplates, and Mann resumed sales and agent recruitment activity for American. He again shared in the premiums attributable to his sales and the sales of agents recruited by him or by his recruits. His status was different from his presalaried status in the respects that American provided him an office in consideration for consultant services, and began to refer to him as a "general agent." Nevertheless, Mann concedes the 1971 contract survived the Director of Agencies episode, and remained the foundation of the parties' relationship. The court was not asked to construct an implied agreement from the parties' conduct.

The evidence further shows Mann undertook to negotiate an improved agency agreement, and there were conversations on the subject between him and American's then president, Mr. Matheson, in early 1974. On July 16, 1974, Matheson wrote appellant the following memorandum:

1. We are amenable to your appointment as a general agent for the Company. If you wish to submit a proposed agents contract, we would be happy to review it with you. We could approach this either on the basis of a non-exclusive, managing general agent as defined in the Utah Insurance Code, or as an exclusive, general agent for us. The commission scale would depend upon the exact nature

of our relationship, but in no event would we exceed a 100 percent commission on first year business. As a general agent you would be responsible for all of your own agency expenses including office rental, secretarial help, telephone, postage, etc. As to office space, we could possibly continue to make space available for you here at a specified rental. Should you elect to enter into a general agency relationship with us, we would consider transferring the agents which you have recruited directly for the Company to this date to such agency under your exclusive control with the agents consent. However, since these agents were recruited while you were a division manager for the Company, the maximum commission schedule in relation to the business produced by said agents would continue at the present 94 percent maximum.

We are also amenable to continuing our present relationship with you as a division manager direct with the Company at a 94 percent commission rate. In consideration for special services in relation to conservation, product development, and general agency consultant, we will continue to furnish an office here at no expense to you. Your continued relationship with the Company under AIM's supervision is, of course, for you to determine with AIM subject to our ultimate review pursuant to your agents contract with us.

Mann made no written response to the memo. His evidence that his agency agreement was orally modified to conform with the AIM contract consists entirely of his following testimony about his conversations on January 3, 1975, with Mr. Matheson:

Q. Tell the jury what was said by the parties on that occasion.

A. Mr. Matheson had written down on paper a proposed general agent's contract, starting at 94% and, based on volume, working up to 100%. I told Frank that was not acceptable at that time, that I wanted a contract just like AIM's.

Q. And who is AIM?

A. American International Marketing. And he agreed that he would give me a contract—he could not give me one just like AIM's because of the conflict with the 5%. He agreed to give me 100% and make some concessions for the other 5%. And that's Item No. 2, which, as it says in his notes, "concessions to his agency," he would advance my agents on submit business and he would advance the managers' overrides as a concession.

Q. Anything else said during the meeting?

A. Yes. We discussed a 1% office allowance. We talked about the straight commission on my 988 account, and he was worried about that balance. So was I. He wanted that worked off.

\* \* \* \* \*

Q. Anything else said?

A. Yes, He indicated that, for me to receive a general agent's contract, that I would have to vacate the office space at the home office.

\* \* \* \* \*

Q. Do you remember anything about the meeting?

A. Only that in his notes he says, "Clealon will consider."

\* \* \* \* \*

Q. Okay, now, was any conclusion reached?

A. No.

Q. What was—

A. I said that I would think it over and that afternoon I stuck my head in the door and said, "Frank, we have got a deal. I will move next door. We can arrange for the rental of the office space."

In the spring of 1976, new management for American was installed after a stock acquisition takeover. On August 6, 1976, appellant was given thirty-day notice of termination of the agency agreement.

[1] Since the matter was the subject of directed verdict at the trial level, we are obliged to view the evidence in the light most favorable to appellant. To uphold the

directed verdict, we must first concur that, even if a jury believed Mann's testimony and discredited American's, it could not, in the proper exercise of jury function, find the parties substituted the AIM contract for their 1971 agreement as the basis of their relationship. Reviewing appellant's testimony reproduced above, we cannot conceive that reasonable jurors could construe the conversations as reported to constitute a cancellation or modification of American's rights, with respect to termination afforded by the 1971 agreement. The subject did not even arise in the course of conversation. A jury could very well find modification was effected, as to the provisions which were discussed, but not as to provisions which were ignored. The nature of an agent's right to share in premiums after agency termination is (as this suit demonstrates) an element of major consequence in agency contracts. The notion that American intended, by Mr. Matheson's statements as reported, to magnify that right as enormously as Mann's complaint suggests is not a notion reasonable minds could entertain. We hold, then, that directed verdict on Mann's contract claim was properly and correctly entered.

Mann's next claim is for damages flowing from American's having terminated the agency agreement in "bad faith." Here again, to affirm the trial court, we must assume a jury would believe Mann's evidence and we must nevertheless concur that a jury could not make findings to sustain a verdict. The trial court concluded the 1971 agency agreement was the operative instrument on the date of agency termination, and we have affirmed. The agreement specifically provides the agency may be terminated by either party on thirty days written notice to the other and how premiums paid after termination will be paid. There is no contractual requirement that a terminating party express or have good cause for termination.

Mann cites substantial authority for the proposition that, even though a party to a contract may have a right to terminate it without cause, he must nevertheless exercise the right in good faith and not at a

time or in a manner which inflicts unnecessary injury or works unconscionable injustice.

Courts have permitted considerations of equity to control over clear contract language covering termination where, for example, a dealer franchise agreement was terminated after the dealer had invested heavily in showroom facilities and parts inventory (*deTreville v. Outboard Marine Corp.*, 4th Cir., 439 F.2d 1099), where an employee was terminated just before a bonus was payable which he had fully earned except for completing a minimum employment period (*Coleman v. Greybar Electric Co.*, 5th Cir., 195 F.2d 374), where the threat of termination was used to discourage the plaintiff and others from asserting workmen's compensation rights (*Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425), and with respect to adhesion contracts. A variety of tort and contract theories have been contrived to permit recovery in these situations, and the "duty of good faith" theory which Mann advances is among them.

[2] Whatever the justification for judicial remaking of the parties' contracts in these extreme cases may have been, it cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts.

In this case, the equities in favor of Mann are hardly overwhelming. The contract under which he operated for some fifteen years was productive for him. In 1974, he was invited to prepare and submit the kind of general agency agreement he wanted, and he declined to do so. He has not, as a result of the termination, ceased to share in premium production attributable to his past effort; he shares in that production in the manner his contract expressly contemplated.

In *Atkinson v. Equitable Life Assurance Society of the U. S.*, 519 F.2d 1112, the Fifth Circuit Court of Appeals considered a

fact situation very similar to the one before us, but where the equities more strongly favored the terminated insurance agent. Atkinson's contract was terminated after 13½ years of operation. Substantial renewal commissions on business he had written became vested, under his contract, after 15 years. In reversing judgment in Atkinson's favor, the court held the mere fact of termination when the investment was nine-tenths earned would not support a judgment. Here, we have in the record Mann's full presentation on the issue of bad faith. It consists entirely of evidence of his satisfactory performance and the lack of good cause for termination.

[3] This Court has previously demonstrated strong reluctance to rewrite contracts for litigants because the consequences of enforcement of the contracts they signed seem unfair.<sup>1</sup> Nothing about the circumstances of this case can overcome

that reluctance. It is unnecessary for us, in the context of this case, to announce that the exercise of a contract right in bad faith is or is not actionable. We merely concur the evidence in this case was not sufficient to justify the submission of any bad faith issue to a jury.

[4] The restitution claim asserted by Mann is easily put to rest. Recovery in quasi contract is not available where there is an express contract covering the subject matter of the litigation.

ELLETT, C. J., and CROCKETT, WILKINS and HALL, JJ., concur.



1. *Bullock v. Deseret Dodge Truck Center*, 11 Utah 2d 1, 354 P.2d 559.

the District Court's findings,<sup>12</sup> but indeed favors those findings.

[8] Finally defendants contend that the District Court's findings of fact are inconsistent with each other and must be set aside. Specifically, defendants assert that findings nos. 9 and 10 are inconsistent with other findings made by the Court. These two findings are two of those urged by defendants themselves and adopted by the Court upon defendants' second motion to amend the findings, noted *ante*. Findings nos. 9 and 10 concern the issue of prescriptive easement rather than the issue of the public roadway, and we perceive no tension between these and other findings made by the Court.

The decree of the District Court is affirmed; costs to plaintiffs.

CROCKETT, C. J., and MAUGHAN and HALL, JJ., concur.

STEWART, J., concurs in the result.



**RIO ALGOM CORPORATION,**  
Plaintiff and Appellant,

v.

**JIMCO LTD., Humeca Exploration Company, Jim L. Hudson, Juanita J. Meyer as Executrix of the Estate of Daniel H. Meyer, Eldon J. Card, Norma Hudson, Jean L. Card, Juanita J. Meyer, N. J. White, Audrey White, Wilma White, Otis Dibler, Dorothy Mae Dibler, Grace Davis, and Marlowe C. Smith, Defendants and Respondents.**

No. 16032.

Supreme Court of Utah.

Sept. 19, 1980.

Assignee of lease of mineral rights who was also co-owner of such rights filed ac-

12. That this is the rule of review in equity cases, see *Provo City v. Lambert*, Utah, 574

tion seeking declaratory ruling as to computation and disbursement of royalties. Lessees counterclaimed and cross claimed against lessors of mineral claims. Lessees and lessors settled their dispute, and assignee objected to the settlement. The Third District Court, Salt Lake County, Dean L. Conder, J., approved the settlement and dismissed the amended complaint for failure to state a cause of action. Assignee appealed. The Supreme Court, Stewart, J., held that: (1) the settlement agreement made between the lessors and the lessees was a contract separate and apart from the original lease, and, therefore, since the smaller royalty payment which would result to the assignee as co-owner was contemplated by the terms of the lease, the settlement was not an improper modification of the lease; (2) the assignee was an incidental third-party beneficiary of the original lease, and, therefore, could not maintain action under it; and (3) the lessors owed no fiduciary duty to the assignee as cotenant to make sure that highest royalty payments were received.

Affirmed.

#### 1. Mines and Minerals ¶64

Where lessors of mineral claims were authorized to elect to waive their right to have royalties determined by external market value of crude uranium, such waiver did not constitute modification of lease or violation of any rights of assignee of leasehold who was also owner of one-fourth of mineral claims.

#### 2. Mines and Minerals ¶64

Where paragraph of lease of mineral claims allowed lessors to elect different method of calculation of royalties, and, under express terms, once election was made it was effective for each year thereafter unless and until expressly revoked, subsequent assignee of leasehold who was also a

P.2d 727 (1978); *Maytime Manor, Inc. v. Stokermatic, Inc.*, Utah, 597 P.2d 866 (1979).

lessor and who was precluded by lease from participating in election had no legal right to challenge either election or refusal to revoke such election or settlement agreement among royalty participants calling for permanent election.

### 3. Mines and Minerals ⇐64

Where lessors of mineral claims made election pursuant to express settlement agreement between lessors and lessees as to how royalties would be divided, agreement between lessors and lessees which constituted such election was separate contract from original lease, and, therefore, assignee of lease had no right to challenge agreement.

### 4. Corporations ⇐197

Owners of voting corporate stock have right to vote their stock as they please and are not obligated to defer to interests of minority stockholders; majority stockholders are subject only to restriction that they may not vote their stock for purpose of oppressing or defrauding minority stockholders.

### 5. Mines and Minerals ⇐64

Where assignee of lease of mineral claims had obvious conflict of interest as to calculation of royalties in that it was also part owner of original claim and recognition of assignee's power to vote on whether lessors could make election as to how royalties were to be computed would give veto power over such choice to assignee, there was no oppressive or fraudulent conduct in lessors and lessees assignors ignoring interest of assignee in settling their own dispute and agreeing to smaller amount of royalty payments.

### 6. Contracts ⇐168

Whether expressed or not, every contract includes covenant of good faith with respect to dealings between the parties; parties to a contract must deal fairly and honestly with each other.

### 7. Contracts ⇐143(3)

A court will not make a better contract for the parties than they have made for themselves.

### 8. Contracts ⇐168

An express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature.

### 9. Mines and Minerals ⇐64

Where assignee of lease of mineral claims was also part owner of original claim, lessors who were also owners were not required to subordinate their own interests to those of assignee in making their election as to how royalties were to be determined.

### 10. Contracts ⇐189

Duty of good faith does not mean party vested with clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract.

### 11. Contracts ⇐189

A court will not enforce asserted rights that are not supported by contract itself.

### 12. Compromise and Settlement ⇐17(2)

Where lessors of mineral claim who had right to exercise election as to how royalties were to be calculated waived their right to revoke royalty election in order to settle lengthy and costly litigation over disposition of royalty payments, consideration paid to them for such settlement was not for interest in mining claims or other property in which assignee was co-owner with lessor and there was no evidence of bad faith on the part of lessor, assignee of lease could not challenge settlement made between lessor and lessee.

### 13. Compromise and Settlement ⇐8(1)

Where lessors of mineral lease did not act in bad faith in agreeing to exercise option as to particular manner in which royalties were to be computed for purpose of settling litigation between lessors and original lessees and such settlement was approved by trial court, settlement agreement would be upheld.

### 14. Contracts ⇐187(1)

Third-party beneficiaries are persons who are recognized as having enforceable



right created in them by a contract to which they are not parties and for which they give no consideration.

#### 15. Contracts ⇌ 187(1)

For third-party beneficiary to have right to enforce right, intention of contracting parties to confer separate and distinct benefit upon third party must be clear; third-party beneficiary who was incidentally benefited may not recover.

#### 16. Contracts ⇌ 187(1)

Where there was no indication in original mineral lease of any intention on part of lessors and lessees to confer upon subsequent assignee of such lease who was also co-owner of original claim any right to control exercise of option by lessors as to how royalties were to be computed or indeed to have it exercised in favor of assignee's self interest, assignee was third-party beneficiary of such agreement and could not recover.

#### 17. Tenancy in Common ⇌ 10

In some situations fiduciary relationship may exist between tenants in common, but mere fact of cotenancy alone does not create such relationship.

#### 18. Tenancy in Common ⇌ 10

Fiduciary relationship between cotenants is usually found when one cotenant of real property undertakes to act on behalf of another cotenant or takes advantage of other cotenants, often in course of acquiring paramount title or ousting other cotenants.

#### 19. Tenancy in Common ⇌ 22

Where mineral lease assignee was also tenant in common owner of one-fourth of mineral claim and owners' amended lease with lessees assigns expressly vested royalty election in the owners of the remaining

three-fourths interest and excluded assignee from the election, the owners of the three-fourths interest owed no fiduciary duty as tenants in common to the assignee with respect to the election option.

#### 20. Mines and Minerals ⇌ 22

Where amended complaint of assignee of mineral rights who was also co-owner of such rights claimed that its contractual rights and cotenancy status had been violated by agreement between lessors and lessees which resulted in reduced royalty payments to assignee as owner, lessors did not owe any fiduciary duty to assignee beyond implied covenant to exercise contractual rights in good faith, and, therefore, since election as to how royalties were to be computed was made in good faith and was not in violation of any fiduciary duty, amended complaint was properly dismissed.

James B. Lee and Kent W. Winterholler of Parsons, Behle & Latimer, Salt Lake City, for plaintiff and appellant.

Albert J. Colton and Anthony L. Ramp-ton of Fabian & Clendenin, Clifford Ashton of VanCott, Bagley, Cornwall & McCarthy, and Clifford D. Vernon, Salt Lake City, William G. Waldeck, Grand Junction, Colo., for defendants and respondents.

#### STEWART, Justice:

The plaintiff, Rio Algom Corporation ("Rio"),<sup>1</sup> brought this action seeking a declaratory ruling as to the proper basis for computing and disbursing royalties payable by Rio as a lessee under lease agreements covering uranium producing properties in San Juan County, Utah. There are two groups of defendants: the Jimcos<sup>2</sup> and Audreys.<sup>3</sup> The Jimcos counterclaimed against

J. Meyer, and Eldon J. Card, are the general partners of Jimco, Ltd. Norma Hudson, Jean L. Card, and Juanita Meyer are also members of the Jimco defendant group.

3. The Audrey defendants are individuals who participated in the original discovery of the uranium properties (or the widows of such persons) and who are owners of undivided interests in the mineral claims. This group includes N. J. White, Audrey White, Wilma White, Otis

1. Rio Algom Corporation is a foreign corporation qualified to do business in the State of Utah. It is a subsidiary of Atlas Alloys, Inc., which in turn is a subsidiary of Rio Algom, Ltd., of Canada.

2. The first group of defendants (the "Jimcos") takes its name from Jimco, Ltd., a limited partnership, which has more than 100 limited partners. Humeca Exploration Company is a partnership whose partners, Jim L. Hudson, Juanita

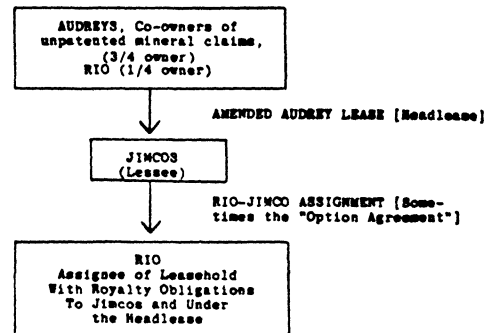
Rio and also cross-claimed against the Audreys. The Audreys cross-claimed against the Jimcos and counterclaimed against Rio, alleging breach of contract and seeking payment of royalties above the amount which Rio claimed to be due.

This appeal is taken by Rio from a district court order dated August 29, 1978, which ruled that a settlement agreement dated July 10, 1978, between the Audreys and the Jimcos was enforceable as to the royalty rate to be paid by Rio and that the agreement did not violate any contract duty owed to Rio by any of the defendants. The court dismissed with prejudice all additional claims by Rio against the Audrey defendants, the claims by the Audrey defendants against Rio and the Jimcos, and the claims by the Jimcos against the Audrey defendants. The court ordered Rio to pay to the Audreys that portion of the royalties to which the Audreys were entitled under the Audrey lease and the settlement stipulation.

In 1964 the Audreys leased uranium properties to the predecessors in interest of the Jimcos. This lease was later superseded by a new agreement between the Audreys and the Jimcos (the "Amended Audrey Lease," or "headlease") executed July 12, 1968, and back-dated to June 1, 1968. Prior to the execution of the amended Audrey lease, Rio acquired a  $\frac{1}{4}$  undivided interest in the subject properties. In addition, in an agreement dated June 3, 1968, the Jimcos granted to Rio an option to acquire Jimcos' rights and obligations as a lessee under the amended Audrey lease. Rio exercised the option June 18, 1968. In so doing Rio became not only the lessee of all the properties subject to the Audrey lease, but also one of the lessors under the headlease with a  $\frac{1}{4}$  undivided royalty interest. As consideration for Jimcos' assignment to Rio, Rio agreed to pay royalties to the Jimcos, in addition to the royalties payable under the amended Audrey lease to the Audreys.

The following diagram illustrates the various relationships among the parties:

Dibler, Dorothy Mae Dibler, Grace Davis, and Marlowe Smith (who died after the commence-



Pursuant to the assignment of the leasehold interest from the Jimcos, Rio commenced the mining of uranium ore from the subject properties. Rio contracted to sell to Duke Power Company the beneficiated product  $U_3O_8$ , also referred to as uranium concentrate or "yellowcake."

The present dispute evolved from a potential conflict between the Audrey-Jimco headlease provisions for alternative methods for computing royalties under that lease and the royalty provisions in the Jimco-Rio lease. Basically, two alternative royalty formulas for determining the royalty to be paid by the Jimcos (or its assignee) were provided under the headlease. The first formula was based on the sales price or gross value of the product sold or used by Rio: 8% of the sales price if crude ore were sold, or 4% of the gross value of yellowcake if yellowcake were sold. The second formula was based on fair market value of crude ore.

The royalty provisions of the Amended Audrey lease are found in Paragraphs 3.1 and 3.2. Paragraph 3.1 provides:

(a) In the event Lessee shall mine or extract ore from the Audrey Group which is sold in its raw or crude form Lessee shall pay Lessors a royalty equal to *eight per cent (8%) of the 'Sales Price'* (as hereinafter defined) received by Lessee from the sale of all ores mined, produced and sold in the crude form from the Audrey Group . . .

(b) In the event Lessee shall mine or extract ore from the Audrey Group and

ment of this action and is survived by his wife, Adrian).

recover therefrom for sale or use in commercial quantities any of the minerals contained in such ore, and if the minerals so recovered shall be any uranium compound, *Lessee shall pay to Lessors a royalty of four per cent (4%) of the 'Gross Value' of such compounds (as hereinafter defined).* . . .

Paragraph 3.2 of the Audrey agreement provides the alternative basis for the computation of royalties. That provision allows the lessors to elect to have royalties computed on the basis of the *fair market value of crude ore*, regardless of whether uranium concentrate or crude ore was sold by Rio. That provision states:

Irrespective of the provisions set forth in paragraph 3.1 above, Lessors shall have the election and option to have royalties due them under the terms of this Lease calculated and paid upon the basis of eight percent (8%) of the fair market value at the mine portal of crude ore mined and produced from the Audrey Group. . . .

Paragraph 3.2, which is critical in this dispute, also provides for an election by the lessors under the Audrey lease as to which royalty formula would be binding. That paragraph states:

. . . [I]n order to exercise such election Lessors must unanimously agree and notify Lessee in writing at least ninety (90) days prior to the commencement of any calendar year of their election to require royalties to be calculated and paid in such manner. After having given such notice, the election so made shall remain in force and effect for the next ensuing calendar year, and from year to year thereafter, unless the Lessors should unanimously agree to notify Lessee in writing of their revocation of said election, which notification must be given at least ninety (90) days prior to the commencement of a calendar year and shall become effective at the commencement of, and remain in effect during the ensuing calendar year, and from year to year thereafter, unless another such notification of election is given at the time and in the manner as specified above.

However, because of the assignment by the Jimcos to Rio, Rio was placed in a conflict of interest situation with the other lessors under the Audrey headlease as a result of its contractual right to receive one-fourth of the royalties earned under the Audrey lease and, at the same time, as a lessee with the obligation to pay the full amount of the royalties. Under these provisions, Rio's interest was to pay the smallest amount of royalties possible. To deal with that conflict of interest, Paragraph 21.3 of the amended Audrey lease excluded Rio from voting in an election for selection of a royalty formula under the headlease. Paragraph 21.3 states:

*Rio Algom Corporation shall, by reason of its interest in this Lease as described in Section II hereof, be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation shall constitute unanimity for the purpose of the said Section 3.2. [Emphasis added.]*

The Jimco assignment establishes royalties to be paid by Rio to the Jimcos and sets payment priorities as between the Audreys and the Jimcos. The Jimco assignment provides in Paragraph X that if uranium concentrate is sold, Rio, as assignee of that lease, is to pay "earned royalties" to royalty interest holders (i.e., the Audreys and Rio under the Audrey lease, and the Jimcos under the Jimco agreement) according to a schedule that provides for payments of between 8% and 15% of the average price per pound of  $U_3O_8$ . Once the dollar amount thereof has been calculated, Rio is to make payments according to the following priorities:

(i) first, to satisfy the royalty to the Lessors in the Head Lease [Audrey Lease] . . . in its entirety . . .

(ii) second, if a balance of Earned Royalty . . . remains after payment of Lessors' royalties . . . to pay in their entirety the Overriding Royalties . . .

(iii) third, *if a balance of Earned Royalty . . . remains* after payment of the Lessors' royalties and Overriding Royalties . . . to pay such balance to JIMCO. (Emphasis added).

The Jimco agreement also establishes a ceiling based on the sales price of  $U_3O_8$  which operates to limit Rio's total obligations under the Audrey and Jimco agreements and gives payment priority to the obligation under the Audrey lease in case the ceiling is met. If the royalties paid under the Audrey lease were based on the value of yellowcake, the Jimcos would be assured of receiving some royalties; but if the royalties were based on a percentage of the ore value and that amount equaled or exceeded 15% of the yellowcake value, no royalties would be owed the Jimcos because of the ceiling provision in the Jimco agreement. As long as the Audreys elected royalty payments based on yellowcake price, the Jimcos would be assured of receiving royalties. However, if the Audreys elected a royalty based on the value of crude ore and the market value of ore increased substantially, the Jimcos could be entitled to little or no royalties.

In August 1975, the Audrey defendants elected to change the royalty payment basis in 1976 from the 4% of the yellowcake value to 8% of the ore value as permitted by the headlease. The Audreys asserted that the basis for calculating the royalty should be the external fair market value of crude ore, unrelated to Rio's production and sale of yellowcake, but the Jimcos claimed that the royalty basis should be determined by reference to Rio's actual selling price for yellowcake or other uranium products produced from the subject properties. Royalties based on a higher external market value would result in higher payments under the Audrey lease and reduce the royalties paid to the Jimcos. The Audreys' election of the ore value royalty basis thus triggered the present dispute. If the Audreys' assertion that the royalties should be based on external market value were found to be correct, the Audreys stood to receive a substantial benefit at the Jimcos' expense.

Rio instituted the present action to resolve the question of its royalty obligations to the two claimant groups. In its complaint Rio alleged it stood willing and able to make royalty payments to the Audreys as per the election of the Audreys under the headlease and to the Jimcos under the assignment of the Jimco lease. Rio paid into court amounts representing royalty payments owed to the defendants and asked that the court adjudge the correct basis for apportioning the payments between the Audreys and the Jimcos.

In July 1978, more than two years after the commencement of this action and shortly before the matter was scheduled to go to trial, the Audreys and the Jimcos entered into a "settlement agreement" contingent upon court approval. Without determining whether "fair market value" of the ore meant sales price or external market value, the defendants agreed as to how the royalties to which they were entitled would be distributed as between themselves. The Audreys in the settlement agreement permanently waived their right to elect under Paragraph 3.2 of the amended Audrey lease to have Rio pay royalties based on 8% of the market value of crude ore. This waiver foreclosed the possibility of an election of higher royalties to the Audreys and Rio under the headlease in the event that a royalty based on ore value (calculated with reference to external market value) exceeded a royalty based on the yellowcake price.

The Audreys agreed to make a permanent election of a royalty under the headlease based on 4% of yellowcake sales. Thus the Audreys were entitled to 3% of the sales price of  $U_3O_8$  (after reduction of Rio's one-quarter interest) under the Audrey lease. The Jimcos, in consideration for the Audreys' waiver of the alternate royalty provision under the headlease, assigned to the Audreys an additional 2.5% of the yellowcake sales price due the Jimcos under the Jimco assignment to Rio. This division of royalties was to apply retroactively to those funds on deposit with the court as well as prospectively for the remainder of the Audrey lease period. Also, as part of

the agreement, both parties dismissed all their claims against each other.

Rio objected to the settlement stipulation because Rio was precluded by that agreement from the possibility of receiving, as a co-lessor under the Audrey lease, larger royalty payments in the form of (1) royalties tied to the external market value of crude ore, because the Audreys had contractually waived that possible alternative, and (2) a share of the 2.5% of royalties received by the Audreys as consideration for their waiver.

In view of Rio's objections to the settlement stipulation, the agreement was expressly made subject to a court ruling that Rio was legally precluded from challenging its implementation and that the stipulation did not violate any duty owed to Rio by any of the defendants. A motion was filed seeking the requisite court ruling. Rio filed objections to the proposed settlement stipulation and also filed an amended complaint wherein it asserted that the stipulation constituted, among other things, tortious interference with its contract rights, a breach of fiduciary duties owed to it, and a violation of its contract rights. The trial court ruled in favor of the defendants and approved the terms of their agreement. Rio's amended complaint was dismissed for failure to state a cause of action.

On appeal Rio contends that the Audreys' waiver of election rights violated Rio's rights under the amended Audrey lease. Specifically, the issue is whether the Audrey defendants have the right to enter into an agreement permanently revoking, for consideration, the election rights provided in Paragraph 3.2 of the amended Audrey

lease without violating Rio's contractual rights. Rio's position is that the settlement stipulation effects material changes in its contractual agreements with the Audreys under the Audrey lease and with the Jimcos under the Jimco agreement.

Rio acknowledges that the amended Audrey lease expressly excluded Rio from participation in the royalty election decision, but Rio asserts that the Audreys were barred from making an election that was not beneficial to Rio because of an implied covenant of good faith and an asserted fiduciary duty that one cotenant owes another cotenant. Rio argues that it is harmed by receiving a smaller proportion of the total royalties to be received by the Audrey lessors as a result of the settlement agreement<sup>4</sup> and that this fact constitutes a modification of the Audrey and Jimco leases without its concurrence.<sup>5</sup> Also, the Audreys, by abandoning the position that their royalties under the headlease should be based on external fair market value of ore, have permanently precluded Rio from the possibility of sharing in the consequences of that potentially more lucrative formula.<sup>6</sup>

Rio relies on the general proposition that the terms of a contract cannot be modified without the consent of all the parties. *Malstrom v. Consolidated Theaters*, 4 Utah 2d 181, 290 P.2d 689 (1955), *Western Airlines v. Hollenbeck*, 124 Colo. 130, 235 P.2d 792 (1951). The Audreys and the Jimcos, on the other hand, deny that their agreement constitutes a modification of the leases in question.

[1] To determine whether the Audrey defendants effected a modification of the

4. Rio is entitled to 25% of the royalties paid pursuant to the Audrey lease (1/4 of the 4% of yellowcake sales royalty). However, its percentage is only 15.3% of the Audreys' and Rio's total royalties, including the additional 2.5% to be paid only to the Audreys by the Jimcos under the settlement agreement.

5. The claim of modification of the Rio-Jimco lease is based on that lease's embodiment of the terms of the amended Audrey lease as they apply to Jimco's tenancy rights and obligations which were assigned to Rio. It is therefore

unnecessary to deal separately with the effect of the stipulation on the Jimco lease.

6. Since Rio's contract with Duke Power provided for a yellowcake sales price which the parties contend was below that of the prevailing market price at the time this dispute arose, a royalty based on external fair market value would increase cotenant Rio's royalty share as lessor/payee and not result in a greater obligation as lessee/payor because of the limit on maximum royalties payable in the Jimco contract.

Audrey lease and violated a duty owed to Rio, we look to the language of the amended Audrey lease as it pertains to royalty rights. The election option provided in Paragraph 3.2 is set out in pertinent part above. The Audreys' right to waive that election without Rio's concurrence is clearly authorized by Paragraph 21.3 of the Audrey lease. That provision states that Rio "shall . . . be excluded from any vote or decision of the lessors relating to royalties." Because of the inherent conflict of interest created by Rio's position as both payor and payee of royalties, the exclusive right to exercise the option was conferred on the Audreys. Rio had no contractual right with respect to the election process. Accordingly, we view the Audrey-Jimco agreement simply as a waiver of a right possessed by the Audreys. That waiver did not constitute a modification of the headlease or a violation of any rights that Rio had thereunder.

[2] By the Audreys' waiving the option election and agreeing to accept the yellow-cake sales basis for the royalties payable under the Audrey lease, a new royalty has not been created.<sup>7</sup> One of the choices available to the Audreys—clearly permissible under the terms of the Audrey lease—has been selected on a permanent basis. Under the express terms of Paragraph 3.2 an election once made is effective for each year thereafter unless and until expressly revoked by the Audrey defendants. A permanent election is no different in effect than an election made pursuant to the lease agreement without a subsequent revocation. Rio had no legal right to challenge either such an election or a refusal to revoke an election.

[3] Nor has Rio any right to challenge the Audrey-Jimco agreement. The Audreys' agreement with the Jimcos is a contract separate and apart from the Audrey lease. The Jimcos assigned a benefit they had under the Rio-Jimco agreement in return for the relinquishment of a contract right by the Audreys. Even though that

agreement affects the option election of the Audrey lease, Rio, by virtue of having agreed to the exclusion from the decision as to how royalties should be determined, has no standing to challenge the Audrey-Jimco agreement. The Audreys had every right to exercise that option as they pleased. As stated in 3 *Corbin on Contracts* § 564 at 293 (1960), "[W]here the parties have made an express contract, the court should not find a different one by 'implication' concerning the same subject matter if the evidence does not justify [such] an interference . . . ."

While Rio may receive a smaller royalty payment under an election made by the Audrey group, that result is clearly contemplated by the terms of the Audrey lease. The cotenants still share proportionally in the royalty payments made pursuant to the Audrey lease, i.e., 4% of the value of yellow-cake is distributed one-fourth (or 1%) to Rio and three-fourths (or 3%) to the Audreys.

Rio analogizes its "nonvoting" status to the position of an owner of nonvoting corporate stock, who, though precluded from voting, retains property interests in the stock which should be protected by those who own voting shares. Rio contends it was illegally deprived of the potential benefits of the annual option being permanently waived by the Audreys. Rio's position is that the Audreys were not entitled to sell that option right without the consent of all lessors, including Rio.

[4, 5] The analogy to nonvoting stockholders does not hold. Generally, owners of voting corporate stock have the right to vote their stock as they please and are not obligated to defer to the interests of minority stockholders. Majority stockholders are subject only to the restriction that they may not vote their stock for the purpose of oppressing or defrauding the minority stockholders. *Ritchie v. McGrath*, 1 Kan. App.2d 481, 571 P.2d 17 (1977); 5 *Fletcher*,

7. The royalties payable by Rio have not been increased or made subject to a formula different from that provided by the lease. Nor has

Rio's share of royalty payments been altered, although 25% of the royalties due the Jimcos have been assigned to the Audreys.

*Cyclopedia of the Law of Corporations* § 2025 (1976). But there is no oppressive or fraudulent conduct in the defendant's ignoring the interest of Rio after Rio had expressly disclaimed the right to vote on a matter where there was an obvious conflict of interest and where recognition of the power to vote would have given a veto power over the choice of the manner of determining royalty payments.

[6-11] Rio contends that the settlement stipulation breaches an implied covenant of good faith. It is fundamental that, whether expressed or not, every contract includes a covenant of good faith with respect to dealings between the parties. The parties to a contract must deal fairly and honestly with each other. *Fischer v. Johnson*, Utah, 525 P.2d 45 (1974); *Flying Tiger Line, Inc. v. United States Aircoach*, 51 Cal.2d 199, 331 P.2d 37 (1958); 3 *Corbin on Contracts* § 541 (1960). A court will not, however, make a better contract for the parties than they have made for themselves. *J. R. Simplot Co. v. Chambers*, 82 Idaho 104, 350 P.2d 211 (1960). An express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature. *Brimmer v. Union Oil Co. of California*, 81 F.2d 437 (10th Cir. 1936); *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 73 P.2d 1163 (1937); 20 *Am.Jur.2d Covenants, Conditions, and Restrictions* § 12 (1965). Because of Rio's dual role, the Audreys were not required to subordinate their own interests to Rio's in making their election. A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract. A court will not enforce asserted rights that are not supported by the contract itself. *In re Cohen's Estate*, 23 Ill.App.2d 411, 163 N.E.2d 533 (1960).

[12] It may be true that a royalty based on the value of yellowcake could result in a lesser total royalty payment under the headlease and that the 2.5% payment to the Audreys under the Jimco agreement would increase the Audreys' total receipts without

Rio's participating in the augmented amount as it would do if the larger amount were paid under the terms of the Audrey lease, but the settlement agreement had a valid purpose, and we are not able to conclude that the 2.5% payment to the Audreys (and excluding Rio) constituted bad faith or an effort to exclude Rio from its rightful share of the royalties. Had the Jimcos agreed to pay a lump sum to the Audreys in return for the Audreys' agreement to exercise its election in a particular manner, it seems even plainer that Rio would not be entitled to participate in the lump sum. Yet the two situations are essentially comparable.

The clear implication of the election provision was that the Audreys had the right to exercise that right in their own self-interest. The settlement stipulation does not deprive Rio of royalties to which it is entitled under the terms of the Audrey lease. The Audreys waived their right to revoke their royalty election to settle lengthy and costly litigation over the disposition of royalty payments. The consideration paid to them was not for an interest in mining claims or other property in which Rio was a co-owner with the Audreys. There is no evidence of bad faith on the Audreys' part.

In settlement of a costly and time-consuming legal dispute, the Audreys relinquished an option they alone had the right to assert in exchange for an assignment of a portion of royalties payable to the Jimcos. The Audreys had the right to bargain with respect to their exclusive option, and the Jimcos' right to make an assignment of royalties to the Audreys in return for relinquishing a legal right is beyond dispute. There is no greater royalty burden placed upon Rio as lessee. Its payments to the Jimcos are payable only after the Audreys and Rio as cotenants have received the payments due them. The royalty ceiling agreed to in the Jimco lease remains the same.

[13] Rio's  $\frac{1}{4}$  undivided ownership interest in the mineral claims stands apart from the option election vested in the Audreys. The Audreys' agreement to exercise the

option in a particular manner was for the purpose of settling litigation between them and the Jimcos. It is basic that the law favors settlements of disputes, *Tracy-Colins Bank & Trust Co. v. Travelstead*, Utah, 592 P.2d 605 (1979); *Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 30 S.Ct. 441, 54 L.Ed. 625 (1910); and under the circumstances of this case in which the approval of the trial court was a necessary predicate of the settlement, we are not able to perceive any element of bad faith.

Rio argues further that it is an intended beneficiary of the election provision of the amended Audrey lease, even though exercised by others, because it participates in the outcome of the royalty election, and that those holding the power of election are obligated to exercise that power to protect Rio's interests. Rio cites as authority cases dealing with the question of the right of one not a party to an agreement to enforce rights under that agreement as a third-party beneficiary, viz., *Montgomery v. Rief, Spencer and Dee*, 15 Utah 495, 50 P. 623 (1897); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974); and *Hamill v. Maryland Cas. Co.*, 209 F.2d 338 (10th Cir. 1954).

[14-16] However, the argument is not sound. Third-party beneficiaries are "persons who are recognized as having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration," 4 *Corbin on Contracts* § 774 at 6 (1960). See *Mason v. Tooele City*, 26 Utah 2d 6, 484 P.2d 153 (1971). For a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct benefit upon the third party must be clear. *Clark v. American Standard, Inc.*, Utah, 583 P.2d 618 (1978). A third-party beneficiary who is incidentally benefited may not recover. *Montgomery v. Rief, et al.*, *supra*; *California Cotton Oil Corp. v. Rabb*, 88 Ariz. 375, 357 P.2d 126 (1960). There is nothing in the Audrey lease which indicates any intention on the part of the contracting parties to confer upon Rio any right to control the exercise of the option or to have it exercised in favor

of Rio's self-interest; indeed, the contract evidences the exact opposite intent. Certainly Rio is entitled to no greater rights, even viewing it as a third-party beneficiary, than it has as an actual party. *Continental Bank & Trust Co. v. Stewart*, 4 Utah 2d 228, 291 P.2d 890 (1955).

Rio also contends that the Audrey defendants, in entering into the settlement agreement with the Jimcos, breached fiduciary duties owed to Rio. Those duties are asserted to exist both by reason of the status of Rio and the Audreys as cotenants of the subject uranium claims and because of the effects upon Rio of the exercise of the Audreys' option election.

[17] In some situations a fiduciary relationship may exist between tenants in common. But the mere fact of cotenancy alone does not create such a relationship. 4A *Powell on Real Property* § 605 at 619 (1979). In *Pure Oil Co. v. Byrnes*, 388 Ill. 26, 57 N.E.2d 356, 361 (1944), the court held that a fiduciary relationship existed between the parties, but stated:

A fiduciary relationship did not arise merely from the fact that appellant and appellee were tenants in common.... Ordinarily one tenant in common may deal with a cotenant respecting the common property. *Albrecht v. Hunecke*, 196 Ill. 127, 63 N.E. 616, 618. But this court, in the case just cited, said: "The question whether there is a fiduciary relation between such parties, so that confidence is reposed by one in the other, will depend upon all the facts and circumstances of the particular case."

[18] A fiduciary relationship between cotenants is usually found when one cotenant of real property undertakes to act on behalf of another cotenant or takes advantage of other cotenants, often in the course of acquiring paramount title or ousting other cotenants. In *Britton v. Green*, 325 F.2d 377 (10th Cir. 1963), one cotenant agreed to become the operating agent for others to "exploit the co-tenancy for their mutual profit." The court held that the cotenant with a right to possess the property owed fiduciary duties to its cotenants not in possession.



Rio argues that *Britton* is applicable to this case, but the facts are distinguishable. In *Britton* the court stated:

It is agreed that seller shall have active charge of the operation of said leasehold estate, and that *said premises shall be operated to the mutual interest of all parties hereto* as economically as good business judgment will warrant. It is further agreed that *the parties hereto will observe the spirit as well as the strict letter of this contract and work at all times to the mutual advantage of each other* in the management and operation and development of said lease. 325 F.2d at 381 n. 2. [Emphasis added.]

[19] In contrast, recognition of an obligation on the part of the Audrey defendants to exercise their contractual election right in the best interests of Rio would be at odds with the purpose for, and intent of, Paragraph 21.3 of the Audrey lease. That provision expressly vests the royalty election solely in the Audreys and excludes Rio from any decision in that election. The obvious purpose was to prevent, at the least, conflict, and at the worst, injury to the Audreys, because of Rio's conflict of interest. The amended Audrey lease was not designed to give Rio the best possible of all worlds which might result from Rio's status as a recipient of the same royalties which Rio itself paid, a possibility that existed because Rio paid and received those royalties in different proportions. The parties foresightedly dealt with this conflict when the Audrey lease was executed. In short, we hold that the Audreys owed no

fiduciary duty to Rio with respect to the election option.

[20] Rio's final argument is that the trial court erred in dismissing its amended complaint for failure to state a cause of action. The amended complaint based its claims both on Rio's asserted contractual rights and the cotenancy status of Rio and the Audreys. Rio argues that the trial court should have allowed it to conduct discovery and present evidence on its claims of breach of fiduciary duties.

Neither the amended Audrey lease nor the nature of the relationship between Rio and the Audreys imposed fiduciary duties upon the Audreys in their dealings with Rio beyond an implied covenant to exercise their contractual rights in good faith. Since the settlement stipulation was not in violation of Rio's contractual rights or of any fiduciary duty, the amended complaint was properly dismissed.

In sum, we affirm the trial court's order sustaining the validity of the Jimco-Audrey settlement stipulation.

Costs to Respondents.

CROCKETT, C. J., and MAUGHAN, WILKINS and HALL, JJ., concur.



LOVE

**RULE 41****Rules of the Utah Supreme Court**UTAH CODE  
1987-1988**RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS**

- (a) Authorization to Answer Questions of Law.
- (b) Procedure to Invoke.
- (c) Certification Order.
- (d) Form of Certification Order; Submission of Record.
- (e) Acceptance or Rejection of Certification.
- (f) Fees.
- (g) Association of Counsel.
- (h) Issuance of Opinion on Certified Questions.

**(a) Authorization to Answer Questions of Law.**

The Utah Supreme Court may in its discretion answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this Rule, but only if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain and answering the certified question will not unduly interfere with the Utah Supreme Court's regular functioning or be inconsistent with the timely and orderly development of the decisional law of the state.

**(b) Procedure to Invoke.**

Any court referred to in paragraph (a) may invoke this Rule by entering an order of certification as described in this Rule. When invoking this Rule, the certifying court may act either sua sponte or upon a motion by any party.

**(c) Certification Order.**

(1) A certification order shall be directed to the Utah Supreme Court and shall state:

- (i) the question of law to be answered;
- (ii) that the question certified is a controlling issue of law in a proceeding pending before the certifying court; and
- (iii) that there appears to be no controlling Utah law.

(2) The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed.

(3) The certifying court may also include in the order any additional reasons for its entry of the certification order that are not otherwise apparent.

**(d) Form of Certification Order; Submission of Record.**

A certification order shall be prepared by the certifying court, signed by the judge presiding over the proceeding giving rise to the certification order, and forwarded to the Utah Supreme Court by the clerk of the certifying court under its official seal. The Court, in its discretion, may then require that certified copies of all or any portion of the record before the certifying court be filed with this Court if, in the opinion of this Court, the record or a portion thereof may be necessary in determining whether to accept the certified question or in answering that question.

**(e) Acceptance or Rejection of Certification.**

Upon filing of the certification order and accompanying papers with the Clerk, the Court shall promptly enter an order either accepting or rejecting the question certified to it, and the Clerk shall thereupon serve copies of this Court's order upon the certifying court and all parties identified in the certification order. If the Court accepts the question for adjudication, the Court will set out in the order

of acceptance (i) the specific question or questions accepted, (ii) those portions of the record which shall be copied and filed with the Clerk of this Court, and (iii) a schedule for the filing of briefs and/or oral argument by the parties. The form of briefs and proceedings on oral argument shall thereafter be governed by Rules 21 and 40 of these rules. It may be presumed that the Court will give the matter expedited treatment.

**(f) Fees.**

The fees for filing an order of certification in this Court shall be the same as for filing and docketing a notice of appeal in a civil appeal in the Court, and the cost shall be equally divided between the parties to the cause unless otherwise ordered by the certifying court in its order of certification.

**(g) Association of Counsel.**

Upon acceptance by the Court of the question of law presented by the certification order, counsel for the parties not licensed to practice law in the state of Utah shall associate a member in good standing of the Utah State Bar in connection with all further proceedings before the Court.

**(h) Issuance of Opinion on Certified Questions.**

The Court will issue a written opinion that will be published and reported. A copy of the opinion shall be transmitted by the Clerk under the seal of the Court to the certifying court and to the parties identified in the certification order.

**TITLE VI. JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS****RULE 42. REVIEW OF JUDGMENTS, ORDERS, AND DECREES OF COURT OF APPEALS**

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

**RULE 43. CONSIDERATIONS GOVERNING REVIEW OF CERTIORARI**

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the Court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this Court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this Court.

**RULE 44. CERTIFICATION AND TRANSMISSION OF RECORD; FILING; PARTIES**

- (a) Appearance, Docketing Fee, Filing, and Service.

SALT LAKE COUNTY, UTAH

JUL 18 1985

Craig G. Adamson (0024)  
Attorney for Defendant  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383

In District Court of Salt Lake County  
By Craig G. Adamson,  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---0000000---

|                            |   |                      |
|----------------------------|---|----------------------|
| VIVIAN M. SCHELLER, et al, | : |                      |
|                            | : | FINDINGS OF FACT AND |
| Plaintiffs,                | : | CONCLUSIONS OF LAW   |
| vs.                        | : |                      |
| DIXIE SIX CORPORATION,     | : | Civil No. C83-6862   |
|                            | : | Judge Dean E. Conder |
| Defendant.                 | : |                      |

---0000000---

This matter came on for trial before the Honorable Dean E. Conder on the 10th day of May, 1985, and was concluded on the same day. Plaintiffs were represented by Walter P. Faber, their attorney of record. Defendant was represented by Craig G. Adamson, its attorney of record. The trial proceeded and each of the parties produced witnesses, introduced exhibits, and made argument in support of their various contentions. The court, at the conclusion of the testimony, requested that counsel present memoranda to the court by May 24, 1985, with responsive memoranda due on May 31, 1985. Counsel complied with the court's request and the court having now had an opportunity to review the file, hear the testimony and argument and review the memoranda

submitted by counsel, and being fully informed in the matter now makes and enters the following:

FINDINGS OF FACT

1. The parties to this action are the partners in a Utah Limited Partnership known and identified as D.S.T., Ltd. Plaintiffs are the limited partners and defendant is the general partner.

2. The agreement creating the partnership was signed on March 3, 1980. Prior to that time Mrs. Scheller, on behalf of the limited partners and various of the representatives of the general partner, had had conversations concerning the formation of the partnership. The first such conversation was in the spring of 1979 between Mrs. Scheller and Hal Larsen. Thereafter, Mrs. Scheller and Mr. Larsen met on the site of the property finally contributed to the partnership by the limited partners and discussed the possibility of forming a limited partnership. Mrs. Scheller and Mr. Larsen discussed possible types and configurations of buildings which might fit on the land. Thereafter, Mrs. Scheller met with six of the members of the defendant and discussed a partnership. At that time she was given a copy of an old partnership agreement which Dixie Six had entered into previously.

3. After the conclusion of the meeting with the Dixie Six members, Mrs. Scheller took the partnership agreement given to her by Dixie Six to James Arrowsmith, her attorney.

4. The final agreement creating the partnership was drafted by James Arrowsmith, Mrs. Scheller's attorney, at that time a member of the firm of Watkins & Faber. Parts of the final agreement came from the previous Dixie Six partnership document provided to Mrs. Scheller and the remainder of the agreement was provided by Mr. Arrowsmith without contact with defendant. Mr. Arrowsmith made changes in the prior agreement to bring the final agreement into conformity with the form of such agreements in use in their office at that time.

5. A portion of the agreement which was copied from the previous agreement is the purpose clause, which is found at Article II of the agreement. That paragraph states that the purpose and character of the business is to subdivide, develop and market certain real property located in Salt Lake County, Utah. The terms subdivide, develop and market are not defined in the partnership agreement, and ~~there was no agreement, at any time, requiring the general partner to develop the property to any particular stage or in any particular manner before marketing it.~~

6. Paragraph 15.3 of the agreement creating the partnership was added to the agreement by Mr. Arrowsmith. That

agreement provides in relevant part:

"The limited partners hereby consent to any sale or other disposition, encumbrance, mortgage or release by Dixie on behalf of the partnership of any or all of the partnership assets, now or hereafter acquired, on such terms and conditions as may be determined by Dixie, . . ."

7. During the term of the partnership the general partner engaged several experts and spent significant amounts of its own time and advanced its own money in preparing plans, plats and studies and in gaining governmental approval for the building of an apartment and commercial complex on the site.

8. At the time the general partner completed its plans for improvements for the site during the fall of 1982, it attempted to find financing to build the project as designed, but was unable to find financing at a rate which it believed appropriate in light of the depressed real estate market in the area during that period of time.

9. During the period of the partnership the general partner entered into sales and contracts for sale of the partnership property as follows:

- a. A sale to Hendrickson in April of 1981;
- b. A sale to Hendrickson in February of 1982;
- c. A proposed sale to P. F. West of all of the remaining property in the partnership in the fall of 1982;

d. A sale of all of the remaining partnership property to Busch Development on June 30, 1983.

10. The limited partners knew of, consented to and participated by signing documents for the two sales to Hendrickson; they were aware of and, through Mrs. Scheller, specifically consented to the proposed sale to P. F. West, which was not consummated. They were aware of the sale to Busch Development on substantially the same terms as the proposed sale to P. F. West. The plaintiffs did not, in any case, object to the right of the general partner to sell the property of the partnership. Plaintiffs' only objection to any of the sales was with respect to the Busch sale and was an objection to the division of the proceeds generated by the sale.

11. In the case of each of the actual sales, the plaintiffs have accepted the limited partner's share of the funds generated by the sale and in no case did the limited partners challenge the right of the general partner to make sale, even though they knew that the condition of the property at the time of each sale was materially different from the concept of developed property which plaintiff Scheller said she originally had in mind for the property in which the plaintiffs urge upon this court. In each case, the land sold was vacant and no additional on-site improvements had been added during the term of the partnership.

12. The agreement of the parties provides that monies from the sale of the partnership properties is to be divided as follows:

- (1) Repayment to the general partner of costs as per billings submitted by the general partner.
- (2) Return of the limited partner's contribution to the partnership with a value thereof to be calculated at \$30,000.00 per useable acre.
- (3) The remainder to be divided equally between the parties.

The general partner may also receive as a cost a real estate commission of up to six percent (6%) of the sales price of the partnership property. The general partner's right to do this was acknowledged by the plaintiffs in their complaint. The general partner has waived its right to the commission on the sales to Hendrickson and has not yet received the sales commission on the sale to Busch.

13. From the funds generated by sales of the partnership property, the general partner has received payment of its actual out-of-pocket costs billed to date, but has received no sales commissions. The limited partners have received \$709,842.04 as a return of their contribution and have received \$205,189.99 toward their share of profits, for a total of



\$915,032.03. The general partner has established a partnership account in which it has retained \$206,050.00. It had withdrawn nothing from that account for payment of real estate commission or profit at the request of plaintiffs' counsel, pending a decision of this court.

14. When all of the funds generated by all of the sales are considered, the property contributed by the plaintiffs at an agreed upon value of \$30,000.00 per acre has been sold, together with governmental approvals, plats, plans, drawings and occupancy permits provided by the plaintiffs for the sum of \$1,262,500.00, together with accruing interest on the balance remaining.

15. The plats, plans, occupancy permits and other reports, studies and governmental approvals secured by the general partners were sold with the land and were at least a part of the reason for the increase in value of the partnership property from \$30,000.00 per acre to \$55,000.00 per acre.

From the foregoing Findings of Fact the court now makes and enters the following,

#### CONCLUSIONS OF LAW

1. The agreement of the parties does not define the words subdivide, develop and market and the actions of the defendant general partner in selling the property as it did does not violate the agreement of the parties.

2. The provisions of the partnership agreement regarding payment of the general partner are not inequitable under the facts of this case.

3. The plaintiffs have, with full knowledge, acquiesced, and in fact, approved of the sales of the property by the general partner in the manner provided for in paragraph 15.3 of the agreement creating the partnership and in direct contravention of the position which they urge upon the court that the property could not be sold by the general partner unless it was developed in a manner which the plaintiffs have failed to specifically prove.

4. It would be inequitable to allow the plaintiffs to accept the fruits of the labors of the defendant without allowing the defendant to recover as provided in the contract.

5. Plaintiffs are estopped by their own actions from taking the position that the defendant has not performed as provided in the contract.

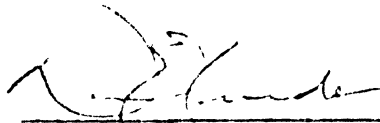
6. The services of the defendant herein have been of value and it would be inequitable to allow the limited partners to profit from the efforts of the general partner without allowing the general partner to profit at the same time.

7. No evidence has been presented to the court as to any alternative method of compensating the general partner and

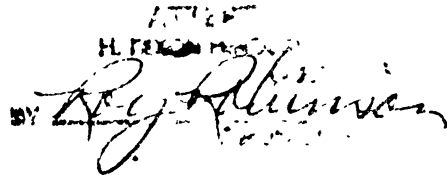
the court concludes that the method of compensating the general partner for its services set forth in the agreement creating the partnership is equitable and appropriate and should be followed.

DATED this 18 day of June, 1985.

BY THE COURT:



Dean E. Conder  
District Judge

ATTORNEY  
H. F. RICHMOND  
BY 

LOVE

JUL 18 1985

Craig G. Adamson (0024)  
Attorney for Defendant  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101

H. Dixon, County Clerk, Third Dist. Court

By

*[Signature]*  
D. J. / Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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|                            |   |                      |
|----------------------------|---|----------------------|
| VIVIAN M. SCHELLER, et al, | : |                      |
|                            | : | J U D G M E N T      |
| Plaintiffs,                | : |                      |
| vs.                        | : |                      |
|                            | : | Civil No. C83-6862   |
| DIXIE SIX CORPORATION,     | : | Judge Dean E. Conder |
|                            | : |                      |
| Defendant.                 | : |                      |

---ooo0ooo---

This matter came on for trial before the Honorable Dean E. Conder, a judge of the above-entitled court on the 10th day of May, 1985, and was concluded on the same day. Plaintiffs were represented by Walter P. Faber, their attorney of record. Defendant was represented by Craig G. Adamson, its attorney of record. Trial proceeded and the parties each provided testimony, submitted documents and made argument to the court in support of their positions. Counsel for each of the parties has also submitted memoranda as requested by the court and the court has reviewed the memoranda and the file. The court being fully advised in the matter has issued its memorandum opinion and has made and entered its Findings of Fact and Conclusions of Law.

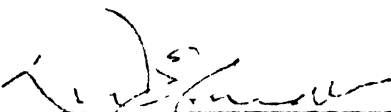
The court now being fully advised and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED:

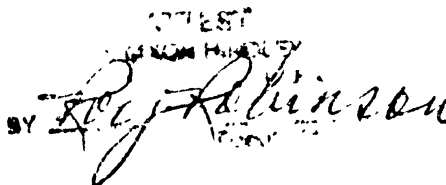
1. The limited partnership between the parties continues in force under its specific written terms.
2. The defendant general partner is ordered to continue to collect and to distribute the funds from the sale of the property of the partnership as provided in Article IX of the agreement of the parties with the first monies applied to payment to general partner for sums due under paragraph 9.2 and 9.3 of the agreement of the parties.
3. Plaintiffs' complaint for declaratory judgment is denied.
4. Defendant is awarded its costs herein.

DATED this 18 day of June, 1985.

BY THE COURT:



Dean E. Conder  
District Judge

BY 

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LIMITED PARTNERSHIP AGREEMENT

AGREEMENT made this \_\_\_\_ day of October, 1976, by  
and between DIXIE SIX CORPORATION, a Utah corporation, hereinafter  
referred to as "Dixie," and <sup>Vivian M. Scheller</sup> VERNON B. CLINTON, of the County of  
<sup>Salt Lake</sup> Salt Lake, State of <sup>Utah</sup> Idaho, hereinafter referred to as "Clinton."  
<sup>Scheller</sup>

WHEREAS, Clinton owns, free of any liens or encumbrances  
a tract of land in the County of Salt Lake, State of Utah, said  
tract hereinafter referred to as the "Property," more particularly  
described on Exhibit "A" attached hereto and by reference made a  
part hereof, such Property suitable for subdivision and develop-  
ment, and

WHEREAS, Dixie has the experience, personnel and  
equipment necessary for the development of the Property, and

WHEREAS, Dixie and <sup>Scheller</sup> Clinton desire to form a Limited  
Partnership for the development and sale of the Property according  
to the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants  
herein, the parties agree as follows:

1. Scope and Description. The parties hereby create  
a Limited Partnership pursuant to the provisions of the statutes  
of Utah for the purpose of subdividing, developing, and marketing  
the Property. The Limited Partnership shall be operated under  
the name of "Dixie Six and <sup>Scheller</sup> Clinton" with the principal office  
thereof at 3225 West 3500 South, City of Salt Lake, County of  
Salt Lake, State of Utah.

2. Term. The Partnership shall commence on the date  
hereof and shall continue until the 31st day of December, 1977,  
and thereafter from year to year unless terminated or dissolved  
as hereinafter provided.

3. Contributions of Partners. Dixie shall be the General Partner of the Limited Partnership and <sup>Scheller</sup> Clinton shall be the Limited Partner of the Partnership. <sup>Scheller</sup> Clinton agrees to contribute the Property to the capital of the Partnership with the Property being valued for purposes of such contribution at the sum of \$740,678.94. Dixie shall contribute its expertise for the purpose of subdividing, developing, and marketing the Property; shall provide or obtain all equipment, machinery and personnel necessary for such subdivision, development and marketing and shall further obtain the necessary and sufficient financing for such subdivision, development and marketing, using the Property as security therefor.

4. Conduct of Partnership. On the date hereof, <sup>Scheller</sup> Clinton shall convey the Property to the Partnership by Warranty Deed. It is understood by the parties that the Property shall be utilized by the Partnership to obtain a loan, the proceeds thereof to be used for the subdivision, development and marketing of the Property by Dixie.

~~It is understood and agreed by the parties that, in marketing the Property, the sales price of the Property shall be the sum of \$16,750.00 per acre. The terms and conditions of such sales shall generally provide for a down payment of ten percent (10%) of the sales price with the balance, together with interest at the rate of eight percent (8%) per annum, to be paid at the rate of one percent (1%) per month of the original outstanding balance for a five (5) year period with the remaining balance due and payable at the end of such five (5) year period.~~

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- 3 -

5. Division of Monies Received. All monies received from the sale of the Property shall be allocated as follows

(a) First, to the actual expenses of the Partnership or Dixie relative to the development and improvement of the Property, such expenses to be itemized on the monthly statement provided to <sup>Scheller</sup> Clinton.

(b) Second, to the return <sup>Scheller</sup> to Clinton of <sup>his</sup> capital contribution in the sum of \$740,478.94.

(c) Third, to Dixie and <sup>Scheller</sup> Clinton equally.

6. Salaries and Drawing Account. No salary shall be paid to any Partner. No drawing account shall be established for any Partner unless and until all actual expenses of development and improvement have been paid and <sup>Scheller</sup> Clinton has been returned his capital contribution.

7. Management, Duties and Restrictions. During the period of the Partnership, the rights and liabilities of Dixie, hereinafter referred to as the General Partner and <sup>Scheller</sup> Clinton, hereinafter referred to as the Limited Partner, shall be as follows:

(a) General Partner.

(1) The General Partner shall obtain the necessary financing for the subdivision, development, and improvement of the Property.

(2) The General Partner shall keep all financial records of the Partnership at <sup>4394 South</sup> 3735 West <sup>2200 Wood Road</sup> 3500 South, Salt Lake City, Utah 84120. Such books and records shall be available for inspection



by any Partner at any time. Additionally, the General Partner shall provide to the Limited Partner, on a monthly basis, a statement of information as to the progress of the Partnership.

(3) The General Partner shall be exclusively responsible for all functions relative to the subdivision, development, and improvement of the Property including obtaining all permits and agreements required in connection therewith. Such subdivision, development and improvement of the Property shall generally be in accordance with the plat map attached hereto as Exhibit "B" and by reference made a part hereof.

(4) The General Partner shall be exclusively responsible for the marketing of the Property.

(b) Limited Partner. The Limited Partner shall not participate in management. There shall be no additional limited partners admitted into the Partnership without the consent of all partners. A limited partner shall not have the right to substitute an assignee in his place without the written consent of the General Partner; however, nothing herein shall prohibit the assignment by gift or bequest by a limited partner of all or part of his partnership interest in the Partnership to any lineal descendant or spouse.

8. Dissolution. The Partnership shall be dissolved upon the occurrence of any of the following events:

- 5 -

(a) The sale of all Property to third parties.

(b) The withdrawal, bankruptcy, insolvency, or receivership of the General Partner.

(c) Upon written notice by the Limited Partner, if the General Partner shall fail to perform its obligations hereunder and such failure shall continue for a period of thirty (30) days after receipt of such written notice.

In the event of a dissolution as provided hereinabove, the Partnership shall immediately begin to wind up its affairs. The proceeds from liquidation of Partnership assets, after payment to all creditors of the Partnership in the order of priority provided by law, shall be paid and applied in accordance with paragraph five (5) hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

GENERAL PARTNER:

DIXIE IX CORPORATION

By \_\_\_\_\_

LIMITED PARTNER:

\_\_\_\_\_  
Vernon B. Clinton

*M. Scheller*

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LEGAL DESCRIPTION

EXHIBIT "A"

BEGINNING at the Southwest Quarter corner of Section 22, Township 3 South, Range 1 West, Salt Lake Base and Meridian, running North  $0^{\circ} 08' 08''$  East 2655.44 feet to the West Quarter corner of Section 22, Township 3 South, Range 1 West, Salt Lake Base and Meridian, thence North  $89^{\circ} 57' 01''$  East 1320 feet; thence South  $0^{\circ} 08' 38''$  West 924 feet; thence North  $89^{\circ} 57' 01''$  East 612.78 feet; thence South  $0^{\circ} 07' 35''$  West 805.03 feet; thence North  $89^{\circ} 52' 25''$  West 12.5 feet; thence South  $0^{\circ} 07' 35''$  West 584.33 feet; thence North  $89^{\circ} 51' 22''$  West 575.70 feet; thence South  $0^{\circ} 08' 31''$  West 347.25 feet; thence North  $89^{\circ} 54' 10''$  West 1345 feet to the point of beginning.

As evidence of good faith Dixie Six Corporation herewith tenders a check in the amount of \$10,000.00 which will apply to the amount Scheller is to receive on the property.

CERTIFICATE OF LIMITED PARTNERSHIP

OF

D. S. T., LTD.

Pursuant to the Utah Uniform Limited Partnership Act, Dixie Six Corporation, a Utah corporation, hereinafter referred to as "Dixie", VIVIAN M. SCHELLER, a woman, and STEVEN D. TOLLSTRUP, a man, hereinafter referred to collectively as "the Limited Partners", and individually by name, have formed a limited partnership and do hereby certify and state:

ARTICLE I  
NAME

The name of the limited partnership is D. S. T., LTD.

ARTICLE II  
PURPOSE

The purpose and character of the business of the partnership is to subdivide, develop and market certain real property located in Salt Lake County, Utah.

ARTICLE III  
PRINCIPAL PLACE OF BUSINESS

The principal office of the partnership shall be at 4394 South Redwood Road, Salt Lake City, Salt Lake County, Utah. The partnership may maintain such other offices and places of business as the partners from time to time find necessary or desirable, either within or without the State of Utah.

ARTICLE IV  
NAMES AND RESIDENCE OF PARTNERS

The names and residence addresses of each member of the partnership, general and limited partners being specifically designated, are as follows:

GENERAL PARTNER:

|                       |   |
|-----------------------|---|
| DIXIE SIX CORPORATION | 4394 South Redwood Road<br>Salt Lake City, Utah 84107 |
|-----------------------|---|

LIMITED PARTNERS:

|                    |   |
|--------------------|---|
| VIVIAN M. SCHELLER | 3778 East Cliff Drive<br>Salt Lake City, Utah 84117 |
|--------------------|---|

STEVEN D. TOLLSTRUP

ARTICLE V  
TERM

The term of the partnership shall begin as of the date of the execution of this Partnership Agreement, and shall continue until December 31, 1982, and thereafter from year to year unless terminated or dissolved as hereinafter provided.

ARTICLE VI  
CONTRIBUTIONS BY PARTNERS

The Limited Partners shall sell to the partnership the real property more fully described in Exhibit "A" annexed hereto and made a part hereof, which has an agreed value of THIRTY THOUSAND DOLLARS (\$30,000) per acre. <sup>FOR USEABLE LAND</sup> Dixie shall contribute to the partnership the sum of \$10,000, which sum shall be paid to the Limited Partners as a down payment on the property. In addition thereto, Dixie shall contribute its expertise for the purpose of subdividing, developing and marketing the property; shall provide or obtain all equipment, machinery and personnel necessary for such subdivision, development and marketing; and shall obtain the necessary and sufficient financing for such subdivision, development and marketing, using the property as security therefor.

ARTICLE VII  
ADDITIONAL CONTRIBUTIONS

The Limited Partners shall not be obligated to make any additional contributions to the partnership.

ARTICLE VIII  
RETURN OF CONTRIBUTIONS

8.1. The Limited Partners shall be entitled to payment for the property upon termination of the partnership as provided in Article V or upon dissolution of the partnership as provided herein; provided, however, the Limited Partners shall not receive payment for the property until (a) all liabilities of the partnership, except liabilities to the General Partner and Limited Partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them; (b) the consent of all partners is had; and (c) the certificate is cancelled or so amended as to set forth the withdrawal or reduction.

8.2. Subject to the limitations of paragraph 8.1, the Limited Partners may rightfully demand payment for the property (a) on dissolution of the partnership, or (b) on the date specified in Article V for termination and dissolution of the partnership.

ARTICLE IX  
PROFITS AND BOOKS

9.1. The first accounting period for the partnership shall be from the date of execution of this Agreement to December 31, 1980. Thereafter, the profits and losses of the partnership shall be computed annually for each period January 1 through December 31. Profits and losses shall be allocated equally as specified hereinbelow.

9.2. Receipts of the partnership shall be allocated as follows:

(a) First, to the actual expenses of the partnership or Dixie relative to the subdividing, development, improvement and sale of the property, such expenses to be itemized on a monthly statement provided to the Limited Partners.

(b) Second, to payment to the Limited Partners for the real property.

(c) Third, one-half of the remainder to Dixie and one-half of the remainder to the Limited Partners.

9.3. In calculating the actual expenses of the partnership or Dixie relative to the subdividing, development, improvement and sale of the property pursuant to paragraph 9.2(a) hereinabove, Dixie shall not apply any fixed cost or overhead expenses to the partnership project. Dixie or any of its affiliates or principals may charge the partnership a real estate brokerage commission not exceeding six percent (6%) of the sales price of the property or any portion thereof.

9.4. No salary shall be paid to any Partners. There will be established an individual drawing account to be maintained for each Partner, which shall be charged with all withdrawals made for such Partner's benefit. No drawing account shall be established for the General Partner unless and until all actual expenses of development and improvement have been paid and the Limited Partners have received payment for the real property.

9.5. An individual capital account shall be maintained for each Partner and shall be credited with all contributions made by that Partner and charged and credited in accordance with this paragraph and with paragraphs 9.1, 9.6 and 9.7 herein.

9.6. As soon as practicable after the close of each calendar year, but in no event later than three and one-half (3-1/2) months after the close of the calendar year, the drawing accounts of the Partners shall be closed to the capital accounts.

9.7. After payment of all debts and expenses of the partnership, the net cash flow of the partnership may be distributed to the Partners annually or more frequently, as determined by the General and Limited Partners. For purposes of this paragraph, net cash flow shall be deemed to mean net cash remaining in the partnership's account after:

payment of all legitimate partnership expenses and withholding a reasonable reserve for contingencies. Such cash flow shall be computed without regard to profits or losses shown on the partnership's books, except as such profits or losses may affect the reserve for contingencies. Any such distributions shall be charged against the Partners' drawing accounts.

9.8. The books of the partnership shall be maintained at the principal office of the partnership and shall be open to reasonable inspection by any partner. Such books shall be kept on such accounting basis as the partnership may determine from time to time.

ARTICLE X  
ADDITIONAL LIMITED PARTNERS

No additional limited partners shall be admitted to the partnership without the unanimous consent of all partners, both general and limited.

ARTICLE XI  
PRIORITY OF LIMITED PARTNERS

No Limited Partner shall have priority over any other Limited Partner either as to contributions to capital or by way of income.

ARTICLE XII  
DEMAND OF PROPERTY IN RETURN FOR CONTRIBUTION

Upon termination of the partnership, no general or limited partner shall have the right to demand and receive property other than cash in return for its contribution. Upon concurrence of all the partners, both general and limited, other than the partner demanding return of his contribution, the withdrawing partner may have his contribution returned in property other than cash.

ARTICLE XIII  
CONDUCT OF PARTNERSHIP

On the date hereof, the Limited Partners shall convey the property described in Exhibit "A" to the partnership by Warranty Deed. The Limited Partners shall cause such property to be graded to meet Salt Lake County standards, and shall cause all buildings and personal property located on such property to be removed therefrom. It is understood by the parties that the property shall be utilized by the partnership to obtain a loan, the proceeds thereof to be used for the subdivision, development and marketing of the property by Dixie.



## MANAGEMENT

15.1. Subject to the provisions stated in this Article, Dixie shall exercise complete control in the management of the partnership and shall devote such time to the partnership as shall be reasonably required for its welfare and success. Dixie shall obtain the necessary financing for the subdivision, development and marketing of the property. Dixie shall proceed with subdividing, developing and marketing the property as expeditiously as possible. Dixie shall do no act detrimental to the best interests of the partnership.

15.2. No Limited Partner shall participate in the management of the partnership business.

15.3. The Limited Partners hereby consent to any sale or other disposition, encumbrance, mortgage or lease by Dixie on behalf of the partnership, of any or all of the partnership assets, now or hereafter acquired, on such terms and conditions as may be determined by Dixie, and to the employment, when and if required, of such brokers, agents and attorneys as Dixie may determine, notwithstanding that any party hereto may have an interest therein; provided, however, in the event Dixie proposes to sell the property to any entity controlled by Dixie or in which Dixie or any of its principals own an interest, the sale price for the property shall be determined as follows:

Dixie shall appoint an appraiser, the Limited Partners shall appoint an appraiser, and the two appraisers thus appointed shall appoint a third appraiser. The three appraisers thus determined shall thereupon appraise the partnership property. An appraisal agreed to by at least two of the three appraisers shall be controlling.

## ARTICLE XVI DEPOSITS

All funds of the partnership shall be deposited in its name in such checking account or accounts designated by Dixie. All withdrawals therefrom shall be made upon checks signed by the authorized officers of Dixie.

## ARTICLE XVII CONVEYANCES

Any deed, bill of sale, mortgage, lease, contract of sale or other document purporting to convey or encumber the interest of the partnership in all or any portion of any real or personal property at any time held in its name, may be signed by Dixie.

## ARTICLE XVIII DISSOLUTION OF PARTNERSHIP

The partnership shall be dissolved upon the occurrence of any of the following events:

- (a) The sale of all property to third parties.

(b) The bankruptcy, insolvency, receivership or involuntary dissolution of Dixie.

(c) Upon written notice by the Limited Partners, if Dixie shall fail to perform its obligations hereunder and such failure shall continue for a period of thirty (30) days after receipt of such written notice.

In the event of a dissolution as provided hereinabove, the partnership shall immediately begin to wind up its affairs. The proceeds from liquidation of partnership assets, after payment to all creditors of the partnership in the order of priority provided by law, shall be paid and applied in accordance with Article IX hereinabove.

ARTICLE XIX  
GOVERNING LAW

This agreement and the rights of the parties hereunder shall be interpreted in accordance with the laws in the State of Utah.

ARTICLE XX  
LIMITED LIABILITY

The liability of the Limited Partners shall be limited to contributions made to the partnership.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands this 3<sup>rd</sup> day of MARCH, 1980.

GENERAL PARTNER:

DIXIE SIX CORPORATION

ATTEST:

[Signature]

By [Signature]  
President

LIMITED PARTNERS:

[Signature]  
Vivian W. Scheller

[Signature]  
Steven D. Tollstrup