1980

Dick Bastian and Phillip Taylor v. Cedar Hills Investment and Land Co., A Partnership, associated Industrial Developers, A California Corporation, and Near East Technological Services: Limited, A California Corporation : Brief of Appellants

Utah Supreme Court

JERIL B. WILSON; Attorneys for RespondentM. DAYLE JEFFS; Attorney for Appellants

IN THE SUPREME COURT OF THE

STATE OF UTAH

DICK BASTIAN and PHILLIP TAYLOR, Plaintiffs and Appellants, vs. CEDAR HILLS INVESTMENT AND LAND CO., a partnership, ASSOCIATED INDUSTRIAL DEVELOPERS, a California corporation, and NEAR EAST TECHNOLOGICAL SERVICES, LIMITED, a California corporation, Defendants and Respondents.	Case No. 16941

BRIEF OF APPELLANTS

Appeal from Judgment in the Fourth Judicial District Court of Utah County, Honorable Don V. Tibbs, District Judge

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TABLE OF CONTENTS

CASES CITED

STATUTES

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DICK BASTIAN and PHILLIP TAYLOR, Plaintiffs and Appellants, vs. CEDAR HILLS INVESTMENT AND LAND CO., a partnership, ASSOCIATED INDUSTRIAL DEVELOPERS, a California corporation, and NEAR EAST TECHNOLOGICAL SERVICES, LIMITED, a California corporation, Defendants and Respondents.	Case No. 16941

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NATURE OF THE CASE

This is an action commenced by plaintiffs for specific performance of two land sale contracts entered into with the defendants or, in the alternative, for damages for breach of two real estate contracts entered into by the plaintiff, Dick Bastian, and Gary Carson. At the time of the trial, plaintiff, Phillip Taylor, was joined as a party of plaintiff on stipulated record (Rec. 259:1-27, Rec. 94-95). During the trial, the claim for specific performance of the contracts was withdrawn by the plaintiffs on stipulation with the defendants and the plaintiffs proceeded upon their claim for damages for breach of the two real estate contracts. Subsequent to the

execution of the earnest money receipts and offers to purchase and the acceptance by the defendants, the parties entered into an amended agreement to the contracts (Rec. 359-360) and agreed to a closing date of February 17, 1978 at Rocky Mountain Title Co. in Orem, Utah (Rec. 362). The parties met for the closing of the transaction. The closing never took place and plaintiffs brought this action for damages.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury on the 27th and 28th days of August, 1979 and the 8th day of November, 1979 before the Honorable Don V. Tibbs. On the 6th day of February, 1980, the trial court made Findings and entered Judgment in favor of the plaintiffs and against the defendants for the sum of $35,000.00, together with eight percent (8%) interest per annum with no award for attorney's fees or costs to either party. The plaintiffs appeal the decision of the trial court.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the Supreme Court rule that on the Findings made by the trial court and on the undisputed facts, plaintiffs are entitled to entry of judgment in the amount of $291,586.40, attorney's fees in the amount of $9,478.00 and costs on appeal.

STATEMENT OF FACTS

Cedar Hills Development Company is a partnership comprised of Near East Technological Services, Limited, a

California corporation, and Associated Industrial Developers, a California corporation, all parties being defendants.

Reed Nixon, Robert Nixon and Mark Nixon are agents of Cedar Hills Development Company in the development of the Cedar Hills properties. They also have their own corporation called Wincor Development Company, a Utah corporation.

William A. Malis and George C. Drivas are agents for Cedar Hills Development Company (Rec. 278:16-22; 306:16-21).

Dick E. Bastian is a real estate developer. Gary Carson is a real estate contractor and developer.

Prior to suit, Phillip Taylor became a party to the transactions by purchasing a part of the interest of Dick Bastian and all of the interest of Noall Tanner. Dick Bastian purchased the interest of Gary Carson prior to trial. Phillip Taylor was joined as a party plaintiff at time of trial, having acquired an interest in the properties (Rec. 259:1-9).

Gary Carson was dismissed out as a party plaintiff during the trial. At trial, Dick E. Bastian and Phillip Taylor held all buyers' interests.

Cedar Hills Development Company and its predecessor in interest, Associated Industrial Developers, Inc. had commenced development of the Cedar Hills property prior to the formation and the incorporation of the Town of Cedar Hills. Sewage lagoons had been constructed to meet health department requirements on the property of Cedar Hills Development Company.

Thereafter, the town was formed with Robert Nixon, one of the agents given power of attorney by Cedar Hills Development Company, becoming its first mayor. Richard LaFrance, the sales agent working for Global Enterprises and Associates, became one of the councilman on the initial town council. At the time of the formation of the town, the area of the Cedar Hills Development Company property, which included the sewage lagoons constructed by the private company, were not annexed into the town and were not transferred eith by ownership, control, or by lease to the town. The testimony of the attorney, Brian Harrison, attorney for Cedar Hills, shows that the lagoons belonged to and were the private property of the Cedar Hills Development Company (Rec. 423:27-30). The town had prepared a lease of the lagoon property to put control within the town but no lease had ever been signed (Rec. 424:5-22). The town had made demands upon the development company to transfer ownership or control of the lagoons but the lease has never been signed to the time of trial, nor has any transfer been made of the ownership or operation of the lagoons (Rec. 424:23-30; 425) and the company refuses to execute the lease (Rec. 425:1-11).

On November 15, 1977, Dick E. Bastian and Gary L. Carson entered into an Earnest Money Receipt and Offer to Purchase for the purchase of 105 acres of development ground from Cedar Hills Development Company (Rec. 288, Ex. 9) for a purchase price of $1,417,500.00 and upon the execution of the earnest money receipt and offer to purchase made payments of

$25,000.00 upon the purchase price. The payment was delivered to Global Enterprises and Associates, the sellers realty agent.

On November 16, 1977, Dick E. Bastian and Gary L. Carson entered into another Earnest Money Receipt and Offer to Purchase from Cedar Hills Development Company for the purchase of 37.75 acres of development land in Plat "C" of Cedar Hills for the purchase price of $517,175.00 and made payment upon said purchase in the sum of $10,000.00 (Rec. 289:20-29, Ex. 10). The earnest money was again delivered to Global Enterprises and Associates.

On November 23, William Malis, acting in behalf of Cedar Hills Development Company, sent a demand letter to Global Enterprises and Associates for delivery of the $35,000.00 earnest money deposits and the demand letter alluded to the fact that there were contingencies that were not met. Cedar Hills Development Company then committed the indemnification of Global Enterprises and Associates, the realty company, regarding the payment of the funds on over to Cedar Hills Development Company (Ex. 12). Upon demand, the real estate broker delivered the $35,000.00 to the agents of Cedar Hills Development Company, S. Reed Nixon, Mark Nixon and Robert Nixon, who had been appointed agents for the development of the property, which is the subject matter of this lawsuit. Their authority was recorded in the Utah County Recorder's Office and is shown as Exhibit 5 in the Record. (Rec. 285:7-15, testimony of Mr. Malis)

The Earnest Money Receipts and Offer to Purchase were contingent upon the parties cooperatively obtaining the annexation of the property into the Town of Cedar Hills and approval of the preliminary plat. Annexation was accomplished in December of 1977 and the preliminary plat approval was obtained on January 4, 1978 (Rec. 358:3-5). The Earnest Money Agreement and Offer to Purchase for the 105 acres provided that 30 days after annexation buyers would pay an additional $175,000.00 and upon such payment sellers would release and provide good and marketable title to 13 acres to the buyers. The contract further provided that the sellers would provide sufficient culinary water supply and use of the sewage lagoons for 30 homes. The balance of the payments under the contract would be in accordance with the written agreement.

The Earnest Money Receipt and Offer to Purchase for the 37.75 acres in Plat "C" provided that buyers would pay $40,000 within 30 days of annexation and approval of the preliminary plat. It further provided that sellers would provide sufficient culinary water supply and the use of the sewage lagoon system for 12 homes. It also provided that upon payment of the $40,000.00 sellers were to provide title to 3 acres and release the remaining acreage upon payment of the balance of the contract price according to its terms (Ex. 10).

Sometime in January or February of 1978, the parties entered into an Amendment Agreement (Ex. 14), and set February

17, 1978 as the closing date for the payment of the amounts due at that time and the delivery of title to the 13 acres and 3 acres, respectively (Rec. 362:11-22, 348:18-24; 509:18-25).

The contracts and Amendment Agreement required the sellers to provide the transfer of certain shares of Manila Water Company stock to the Town of Cedar Hills, to provide a sufficient amount of water to the Town of Cedar Hills and to insure the development of the buyers project for the entire 142.75 acres being conveyed. The Amendment Agreement further provided that Cedar Hills Development Company would dedicate to the Town of Cedar Hills an access to the property being released at the time of the first release and payment of the $215,000.00 under both contracts, so as to insure access to the buyers for the first properties that they were going to develop. At closing, the contracts also required conveyance of good and marketable title to the 16 acres at the same time as the payment of the $215,000.00.

Between the approval of the preliminary plat and the closing, the parties discovered that the State Health Department had put a limit on the amount of connections that could be made to the defendants' sewage lagoons and that the lagoons had not been transferred to the Town of Cedar Hills. Defendants, through their agent, George Drivas, and plaintiffs met at the office of Rocky Mountain Title Company on February 17, 1978 for the ostensible purpose of closing the transaction, conveying the 13 and 3 acres, respectively, and making payment

of the $175,000.00 and $40,000.00, respectively. At the time of closing, plaintiffs discovered that the defendants did not have title to the properties to be conveyed, had mortgages upon the properties, had not transferred the culinary water to the town of Cedar Hills as required by the Amendment Agreement and were not in the position to close. At closing, no documents were prepared for the conveyance of the 13 and 3 acres, respectively, or for the release of the underlying obligations owed by the defendants.

At the time of the closing meeting, a dispute arose over sewage hookups. The plaintiffs demanded the defendants give approval to the use of the sewage lagoons for 30 and 12 hookups, respectively (Rec. 548:18-27). The defendants previously assured the plaintiffs that such would be provided, but at the time of the closing, refused to sign authorization for the use of the sewage lagoons.

At the time of the closing meeting, the sales agent, Richard LaFrance acting for the sellers on the project, arrived at the closing meeting with a letter from the State Health Department authorizing the increase in the number of the sewage lagoon hookups sufficient to meet the needs of the plaintiffs herein (Ex. 15). Despite such authorization, the defendants' agent, George C. Drivas, refused to give the authorization for the use of the sewage lagoons.

At the time of the closing, the defendants were not prepared nor ready to deliver a good and marketable title to

the premises required to be delivered at the time of closing.

The plaintiffs had the funds available to make the payments due, amounting to $215,000.00, as required under the Earnest Money Receipts and Offer to Purchase and Amendment Agreement. The defendants did not convey water rights to the town as required by the Amendment Agreement (Ex. 15) nor deliver title to 16 acres as required by the contracts. The plaintiffs did not tender the money to the defendants because the defendants were not in the position to deliver the necessary title to the plaintiffs. Even if the plaintiffs had tendered the amount required, because of title defects, lack of title in the defendants and encumbrances on the properties, plaintiffs could not have obtained that for which they had contracted.

The realtor attempted to get the parties together for an additional closing and to get the matter resolved (Ex. 27). The plaintiffs attempted to enter into a compromise regarding the 42 hookups to the sewage lagoon and to set an additional closing meeting within 10 days and offered their full performance of the contracts. (Ex. 42)

At the time of the closing meeting, the evidence showed that the buyers had in excess of $400,000.00 on hand, which was more than was needed to meet the $215,000.00 in payments under the contract.

At the time of the closing date of February 17, 1978 the property had an appraised value of $2,212,000.00, the purchase price to plaintiffs was $1,934,675.00, and the dif-

ference between market and purchase price was $277,325.00. The plaintiffs had paid $35,000.00 to the defendants as earnest money (Rec. 560:21-26). They had paid engineering costs of $11,761.40 (Rec. 555:6-19) and had paid an annexation fee of $2,500.00 (Rec. 563:8-13). The parties stipulated that if either party was entitled to attorney's fees that $9,478.00 costs would be a reasonable amount. (Rec. 648:7-15)

All representations of the sellers to the buyers up to the closing meeting were made through their agents, the realtors. The realtors drafted all agreements except for the Amendment Agreement drafted by William A. Malis, the agent and attorney of the defendants, Cedar Hills Development Company.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFFS WERE NOT READY, WILLING AND ABLE TO COMPLETE THE TRANSACTION AS PROVIDED FOR IN THE AGREEMENTS

The contracts between the parties are comprised of:

(a) Earnest Money Receipt and Offer to Purchase dated 11/15/77, (Ex. 9, Rec. 289:7-9) for purchase of 105 acres.

(b) Earnest Money Receipt and Offer to Purchase dated 11/16/77, for the purchase of 37.75 acres (Ex. 10, Rec. 290:19-21).

(c) Amendment Agreement applying to both Earnest Money Receipts, undated (Ex. 14, Rec. 300:8-10).

(d) The oral agreement fixing the closing date for payment of the $175,000.00 (Ex. 9) and $40,000.00 (Ex. 10) set for February 17, 1978

at Rocky Mountain Title Company (Rec. 541:5-10; 397:9-20; 417:3-18).

A careful analysis of the component parts of the contracts shows that the buyers were required under the contracts and as a condition of the purchase:

(a) To obtain annexation of the properties into the town of Cedar Hills.

(b) To obtain preliminary plat approval on the development within 90 days of the execution of the agreement. Annexation was accomplished in December, 1977 by the buyers (Rec. 331:6-8; Ex. 3, testimony of Reed Nixon) and the preliminary plat approval was obtained on January 4, 1978 (Ex. 14 and 41).

(c) Payment of $175,000.00 on Exhibit 9 and $40,000.00 on Exhibit 10 at time of closing.

(d) Payment of installments pursuant to the terms of the Amendment Agreement commencing October 4, 1978.

The contracts required of the sellers:

(a) Sufficient culinary water for the entire project, acreage of 142.75 acres.

(b) Use of the lagoon systems for 30 homes (Ex. 9) and for 12 homes (Ex. 10). Use of lagoon system was to be furnished at the time of the closing.

(c) Conveyance of clear title to 13 acres at time of the payment of the $175,000.00 on Exhibit 9.

(d) Conveyance of clear title to 3 acres from the property covered by Exhibit 10 to be conveyed at the time of the payment of $40,000.00.

(e) Transfer of the shares of water in Manila Water Company to the town of Cedar Hills pursuant to paragraph 1 of the Amendment Agreement to the earnest money agreements (Ex. 14). Dedication to the town of Cedar Hills of certain real property for necessary access to

buyers' first release pursuant to paragraph 3 of the Amendment Agreement (Ex. 14).

(f) Good and marketable title to the 16 acres to be conveyed at time of closing.

In the Findings entered by the trial court, the trial court held in Finding No. 1 that neither the plaintiffs nor the defendants were ready, willing and able to complete the transaction as provided in the Option Agreements and Amendment. A careful examination of the trial court's Findings indicates the only alleged failure on the part of the plaintiffs was the failure to tender the $215,000.00 required to be paid at the closing as agreed in the contracts.

The trial court found in Finding No. 4 that plaintiffs had the funds to make the payment but failed to tender such payment.

In Finding No. 6, the trial court held that the defendants were not in a position to deliver the necessary title to the plaintiffs even if the plaintiffs had tendered the amounts required.

The trial court made no Findings of any failure on the part of the plaintiffs of their performance on the contracts except for the failure to tender the monies they had available at the time of the meeting set by the parties at Rocky Mountain Title Company for the closing of the transaction. The trial court was in error in ruling that such failure to tender was a breach of contract by plaintiffs because Finding No. 6 makes it obvious that tender was a useless act, when the trial court held, "Defendant was not in position to deliver the necessary

titles to the plaintiff" (Rec. 108). Defendants were not in a position to close the transaction because of defects in title and sellers' lack of preparedness to close. This Court has consistently held that a trial court should not require the parties to do a useless act. However, aside from the obvious inconsistency in holding that the plaintiffs had defaulted under the contract for failure to make a tender, and then also holding that even if the tender had been made that the defendants were not in a position to deliver title, the trial court has ignored the decision of this Court in Huck vs. Hayes, 560 P.2d 1124 (1977).

The facts in Huck vs. Hayes are remarkably similar to the facts in the case now before the Court. In that case, the contract required the defendant to furnish good and marketable title with the title insurance policy in the plaintiff's name. The day before the closing set by the parties, the preliminary title report showed that the property was in the name of Kirschbaum and not Hayes, the seller. It showed that there was a federal tax lien against the property and also made exceptions for two previous warranties for failure to state marital status or disclose what interest the defendant had in the property. A closing date was set by the parties for March 8, 1974. The Court found that on that date the plaintiff-buyer had sufficient funds to make the payment required by the agreement. It further found that the buyers did not offer to make the payment. There was a period of

time when the realtor was trying to get the parties together for closing and then the defendant-seller took the position that because the buyers had not made payment required by the contract on the closing date, the seller had no further obligations under the contract. Those statements of fact in Huck vs. Hayes are almost identical to the facts present in the case now before the Court. The parties entered into two earnest money contracts (Exs. 9 and 10), subsequently amended by an Amendment Agreement (Ex. 14), and then set a closing date by oral agreement for February 17, 1978 at the offices of Rocky Mountain Title (Rec. 348:18-25). The evidence is undisputed and the trial court held that at closing the plaintiffs had the funds to make the payment of $215,000.00 required to be paid under the two agreements ($175,000.00 under Ex. 9 and $40,000.00 under Ex. 10). This Supreme Court speaking in Huck vs. Hayes pointed out that under the contract it was the defendant-seller's responsibility to furnish good title to the property to be conveyed and a title insurance policy evidenced in such title. This Court held in Huck vs. Hayes that such obligation was a condition precedent to the seller's right to demand payment from the purchaser where the Court said:

> Inasmuch as under the contract the defendant's responsibility to furnish good title and a title insurance policy, the furnishing thereof was a condition precedent to his right to demand payment from the purchaser.
>
> It is fundamental that a party to a contract should obtain no advantage for the fact that

> he is himself unable to perform. Since the defendant had not come forth with the agreed title insurance policy demonstrating that he could convey a clear and marketable title as of the proposed closing date, March 8, 1974, he could neither demand payment by the plaintiff on that date, nor claim that the latter was in default for failing to make the payment. (Emphasis Added)

In the present case, the title report on the 105 acres (Ex. 17), being purchased under Exhibit 9, shows that Cedar Hills Development Company had title only to the south approximately 660 feet of said property and title to the remaining portion is in the name of Keith Wagstaff. The title report, further shows the following clouds on the title on the 105 acres:

> (a) Sale to Utah County for taxes for the year of 1976, item 2.
>
> (b) Sale to Utah County for taxes for the year 1976, item 3.
>
> (c) An easement for a concrete ditch across the property, item 5.
>
> (d) An easement for a concrete ditch, item 6.
>
> (e) An overlap on part of the property by virtue of a deed in the name of George Dale Burgess and Ann Burgess, item 7.
>
> (f) A Judgment in favor of the State Tax Commission of Utah against Cedar Hills Development Company, item 9.
>
> (g) An unrecorded Uniform Real Estate Contract between Keith Wagstaff as seller and Doyle Barrett and C. Dale Murdock as buyers, item 10.
>
> (h) Unrecorded Real Estate Contract between Cedar Hills Investment Group as sellers and

Associated Industrial Developers as buyers, item 11.

The title report on the 37.75 acres (Ex. 18), being purchased under Exhibit 10, shows that the Federal Land Bank holds an undivided one-half interest in all minerals, Jay Ezra Adams and Effie W. Adams hold title to the South 1,110 feet, and Cedar Hills Development holds title to the remainder. The title report further shows the following clouds on the title:

(a) Sale to Utah County for taxes for the year 1977, item 2.

(b) Sale to Utah County for taxes for the year 1976, item 3.

(c) An overlapping description and a deed to James D. Harvey and Barbara S. Harvey as to an overlap of the property, item 5.

(d) A Deed of Trust by Associated Industrial Developers to Zions First National Bank in the amount of $225,000.00, item 6.

(e) A Deed of Trust by Cedar Hills Development Company to Prudential Federal Savings and Loan dated December 28, 1977 (after the execution of the agreement with the plaintiffs herein) in the amount of $1,457,334.00, item 7.

(f) A Judgment in favor of the State Tax Commission of Utah against Cedar Hills Development Company in the amount of $227.75, item 8.

(g) An unrecorded Real Estate Contract between Jay Ezra Adams and Effie W. Adams as sellers, and Doyle Barrett and C. Dale Murdock as buyers, item 9.

(h) The interest of Effie W. Adams, Trustee of the Effie W. Adams Family Trust Agreement by reason of a Quit Claim Deed dated December 12, 1977, item 12.

(i) The property is subject to right of ingress and egress at all times for purpose of mining, milling or extracting minerals from the land, item 13.

The contracts entered into between the parties made no exclusions or exceptions for other than conveyance of fee simple absolute title to the buyers, title to be delivered in accordance with the release provisions of the agreements as payments were made. Buyers had made payment of $25,000.00 on the 105 acres and $10,000.00 on the 37.75 acres as earnest money (Rec. 435:17-20; 436:26-28). Sellers made demand upon the realtors and received the $35,000.00 on November 23, 1977 (Rec. 292:2-10; Ex. 12).

At the time of closing, the buyers were to have paid $175,000.00 on the 105 acres and $40,000.00 on the 37.75 acres, constituting $215,000.00 and, at that time were to have obtained the fee simple absolute title, evidenced by a policy of title insurance, on 13 acres out of the 105 acres and 3 acres out of the 37.75 acres.

The testimony of Douglas Church, president of the title company, and Exhibits 17 and 18, shows that at the time of the proposed closing the defendants did not have clear title to the property and could not produce clear title for the closing (Rec. 551:8-11, 21-25; 512:11-22; 513:18-28; 514:6-21; 515:17-28; 516:5-8; 517:5-15; 554:8-9, 18-30; 573:3-8).

There was no deed prepared as required by the contracts for the conveyance to the plaintiffs at the time of the

closing of the 13 acres and the 3 acres, respectively (Rec. 515:16-28).

There was no release of mortgage from Prudential Federal Savings and Loan nor Zions First National Bank. The company president attempted to secure documents to clear the encumbrances but was unsuccessful.

> Q. You said you contacted on your own the lending institutions relative to obtaining a release as to their deeds of trust. What response did you get from them?
>
> A. Most of the feed back from then was of a vague nature. I received some information from one of the ladies in Salt Lake at Prudential; however, I received very little satisfaction in the fact that we would be getting a partial reconveyance of those.
>
> Q. Now, when you say you got very little satisfaction, what do you mean?
>
> A. I mean she indicated the amount, the approximate amount but stated that she was not sure whether they could be reconveyed and she would refer me to -- I can't remember his name, either one of the other fellows in the office, and so forth and basically just a run around is what I picked up. (Rec. 516:9-25)

The defendants themselves admitted that they had no deed prepared to convey title to the buyers as required by the contract on the 13 and 3 acres, respectively; had obtained no release of mortgage and did not have title to the property (Rec. 687:30; 688:1-7), testimony of Mr. Nixon:

> Q. Were you able at that time to convey title by Warranty Deed?
>
> A. No.

Q. Why not?

A. Because of the underlying obligations and mortgages on the property.

Q. Did you have title?

A. No. (Rec. 687:30 to 688:7)

The Amended Agreement, paragraph No. 1, required that the sellers transfer water rights to the City. The testimony of the agent for Cedar Hills Investment and Land Company, Reed Nixon, the testimony of Mr. Malis and the testimony of Mr. Church, the title company representative, all established that they did not and could not get the water certificates until the underlying indebtedness of the seller, Cedar Hills Investment and Land Company, upon all of the properties had been paid. (Rec. 683:17-27; 684:22-27)

The sellers could not deliver one-half (1/2) of the mineral rights on the 37.75 acres, although the contract called for conveyance of clear title to the property. The title report shows that as to the 37.75 acres, the Federal Land Bank had an undivided one-half (1/2) interest in the mineral rights in the property. There is no testimony that sellers had any ability to or any contract for the securing of said mineral rights. Defendants could not deliver those mineral rights and without the mineral rights, the plaintiffs could not secure FHA financing on the houses to be constructed on the property (Rec. 511:16-23; 574:3-8; 612:5-29).

The Amendment Agreement required that the sellers

dedicate to the City "certain real property for necessary access to Buyer's first release" on which preliminary plat approval had been obtained. Such transfer had not taken place and, at the time of closing, no documents were presented to dedicate said property to the City to provide the buyers with access to the property.

The Earnest Money Contracts required the sellers to provide the buyers with 42 hookups to the lagoon system owned by the sellers. The testimony is consistent through all witnesses that the buyers were intending to build 42 homes on the first released property to be conveyed at the time of closing. They had a bank commitment for the construction of said homes on condition that water and sewer connections were provided. The contracts required the hookups. The frustration of the intended closing meetings was primarily caused by the refusal or inability of the sellers to deliver the 42 hookups. (Rec. 517:25-28; 548:18-27)

The defendants tried to excuse such failure to deliver the hookups, claiming such right belonged to the Town of Cedar Hills, and have maintained that they were willing to deliver "all that they could" in the way of hookups, but that they did not have the power to deliver the hookups nor the mineral rights. This contention of defendants is untenable since the defendants owned the lagoons and had refused to transfer them to the town or even sign a lease on them (Testimony of Brian Harrison, Rec. 424:23-30). However, in Smith vs.

Warr, (1977) 564 P.2d 771 the sellers, arguing against a claim for damages for breach of the sellers agreeing to deliver title, urged upon the Court that the Utah Court should accept a good faith-bad faith distinction and that only out-of-pocket loss should be awarded in cases of a good faith breach. The Supreme Court of Utah held that the rule followed by Utah in a breach of contract by the vendor is that damages are to be awarded for the breach of contract for the sale of the real estate regardless of the good faith of or inability to deliver what was contracted to be delivered by the party in breach. The Court reversed, requiring the trial court to make a determination of the damages consistent with that opinion without regard to the good faith-bad faith concept.

Thus, even if the seller, Cedar Hills Investment and Land Company, was unable to deliver the 42 hookups as it had contracted to do, unable to deliver the mineral rights as it had contracted to do, unable to deliver water right, or unable to convey title, their good faith or inability to be able to perform does not furnish any release from its responsibility to do so and its obligation to pay damages for failing to do so. Under the contract the sellers were to furnish sufficient culinary water for the entire acreage and the 42 hookups (30 hookups for the 105 acres and 12 hookups for the 37 acres). Defendants now maintain that they could not deliver the water shares until such time as the entire contract by which they were purchasing the land had been paid

off and the underlying indebtedness owed by Cedar Hills Investment and Land Company to the people from whom they purchased the property had been paid. They say this inability should relieve them of the responsibility to deliver what was required by the contracts and specifically provided by the Amendment Agreement (Ex. 14) drafted by the seller, Mr. Malis. As pointed out in Smith vs. Warr, supra, good faith of the sellers does not give any relief from the responsibility and the obligation to pay damages for failing to do so.

It is significant in this matter that the sellers, having the obligation under the contract to deliver clear title, release of mortgages, transfer of water rights and the hookups for the sewer, provided no documentation sufficient to carry out a closing at the time that Mr. Drivas came for the purported purpose of closing. Sellers' failure is strongly pointed out in the testimony of Doug Church, the president of the title company, who indicated in his testimony as follows:

> Q. Now, on the date of the closing, the scheduled closing, did you have the necessary documents in your possession to conduct the closing?
>
> A. I did not have all of the -- I could not adequately pass title at that time. There would need to be some exceptions that would affect the title that needed to be cleared up before that could be done.
>
> . . . title report which showed the Federal Land Bank of Berkeley actually as a half -- as being a fee title holder of one half of the mineral rights and Jay Ezra Adams and Effie W. Adams had a fee interest in a portion of the property.

Q. Would that mean, as you view it, the south 1,110 feet was still titled in the Adams?

A. Yes, according to the chain of title, yes, that's correct.

Q. Were you provided, in preparation for the closing, were you provided with any documents to clear up the title problems in connection with that 37.75 acres?

A. No, sir, I was not.

Q. Were you given any instructions to procure any releases of Deeds of Trust or transfers by deeds to clear up the title problems?

A. No, sir, I was not . . .

Q. Did you have sufficient instruments in your possession on February 17, 1978 on which you could have made a closing and conveyance of title and the issuance of a title policy on those thirteen and three acres, respectively?

A. Not completely, no, sir.

Q. Were any documents given to you or the means by which you could have obtained these documents to give a clear title on those acreages?

A. Not at that time. (Rec. 511:5-25; 512:11-14; 514:14-21; 515:29-30; 516:1-8)

The evidence clearly shows that the defendants were in default under the contract, did not and were not able to provide what they contracted to deliver at a time set for closing by the parties, and the buyers, plaintiffs herein, were ready, willing and able to close the transaction as contracted.

The ruling of the Court in Huck vs. Hayes, supra, sets the guideline for the trial court. It was error for the trial court to hold the plaintiffs' failure to make an actual

tender of the monies they had in preparation for the closing (Rec. 554:26-30; 555:1-28) was a breach of the agreement.

In fact, the parties had made an offer in writing to close the matter and make the payment which was $215,000.00 even after the intended closing date. On February 23, 1978, plaintiffs' counsel attempted to negotiate a resolution of the problem of the 42 hookups to the lagoon system and in the last paragraph informed the defendants that plaintiffs were ready to close and prepared to close the matter within 10 days (Ex. 42). Under 78-27-1, Utah Code Annotated, 1953, as amended, a written offer to close the matter and make the payment by the plaintiffs is equivalent to an actual tender of money. Under these circumstances, the trial court erred in failing to hold that the plaintiffs were ready, willing and able to perform under the contract. The trial court should have ruled that defendants alone were in breach of the agreements.

POINT II

THE TRIAL COURT ERRED IN THE AMOUNT OF DAMAGES AWARDED PLAINTIFFS. THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO PLAINTIFFS

In the decision entered by the trial court, the plaintiffs were awarded judgment against the defendants for $35,000.00 with interest at the rate of eight percent (8%) per annum. No attorney's fees or costs were awarded to either party. In entering the judgment, the trial court failed to follow the Utah law with regard to measure of damages for breach by the sellers of the land sale contract. The circumstance

now before the Court is that the vendee was ready, willing and able to perform and appeared at the closing prepared to close the transaction. The vendor had:

> (a) made no preparations for the closing,
>
> (b) had not provided a clear title to the title company to be conveyed at closing,
>
> (c) could not provide a policy of title insurance showing clear title,
>
> (d) had no provisions for release of encumbrances,
>
> (e) had no documents for conveyance of the property to be conveyed at the time of the closing,
>
> (f) failed to transfer the water rights to town, and
>
> (g) failed to dedicate the property to the town to provide access to the subject property to be conveyed by the sellers to the buyers.

Under such circumstances, this Court has spoken very clearly as to the measure of damages to be applied by the trial court. In 1959 in the case of Andreasen vs. Hansen, 8 Utah 2d 370, 335 P.2d 404 (1959), the Court in discussing the measure of damages for breach of a land sale contract said at page 373:

> The proper measure of damages would be the difference between the defendant's offer and the actual market value of the property.

However, that issue was more specifically dealt with in 1962 in Bunnell vs. Bills, 13 Utah 2d 83, 368 P.2d 579 (1962) where the Court said at page 88:

> The measure of damages where the vendor

> has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee. . . (Emphasis Added)

The Court further said:

> Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact, and to recover damages plaintiff must prove not only that she has suffered a loss, but must also prove the extent and the amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty. Id. at 88.

The evidence presented in Bunnell v. Bills, supra, was the plaintiff's opinion as to the value of the property. The case was then affirmed as to that part of the decision finding that the parties had entered into a binding contract and that the defaulting vendor became liable in damages for the breach. It was reversed and submitted back to the trial court to have further hearing to determine the market value of the property.

In the case now before the Court, plaintiffs presented their evidence as to the market value of the property at the time of the breach on February 17, 1978 and to that end, plaintiffs called as a witness Steven Charles Blankenship, a real estate appraiser. Counsel for the defendants stipulated to Mr. Blankenship's qualifications as a qualified appraiser (Rec. 631) where counsel said at lines 6-9:

> Mr. Wilson: Excuse me if I may interrupt. I am personally acquainted with Mr. Blanken-

> ship and I will stipulate he is qualified as an appraiser and I have used him on several occasions if that will save time.

The property, both the 105 acres and the 37.75 acres, were appraised using two methods of appraisal, the market data approach and the development cost approach (Rec. 631:19-22). Mr. Blankenship appraised the property at $15,500.00 per acres on the date of the breach using the market data approach, and a value of $15,600.00 per acre using the development cost approach. The appraiser then testified that the value of the property using the lower of the two appraisal methods was, at the time of the breach of February 17, 1978, $2,212,000.00 (Rec. 637:14-18). The purchase price of the two properties combined was $1,934,675.00 (Exs. 9 and 10, Rec. 638:18-22). The difference between the purchase price to the plaintiffs for the property and the market value on the date of the breach was $277,325.00. No rebuttal evidence as to such value was presented by defendants and in fact, the testimony of Mr. Blankenship was corroborated by Mr. Reed Nixon, a witness called by the defendants. In his testimony regarding properties sold by the defendants, Mr. Nixon was asked by his own counsel:

> Q. What was the sales price and what was the sales price at which those lots were to be sold to Mr. Jensen?
>
> A. Twelve Five.
>
> Q. Twelve Thousand Five Hundred per lot?
>
> A. Yes.

Recross-examination, question by Mr. Jeffs of Mr. Nixon:

> Q. Mr. Nixon, that is the figure that Mr. Blankenship used in his appraisal, was it not?
>
> A. That is correct. (Rec. 705:24-30; 706:1-16; 710:20-29; 711:2-5)

The testimony of the defendants' own witnesses of actual sales corroborated the figures used by the appraiser in determining the value of the property on the date of the breach of contract.

In 1977, in the case of Smith vs. Warr, 564 P.2d 771 (1977), the Court said at page 772:

> The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee. . .
>
> The rule followed by Utah is that benefit-of-the-bargain damages are to be awarded for breach of contract for the sale of real estate, regardless of the good faith of the party in breach. We therefore reverse, and remand to the District Court for a determination of damages consistent with this opinion, for an award of reasonable attorney's fees as required by the contract, and for costs below in the discretion of the Court. . . (Emphasis added)

The Court's denial of plaintiffs' request for attorney's fees of $9,478.00 (stipulated as to amount, Rec. 648:7-15) was in accordance with Bunnell vs. Bills, supra, and Smith vs. Warr, supra. The trial court should have awarded as the benefit-of-the-bargain to the vendees, the difference between market value and the buyers' purchase price of $277,325.00, and in addition the plaintiffs should have been reimbursed the $35,000.00 paid upon the contract and the attorney's fees in the amount

of $9,478.00. In Smith vs. Warr, supra, the vendor contended that because they were unable to deliver what they had contracted to deliver, the Court should adopt a good faith-bad faith rule and that the District Court should have awarded to the buyers only their out-of-pocket losses. The Court specifically rejected the sellers' contention that benefit-of-the-bargain damages have only been awarded in Utah when the breach was in bad faith. The Court said that that contention is not well founded and cited Bunnell vs. Bills, supra, in support thereof. It went on to say at page 722:

> [T]he rule followed by Utah is that benefit-of-the-bargain damages are to be awarded for breach of contract for sale of real estate, regardless of the good faith of the party in breach.

The Court reversed the trial court decision, and ordered it remanded to the District Court for the determination of the damages consistent with the rule on the measure of damages for loss of bargain and for an award of reasonable attorney's fees as required by the contract. In 1978, this Court again in Beckstrom vs. Beckstrom, 578 P.2d 520 at page 523 restated the entitlement of the vendee to the market value of the property less the amount the vendee agreed to pay for the property. The Court again cited Bunnell vs. Bills, supra, Smith vs. Warr, supra, and Andreasen vs. Hansen, supra, in support of such measure of damages.

In addition to their loss of bargain, the plaintiffs have suffered their expenses incurred as a result of entering

into the contract and the subsequent breach of the agreements by the defendants. Those items of damages are uncontested and include:

> (a) $35,000.00 paid upon the earnest money contracts (Rec. 560:21-26) which money was obtained from the real estate brokers by demand of the defendants within a few days after the earnest money contracts were signed. (Ex. 12).
>
> (b) The engineering costs expended on the project of $11,761.40 (Rec. 555:6-19, the undisputed and unrefuted testimony of Dick Bastian).
>
> (c) $2,500.00 paid as an annexation fee to the town of Cedar Hills to annex the defendants property into the town (Rec. 563:8-13).
>
> (d) Attorney's fees of $9,478.00 (stipulation of counsel, Rec. 648:7-15).

Plaintiffs further submitted testimony to the trial court as to the time and effort spent by Mr. Bastian and Mr. Taylor in the furtherance of this project. Plaintiffs-appellants acknowledge that such expenses could be properly excluded by the trial court. However, the loss of bargain defendants paid under the contract, out-of-pocket expenses incurred by the plaintiffs as a result of entering into the contract and the attorney's fees to the plaintiffs were not discretionary with the trial court. The trial court having determined that defendants were unable to convey a correct title or deliver that which they contracted to deliver, plaintiffs-appellants were entitled as a matter of right to be awarded such damages. The proved, established and unrebutted evidence discloses that plaintiffs were entitled to an award of damages:

(a)	Benefit-of-the-bargain	$277,325.00
(b)	Payment on contract	35,000.00
(c)	Out-of-pocket expenses	11,761.40
(d)	Attorney's fees	9,478.00

The trial court misapplied the Utah law in failing to award plaintiffs damages in said amount of $333,564.40.

The trial court, apparently concluding both parties were in default, attempted to avoid an inequity by not allowing defendants to retain the $35,000.00 paid upon the earnest money contracts. This, however, was not an equity case. It was a suit for damages from the time that the parties stipulated that the plaintiffs might withdraw their specific performance, it being obvious that sellers could not convey title and deliver that which was contracted for. From that point on it was an action at law for damages for breach of contract and the trial court was required by the decision of Smith vs. Warr, supra, and Bunnell vs. Bills, supra, upon a showing of the value of the property by competent evidence, to make an award for the loss of bargain. The Court should also have made an award for reimbursement of the monies paid under the contract, attorney's fees provided by the contracts and an award to the plaintiffs for their out-of-pocket expenses as a result of entering into the contracts and the subsequent breach by the defendants.

Based upon the evidence now in and before the Court, this Court should make the appropriate award for damages as delineated herein.

POINT III

THE TRIAL COURT ERRED IN HOLDING THAT THE REQUIREMENTS FOR FURNISHING OF SEWER HOOKUPS WAS WAIVED

Plaintiffs entered into the purchase agreement for 142.75 acres of property for the purpose of developing the same as residential building lots. The fact that it was purchased for development is evidenced by the contracts themselves, which provided that the contracts were contingent upon the securing of approval of the annexation of the town of Cedar Hills and plat approval within 90 days. Those Exhibits are in evidence as plaintiff's Exhibits 1, 2 and 3. The purchasers, as developers of the property, would have to provide, in order to go forward with the development, culinary water and sewage hookups in order to be able to build the homes as is shown by the testimony of Mr. Bastian (Rec. 573) wherein the question was asked (beginning at line 12):

> Q. Mr. Bastian, why were you so insistent at the time of the projected closing of having a letter committing the forty two hookups from Cedar Hills Development Company?
>
> A. Without sewer hookups or any water hookups, we could not get, No. 1, plat approval No. 2, loan commitment; No. 3, could not transfer title to any of the lots I hoped to develop.

Without the culinary water and the sewer hookups, the buyers were not receiving what they had contracted to purchase. They were not given clear title to the property, and they were not getting the water and sewer hookups which were a necessary and fundamental part of the purchase agreement. The land without

the capability of development was useless to them and did not warrant the purchase price in excess of $13,500.00 per acre. These requirements for water and sewer hookups were not waived as shown by the evidence presented to the trial court, a letter from the seller's real estate agents to sellers indicating in paragraph No. 4 that the development company needed to provide a letter authorizing the use of the 42 hookups from the lagoon system owned by the development company to authorize the buyers to go forward with the project. (Ex. 13) On the date of the closing, the realty agent, Richard LaFrance, obtained authorization from the Division of Health for increased commitment for the lagoons owned by the development company sufficient to include the additional 42 hookups required by the buyers and which were an integral part of the contract (Ex. 15). The authorization requested in the closing meeting, which would have met that requirement under the contract, was never given. Mr. Bastian testified:

> Q. Now, going forward to the conference for closing purposes, will you tell us what you said, what Mr. Carson or Taylor said, and Mr. Drivas said relative to the same subject matter, the hookups the water and the conveyance of title? (Mr. Jeffs)
>
> A. In the conversation and in previous written documents we had agreed to accept the existing water shares that the sellers now owned in the amount of one hundred and twenty-three shares, I believe, to be dedicated to Cedar Hills to give them the bargaining power in obtaining water for our subdivision in the future; that it was imperative that we have forty-two of the sewer hookups that have already been promised set aside and dedicated to this plan so we could

get F.H.A. approval and develop the subdivision. Also, mention was made of the title to the thirty seven acres to the effect that part of the mineral rights had been deeded off and without the mineral rights, F.H.A. would not give lending or approval.

Q. What did Mr. Drivas respond to those matters?

A. I don't recall. I don't know that that's become an issue. The main issue was the water shares and the sewer hookups. (Rec. 553:12-30; 554:1-9)

The agreement on the sewer hookups had not been waived, as is demonstrated by Mr. Bastian's testimony.

Q. Do you know the reason why the closing did not go forward on the 17th?

A. It wasn't ready to close. The things, the personal and real property that I had contracted to buy were not in evidence and no vehicle had been provided for their forthcoming.

Q. What do you mean by "no vehicle was provided for their forthcoming"?

A. The sewer hookups, no documentation either from Cedar Hills or from the owners allowing me to use them on the forty-two lots that I had contracted to use them on. No water shares were in evidence or forthcoming to be dedicated to Cedar Hills City to allow me to obtain the additional water connections that I needed. I had contracted for both of these, real and personal property. (Rec. 554:10-24)

On February 10, after the Amendment Agreement was written, Mr. McNeilly, acting in behalf of the selling agents, Global Enterprises, wrote to Mr. Reed Nixon, the agent of Cedar Hills Development Company (Ex. 20), requesting the authorizations of the hookups and suggesting that if they could obtain the authorization from the town of Cedar Hills and the Department

of Health officials this would meet the buyers' requirements.

Despite such requests in writing by sellers' own agent and the fact that the selling agent, Mr. Richard LaFrance, produced at the closing meeting the authorization from the State Health Department for the increased use of the lagoons, nevertheless, Mr. Drivas, an agent sent by the sellers to attend the closing, refused to provide the authorization for the use of the hookups. The testimony of Mr. Bastian shows that no waiver was given:

> Q. And I don't want you to give me all two hours of discussion, but can you tell me those things that Mr. Drivas said relative to going forth with the closing?
>
> A. I wanted a guarantee that I would get my 42 sewer hookups. Mr. Drivas said, 'I can't give you what I do not have. What I have, I give to you.'
>
> Q. Thereafter at the meeting was Mr. Drivas asked to sign an instrument or to give a letter committing those hookups?
>
> A. Yes.
>
> Q. What was his response to that request?
>
> A. That it wasn't within his power to do so, that that would have to come from the City of Cedar Hills. (Rec. 548:14-27)

In this particular situation, the sewage lagoons in use by the town were owned by the development company, the sellers in this matter; the town had been making considerable efforts to gain a lease or conveyance of the sewage lagoons so that it might have control of them; the sellers had com-

mitted to deliver 42 hookups to the lagoons as a part of the property being purchased; and the defendants-sellers come to the closing meeting to obtain their $215,000.00 without any preparations for the closing and refused to give their authorization to the use of their lagoons. In the face of such testimony and behavior, it is an incorrect ruling by the trial court that the plaintiffs waived their right to receive the 42 sewer lagoon hookups as an integral part of this purchase.

POINT IV

THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT AGAINST ASSOCIATED INDUSTRIAL DEVELOPERS, INC. AND NEAR EAST TECHNOLOGICAL SERVICES, LIMITED, INC.

In this matter, plaintiffs brought the suit against Cedar Hills Development Company, which company has subsequently changed its name to Cedar Hills Land and Investment Company, (statement of defense counsel Rec. 660:8-30; 661:1-16), Associated Industrial Developers, a California corporation, Near East Technological Services, Limited, a California corporation, William A. Malis and George C. Drivas. At the close of the plaintiffs case, the trial court dismissed William A. Malis and George C. Drivas from the action (Rec. 651:18-28) and dismissed Wincor Development (Rec. 652:3-4). Cedar Hills Development Company is a partnership, its principal officer is William A. Malis (Rec. 277:7-11) and its partners are Associated Industrial Developers and Near East Technological Services, Inc. (Rec. 277:16-19, Rec. 277:28-30, Rec. 278:6-19,

Rec. 278:27-30, Rec. 279:1).

In determining that Cedar Hills Development Company, now Cedar Hills Land and Investment Company, partnership was liable, the Court should have also entered judgment against Associated Industrial Developers, Inc. and Near East Technological Services, Limited, Inc., the corporate partners in Cedar Hills Development Company and the principals obligated for the debts incurred in the name of the partnership.

CONCLUSION

The trial court correctly ruled that the defendants could not close the transaction or deliver that which they had contracted to deliver, i.e. good title free of encumbrances on a release schedule provided by the parties agreement. The trial court further correctly ruled that the plaintiffs had the ability and the funds available for the closing.

Based upon the trial court's misassumption that the technicality of tender made both parties equally at fault in the transaction, the trial court incorrectly ruled that plaintiffs were only entitled to a refund of the $35,000.00 earnest money they had paid upon these contracts.

This Court should now apply its previous pronouncements of the measure of damages. It should make the determination of damages, which are all supported in the record and unrefuted and correct the judgment of the trial court. This Court should award to the plaintiffs the loss of bargain in the amount of $277,325.00, the $35,000.00 paid upon the contract,

engineering costs incurred as a result of entering into the contracts in the amount of $11,716.40, annexation fee in the amount of $2,500.00 and the stipulated amount of attorney's fees of $9,478.00.

Plaintiffs, the buyers in this transaction, respectfully request the Court to enter its amended judgment in accordance with the law and with the evidence.

Dated and signed this 25th day of June, 1980.

RESPECTFULLY SUBMITTED:

M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellants to Jeril B. Wilson, Attorney for Defendants and Respondents, 350 East Center, Provo, Utah 84601, by placing a copy of same in the U. S. Mails, postage prepaid, this 25th day of June, 1980.

M. Dayle Jeffs