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Stanley Martin Redd, Sheila M. Redd, His Wife;
Sterling Hardson Redd, Jill D. Redd, His Wife; Paul
Dutson And Donna Dutson, His Wife v. Western
Savings & Loan Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STANLEY MARTIN REDD, SHEILA M. REDD, his wife; STERLING HARDSON REDD, JILL D. REDD, his wife; PAUL DUTSON and DONNA DUTSON, his wife,

Plaintiffs-Appellants,

vs.

WESTERN SAVINGS & LOAN COMPANY,

Defendant-Respondent.

Case No. 17231

BRIEF OF RESPONDENT

Appeal from Summary Judgment in favor of the Respondent
by the Third Judicial District Court of Salt Lake County,
Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellants in 1976 borrowed \$108,000 from respondent to purchase an apartment complex. In order to obtain the loan, appellants agreed that if they sold any interest in this investment property either the loan balance would become immediately due and payable or the new buyers would assume the loan at a higher rate of interest. In 1979, however, appellants secretly sold the property and deliberately tried to conceal the sale from respondent. In 1980, after respondent discovered the sale, appellants failed to pay the loan balance or to have the new buyers assume the loan. Appellants filed the present action to attempt to prevent foreclosure. The lower court granted summary judgment in favor of respondent, concluding that "the 'due-on-sale' clause before the court is not an unreasonable restraint on alienation within the meaning of Utah law," and that it is "a legal, valid, and enforceable contract provision." Appellants have appealed that decision to this Court.

STATEMENT OF FACTS

On November 18, 1976, Stanley and Sheila Redd, Sterling and Jill Redd, and Paul and Donna Dutson (hereinafter referred to as "appellants") borrowed \$108,000 from respondent Western Savings & Loan Company (Western Savings) (R. 22) to purchase a twenty-four (24) unit apartment complex as an investment. (R. 110.) In connection with the financing of this investment property, appellants executed a Trust Deed, a Trust Deed Note and a separate document entitled "Acknowledgment of Trust Deed Acceleration Clauses." (R. 22-25, 31, 33, 110.) The relevant portions of these instruments are set out below.

Paragraph 29 of the Trust Deed (R. 25), the so-called "due-on-sale" provision, required the appellants to notify Western Savings if they transferred the property, whether by contract or otherwise, and the provision gave Western Savings the election to accelerate the note or increase the interest rate of the note:

29. [Appellants agree] to notify [Western Savings] in writing should said property or any interest therein be conveyed, transferred or assigned, whether by deed, contract of sale, . . . or otherwise, Should said property or any interest therein be so conveyed, . . . all indebtedness secured hereby shall forthwith, without notice, become due and payable at the election of [Western Savings] . . . and should [Western Savings] not so elect and the person who acquires said property or any interest therein assumes the indebtedness evidenced by the note secured hereby, [appellants consent] . . . to the reduction or increase of the interest rate thereof. (Emphasis added.)

The Trust Deed Note (R. 33) provided that if any of the terms of the Trust Deed were violated, including failure to notify Western Savings of any transfer of the property as required by Paragraph 29, supra, the principal balance of the note could be accelerated:

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable. (Emphasis added.)

The appellants' attention was directed specifically to Paragraph 29 of the Trust Deed and they understood the consequences of violating its terms, as evidenced by their endorsement of the "Acknowledgment of Trust Deed Acceleration Clauses," (R. 31) which provided:

In connection with the making of this Trust Deed loan, we, the undersigned borrowers, acknowledge that our attention has been called to paragraphs 29 and 30 of the Trust Deed, which can result in acceleration of this note in the event of any of the occurrences as set forth in those paragraphs.

Although appellants recognized and understood the terms of the financing documents at issue in this case, they nevertheless deliberately breached their obligations under those documents. On or about September 25, 1979, in direct violation of the Trust Deed, they sold their interest in their investment property by contract sale without informing Western Savings of that transfer. (R. 3, 111.) It was only when Western Savings determined that the monthly Trust Note payments were being made by Escrow Services, Inc.,

(Escrow Services) that Western Savings investigated and discovered that the property had been transferred. To date, Escrow Services has continued to proffer monthly payments which Western Savings has refused to accept so as not to work a waiver of its contractual rights. (R. 38, 40, 111.)

After learning that the apartment complex had in fact been transferred, Western Savings offered to allow the new buyers to assume the appellants' indebtedness at an increased interest rate. (R. 21, 111.) The new buyers, however, failed to submit the necessary loan application forms. (R. 28.) Accordingly, because appellants secretly breached their contractual obligations and continued to violate the terms of their financing agreement, even after discovery, Western Savings relied on its contractual rights to accelerate the remaining balance. When appellants failed to pay the principal due, Western Savings began foreclosure proceedings.

For more than three and one-half years, appellants failed to complain to Western Savings or otherwise challenge Paragraph 29 of the Trust Deed. Although appellants could have borrowed money for their investment property from other lending institutions, and at different terms, they accepted the terms offered by Western Savings. Western Savings relied on those terms in agreeing to lend money to the appellants. Appellants, however, on May 19, 1980, after violating the terms of the loan agreement, filed a complaint seeking: (1) declaratory judgment that Western Savings did not have the

right to enforce the express and clear terms of the Trust Deed agreement; (2) an injunction against the acceleration of the indebtedness and foreclosure proceedings, although both were part of the agreed terms of the Trust Deed; and (3) "damages" allegedly resulting from Western Savings' reliance on the terms of the Trust Deed. (R. 2-8.)

Arguments based upon the undisputed facts were heard on July 10, 1980, and the Honorable Kenneth Rigtrup rendered summary judgment in favor of Western Savings:

ORDER GRANTING SUMMARY JUDGMENT

The pleadings, affidavits and exhibits before the court show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Based upon the above findings and conclusions and for good cause appearing, it is hereby

ORDERED that plaintiffs' complaint is dismissed with prejudice and all parties are to bear their own costs. (R. 113.)

By this appeal, appellants seek to avoid the obligations to which they agreed, simply because those obligations ceased to be economically beneficial to them. For the reasons stated herein, the appellants' appeal must be rejected and the decision of the lower court affirmed.

ARGUMENT

- I. WESTERN SAVINGS HAS THE CONTRACTUAL, EQUITABLE, AND STATUTORY RIGHT TO INCREASE THE INTEREST RATE OF THE TRUST NOTE AS CONSIDERATION FOR ITS CONSENT TO THE TRANSFER OF THE SUBJECT PROPERTY AND ITS WAIVER OF THE DUE-ON-SALE CLAUSE.

The Trust Deed and Trust Deed Note specifically authorized Western Savings to accelerate the indebtedness or

increase the interest rate of the Trust Note if the appellants conveyed the property by contract. The appellant recognize this and, therefore, now argue that the due-on-sale clause of the Trust Deed is an unreasonable restraint on the alienation of property. Such an argument is invalid for three reasons: (1) increasing the interest rate to the new buyer on the remaining indebtedness to more closely reflect current interest rates, in lieu of accelerating the original borrower's indebtedness, is not a restraint on alienation; (2) such a practice is reasonable; (3) such a practice is equitable; and (4) the Utah Legislature has authorized state-chartered savings and loan associations, such as Western Savings, to exercise its options under the due-on-sale clause.

A. Western Savings' Exercise Of Its Rights Under
The Due-On-Sale Clause Is Not A Restraint On Alienation.

Appellants argue that the due-on-sale clause constitutes an unreasonable restraint on their ability to convey their apartment complex. While they make various arguments in support of this proposition, it is important to realize why appellants do so. The simple fact is that, if the new buyers assume the loan at an increased interest rate the appellants will receive less money than they prefer to receive. Therefore, appellants desire the new buyers to obtain the benefit of the low (by today's standards) 9-5/8% interest rate on the existing loan.

A contractual provision in a loan agreement which merely affects the asking price of the serial may prefer to

receive for his property but does not restrain the actual transfer of the property is not a restraint on alienation:

In practical terms [these provisions] merely [affect] the vendor-mortgagor's total asking price for his property. A higher interest rate will probably cause the vendor-mortgagor to lower his sales price in order to compete price wise with similar property . . . thus the vendor-mortgagor's ability to command his preferred asking price might be somewhat impaired. Nevertheless, the increased interest provision does not restrain the actual transfer of the property because there is no constraint on the vendor-mortgagor's freedom to alienate his property.

Miller v. Pacific First Federal Savings and Loan Association, 545 P.2d 546, 548-59 (Wash. 1976) (citations omitted); see also, Gunther v. White, 489 S.W.2d 529 (Tenn. 1973); Enforcement of Due-On-Transfer Clauses, 13 Real Property, Probate and Trust Journal 891 (1978).

Appellants' attempt to characterize a due-on-sale clause as a "restraint on alienation" tortures that concept as it has heretofore been understood. This was recognized in a recent state court decision interpreting the due-on-sale clause:

The Restatement of Property § 404 (1944) defines a restraint on alienation as follows:

(1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance

- (a) to be void; or
- (b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
- (c) to terminate or subject to termination all or a part of the property interest conveyed.

(2) If a restraint on alienation is of the type described in Subsection (1), Clause (a), it is a disabling restraint.

(3) If a restraint on alienation is of the type described in Subsection (1), Clause (b), it is a promissory restraint.

(4) If a restraint on alienation is of the type described in Subsection (1), Clause (c), it is a forfeiture restraint.

One need simply read the various subparts of § 404 to conclude that a "due on sale" clause does not, in any manner, bring about any of the effects noted there and cannot, therefore, be a direct restraint on alienation.

The questioned clause in no manner precludes the owner-mortgagor from conveying his property. The owner is free to convey without legal restraint and the conveyance does not cause a forfeiture of the title, but only an acceleration of the debt.

It is true that the possibility of acceleration may impede the ability of an owner to sell his property as he wishes [the basis of the court's decision in Tucker v. Larsen, 526 P.2d 1169 (Cal. 1974), a case heavily relied upon by appellants]; nonetheless, not every impediment to a sale is a restraint on alienation, let alone contrary to public policy. It is a fact that zoning restrictions, building restrictions, or public improvements may impede the sale and substantially affect the ability of an owner to realize a maximum price. Yet no one suggests that such restrictions or covenants, as a class, are invalid simply because they affect the ease with which one may dispose of one's property. We are somewhat at a loss to understand how or why so many courts have been willing to describe a "due on sale" clause as a restraint on alienation and we are unwilling to do so.

Occidental Savings & Loan Ass'n v. Venco, 293 N.W.2d 843, 845 (Neb. 1980). (Emphasis added.) See also, Enforcement of Due-On-Transfer Clauses, supra, at 898, 916, 926.

Requiring the appellants' new buyers to assume the loan at an increased interest rate does not prohibit appellants from transferring their property; it only lowers the price appellants will receive for their apartment complex.

Therefore, this case does not involve a "restraint on alienation."

B. Enforcement Of The Due-On-Sale Clause Is Reasonable.

Appellants correctly note that one of the purposes of the due-on-sale clause is to preserve and protect the lender's security and avoid having to resort to that security to obtain payments. However, that is not the only reason for the due-on-sale clause. There are additional purposes for these provisions which the majority of courts have recognized as being justified. Specifically, the due-on-sale clause permits lending institutions, including Western Savings, to adjust their loan portfolio toward current market rates and insure that mortgages and trust notes are saleable on the secondary mortgage market. See, Occidental Savings & Loan Ass'n. v. Venco, 293 N.W.2d at 849; Century Federal Savings & Loan Ass'n of Bridgeton v. Van Glahn, 364 A.2d 558, 562 (N.J. 1976).

The necessity, fairness and, therefore, the reasonableness of the due-on-sale clause have been recognized by the majority of courts considering this question, particularly in these times of double-digit inflation and widely fluctuating interest rates. See, Occidental Savings & Loan Ass'n v. Venco, 293 N.W.2d 843 (Neb. 1980); Tierce v. APS Co., 382 So.2d 485 (Ala. 1980); Miller v. Pacific First Federal Savings & Loan Ass'n., 545 P.2d 546 (Wash. 1976); Crockett v. First Federal Savings & Loan Ass'n., 224 S.E.2d

580 (N.C. 1976); Century Federal Savings & Loan Ass'n v. Van Glahn, 62 Misc.2d 863, 313 N.Y.S.2d 804 (1970); Malouff v. Midland Federal Savings & Loan Ass'n., 509 P.2d 1240 (Colo. 1973); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973); Mutual Federal Savings & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 762 (Wis. 1973); Peoples Savings Ass'n v. Standard Industries, Inc., 257 N.E.2d 406 (Ohio 1970); Stith v. Hudson City Savings Institution, 63 Misc.2d 863, 313 N.Y.S.2d 804 (1970).

1. The due-on-sale clause is necessary to set fair and reasonable interest rates on mortgages and trust deed notes.

One important factor that any lender considers in setting the interest rate of a loan is the period of time the loan will be outstanding. Obviously, the longer the time period, the greater risk the lender assumes that he may not realize a reasonable return on his money because of inflation, catastrophe, the uncreditworthiness of the borrowers, etc. This basic principle is equally applicable to the mortgage loan industry. Properties subject to mortgages are sold, on the average, about every ten to twelve years. See, U.S. League of Savings Associations, Mortgage Portfolio Management (1978) at 127. Therefore, when Western Savings makes its loans, it knows that, on the average, the interest rates on the loans will be updated toward current market levels within ten to twelve years, even though the loans themselves are written for a thirty-year period. Therefore,

Western Savings in effect sets the interest rates on its loans to account for a ten to twelve-year risk period.

Given the present economic conditions, a judicial holding that the due-on-sale clause is unenforceable would effectively lock Western Savings and similar lenders into low rates of return for thirty years, even though interest rates initially were set on the assumption that they would be adjusted upward to current levels at least two or three times during the 30-year period of the loan.

Appellants contend that raising the interest rates to meet the projected economic risks of inflation is not a reasonable purpose of the due-on-sale clause, relying heavily upon Wellenkamp v. Bank of America, 148 Cal. Rptr. 379, 582 P.2d 970 (1978). In that case, the court wrongly assumed that lenders did not correctly project future economic conditions, i.e., they did not anticipate the recent high inflation and interest rates and, therefore, it would be "unjust to place the burden of the lender's mistaken economic projections on property owners. . . ." Id. at 976.

Simply put, the Wellenkamp decision is not supported by the facts of the case, by economic principle or by logic. Contrary to the Wellenkamp decision, lenders made no errors in projecting future economic conditions. The error they made was in projecting future judicial decisions. Lenders knew that the interest rates they gave to borrowers would account for risks incurred over an average ten to twelve-year period. What they failed to foresee was that the

California Supreme Court would hold that the interest rates set for that ten to twelve-year risk period would have to compensate lenders for risks incurred over thirty years. In short, the California court made an independent, after-the-fact business judgment about how interest rates should be set, and this judgment changed the mortgage loan industry in California.

Obviously, if a lender had known that the interest rate on a loan to the appellants could not be increased by reason of the exercise of the due-on-sale clause, the lender's economic projections would have been forecast on the basis of a thirty-year period rather than a ten or twelve-year period. The interest rate the appellants received thus would have been higher at the outset. Therefore, by receiving the interest rate of only 9-5/8%, appellants already have benefitted from their loan terms. Further allowing them to lock up that interest rate for up to thirty years after they sell their property to someone else, unfairly permits them to transfer their low interest loan to the new buyers and thereby receive an unbargained-for windfall profit at the expense of lenders and all other new buyers who are not lucky enough to assume existing mortgage loans. See generally, Enforcement of Due-On-Transfer Clauses, supra, at 930.

If lenders are forced temporarily to absorb losses caused by a judicial decision that they cannot enforce due-on-sale clauses, they will have to recover from future

customers the unrealized anticipated revenues.¹ This will be necessary in order to cover losses sustained by carrying low interest rate mortgages as well as to cover future risks which the lender will have to bear beyond the usual ten to twelve-year period. The only way additional revenue can be generated is by charging higher rates to new customers on conventional mortgages, by instituting variable rate mortgages which reflect current interest rates, by making short-term loans amortized over shorter periods which would require all purchasers to refinance their loans more often, or by ceasing to make new loans and go to the second-mortgage market. Under any of these alternatives, a borrower's monthly

¹Savings and loan associations, including Western Savings, recently have been put into a serious earnings crunch with the substantial rise in interest rates during the past two years. Many will have a net operating loss for 1980. To attract depositors, they have had to offer unprecedentedly high rates of interest on their passbook accounts, certificates of deposit and money market certificates. Without these deposits, the lending institutions would be unable to maintain minimum reserves on which to borrow additional funds which in turn are lent to prospective home purchasers.

Because savings and loan associations "borrow short and lend long," they are squeezed during periods of rising interest rates: they have to pay extremely high interest on short-term accounts, by using income from relatively low-interest long-term loans. This problem arises because the vast majority of the loans which a lender holds in its portfolio was made before the steep rise in interest rates. Consequently, savings and loan associations are forced to pay high-interest short-term accounts from low-interest long-term mortgage loans. The only way these lenders can continue to make loans and meet expenses is to raise the yield of their loan portfolio. If they are prevented from raising the rates on previous loans, e.g., by using the due-on-sale clause, then they will have to raise rates dramatically on future loans.

payments will be higher, thus making it impossible for many otherwise qualified buyers to purchase property. See, Malouff v. Midland Federal Savings and Loan Association, 509 P.2d at 1244-45; Wellenkamp v. Bank of America: A Victory for the Consumer?, 31 Hastings L.J. 275, 293-97 (1979); 'Flexibility in Housing Subsidies, No Variable Mortgages' - Garn, The Salt Lake Tribune, November 28, 1980 at B-6. Lenders Pushing Second Mortgages to Ease Pinch of Long-Term Loans, The Wall Street Journal, November 4, 1980 at 31. In contrast to these alternatives, the reasonableness of the due-on-sale mortgage is apparent. Under this type of mortgage, the interest rate is fixed between the lender and his original borrower. The original borrower is able to retain the advantage of his original interest rate for as long as he has the loan, even though current interest rates may have risen substantially. If the original borrower sells the property during the life of the loan, the new buyer is then able to assume the loan at least at the current interest rate and probably at a slightly lower rate than the market rate. Malouff v. Midland Federal Savings and Loan Association, 509 P.2d at 1245.

Appellants' brief attempts to demean the beneficial aspects of the due-on-sale clause by mischaracterizing Western Savings' argument before the lower court. Western Savings has never argued that an adverse "decision will bring the mortgage loan industry to its knees" or that "financial

chaos has fallen upon the states who have rejected [the arguments presented herein.]" Appellants' Brief at 28.

Lending institutions will continue to make loans to enable borrowers to purchase homes and investment properties. They will in fact incur some losses if they are not allowed to rely upon the due-on-sale clause, but as demonstrated above the primary adverse impact will be upon borrowers seeking new loans. They will be forced to accept one of the alternatives to conventional mortgages, and they will bear all the attendant disadvantages.

Appellants rely heavily upon California precedent. Since Wellenkamp, however, California lenders have found new ways to alleviate the bind in which that decision placed them. They have instituted many of the alternative loans described above, and the adverse impact on prospective borrowers has been real. See, e.g., Wellenkamp v. Bank of America: A Victory for the Consumer?, 31 Hastings L.J. 275 (1979).

The question before this Court is who will bear the burden of increased interest rates brought on by inflation? The appellants seek to shift that burden from existing borrowers who already have realized inflationary gains in the value of their property to lending institutions, including Western Savings, and to those new borrowers who want to purchase homes but who may be unable to afford the higher payments resulting from that shift.

Such a result should not be allowed. The issue of who is to bear the burden of increased rates was decided previously by the appellants themselves when they agreed that Western Savings could either accelerate their loan if the apartment complex was conveyed by contract of sale or increase the interest rate of that loan if it were to be assumed. This resolution of the issue was approved in Gunther, 489 S.W.2d at 532, when the court stated:

[The lender under its contract had] the right to insist upon the repayment of their loan in the event of sale, so that they can relend the money at an increased interest rate, and so maintain their supply of lending money, at the level of the present cost of such money. In this situation, equity should not depart from the law which requires it to enforce valid contracts and strike down the acceleration options simply because its exercise will let the [lenders], not the [borrowers] make the profit on the interest rate occasioned by the increased cost of money.

This resolution similarly should be approved by this Court.

2. The due-on-sale clause is necessary to obtain adequate secondary mortgage market funding.

Besides having an adverse impact on borrowers seeking new loans, elimination of the due-on-sale clause would reduce the number of loans that could be made. The amount of mortgage money which Utah savings and loan associations, including Western Savings, receive from their depositors is far less than the amount they lend out. They are able to lend additional money because of their ability to sell their financing instruments to investors in the secondary mortgage market outside the state.

These secondary mortgage market investors, as did Western Savings, anticipated that mortgage loan interest rates would be adjusted every ten to twelve years. If they do not receive that readjustment through enforcement of the due-on-sale clause, they either will refuse to purchase Utah mortgages or else will require a higher rate of interest on new loans to compensate for the increased risk of holding the mortgages for longer periods. Therefore, without enforceable due-on-sale clauses, to sell trust notes and mortgages on the secondary market, Utah lenders will be required to charge new borrowers substantially higher interest rates, thereby decreasing the number of loans that will be made.

In contrast, the reasonableness of the due-on-sale loan agreements is apparent, because through their use Utah lenders are able to obtain funds from the secondary market, thereby enabling more people to purchase homes at lower rates.

As demonstrated, infra, appellants fail to address fairly the adverse economic impacts which will result if this Court strikes down the due-on-sale clause.

The Federal National Mortgage Association ("Fannie Mae"), the major purchaser of mortgage loans, announced that beginning with loans written October 1, 1980, those new buyers seeking to assume existing loans will be unable to do so unless they pass a credit check and agree to accept prevailing market interest rates. See, Fannie Mae to Require

Prevailing Rates, Credit Checks on Mortgage Assumptions, The Wall Street Journal, August 11, 1980, at 25.

In addition, "Fannie Mae" has announced that it no longer will buy conventional mortgages from lending in those eleven states which judicially or statutorily have prohibited enforcement of due-on-sale provisions. Instead, it only will purchase loans which carry a provision that the entire loan can be called after seven years, with no guarantee of refinancing. See, Higher Mortgages, 'Call-In Option' Threaten Homebuyers, Industry, The Salt Lake Tribune, Nov. 8, 1980 at C-6. This means that all new home buyers will be faced with the threat of increased rates and payments in seven years, whereas if they had conventional mortgages with enforceable due-on-sale clauses, they would be assured of a fixed monthly payment for as long as they owned their homes.

Future borrowers should not be forced to bear the risks of increased rates or of an inability to finance home purchases. These risks can be avoided by allowing lenders, including Western Savings, to enforce the due-on-sale provisions of loan agreements into which borrowers, including appellants, freely entered.

C. Enforcement Of The Due-On-Sale Clause In This Case Is Equitable.

Not only is the enforcement of the due-on-sale clause reasonable, as discussed above, but it also is equitable in this case to allow an upward adjustment of the interest rate pursuant to the loan agreement. This is so

because: (1) if the interest rate had gone down, appellants could have refinanced their property at the lower rate; (2) under the doctrine of laches, appellants are barred from challenging the due-on-sale clause, since they waited more than three and one-half years to object to its provisions; (3) under the doctrine of "unclean hands," appellants are barred from challenging the due-on-sale clause because of their demonstrated bad faith and secretive actions evidenced by their concealment of the transfer of the property; and (4) this case involves investment rather than residential property, as discussed, infra.

If the interest rate had decreased after appellants took their loan from Western Savings, they could have refinanced their property pursuant to the Trust Note, and prepaid the loan from Western Savings, thereby incurring some prepayment expense. If appellants had refinanced with Western Savings, it was its policy not to charge a prepayment fee. But if the appellants had gone elsewhere to refinance their property at lower rates, Western Savings would have been bound by the terms of the Trust Note and would not have realized any long-term revenue anticipated in making the loan. Now, however, when interest rates have gone up rather than down, appellants argue they should not be bound by the terms of their agreement with Western Savings. In other words, appellants contend that Western Savings should bear all the risks. If interest rates go down, appellants should be able to refinance at the lower rate; and if interest rates

go up and if appellants sell their property, Western Savings should not be able to adjust the loan rate to account for that increase. This is an inequitable proposal, particularly where, as here, the appellants agreed to and Western Savings relied on the provisions of the loan documents which allowed Western Savings to either accelerate the loan in the event of sale or else increase the interest rate of the loan to the new buyer who assumes the loan.

It is crucial to note that appellants for more than three and one-half years did not challenge the due-on-sale clause. Appellants neither objected to that provision when they executed the Trust Deed, Trust Note, and "Acknowledgment of Trust Deed Acceleration Clauses" nor contested that provision at any time during the following three and one-half years. Appellants obviously viewed their loan arrangements as economically beneficial to them for that period, but now, because they have sold the property and interest rates are higher, they are seeking any way possible to avoid their obligation under the due-on-sale provision. In effect, they are asking this Court for a reformation of the contract. It is patently inequitable for them first to obtain and for three and one-half years receive the benefit of the loan agreement, which included the due-on-sale provision, and now after selling the property, seek to challenge and evade that provision.

Not only did appellants wait for such an unconscionably long period before objecting to the due-on-sale

provision, they were not honest enough to inform Western Savings of their conveyance of the property. Instead, they deliberately concealed the transfer and avoided informing, confronting or negotiating with Western Savings. Where the appellants so obviously are motivated by bad faith and have engaged in inequitable conduct, they are not entitled to the relief they seek in this appeal.

Lastly, even the California courts, the decisions of which are cited extensively in Appellants' Brief, have held that it is reasonable and equitable to enforce the due-on-sale clause where the subject property is investment property. See, Medovoi v. American Savings and Loan Ass'n., 89 Cal. App. 3d 875, 152 Cal. Rptr. 572, 587 (1979). Similarly, because this case involves investment property--a 24-unit apartment complex--the due-on-sale clause should be enforced and the decision of the lower court should be affirmed.

D. Western Savings Has The Statutory Right To Enforce The Due-On-Sale Clause.

Federally-chartered savings and loan associations are governed by federal regulation and are specifically authorized to enforce due-on-sale clauses:

(f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written

consent. . . . [E]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract. 12 C.F.R. § 545.8-3(f)

The effect of this regulation is to enable Utah's federally-chartered savings and loan associations to increase the yield of their mortgage portfolios, consequently permitting them to remain profitable and offer new loans at the lowest possible rates.

The Utah Legislature has insured that state-chartered savings and loan associations in Utah shall be competitive with those which are federally-chartered. This was accomplished by enactment of Sections 7-7-5.1 and 7-13-74, Utah Code Annotated.

Section 7-7-5.1 provides that "any savings and loan association . . . may make any loan . . . which such association could make were it incorporated as a federal savings and loan association. . . ."

Section 7-13-74 further provides that any state-chartered savings and loan association:

shall have, in addition to all rights, powers, privileges, benefits and immunities presently possessed, all additional rights, powers, privileges, benefits and immunities now or hereafter possessed by federal chartered savings and loan associations . . . unless and until the commissioner of the department of financial institutions of Utah shall, by regulation, disapprove of any additional right, power, privilege, benefit or immunity, thus acquired.

The Utah Legislature thus has authorized Utah's state-chartered savings and loan associations to offer the

same kinds of loans as federal associations. Accordingly, Utah law authorizes state associations to enforce due-on-sale provisions such as the one in the agreements between Western Savings and the appellants.

The Utah Legislature has not "[subordinated] its regulation of state [associations] . . . to all present and future regulations adopted by the federal bureaucracy," as appellants contend. (Appellants' Brief at 31.) On the contrary, Section 7-13-74 specifically provides that the Commissioner of the Department of Financial Institutions may, by regulation, prevent state associations from enforcing the same provisions that a federal association could enforce. The Commissioner, however, has not ruled that state-chartered savings and loan associations may not enforce due-on-sale clauses. Therefore, Utah law permits Western Savings to rely upon and enforce the due-on-sale clause contained in its agreement with appellants.

II. SUMMARY JUDGMENT WAS PROPERLY
GRANTED BY THE LOWER COURT.

In response to appellants' complaint, Western Savings, pursuant to Rule 12(b), Utah Rules of Civil Procedure, filed a motion to dismiss. Further, pursuant to Rule 12(b), Western Savings presented matters outside the complaint, specifically, an affidavit from Sterling Thomas, Assistant Vice-President of Western Savings, and all the relevant documents from appellants' loan file. Accordingly, the lower court properly treated the motion as one for

summary judgment under Rule 56, Utah Rules of Civil Procedure. During the course of the hearing upon the motion to dismiss, the lower court considered the complaint, the motions and memoranda, arguments of counsel and the evidence consisting of the relevant documents and affidavits. Based on the foregoing, the lower court granted summary judgment in favor of Western Savings.

Pursuant to the standards enunciated in Rule 56(c), the lower court correctly entered summary judgment which this Court should affirm because: (1) there are no material facts in dispute; (2) no material facts were disputed before the lower court; therefore, appellants are now barred from contesting the findings of fact; and (3) Western Savings was entitled to judgment as a matter of law.

A. There Are No Material Facts In Dispute;
Therefore, The Lower Court Properly Entered Summary
Judgment.

The relevant, material, undisputed and dispositive facts in this case are:

(1) In order to finance their investment in a 24-unit apartment complex, appellants borrowed \$108,000 from Western Savings and freely executed the Trust Deed, Trust Deed Note, and Acknowledgment of Trust Deed Acceleration Clauses now at issue.

(2) Paragraph 29 of the Trust Deed required appellants to notify Western Savings if they transferred an interest in the property.

(3) On or about September 25, 1979, appellants violated the trust deed by selling their interest in the property without informing Western Savings.

(4) Paragraph 29 also provided that if the property was sold, Western Savings could accelerate the balance of the note or, if Western Savings waived that right and allowed the loan to be assumed, the appellants would have to agree to an increase in the interest rate of that loan. The appellants have refused to comply with this term of the agreement.

In sum, the court found that the appellants are investors, who acknowledged they understood the agreement they entered, but who nevertheless deliberately breached it and then attempted to hide their violation from Western Savings. Based on these facts, the lower court concluded that there was no reason in law or equity not to enforce the agreements reached between Western Savings and the appellants.

The above-stated material facts are not in dispute and were not disputed in the lower court; however, in an effort to avoid the lower court's summary judgment, appellants now attempt to raise a litany of phantom issues of disputed material fact. These so-called issues of fact, however, are either (a) issues of law, or (b) are not disputed, or (c) were immaterial to the lower court's decision.

Appellants' first purported issue of fact relates to the interpretation of the due-on-sale clause. Contrary to appellants' assertions, Paragraph 29 of the Trust Deed specifically grants Western Savings the right to accelerate the balance of the loan upon transfer of the property or increase the interest rate of the note if the loan is assumed. See, page 2, supra.

Further, contrary to appellants' assertions, there is no contradictory language between the Trust Deed and Trust Deed Note. The Trust Deed Note specifically incorporates by reference the terms of the Trust Deed and provides for the acceleration of the note for violation of the terms of the Trust Deed. There is no dispute that the appellants violated the terms of the Trust Deed and, consequently, Western Savings, pursuant to the Trust Deed and Trust Deed Note, properly accelerated the balance of the loan. Additionally, this Court previously has held that a note and security instrument, though separate documents, are not to be construed separately, but together, and that they constitute a single contract. An acceleration provision in the Trust Deed operates upon the note, the same as upon the Trust Deed itself, and matures the note for all purposes. See, American Savings & Loan Association v. Blomquist, 21 Utah 2d 289, 293, 445 P.2d 1 (1968).

Contrary to appellants' first purported issue of fact, the lower court did examine the contract language. That language is clear, and granted Western Savings the right

to accelerate the loan after the appellants failed to have their new buyers assume the loan at a higher interest rate. Therefore, there was no dispute regarding the language of the acceleration clause, which in any event is an issue of law and not of fact.

Appellants' second purported issue of fact relates to the "fact" that the Trust Deed Note does not specifically include the acceleration clause. Again, as previously discussed, the Trust Deed Note provided that the note would be accelerated for violation of the terms of the Trust Deed, thereby incorporating the provisions of the deed into the note itself; and these two documents must be read together. This also is an issue of law and not of fact.

Appellants' third purported issue of fact relates to the circumstances surrounding the appellants' signing of the documents. The subjective intent of the parties is irrelevant unless the language of the contract provisions are ambiguous. See generally, Mark Steel Corp. v. Eimco Corp., 548 P.2d 892, 894 (Utah 1976); Shattuck v. Precision-Toyota, Inc., 566 P.2d 1322, 1334 (Ariz. 1977); Johnson v. O-Ray Turkeys, Inc., 392 P.2d 741, 743 (Okla. 1964). Here, the language of the documents clearly gives Western Savings the power and authority to enforce the due-on-sale clause. Moreover, any argument that appellants did not understand Paragraph 29 would be a sham in light of appellants' endorsements of the Acknowledgment of Trust Deed Acceleration Clauses. Therefore, there is no genuine issue of fact

regarding the circumstances of appellants' execution of the documents now at issue.

Appellants' fourth purported issue of fact relates to the justifications for the due-on-sale clause. Appellants' contention is without merit. First, these arguments are immaterial to the lower court's decision, which centered upon the agreements themselves, the appellants' knowledge of these agreements, and the appellants' inequitable conduct. Second, even if the justifications for enforcement of the due-on-sale clause were material to the lower court's decision, the effects of the elimination of the due-on-sale clause are not in dispute. Following the Wellenkamp decision, California savings and loan associations instituted variable rate mortgages and other mortgage alternatives. From the perspective of persons seeking new loans, these alternatives are inferior to conventional fixed-rate loans because of their higher rates or shorter durations. See pages 12 to 16, supra. Furthermore, as demonstrated by "Fannie Mae's" latest pronouncements requiring seven-year "call back" mortgages in those states striking down the due-on-sale clause, the effects on the secondary market are as real as the effects in the primary market. See, pages 16 to 18, supra. These facts are not in dispute and have been recognized by numerous authorities.

Appellants' fifth purported issue of fact is related to their fourth issue and pertains to the necessity of adjusting mortgage portfolios toward current rates.

Again, this issue was not material to the lower court's decision, which was based upon appellants' inequitable conduct and their breach of an express agreement. Additionally, this requirement has been discussed and relied upon by the authorities cited above, which recognize that savings and loan associations must raise the yield on their loan portfolios whenever they are faced with increased costs of obtaining new money.

Appellants' sixth purported issue of fact is that no evidence was presented to distinguish residential from commercial or investment property transactions. Appellants' contention is without merit because: (1) they offered no such evidence and thus are barred from raising that issue on appeal; (2) as the lower court noted, appellants are investors, who understood and deliberately breached their agreement with Western Savings; and (3) even the California courts permit enforcement of due-on-sale clauses in cases involving investment property. See, e.g., Medovoi v. American Savings & Loan Ass'n, supra.

Appellants' seventh purported issue of fact is that no evidence was presented to establish the public policy considerations involved in the case. Appellants' contention is without merit because: (1) they offered no such evidence and thus are barred from raising that issue on appeal and (2) all of the relevant cases briefed and argued to the lower court continued an analysis of the public policy considerations involved in a judicial decision whether or not to

permit enforcement of due-on-sale clauses. Compare, e.g., Occidental Savings & Loan Ass'n v. Venco Partnership, supra, and Wellenkamp v. Bank of America, supra. See also, the lower court's Conclusion of Law No. 1.

Appellants' eighth purported issue of fact is that no evidence was presented to determine whether enforcement of a due-on-sale clause constitutes an unreasonable restraint on alienation. This contention is without merit because the matter is an issue of law which was briefed and argued to the lower court. (Conclusion of Law No. 1.)

Appellants' ninth purported issue of fact is that no evidence was presented to establish that Western Savings' enforcement of the due-on-sale clause does not work a penalty or forfeiture. This contention is without merit because: (1) the appellants presented no evidence to the contrary and (2) the matter is an issue of law. (Conclusion of Law No. 2.) See, e.g., Miller v. Pacific First Federal Savings & Loan Ass'n, 545 P.2d at 549.

Appellants' tenth purported issue of fact is that no determination was made whether a foreclosure pursuant to a due-on-sale clause should be treated as a mortgage foreclosure. Obviously, this matter is an issue of law and is wholly immaterial to the lower court's conclusion that "Under the above facts of this case, the 'due on sale' clause before the court is a legal, valid, and enforceable contract provision. . . ." (Conclusion of Law No. 2.)

Appellants' eleventh purported issue of fact is that no determination was made about the effect of due-on-sale clauses upon economic considerations involved in property transactions. Appellants' contention is without merit because: (1) they offered no such evidence and thus are barred from raising that issue on appeal and (2) the issue is immaterial to the lower court's decision herein.

Appellants' twelfth purported issue of fact is that no evidence was presented to establish the effect upon lenders if due-on-sale clauses are ruled unenforceable. Appellants' contention is without merit because: (1) Western Savings by affidavit established the adverse effects upon lenders; (2) appellants failed to rebut this evidence; and (3) as demonstrated, supra, at pages 11 to 14, such adverse effects upon lenders are well recognized.

Appellants' thirteenth purported issue of fact is that no finding was made whether a due-on-sale clause is an appropriate way to control interest rates. Appellants' contention is without merit because: (1) they offered no such evidence nor requested such a finding and thus are barred from raising that issue on appeal and (2) the issue is immaterial to the lower court's decision herein.

Appellants' fourteenth purported issue of fact is that the lower court failed to state or clarify the applicability of Sections 7-7-5.1 and 7-13-74, Utah Code Annotated. Appellants' contention is without merit because: (1) this matter is an issue of law and (2) appellants never

requested the lower court to make such a statement or clarification in its conclusions of law.

B. The Appellants' Purported Issues Of Material Fact Were Not Disputed In The Lower Court; Therefore Appellants Are Barred From Raising Such Issues On Appeal.

Appellants made no attempt in the lower court to raise any issue of disputed material fact as they should have done pursuant to Rule 56, if they were to avoid summary judgment.

Western Savings provided the relevant loan documents and the affidavit of Sterling Thomas in order to establish the undisputed facts justifying enforcement of the due-on-sale clause in this case. Accordingly, Western Savings' motion to dismiss was treated as a motion for summary judgment pursuant to the provisions of Rule 56. Rule 56(e) provides:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The appellants offered no evidence to raise any issue of material fact before the lower court; none of their affidavits or exhibits were offered to contest nor did they contest facts established by Western Savings. Furthermore, appellants did not even submit an affidavit pursuant to Rule 56(f) explaining why they could not obtain facts to dispute

Western Savings' evidence. Obviously, they failed to do so because the relevant, material and dispositive facts are not in dispute, i.e., they knowingly entered into an express agreement and three and one-half years later breached that agreement and deliberately tried to conceal that conduct from Western Savings.

Because the appellants failed to demonstrate that there was any issue of disputed material fact before the lower court, that court properly entered summary judgment and its decision should be affirmed.

C. Western Savings Was Entitled To Judgment As A Matter Of Law.

Based on the undisputed facts and substantial authority, the lower court properly held Western Savings was entitled to judgment as a matter of law. Under the facts of this case, as the lower court concluded, the due-on-sale clause is not a restraint on alienation. Its elimination would create the burden of even higher interest rates for those who seek new loans in the future. Enforcement of the due-on-sale clause provides the greatest amount of loan money at the lowest possible rate. The Utah Legislature has authorized state-chartered savings and loan associations to enforce due-on-sale clauses. Such enforcement in this case is proper because of the appellants' acknowledgement of the acceleration clause, because of their inequitable conduct and because this case involves investment rather than residential

property. Based on the foregoing, the decision of the lower court should be affirmed.

III. WESTERN SAVINGS HAS THE CONTRACTUAL AND STATUTORY RIGHT TO FORECLOSE THE PROPERTY PURSUANT TO THE TERMS OF THE TRUST DEED.

As a "last resort" argument, appellants contend that if Western Savings is allowed to foreclose the property pursuant to the terms of the Trust Deed, the redemption period should be six months rather than three months. (Appellants' Brief at 33-35.) This argument is without merit.

Paragraphs 21 and 22 of the Trust Deed specifically grant Western Savings the right, upon appellants' default on any agreement in the Trust Deed, to accelerate the remaining balance and cause the trustee to execute a written notice of default and sell the property, pursuant to the laws of Utah, to satisfy outstanding obligations.

Section 57-1-23, Utah Code Annotated, authorizes the trustee to sell the subject property for breach of an obligation under the Trust Deed:

A power of sale is hereby conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner hereinafter provided, after a breach of an obligation for which the trust property is conveyed as security. . . . (Emphasis added.)

Pursuant to Section 57-1-31, Utah Code Annotated, appellants have three months to prevent the foreclosure sale by curing the default which necessitated such action:

Whenever all . . . of the principal sum of any obligation secured by a trust deed has . . . been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed . . . at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised . . . [the trustor] may pay the beneficiary . . . the entire amount then due under the terms of such trust deed and the obligation and trust shall be reinstated . . . as if no such acceleration had occurred. (Emphasis added.)

Appellants have several possible courses of action, and are not limited, as they argue in their brief, to paying the entire balance within three months, although that is one option. A second option is for them to rescind their sale of the property, and pay all costs and fees, thereby curing the default caused by the sale of the property. A third option is for them to pay all costs and fees and do that which Western Savings has always sought to have them do--have the new buyers assume the loan at the increased interest rate available at the time of the transfer of the property.

Therefore, although a foreclosure sale of the property could take place pursuant to Utah law in the event this Court affirms the trial court's decision, appellants have several other options available to them to avoid that result.

CONCLUSION

The fact that appellants will not receive as much for their investment property as they would prefer, is not good reason to strike down the due-on-sale clause. On the

contrary, enforcement of that clause: (1) does not work an unreasonable restraint upon alienation; (2) is reasonable; (3) is equitable; and (4) is authorized pursuant to Utah law.

Based on the foregoing, the lower court properly entered summary judgment, and its judgment should be affirmed.

DATED this 5th day of December, 1980.

Respectfully submitted,

Richard W. Giauque
James R. Holbrook
Stephen T. Hard

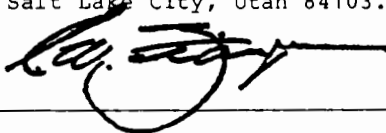
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By 

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CERTIFICATE OF SERVICE

Two copies of the foregoing BRIEF OF RESPONDENT was mailed, postage prepaid, this 5th day of December, 1980 to Neil R. Sabin, Stringham, Larsen, Mazuran & Sabin, 200 North Main Street, Suite 200, Salt Lake City, Utah 84103.



A handwritten signature in black ink, appearing to read "Neil R. Sabin", is written over a horizontal line.