

1990

# William R. Kelley, Jr. v. Leucadia Financial Corporation, a Delaware corporation : Petition for Rehearing

Utah Supreme Court

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David R. Olsen, Charles P. Sampson, Paul A. Simmons; Sutter, Axland, Armstrong and Hanson; Attorneys for Respondent.

John A. Snow, Kathryn H. Snedaker; Van Cott, Bagley, Cornwall, and McCarthy; Attorneys for Petitioner.

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## Recommended Citation

Legal Brief, *Kelley v. Leucadia Financial Corporation*, No. 900187.00 (Utah Supreme Court, 1990).  
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S9  
DOCKET NO.

BRIEF

900187

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM R. KELLEY, JR.,  
Plaintiff/Respondent,

vs.

LEUCADIA FINANCIAL  
CORPORATION, a Delaware  
corporation,

Defendant/Petitioner.

Case No. 900187

Priority No. 15

PETITION FOR REHEARING

On Writ of Certiorari  
From the Opinion and Order  
Of the Utah Court of Appeals,  
Case No. 880534-CA

VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
John A. Snow  
Kathryn H. Snedaker  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Defendant/Petitioner

SUITTER AXLAND ARMSTRONG & HANSON  
David R. Olsen  
Charles P. Sampson  
Paul M. Simmons  
175 South West Temple, Suite 700  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7300

Attorneys for Plaintiff/Respondent

FILED

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CLERK SUPREME COURT,  
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM R. KELLEY, JR.,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	
	)	
LEUCADIA FINANCIAL	)	Case No. 900187
CORPORATION, a Delaware	)	
corporation,	)	
	)	
Defendant/Petitioner.	)	Priority No. 15
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John A. Snow  
Kathryn H. Snedaker  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Defendant/Petitioner

SUITTER AXLAND ARMSTRONG & HANSON  
David R. Olsen  
Charles P. Sampson  
Paul M. Simmons  
175 South West Temple, Suite 700  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7300

Attorneys for Plaintiff/Respondent

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### GROUND FOR REHEARING

On December 31, 1992, this Court rendered its decision<sup>1</sup> in this case holding that, as a matter of law, a seller under a standard form Utah Earnest Money Sales Agreement is not entitled to rely on the stated terms of that contract. Leucadia requests that the Court reconsider its decision on the following grounds:

1. The Court misapprehends fundamental principles of law that should govern this decision with serious consequences to all parties utilizing standard form real estate contracts.

2. The Court misapprehends several key facts of this case which distinguish it from the cases the Court relied on in reaching its decision including (a) that the defect which rendered title unmarketable was not a defect over which this seller had any control, (b) the defect occurred not as a result of any conduct or fault of the seller's, and (c) the defect could not be cured by the paying of money.

As set forth more fully below, petitioner believes reconsideration of these key facts and review of critical legal precepts will allow this Court to render a decision that both recognizes the general application of specific performance of a buyer while at the same time adhering to fundamental and long-standing legal principles, including that parties to a contract are entitled to rely on the express terms of that contract

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<sup>1</sup> See Appendix A.

without fear that a court, without notice, will rewrite essential provisions.

#### BACKGROUND

On March 2, 1987, plaintiff William R. Kelley and First Security Mortgage Company<sup>2</sup> ("First Security") executed a standard form Utah Earnest Money Sales Agreement by which First Security agreed to sell residential property in Park City, Utah, to Kelley. Under the terms of the agreement, the seller was to provide marketable title to buyer upon closing. Paragraph G, which is the provision dealing with title inspection, provides that if there are defects in the title to which the buyer has objected,

Seller shall be required through escrow at closing to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer and all monies received herewith shall be returned to the respective parties.

(R. 15.) Similarly, Paragraph H, dealing with title insurance, provides that "[i]f title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated."

(R. 15.)

After the agreement was executed, the parties learned that First Security could not convey marketable title to all of

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<sup>2</sup> Leucadia is asserting the rights of First Security in this appeal. (R. 844-46.)



the property contemplated by the agreement due to an erroneous survey. (R. 143.) The defect which rendered title unmarketable was not a defect over which this seller had any control. The boundary dispute resulted from a prior erroneous survey and previous conveyances of the property incorporating the description from the erroneous survey. (R. 81, 150.) It was not a defect which could be cured by the payment of money.

First Security took reasonable efforts to resolve this dispute. It attempted to resolve the problem through negotiation (R. 357) and, when these efforts were unsuccessful, it initiated an action against the adjacent landowners to establish correct boundaries. (R. 23-59.) It soon became apparent to First Security that the litigation with the adjacent landowners would not be satisfied without the expenditure of great time and expense. Moreover, First Security was aware that it was impossible to predict the outcome of the litigation. For these reasons, First Security notified Kelley that it would go forward with the action to resolve the boundary dispute if Kelley would assist First Security in paying the costs of the action. (R. 114-15.) Kelley was unwilling to do so; First Security was unwilling to bear the risk and expense of the litigation without such participation by Kelley. (R. 114-15.)

At the time set for closing, First Security was still unable to provide marketable title. To determine its course of conduct, First Security turned to the terms of the contract that it believed governed the relationship between the parties.

Understanding that Kelley was unwilling to waive the defect in title<sup>3</sup> and viewing the contract language objectively, First Security understood the mandatory language of paragraphs G and H to require termination.

Kelley continued to insist that First Security acquire title to the disputed property and convey it as contracted, and filed this action to obtain the court's assistance in this regard. The trial court ordered First Security to convey the property to Kelley. First Security appealed. The Utah Court of Appeals held that Kelley's remedies under the agreement were to waive any title defect and proceed with the closing or to terminate the agreement and receive a refund of his earnest money deposit.<sup>4</sup> Slip Op. at 1. The court of appeals determined that Kelly refused to waive the defect and, therefore, ordered held that Kelley's remedy was limited to a refund of his earnest money deposit. Slip Op. at 3. The court reversed the judgment of the trial court and remanded the case for entry of judgment consistent with the court's opinion. Slip Op. at 3.

This Court reviewed the court of appeal's decision on writ of certiorari, reversed the judgment of the court of appeals and affirmed the trial court's judgment. The Court concluded that pertinent provisions of the earnest money

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<sup>3</sup> In fact, Kelly insisted that First Security resolve the boundary dispute, clear title as provided for in the contract, and convey the entire property described in the agreement. (R. 120.)

<sup>4</sup> See Appendix B.

agreement were written only for the advantage of the buyer and could not be relied upon by a seller, despite the clear and unqualified express terms of the contract.

### ARGUMENT

#### I. The Court's Decision Misapprehends General Rules of Contract Construction and Established Utah Precedent.

Leucadia requests this Court to reexamine its holding that, as a matter of law, a seller under a standard form Utah Earnest Money Sales Agreement is not entitled to rely on the stated terms of that contract. This holding does not comport with several well-established principles of Utah law.

Utah adheres to the objective theory of contract interpretation.

"The basic rule of contract interpretation is that the intent of the parties is to be ascertained from the content of the instrument itself.... Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none." The plain meaning rule preserves the intent of the parties and protects the contract against judicial revision.

Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990) (citations omitted). See also Park Valley Corp. v. Bagley, 635 P.2d 65, 67 (Utah 1981) ("[S]ellers and buyers should be able to contract on their own terms without the indulgence of paternalism by the courts in the alleviation of one side or another from the effects of a poor bargain."); Prudential Capital Group Co. v. Mattson, 802 P.2d 104, 106 (Utah

Ct. App. 1990) (same); Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989, 990-91 (1958) (same); Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712, 717 (1958) ("It is not [the court's] prerogative to step in and renegotiate the contract of the parties.").

Several fundamental rules of contract construction guide Utah courts in interpreting contracts. For example, it is axiomatic that where general and specific provisions in a contract may relate to the same thing, the more specific provision should control. E.g., Corso v. Creighton University, 731 F.2d 529, 533 (8th Cir. 1984); Restatement (Second) of Contracts § 203(c) at 93 (1981). The rule in its most restrictive form is that the specific provisions qualify the meaning of the general provisions. 17A Am. Jur. 2d Contracts § 367 at 387-88 (1991). Corbin applies the rule more sweepingly:

If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.

3 Corbin on Contracts § 547 at 176 (1960).

Another rule universally adopted is that the word "may" is permissive and "shall" is mandatory in private contracts. E.g., Professional Executive Ctr. v. LaSalle Nat'l Bank, 570 N.E.2d 366, 373 (Ill. Ct. App. 1991); Leghorn v. Wieland, 289 So.2d 745, 747 (Fla. Ct. App. 1974). Black's Law Dictionary defines the term "shall" as follows:

As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation.

Black's Law Dictionary 1375 (6th ed. 1990).

The Court's holding in this case that the seller under a standard form Utah Earnest Money Sales Agreement is not entitled to rely on the stated terms of that contract is inconsistent with these fundamental principles. There is no indication on the face of the contract that the seller is not entitled to rely on the provisions found in paragraphs G and H. Rather, the terms of the contract relating to the seller's obligation to provide marketable title upon closing state in clear, mandatory terms that where there are defects in title that cannot be cured through an escrow at closing, the agreement shall terminate, unless the buyer waives such defects or encumbrances.

The language in paragraphs G and H could easily have been drafted to provide a benefit to only one of the two contracting parties.<sup>5</sup> Had the parties intended to allow only

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<sup>5</sup> There is no doubt that the drafters of the standard form Earnest Money Agreement were capable of drafting provisions applicable only to one of the parties to the contract. Paragraph N of the agreement makes such a distinction. It provides:

In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement ... the earnest money deposit shall be returned to Buyer.

the buyer to benefit from the provisions of Paragraph H, for example, the drafters could have provided that "if title cannot be made so insurable through an escrow agreement at closing, the buyer may, at his option, (1) terminate the contract and receive a return of the earnest money deposit; or (2) waive the defect and proceed to closing; or (3) waive full performance and elect to accept that title which the seller is able to convey with an abatement in purchase price." The drafters did not so provide. Instead, they drafted a provision that appears on its face to give protection to both buyers and sellers. They drafted a provision that appears on its face to require mandatory termination in the event of a title deficiency that is not curable through the payment of money at closing.<sup>6</sup> Without clear notice that a party to a contract is not entitled to rely on a material provision of that contract, a court should not rewrite the terms of the agreement for the benefit of one party alone.<sup>7</sup>

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<sup>6</sup> There are only a limited number of circumstances where a title defect could not be cured through closing, thereby allowing a seller to be relieved from the agreement. Where title defects can actually be cured by the simple payment of money in escrow, e.g., to remove liens or encumbrances, the seller would be required to perform as stated in the contract. Where, however, no amount of money would "cure" the defect (such as in this case where no amount of money could guarantee that a court would find the survey erred on the side of the Kelleys), the seller is entitled to receive the benefit of the stated provisions of the contract providing for mandatory termination.

<sup>7</sup> The Court's decision has serious implications for all parties utilizing the standard form earnest money. Parties to a standard form earnest money, for example, will no longer be able to assume that the rights and obligations expressed in the contract truly extend to both parties to the contract. They will be left to speculate, on a provision by provision basis, whether the stated terms actually provided for the rights and obligations indicated, or whether, without notice, they will learn that they should have drafted a new contract because the protection the parties thought they were receiving were actually only for the benefit of one party, but not both, despite the contract's stated terms.

The Court also looked to paragraph N, dealing with attorney's fees, in determining that a seller cannot rely on the specific language in paragraphs G and H. Paragraph N provides that if either party defaults in any of the terms of the agreement, the defaulting party is responsible to pay all costs and expenses, including attorney's fees, which may arise in enforcing or terminating the agreement or pursuing any remedy available in law. Leucadia recognizes that there are many remedies potentially available at law to parties to a real estate contract, including specific performance under appropriate circumstances. However, Leucadia submits that this general provision allowing for the recovery of attorney's fees should not be a basis for modifying or replacing the very specific provisions which were drafted to accommodate a very specific set of circumstances such as those presented here.

II. Paragraphs G and H Can Be Interpreted Consistent With the Law of Specific Performance and at the Same Time Give the Ordinary Meaning to the Contract Language.

The Court's decision expresses the concern that

to construe paragraphs G and H as barring a buyer's right to specific performance would allow a seller to breach the contract without consequence, since the buyer's only remedy would be to rescind the agreement. Not only would a seller have no motivation to clear title, but the cost of clearing title would be shifted to a buyer determined to purchase the property. Thus, Leucadia's construction would place buyers in a disadvantageous position relative to sellers and deny them traditional remedies, such as specific performance. The even-handed protection that a uniform contract form

ought to give both parties would become, in effect, illusory.

Decision at 6. The position advocated by Leucadia, however, actually works to provide "even-handed protection" to both parties and give the full and ordinary meaning to all contract provisions. Indeed, the overwhelming majority of courts and commentators have so recognized.

The generally recognized rule of law in this area is summarized by Professor Milton R. Friedman:

Some contracts of sale provide that if the seller is unable to deliver good title, the seller will return all payments on account of the purchase price (plus, perhaps, the net cost of title examination and of a survey, if any) and thereupon the contract will become void. This provision is included at the seller's instance to avoid a possible liability for substantial damages if title should prove defective. It protects the seller against such liability and bars the purchaser from specific performance with an abatement in purchase price where the seller acts in good faith. The provision has also been held for the benefit of the buyer, who may waive the defect and entitle himself to the conveyance, provided he so elects with reasonable promptness. It does not permit seller to take advantage of his own breach where inability to perform is due to his own fault or collusion. Neither does it require a seller to buy an outstanding interest at a substantial cost, in order to make his title marketable. But whether or not seller must subject himself to substantial expense to clear his title in the absence of bad faith depends upon the intentions of the parties. Generally speaking, a vendee who seeks specific performance may not compel his vendor to clear his title by means of litigation against a third party, on the ground that the court cannot supervise a lawsuit. But a vendor has been required to clear his title by completing Torrens



proceedings and to conduct apparently simple proceedings to have old mortgages properly satisfied. A subvendor has been compelled to exercise his right to purchase, against the primary vendor in order to enable him to perform under a subcontract.

The purpose of an exculpatory clause is to protect a seller from a possible liability for substantial damages if he should be unable to convey title in accordance with the contract. It should not permit him to cancel a contract that no longer seems attractive, particularly if the purchaser is willing to waive the defect in question. Nor should it excuse the seller from making reasonable efforts at moderate expense to put his title in order. It should not excuse him generally from satisfying some lien he has created, e.g., a mortgage, or has suffered to occur, e.g., unpaid real estate taxes.

M. Friedman, Contracts and Conveyances of Real Property § 1.5 at 113-16 (3d ed. 1975) (emphasis added, footnotes omitted).

Courts universally follow this rule. E.g., King v. Knibb, 447 A.2d 1143 (R.I. 1982) (specific performance not appropriate where title not marketable at closing through no fault of seller, seller has not acted in bad faith, and seller has not waived the protection of the termination clause); Hum v. Pinner, 608 P.2d 64 (Ariz. Ct. App. 1980) (if, after good faith effort by the sellers, they are unable to perfect the title, buyers must take the title with the defects or terminate); Lanna v. Greene, 399 A.2d 837 (Conn. 1978) (parties' real estate contract contractually eliminated vendee's right to specific performance with an abatement in purchase price; real estate contract like all other agreements must be considered as a whole and each part of it must be given effect if possible); Robinson

v. Compton, 549 P.2d 274 (Idaho 1976) (parties' stipulation eliminating specific performance and abatement as remedy for the inability of vendor to provide merchantable title is binding in the absence of bad faith and forecloses an action for a different remedy). C.f. Berry v. Nardoizzi, 284 N.E.2d 250 (Mass. 1972); Sawl v. Kwiatkowski, 212 N.E.2d 228 (Mass. 1965).

The cases cited by this Court in its decision are not to the contrary. In Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974), the seller under a real estate contract sought to terminate the contract on grounds that it could not correct a title defect within the time prescribed in the contract. The buyer, however, was prepared to waive the defect and accept at closing the title which the seller was able to convey. Under these circumstances, the court found that the seller could not terminate the contract but was required to convey that title which it had. The court noted, however, that "[i]f the seller is truly unable to satisfy a title defect, and the purchaser refuses to waive satisfaction, then the seller is entitled to claim frustration of the contract and avoid specific performance." 531 P.2d at 1380.

The Court also cites, Reed v. Wadsworth, 553 P.2d 1024 (Wyo. 1976), for the proposition that "sellers of real property cannot terminate an earnest money agreement under a provision permitting the buyers to demand a refund of their earnest money when the sellers had breached the contract." While certainly

correct as stated, the facts of that case (and thus its holding) are really inapposite here.

The sellers in Reed refused to prepare the final papers to close the sale, an act entirely within their control, and sought thereby to avoid the contract. Such is not the case here. First Security did not by its own conduct create a situation to render title unmarketable and then seek to avoid the contract. The title defect facing First Security was entirely out of its control; no amount of money could have cured the defect. Moreover, First Security was not anxious to terminate the contract. In fact, it was willing to go forward with the closing provided that the buyer acted in accordance with the terms of the contract and waive the title defects.

The interpretation of paragraphs G and H urged by Leucadia does not allow a seller to breach the contract without consequence. In fact, it expressly recognizes that if the seller acts in bad faith and encumbers title to avoid closing, or is at fault in any way for the title defect, the buyer would be entitled to specific performance of the contract.<sup>8</sup> However, where, as here, the seller has made a good faith effort to clear title and still is unable to do so, the seller should not be exposed to unlimited liability to perform. Rather, the Court

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<sup>8</sup> This situation is also covered by the express terms of paragraphs G and H which makes an exception where the title defect can be "cured through escrow at closing." Virtually any defect which the seller intentionally created, e.g., a lien or encumbrance, could be cured by the payment of money. See supra note 6.

should acknowledge that it is precisely this risk that the parties bargained away.

#### CONCLUSION

Clearly foreseen by the drafters of the uniform contract is the contingency that the seller may be unable to cure defects in title through the payment of money at closing. In that event, paragraphs G and H, in language that is unambiguous and of ordinary meaning, stipulated that the purchaser shall at its election choose between two options. This language is mandatory and places the burden on the purchaser to decide at the closing in which of the two designated ways the transaction is then to be brought to an end; either by accepting such title as the seller can convey (but without any abatement in price for title deficiencies), or by rescinding the contract and obtaining a refund of the down payment. While, of course, if the seller refuses to convey or refund, or deliberately creates a defect in title, the buyer could seek recourse in law or equity, this is not such a case.

The difficulty in this case arose when First Security, for reasons entirely beyond its control, found it was unable to provide the title for which the agreement called. Kelley then refused to choose either of the options to which he expressly had been limited in these circumstances. Instead, Kelley sought conveyance of either clear title, which First Security was not then in a position to deliver, or such lesser title as First Security did have power to convey, but with an unbargained

abatement in the purchase price. By requesting remedies which were contractually excluded, Kelley was, in effect, asking the court to redraft the parties' contract of sale. It is fundamental that equity enforces contracts; it does not rewrite them.

Leucadia requests the Court to reconsider its interpretation of this standard form contract and affirm the decision of the court of appeals.

DATED this 22<sup>nd</sup> day of January, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By Kathryn H. Snedaker  
John A. Snow  
Kathryn H. Snedaker  
Attorneys for Defendant/Petitioner  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petition for Rehearing to be hand delivered this 22nd day of January, 1993, to the following:

David R. Olsen  
Charles P. Sampson  
Paul M. Simmons  
SUITTER AXLAND ARMSTRONG & HANSON  
175 South West Temple, #700  
Salt Lake City, Utah 84101

D. Frank Wilkins  
175 S. Main Street, #1000  
Salt Lake City, Utah 84111

David W. Lund  
Assistant Attorney General  
Tax & Business Regulation Division  
130 Utah State Capitol  
Salt Lake City, Utah 84114

and to be mailed, postage prepaid, to the following:

David W. Johnson  
P.O. Box 3598  
Park City, Utah 84060



Tab A

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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William R. Kelley, Jr.,  
Plaintiff and Petitioner,

No. 900187  
F I L E D  
December 31, 1992

v.

Leucadia Financial Corporation,  
a Delaware corporation,  
Defendant and Respondent.

\_\_\_\_\_  
Geoffrey J. Butler, Clerk

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Third District, Summit County  
The Honorable Pat B. Brian

Attorneys: David R. Olsen, Charles P. Sampson, Paul M. Simmons,  
Salt Lake City, for plaintiff  
John A. Snow, Kathryn H. Snedaker, Salt Lake City,  
for Leucadia Financial Corp.  
R. Paul Van Dam, David W. Lund, Salt Lake City, for  
Department of Commerce  
D. Frank Wilkins, Salt Lake City, David W. Johnson,  
Park City, for amicus Utah Association of Realtors

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On Certiorari to the Utah Court of Appeals

STEWART, Justice:

This case presents the issue of whether a buyer of real estate can obtain specific performance of a standard Utah Earnest Money Sales Agreement against a defaulting seller.

First Security Bank (FSB) agreed to sell real property to William R. Kelley pursuant to a standard Earnest Money Sales Agreement.<sup>1</sup> FSB could not provide marketable and insurable title because of a boundary dispute. Kelley filed an action for a declaratory judgment and for specific performance of the agreement. The trial court entered an order directing FSB to convey the property to Kelley.

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<sup>1</sup>On appeal, Leucadia has been substituted for FSB as defendant.



The court of appeals reversed the trial court, holding in an unpublished opinion that the terms of the standard Earnest Money Sales Agreement preclude a buyer from obtaining specific performance against a breaching seller. The court held that when a seller fails to provide a marketable and insurable title, the standard agreement limits the buyer to one of two remedies: (1) enforcement of the agreement, but only after the buyer tenders full payment of the contract price; or (2) rescission of the contract with a refund of the earnest money. We granted certiorari because of the potential effect of that ruling on real estate transactions using the standard Utah Earnest Money Sales Agreement.

On March 2, 1987, Kelley and FSB executed an earnest money sales agreement by which FSB agreed to sell residential property in Park City, Utah, to Kelley. Kelley paid \$10,000 in earnest money to FSB and began liquidating some of his assets to obtain the balance due. The closing was set for April 20, 1987.

The agreement, written on a standard form, included the following general provisions: (1) The seller would furnish good and marketable title, subject to encumbrances and exceptions provided in the contract, "evidenced by a current policy of title insurance"; (2) if title insurance was unobtainable due to title defects, the buyer could elect to waive the defects or to terminate the agreement and have the earnest money refunded; and (3) time was of the essence. The seller added a handwritten provision stating that the property was sold "'as is,' without warranty. Title conveyed by special warranty deed."

FSB acquired the property by quitclaim deed from the former owners, who had defaulted on loans secured by the property. The property, consisting of approximately thirteen acres, included a residence, a stream, and a spring. The stream fed a trout pond located in front of the house and provided irrigation water for the property.

After execution of the agreement, a survey revealed that FSB's quitclaim deed contained an erroneous property description, which misplaced a boundary line by 15.22 feet, thereby excluding the stream and spring. In an attempt to cure the defect, FSB asked the adjoining property owners, the Armstrongs, to convey the disputed property. The Armstrongs refused and cut off the water to the pond, causing it to dry up.

On April 22, 1987, two days after the specified closing date, FSB and Kelley agreed to extend the date to June 1, 1987, so that FSB could clear up the boundary problem. Thereafter, the parties agreed to extend the closing date to July 1, 1987, and then to August 31, 1987.

In July 1987, FSB filed a complaint against the Armstrongs to quiet title to the disputed portion of the property and to recover damages caused by vandalism. FSB informed Kelley that he need not retain an attorney because the bank would handle the litigation.

On September 4, 1987, four days after the last agreed upon closing date, FSB's attorney sent a letter to Kelley, demanding that he close the transaction by September 15, 1987. The letter stated that FSB would consider the agreement terminated if the closing were not consummated by the 15th and that FSB was ready and able to sell the property "'as is' without warranty in accordance with the terms of the earnest money agreement." FSB also stated that it would not proceed with the Armstrong litigation and that it had only pursued the lawsuit because it was interested in closing the deal with Kelley and not because it had a legal obligation to deliver clear title. FSB offered to assign its rights in the Armstrong litigation to Kelley and recommended that Kelley obtain counsel. FSB also offered to refund Kelley's earnest money should he choose to "walk away from the deal."

Kelley, who was then living in Massachusetts, did not receive the letter until September 8, 1987. He immediately replied by telegram to FSB, stating that he would not abandon the deal. Kelley then retained counsel, who contacted FSB and requested copies of all documents relating to the boundary litigation. Kelley's counsel asked for a thirty-day extension of the closing date so that Kelley could evaluate the litigation and its effect on the value of the property. FSB agreed to extend the closing date only one week, to September 22, but stated that it would cooperate fully with respect to the litigation. Kelley's attorney, however, did not receive the necessary documents from FSB's attorney until October 15, 1987. Nevertheless, on September 22, 1987, Kelley's attorney wrote to FSB and tendered Kelley's performance. The letter stated that Kelley was ready, willing, and able to close and that the necessary funds had been transferred to Williamsburg Savings Bank in Salt Lake City to be paid at closing. The letter also stated that the "tender is conditioned only upon First Security honoring its obligations pursuant to the earnest money sales agreement and delivering the property free from those defects which it has undertaken to cure." On the same day, Kelley filed a complaint against FSB for a declaratory judgment, damages for breach of contract, and specific performance. Kelley's funds were subsequently deposited with the Summit County clerk.

On September 24, 1987, FSB executed a release of Kelley's \$10,000 earnest money deposit, but Kelley refused to accept it. The next day, Leucadia Financial Corporation formally offered to purchase the property from FSB, and on November 2, 1987, Leucadia and FSB entered into an earnest money sales agreement. Leucadia purchased the property on November 25, 1987.

FSB moved to dismiss Kelley's complaint on the grounds that Kelley's tender was defective and specific performance was not a remedy available under the agreement. Kelley countered with a motion for partial summary judgment, asserting that he was entitled to specific performance and an abatement in the purchase price. The court denied FSB's motion to dismiss and granted Kelley's motion for partial summary judgment, ruling that Kelley was entitled to specific performance. The court reserved for trial Kelley's claim for damages and an abatement in the purchase price. Kelley and FSB subsequently settled the abatement and damages issues, and the trial court entered a decree of specific performance directing FSB to convey the undisputed portion of the property by special warranty deed and the disputed portion by quitclaim deed.

The parties stipulated to substitute Leucadia for FSB and Leucadia appealed to this Court. Pursuant to Rule 42 of the Utah Rules of Appellate Procedure, we transferred the case to the court of appeals. The court of appeals held that Kelley was not entitled to the equitable remedy of specific performance because Kelley's remedies were limited by paragraphs G and H of the agreement. Given that ruling, the court of appeals did not decide whether Kelley's tender was legally sufficient.

#### I. A BUYER'S RIGHT TO SPECIFIC PERFORMANCE UNDER THE STANDARD EARNEST MONEY SALES AGREEMENT

The terms of the standard Earnest Money Sales Agreement have been approved by the Utah Real Estate Commission and the Attorney General. With some exceptions not relevant here, real estate agents may fill out only those forms approved by the Utah Real Estate Commission and the Attorney General. Utah Code Ann. § 61-2-20 (1989). According to the Utah Association of Realtors, which appeared as amicus curiae, the standard form Earnest Money Sales Agreement is used in the majority of real estate transactions conducted by its members.

Paragraphs G and H, which deal with title inspection and title insurance, were construed by the court of appeals to provide a buyer's exclusive remedies against a breaching seller. Kelley v. Leucadia Financial Corp., No. 880534-CA, slip op. at 3 (Utah Ct. App. Jan. 5, 1990). Paragraph G provides that if there are defects in the title that the seller does not cure, the buyer may declare the agreement null and have all monies returned. The last sentence of paragraph G states:

If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

The court of appeals held that because Kelley had not declared the agreement null and void under paragraph G, his remedies were limited to those stated in paragraph H.

Paragraph H deals with title insurance and confers on the buyer a right to nonjudicial rescission if the agreed-upon title insurance is not provided. Paragraph H provides:

If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated.

(Emphasis added.) The court of appeals held that paragraph H allows a buyer either to (1) waive the title defect and pay the full purchase price or (2) rescind the agreement and receive a refund of his earnest money. Under that construction, Kelley's refusal to waive the title defects caused the agreement to terminate by its own terms.

Leucadia argues that Kelley is limited to the remedies set forth in paragraphs G and H. That position is untenable. Paragraphs G and H do not purport to be exclusive remedies, nor do they in any way limit the traditional common law or equitable remedies available to a buyer. Rather, these provisions are designed to give buyers the right to walk away from the contract and obtain a refund of their earnest money without having to obtain judicial redress. Thus, the remedies set out in paragraphs G and H are for the sole benefit of the buyer.

A seller is not entitled to take advantage of a provision intended to benefit the buyer alone. E.g., Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1975). Ace Realty construed a provision of an earnest money sales agreement similar to paragraph H. The court stated, "The contractual provision that title is to be good and merchantable or the contract will be void and the earnest money returned is for the benefit of the purchaser, rather than the seller." Id. The court then held that a seller could not avoid its contractual obligations under a provision clearly for the benefit of the buyer. Id. at 1381. Similarly, the court in Reed v. Wadsworth, 553 P.2d 1024, 1034 (Wyo. 1976), held that the sellers of real property could not

terminate an earnest money agreement under a provision permitting the buyers to demand a refund of their earnest money when the sellers had breached the contract. Accordingly, paragraphs G and H give the buyer the absolute right to rescind the agreement if the seller defaults, but they do not confer on a defaulting seller the right to compel the buyer to either terminate the agreement or pay full value notwithstanding the seller's defective performance.

Moreover, to construe paragraphs G and H as barring a buyer's right to specific performance would allow a seller to breach the contract without consequence, since the buyer's only remedy would be to rescind the agreement. Not only would a seller have no motivation to clear title, but the cost of clearing title would be shifted to a buyer determined to purchase the property. Thus, Leucadia's construction would place buyers in a disadvantageous position relative to sellers and deny them traditional remedies, such as specific performance. The even-handed protection that a uniform contract form ought to give both parties would become, in effect, illusory.

Leucadia's position that paragraphs G and H provide exclusive remedies is also inconsistent with paragraph N, which makes clear that those provisions were not intended to be a buyer's sole remedy. Paragraph N deals generally with the remedies available in the event of a default by either the buyer or the seller. It states:

In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

(Emphasis added.) Paragraph N clearly contemplates that both buyers and sellers may pursue "any remedy provided hereunder or by applicable law." The language "any remedy . . . under applicable law" means all applicable statutory, common law, and

equitable remedies. Specific performance with an abatement in the purchase price has long been recognized as an appropriate remedy when a seller refuses to convey. Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1975).

Buyers and sellers are, of course, at liberty to modify a standard agreement and negotiate terms that limit or expand the remedies of one or both parties. There is no evidence here, however, to suggest that the parties intended to limit Kelley's remedies to preclude specific performance.

## II. TENDER

We now turn to the issue of whether Kelley made a timely and unconditional tender of his performance to FSB. The trial court found that Kelley made an unconditional tender. The court of appeals, however, did not address the issue because it held that paragraphs G and H controlled Kelley's remedies. The parties have briefed this issue, and we address it in the interest of judicial expediency.

To obtain a decree for specific performance against a defaulting party, the aggrieved party must make an unconditional tender of the performance required by the agreement. Century 21 All Western Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982); see also Baxter v. Camelot Properties, Inc., 622 P.2d 808, 811 (Utah 1981); Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975). Neither party to an agreement "can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance." Century 21, 645 P.2d at 56. In other words, "a party must make a tender of his own agreed performance in order to put the other party in default." Id.; see also Fischer v. Johnson, 525 P.2d 45, 46-47 (Utah 1974).

The tender cannot impose on the other party a new condition or requirement not already imposed by the contract. Century 21, 645 P.2d at 56; accord 5A Arthur L. Corbin, Corbin on Contracts § 1233 (1964) [hereinafter "Corbin"]. If the law were otherwise, one could use a tender to compel the other party to comply with new contractual terms. Accordingly, a tender, as a general rule, must be unconditional. A tender that contains an improper condition or requirement disqualifies a party from obtaining a decree of specific performance. Baxter, 622 P.2d at 811; Century 21, 645 P.2d at 56. A party to a bilateral contract may, however, properly condition a tender on the other's performance, since such a condition does not impose a requirement beyond that already contained in the contract. 5A Corbin § 1233.

Leucadia argues that Kelley's tender was defective because Kelley's demand for a title free from the boundary defect

was a new condition not contained in the agreement. Kelley responds that his demand did not impose a new condition on FSB, but insisted only that FSB do that which it had promised to do in the agreement and had, in fact, undertaken to do by filing the lawsuit against the Armstrongs.

Whether Kelley's demand that FSB cure the title defect constituted a conditional tender depends on whether the agreement already obligated FSB to do so. Paragraph 3 of the agreement states that the seller "agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein." The primary obligation of a seller under an earnest money sales agreement is to provide marketable title. Marketable title is one that may be "freely made the subject of resale" and that can be sold at a "fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for the loan of money." 77 Am. Jur. 2d Vendor and Purchaser § 131, at 313-14 (1975). Generally, when a seller agrees to convey marketable title, the seller must undertake to cure defects if it can be done in the exercise of reasonable diligence and within a reasonable time. See, e.g., Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1975).

The boundary dispute with the Armstrongs constituted a cloud on the title and adversely affected the value and marketability of the property, a fact FSB admitted in its complaint against the Armstrongs. FSB argued to the trial court that the "'as is' without warranty" language in the handwritten notation referred to warranties of title and therefore released FSB from any obligation to resolve the boundary dispute. That argument is not valid. In the same notation, FSB agreed to convey the property to Kelley by special warranty deed. A special warranty deed, although not as broad as a general warranty deed, carries with it certain warranties of title. Therefore, the "as is" language did not modify FSB's express promise to convey marketable title.

FSB's own conduct and statements support this conclusion. FSB acknowledged its obligation to provide clear title when it undertook the Armstrong litigation and told Kelley that he need not retain an attorney. For a period of four months, FSB, by its actions and statements, led Kelley to believe that FSB would resolve the boundary problem and deliver clear and marketable title, as it was obligated to do under the contract. Not until its letter of September 4 did FSB disclaim any obligation to do what it had previously acknowledged. It was only then, and for the first time, that FSB stated that it had undertaken the litigation, not because it was obligated to, but because of FSB's interest in closing the deal with Kelley.

In view of FSB's express promise to provide clear and marketable title and its having undertaken litigation to do so, we hold that Kelley's tender did not impose a new condition, but

was merely a request that FSB do what it was contractually obligated to do.

### III. TIMELINESS

Finally, Leucadia argues that Kelley cannot seek specific performance because time was of the essence and Kelley failed to tender his performance by the closing date. Because the closing date had been extended several times by mutual agreement, Kelley properly tendered his performance on September 22, the last agreed upon closing date. We therefore reject FSB's argument.

The judgment of the court of appeals is reversed, and the trial court's judgment is affirmed.

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WE CONCUR:

Gordon R. Hall, Chief Justice

Christine M. Durham, Justice

Regnal W. Garff, Jr., Court  
of Appeals Judge

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HOWE, Associate Chief Justice: (Concurring)

I concur but write to point out an inconsistency between paragraph G and paragraph H of the agreement. The last sentence of paragraph G provides that if a defect in title is not curable through an escrow at closing, the agreement shall be null and void at the option of the buyer. The last sentence of paragraph H states that if title cannot be made insurable through an escrow at closing, the agreement shall be terminated unless the buyer elects to waive the defects or encumbrances. While paragraph G speaks of a "defect in title" and paragraph H deals with a "title that cannot be made so insurable," I believe that they both address the same thing. Yet in paragraph G, termination is at the option of the buyer, whereas in paragraph H, termination appears to be mandatory unless the buyer elects to waive the defects. It was here that the court of appeals was misled. It construed paragraph H literally instead



of in light of paragraph G. Justice Stewart has properly reconciled the two paragraphs by holding that termination is intended to be at the option of the buyer.

I think the court of appeals also erred in that it did not consider whether the defect in title here could be cured through an escrow at closing as provided for in both paragraphs G and H. From all that appears in the record before us, a stipulated amount could have been withheld from the purchase price at closing and escrowed pending resolution of the boundary dispute.

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Zimmerman, Justice, having disqualified himself, does not participate herein; Garff, Court of Appeals Judge, sat.

**Tab B**

FILED

IN THE UTAH COURT OF APPEALS

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JAN 5 1990  
*Gary Noonan*  
J. T. Noonan  
Clerk of the Court  
Utah Court of Appeals

William R. Kelley, Jr., )  
 )  
Plaintiff and Respondent, )  
 )  
v. )  
 )  
Leucadia Financial Corporation, )  
a Delaware corporation, )  
 )  
Defendant and Appellant. )

OPINION  
(Not For Publication)

Case No. 880534-CA

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Third District Court, Summit County  
The Honorable Pat B. Brian

Attorneys: John A. Snow and Kathryn H. Snedaker, Salt Lake  
City, for Appellant  
David R. Olsen, Charles P. Sampson, and Claudia F.  
Berry, Salt Lake City, for Respondent

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Before Judges Davidson, Bench, and Jackson.

JACKSON, Judge:

Leucadia Financial Corporation (Leucadia)<sup>1</sup> appeals a summary judgment decree of specific performance requiring it to convey real property to respondent (Kelley) pursuant to a sales agreement. The lower court reserved Kelley's damages as an issue to be tried, but the parties settled that issue out of court prior to the appeal. We reverse.

The issues we must decide are (1) whether the parties' sales agreement provides remedies to Kelley if Leucadia is unable to convey marketable title, and (2) whether those remedies require conveyance by Leucadia if title is not marketable.

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1. During the proceedings below, Leucadia succeeded to the interest of the original seller, First Security Mortgage Company. For simplicity, we will refer to Leucadia as the seller.

The property contemplated by the parties in their sales agreement was not surveyed until after the parties executed that agreement. The survey revealed that Leucadia's property description did not include certain acreage containing a stream, a pond, and a spring, all of which the parties had believed to be part of their agreement. Leucadia was unable to resolve the land description problem by negotiating with the adjoining property owner. Thereafter, Leucadia initiated litigation against the adjoining owner and then decided it was not worth prosecuting. While Leucadia was trying to clear title to the disputed land and water rights, the parties in the instant action extended their closing date. Later, each of the parties maneuvered to obtain remedies which each believed to flow from their contract.

Leucadia offered to convey title subject to the defects or to return Kelley's earnest money deposit. Kelley tendered a portion of the agreed purchase price and insisted that Leucadia clear title and then convey the property. Simultaneously, Kelley filed suit for (1) a declaratory judgment of the parties' rights under the terms of the contract, and (2) specific performance pursuant to the contract terms, as declared.

The lower court implicitly interpreted the contract as not providing an agreed remedy in the event Leucadia could not convey clear and marketable title to all the property. Judgment was entered for an equitable remedy, i.e., specific performance, with an abatement of the purchase price to follow. Thus, the lower court interpreted the parties' agreement as a matter of law, not determined by extrinsic evidence of intent. We accord that construction no particular weight and review the determination under a correctness standard. See Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). Whether ambiguity exists in a contract is also a question of law. Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983). We find, as a matter of law, no ambiguity in the agreement concerning the rights and remedies of the parties in the event title was found to be defective and unmarketable.

A cardinal principle of contract law is that, in the absence of fraud or mutual mistake, a clear and unambiguous contract must be enforced according to its terms. East v. Kahan, 206 Kan. 682, 481 P.2d 958, 961 (1971). The terms of the contract, where clear and unambiguous, are conclusive. Goodman v. Newzona Inv. Co., 101 Ariz. 470, 421 P.2d 318, 320 (1966). The first source of inquiry is the written document

itself. Big Cottonwood Tanner Ditch Co. v. Salt Lake City Corp., 740 P.2d 1357, 1359 (Utah Ct. App. 1987). Thus, we turn to the terms to which these parties agreed.

Leucadia agreed "to furnish good and marketable title to the property," subject to encumbrances and exceptions noted in the contract. Paragraph G (Title Inspection) of the agreement provided a title inspection procedure prior to closing, including how the parties would deal with any title defect that appeared: "If said defect is not curable through an escrow agreement at closing, this agreement shall be null and void at the option of the buyer, and all monies received herewith shall be returned to the respective parties." Kelley refused to accept this option. The parties agreed that title insurance would be utilized for closing. Paragraph 4 (Title Insurance) of the agreement provided the procedure for insuring title: "If title cannot be made insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects and encumbrances, be refunded to Buyer, and this agreement shall thereupon be terminated." Title could not be made insurable without exceptions for defects. Kelley refused to waive the defects, thus his remedy, as agreed, was limited to a refund of his earnest money deposit, not specific performance.

We have examined the other issues argued by the parties, including that of tender,<sup>2</sup> and conclude they are meritless or that they do not require our consideration in light of the clear and unambiguous terms of the parties' agreement.<sup>3</sup>

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2. This court recently discussed the requirement of tender, where a purchase agreement contemplates simultaneous performance by the parties, in Bell v. Elder, 121 Utah Adv. Rep. 16 (Ct. App. 1989), as Carr v. Enoch Smith Co., 119 Utah Adv. Rep. 89 (Ct. App. 1989). See also Utah Code Ann. § 78-27-1 (1987).

3. In its brief, Leucadia touched on a related issue of vandalism, believed to have been committed by the adjoining landowner, which diverted the water and dried up the pond. Paragraph P (Risk of Loss) of the parties' agreement provided a procedure for dealing with loss or damage to the property prior to closing. Kelley did not seek to use that procedure.

The judgment of the trial court is reversed, and the case is remanded for entry of judgment consistent with this opinion.

  
Norman H. Jackson, Judge

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I CONCUR:

  
Richard C. Davidson, Judge

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BENCH, Judge (dissenting):

The main opinion reverses this judgment because there is no contractual provision allowing for specific performance. If Kelley made a proper and timely tender of payment, I believe the remedy of specific performance is available.

My colleagues are correct in limiting the parties' remedies at law to the terms of the contract. If there was a "defect" in Leucadia's title, the contract permits Kelley to: 1) waive the defect and go through with the purchase; or 2) take a refund of his earnest money. In this case, Leucadia agreed to sell property located at a specific address in Summit County. Leucadia had good and marketable title to property located at that address. Leucadia erroneously believed and represented that the property contained a neighboring stream, pond, and spring. That fact should not cloud title to the property Leucadia actually owned. There is, therefore, no "defect" in Leucadia's title. See Black's Law Dictionary 1332 (5th ed. 1979) (defective title means unmarketable title). Clearly, where the contract has not provided a legal remedy, the trial court could order specific performance of the contract.

Even where a legal remedy is provided, however, the trial court has the discretion to order specific performance of the contract if the legal remedy is inadequate. See generally Restatement (Second) of Contracts §§ 357-360 (1981). "The rule

has been long established that a vendee has the right to insist upon performance by the vendor to the extent the latter is able to perform with an abatement in the purchase price equal to the value of the deficiency or defect." Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976); see also In re Hayhurst's Estate, 478 P.2d 343 (Okla. 1970); Streator v. White, 26 Wash. App. 430, 613 P.2d 187 (1980).

I believe the trial court had the discretion to order Leucadia to convey the property it owned with an abatement in the purchase price. Resolution of this appeal should turn not on the unavailability of specific performance as a remedy, but on whether Kelley made a proper and timely tender, as argued by the parties.

A handwritten signature in cursive script, reading "Russell W. Bench". The signature is written in dark ink and is positioned above a horizontal line.

Russell W. Bench, Judge