1983

Jay A. Quealy, Jr., Virginia W. Quealy, His Wife, Peter P. K. Ng, And Wing Jun Ng, His Wife v. Bruce B. Anderson And Gary S. Anderson : Brief of Respondents

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Gordon Stachan and James A. Boevers; Attorneys for Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. QUEALY, JR., VIRGINIA W. QUEALY, his wife, PETER P.K. NG, and WING JUN NG, his wife,	:	
Plaintiffs and Appellants,	:	No. 19016
vs.	:	
BRUCE B. ANDERSON and GARY S. ANDERSON,	:	
Defendants and Respondents.	:	

BRIEF OF RESPONDENTS

Appeal from the Third Judicial District Court
of Salt Lake County,
The Honorable Jay E. Banks, District Court Judge

PRINCE, YEATES & GELDZAHLER
Gordon Strachan
James A. Boevers
Attorneys for Respondents
424 East Fifth South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 521-3760

RAY, QUINNEY & NEBEKER
Don B. Allen and
Tara D. Anderson
Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. QUEALY, JR., VIRGINIA W. QUEALY, his wife, PETER P.K. NG, and WING JUN NG, his wife,	:	
Plaintiffs and Appellants,	:	No. 19016
vs.	:	
BRUCE B. ANDERSON and GARY S. ANDERSON,	:	
Defendants and Respondents.	:	

BRIEF OF RESPONDENTS

Appeal from the Third Judicial District Court
of Salt Lake County,
The Honorable Jay E. Banks, District Court Judge

PRINCE, YEATES & GELDZAHLER
Gordon Strachan
James A. Boevers
Attorneys for Respondents
424 East Fifth South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 521-3760

RAY, QUINNEY & NEBEKER
Don B. Allen and
Tara D. Anderson
Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

TABLE OF CONTENTS

	Page
AUTHORITIES CITED	ii
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENTS	8
A. APPELLANTS' ESTOPPEL ARGUMENT IS RAISED FOR THE FIRST TIME ON APPEAL AND SHOULD NOT BE CONSIDERED BY THE COURT	8
B. NEITHER THE JURY NOR THE TRIAL COURT MADE ANY FINDING EXTINGUISHING DEFENDANTS' CONTRACTUAL RIGHT TO ATTORNEYS' FEES	9
1. Respondents Were Not Awarded Rescission of the Agreement	10
2. There Was No Finding That The Earnest Money Agreement Was Either Void, Rescinded or Extinguished	15
C. THE "EARNEST MONEY RECEIPT AND OFFER TO PURCHASE" AGREEMENT REQUIRES AN AWARD OF ATTORNEYS' FEES TO DEFENDANTS	19
1. Respondents Have Enforced a Right Arising Out of the Agreement	19
2. The Trial Court Properly Interpreted the Agreement as Requiring a Reciprocal Right to Attorney's Fees	21
CONCLUSION	27

AUTHORITIES CITED

	Page
Alexander v. Brown, 646 P.2d 692 (Utah 1980).....	27
Anaheim Company v. Elliott, 609 P.2d 382 (Or. App. 1980)	10,13,14
Auto Lease Co. v. Central Mutual Ins., 325 P.2d 264 (Utah 1958).....	26
B.L.T. Investment Company v. Snow, 586 P.2d 456 (Utah 1978).....	9,10,11, 12,13,15
Bekins Bar V Ranch v. Beryl Baptist Church of Beryl, Iron County, 642 P.2d 371 (Utah 1982).....	8
Camp v. Deseret Mutual Benefit Association, 589 P.2d 780, 782 (Utah 1979).....	26
Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).....	18
Car Doctor Inc. v Belmont, 635 P.2d 82 (Utah 1981).....	11,20,26
Charlton v Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961).....	15
Continental Bank & Trust Co. v. Stewart, 4 Utah 2d 228, 291 P.2d 890 (1955).....	25
Davis v. Dunigan, 205 P.2d 839 (Oregon 1949).....	17
Dubois v. Nye, 584 P.2d 823 (Utah 1978).....	24
Edwards Pet Supply v. Bentley, 652 P.2d 889 (Utah 1982).....	27
Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981).....	24
Engle v. First National Bank of Chugwater, 590 P.2d 826, (Wyo. 1979).....	16

Foy v. Anderson, 580 P.2d 114 (Mont. 1978)..... 25

Hackford v. Snow, 657 P.2d 1271 (Utah 1982)..... 21,24

Higgins v. City of Fillmore, 639 P.2d 192 (Utah 1981)..... 8

Huber Rowland Construction v. City of Salt Lake, 7 Utah 2d 273, 323 P.2d 238 (1958)..... 26

Hurt v. New York Life Ins. Co., 51 F.2d 936 (10th Cir. 1931)..... 16

Johnson Tire Service, Inc. v. Thorn, Inc., 613 P.2d 521 (Utah 1980)..... 27

Kohler v Garden City, 639 P.2d 162 (Utah 1981)..... 15,20

Litho Sales Inc. v Cutrubus, 636 P.2d 487 (Utah 1981)..... 11,26

Mortenson v. Financial Growth, Inc., 23 Utah 2d 54, 456 P.2d 181 (1969) on appeal after rem'd, 523 P.2d 1229 (Utah 1974)..... 8

Mullins v. Evans, 560 P.2d 1116 (Utah 1977)..... 18

Nixon and Nixon, Inc. v. John Den & Associates, 641 P.2d 144 (Utah 1982)..... 24

North Park Bank of Commerce v. Nichols, 645 P.2d 620, (Utah 1980)..... 27

Plain City Irrigation Co. v. Hooper Irrigation Co., 11 Utah 2d 188, 356 P.2d 625 (1960)..... 19,25

Plywood Marketing Assoc. v. Astoria Plywood Corp., 558 P.2d 283 (Wash. App. 1976)..... 18

Roper v. Neet, 591 P.2d 423 (Or. App. 1979)..... 10

Sam Macri & Sons, Inc. v United States, 313 F.2d 119 (9th Cir. 1963)..... 22

Scantlin v. Superior Homes, Inc., 627 P.2d 825 (Kansas 1981)..... 18

Seal v. Tayco, Inc., 400 P.2d 503 (Utah 1965)..... 26

Sipe v. Pearson, 556 P.2d 654 (Or. 1976)..... 10

Sweet v. Stormont Vail Regional Medical Center, 647 P.2d 1274 (Kansas 1982)..... 16

Taylor National, Inc. v. Jensen Brothers Construction Co., 641 P.2d 150 (Utah 1982)..... 24

United States v. Peter Kiewit & Sons Co., 235 F. Supp. 500 (D. Alaska 1964)..... 22,23,25

Usinger v. Campbell, 572 P.2d 1018 (Oregon, 1977)..... 10,12,13 14

Villeneuve v. Schamanek, 639 P.2d 214 (Utah 1981)..... 9

Wells Fargo Bank, N.A. v. MidWest Realty & Financial, Inc., 544 P.2d 882 (Utah 1975)..... 24

Wingets Incorporated v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972)..... 25

Woodruff v. McClellan, 622 P.2d 1268 (Wash. 1980)..... 10,14

SECONDARY AUTHORITIES

5 Williston on Contracts, Third Edition, Section 666..... 16

I.

NATURE OF THE CASE

The issue at trial was whether defendants-respondents Bruce and Gary Andersons' (hereinafter referred to as respondents) decision not to purchase property owned by plaintiffs-appellants Quealys and Ngs (hereinafter referred to as appellants) had been excused under the terms of the "Earnest Money Receipt and Offer to Purchase" agreement. The issue on appeal is the propriety of Judge Banks' award of attorneys' fees to respondents, as the prevailing parties, based on the following provision of the "Earnest Money Receipt and Offer to Purchase" agreement:

> "We do hereby agree to carry out and fulfill the terms and conditions specified above . . . If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorneys' fee."
> Line 45-48, Exhibit 2-P. (emphasis added)

II.

DISPOSITION IN THE LOWER COURT

This matter came to trial on June 28, 1982, before the Honorable Jay E. Banks, sitting with a jury. The jury returned a special verdict after hearing five days of testimony and examining fifty-three exhibits. Based on the jury's answers to the special verdict questions respondents were awarded a judgment of dismissal, no cause of action, on July 9, 1982. Judge

Banks subsequently awarded respondents $24,677.00 in attorneys' fees and costs, based on his interpretation of the language quoted above from the "Earnest Money Receipt and Offer to Purchase " agreement. Appellants appeal only from the award of attorneys' fees.

III.

RELIEF SOUGHT ON APPEAL

Respondents submit that Judge Banks' award of attorneys' fees and costs was proper, and ask this Court to affirm the judgment and to award respondents costs and reasonable attorneys' fees in defending this appeal. Respondents are not pursuing their cross-appeal, which sought a modification of Judge Banks' award, because respondents have determined that the trial court acted within its discretion.

IV.

FACTS

References to the Record on Appeal will be designated ("R") except for references to exhibits ("Ex").

The issue raised on appeal is whether Judge Banks properly exercised his discretion in awarding respondents attorneys' fees for successfully defending against a claim of breach of an "Earnest Money Receipt and Offer to Purchase" agreement.

In July of 1977, respondents and appellant Jay A. Quealy agreed that respondents would purchase approximately 800 acres of land, owned by appellants, located two miles east of

Heber City. Respondents planned to subdivide the property into residential lots. However, respondents' plan was necessarily contingent upon the presence of adequate water and the receipt of zoning approval from Wasatch County.

The purchase agreement was executed on a standard "Earnest Money Receipt and Offer to Purchase" form (Ex. P-2). Reflecting the specific use respondents planned to make of the property, the purchase was made contingent upon developing an adequate supply of water and procuring residential zoning approval. These conditions were added to the agreement in paragraphs 52j., which reads as follows:

> This offer is made subject to the following conditions. . .:
>
> 1. Assurance of an adequate culinary and irrigation water system to meet the needs of residential development of the property.
>
> 2. Assurance of proper zoning to develop the property into residential lots.
>
> 3. Satisfaction of the boundary [sic] lines.

As the jury subsequently found (Special Verdict, R.556-557), the condition that proper zoning be obtained was never met, thereby ending defendants' purchase obligation.

Appellants made no further demands upon respondents for performance until more than two years after the agreement had been signed, when appellants filed this suit alleging respondents breached the agreement by failing to purchase the

property (Complaint, R.12-16). Respondents raised numerous affirmative defenses in their Answer, including the Tenth Defense that the agreement had been abandoned (R. 19-28). At trial, however, the dispute was narrowed to whether respondents' performance had been excused by the non-occurrence of the conditions set forth in paragraph 52.j. and whether an accord and satisfaction had been reached regarding the issue of performance. Only these issues were submitted to the jury (Special Verdict, R. 556-557).

The respondents prevailed on the jury's answers to the following Special Verdict questions:

> 1. Did defendants Bruce and Gary Anderson satisfy their obligations under the agreements to attempt to obtain the preliminary indication of the zoning change to permit the 1-5 acre lot preferred by defendants? YES
>
> 2. Did Wasatch County officers give a preliminary indication of assurance that a zoning change would be approved to permit the 1-5 acre lot development planned by defendants? NO
>
> . . .
>
> 4. Were the claims asserted by plaintiff Jay A. Quealy in this lawsuit the subject of a settlement and accord with defendants? YES

Based on these answers, respondents were awarded a judgment of dismissal, no cause of action (Judgment, R.622-625).

Respondents, as the prevailing parties, proffered testimony as to their attorneys' fees (Transcript re: Attorneys'

Fees, July 2, 1982, at p.2, R.736). Respondents did not "incongruously assert" as contended by Appellants (Appellants Brief, pp. 7-8) that the contract had been suddenly resurrected. Rather, respondents argued that they were entitled to an award of attorneys' fees because:

> In this case we [had] to defend our rights to stand by the conditions in the agreement. It's a right arising out of this agreement, and we incurred substantial attorneys' fees in doing that.

(Transcript re: Attorneys' Fees, July 2, 1982, p. 1-d, R.734).

Respondents were awarded these fees pursuant to the district court's interpretation of lines 45 through 48 of the "Earnest Money Receipt and Offer to Purchase" agreement, which reads as follows:

> "We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or warranty deed: in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorneys' fee." (emphasis added) (Ex. P-2, R. 9-10)

Appellants' only objection to respondents' proffer was that respondents were not entitled to an award of fees under the language of the agreement (Transcript re: Attorneys' Fees,

July 2, 1981, p. 1-c, R.733). The question of awarding attorneys' fees was taken under advisement by Judge Banks, who directed respondents to submit their attorneys' fees and costs to the court (Transcript re: Attorneys' Fees, July 2, 1982, pp. 2-3, R.736-737).

Respondents submitted a Memorandum of Attorneys' Fees and Costs to the trial court on July 9, 1982 (R. 619-622) and a Supplemental Affidavit (R. 628-629), on August 11, 1982 as to the amount of fees. Appellants do not challenge the reasonableness of the amount of the fee award; appellants only challenge the correctness of the award itself to respondents as prevailing parties.

Both parties also submitted memoranda on the issue of whether Judge Banks' award of attorneys' fees to respondents was proper (Plaintiff's Memorandum in Opposition, dated July 13, 1982 (R. 703-713); Defendants' Memorandum in Support, dated August 11, 1982 (R. 630-656)). Appellants, in their memorandum, made five arguments in opposition to the award (all of which were rejected by the trial court):

(1) the language of the "Earnest Money Receipt and Offer to Purchase" agreement did not support an award of attorneys' fees to respondents (R. 709);

(2) respondents had not made a timely proffer of attorneys' fees, hence there was no evidence in the record to support an award (R. 705);

(3) equity did not support such an award (R. 711);

(4) respondents were not really the prevailing parties (R. 704);

5) respondents should be precluded from receiving attorneys' fees because they had amended their proffer (R. 707).

Appellants did not argue or even raise the issue before Judge Banks that respondents should be estopped from relying on the contract. The only argument made to the trial court that has been reasserted on appeal is appellants' first argument that the language of the "Earnest Money Receipt and Offer to Purchase" agreement did not support an award.

Judge Banks scheduled a hearing on the award of attorneys' fees on January 5, 1983 . Appellants acknowledged that the respondents' proffer of fees on July 2, 1982 was timely (Transcript of Motion for Attorneys Fees, Jan. 5, 1983, p. 12) and in opposition to the award raised only the first, third and fifth arguments listed above (Transcript of Motion for Attorneys Fees, Jan. 5, 1982, pp. 12-19). Judge Banks interpreted the "Earnest Money Receipt and Offer to Purchase" agreement to require a reciprocal award of attorneys' fees:

> If one is entitled to it the other is entitled to it.

(Transcript of Motion for Attorneys Fees, Jan. 5, 1983, p. 5) Based upon these findings, respondents were awarded attorneys' fees and costs in the amount of $24,877.00.

V.

ARGUMENT

A. APPELLANTS' ESTOPPEL ARGUMENT IS RAISED FOR THE FIRST TIME ON APPEAL AND SHOULD NOT BE CONSIDERED BY THE COURT

Appellants' first argument is that respondents should be estopped from recovering attorneys' fees because they prevailed on their defenses of failure of a condition precedent and settlement and accord. This argument should not be considered by this court because appellants failed to raise the issue in the trial court. Regardless of the substance of appellants' argument, the decisions of this Court make it clear that this issue cannot be raised for the first time on appeal. Mortenson v. Financial Growth, Inc., 23 Utah 2d 54, 456 P.2d 181 (1969), on appeal after rem'd, 523 P.2d 1229 (Utah 1974); Bekins Bar V Ranch v. Beryl Baptist Church of Beryl, Iron County, 642 P.2d 371 (Utah 1982).

The case of Higgins v. City of Fillmore, 639 P.2d 192 (Utah 1981) is illustrative. Plaintiff, a general contractor, sued the City of Fillmore for breach of a construction contract. The city counterclaimed alleging the contract had not been finished on time. The trial court found for defendant on the ground that the city had delayed completion of the work. On appeal the city argued that "the contract was divisible and that delays on one portion did not affect work on the remain-

der". Id. at 194. This Court refused to address the argument as it had not been made to the trial court. See also Villeneuve v. Schamanek, 639 P.2d 214 (Utah 1981).

Although appellants have abandoned all but one of the arguments made to the trial court, this belated change in strategy does not allow appellants to raise an entirely new issue for the first time on appeal.

Any argument by appellants based upon one or more of respondents' numerous alternative defenses is similarly misplaced. Plaintiffs never claimed in the trial court that any of these defenses barred defendants' right to attorneys' fees. Because the trial court never had the opportunity to address, consider, or decide this issue, it should not be considered now by this Court.

B. NEITHER THE JURY NOT THE TRIAL COURT MADE ANY FINDING EXTINGUISHING DEFENDANTS' CONTRACTUAL RIGHT TO ATTORNEYS' FEES.

The "estoppel" issue is not only improperly before the Court, it is also without merit. Appellants' argue that based upon B.L.T. Investment Company v. Snow, 586 P.2d 456 (Utah 1978), respondents are estopped from recovering attorneys' fees since the contract had been rescinded. This argument has two fatal flaws. First, this case is clearly distinguishable from B.L.T. Investment Company v. Snow, Id. In the instant case neither the jury nor trial court found that the "Earnest Money

Receipt and Offer to Purchase" agreement had been rescinded or abandoned. Second, appellants' argument rests on the incorrect premise that the non-occurrence of a condition precedent and the occurrence of an accord and satisfaction are the functional equivalents of rescission of the entire contract.

1. Respondents Were Not Awarded Rescission of the Agreement

In BLT Investment, the court held that if a party successfully seeks rescission of a contract, the party cannot be awarded attorneys' fees based on a provision in the rescinded contract. Appellants recite at length from a diverse collection of pleadings and other court documents (pp. 9 through 12 of Appellant's Brief) in an attempt to show that the reasoning in BLT Investment should be applied in this case. Appellant's efforts, however, hide the fact that this case is clearly distinguishable from BLT Investment. In this case the trial court did not grant rescission of the agreement. The reasoning of BLT Investment does not apply when the trial court has not awarded rescission. Usinger v. Campbell, 572 P.2d 1018 (Oregon 1977); Woodruff v. McClellan; 622 P.2d 1268 (Wash. 1980); Anaheim Company v. Elliott, 609 P.2d 382 (Or. App. 1980); Sipe v. Pearson, 556 P.2d 654 (Or. 1976); Roper v. Neet, 591 P.2d 423 (Or. App., 1979). A brief comparison of the facts of BLT Investment with this case, and with the cases that are applicable illustrate the crucial distinctions.

In BLT Investment, plaintiff-purchaser sued for specific performance of a written land-sales contract. Defendant-seller Snow affirmatively sought and was awarded rescission of the contract. The central issue in the case was whether the grounds asserted by defendant (i.e.- the failure of the parties to reach a satisfactory escrow agreement) were sufficient for the court to grant rescission of the contract. Moreover, once the trial court decided to award rescission, it ordered a return of the parties to their status quo.

In this case the issue of whether the contract was rescinded was never even submitted to the jury (Jury Instructions, R.522-555, Special Verdict, R.556-557). Although respondents did plead in the alternative that the contract was rescinded, Judge Banks determined that rescission was not applicable to the facts of the case. Rather he determined that the facts could support only the defenses of accord and satisfaction and failure of a condition precedent. On appeal this determination is entitled to a great degree of deference and a presumption of correctness. Litho Sales Inc. v Cutrubus, 636 P.2d 487 (Utah 1981); Car Doctor Inc. v Belmont, 635 P.2d 82 (Utah 1981).

Since the trial court did not order or grant rescission of the agreement (Judgment, R. 622-623), nor attempt to return the parties to the status quo existing before the contract had been entered, BLT Investment does not apply. The

reasoning in BLT Investment is simply that if a party successfully rescinds an agreement in its entirety, it cannot then use a provision in the rescinded contract for its own benefit. Conversely, however, when a party is excused from only a portion of his performance, or only a part of the contract is settled, there is no basis for denying attorneys' fees sought under a different portion of the contract.

Usinger v. Campbell, 572 P.2d 1018 (Oregon 1977), illustrates the reasons for not extending BLT Investment to bar attorneys' fees to prevailing defendants asserting defenses similar to those asserted by defendants here. Two affirmative defenses raised by the defendants in Usinger are identical to those raised here: 1) that the earnest money agreement sued upon was too vague to be enforced, and; 2) plaintiffs had not performed certain conditions "precedent" as required under the agreement. Defendants prevailed on both defenses and were awarded attorneys' fees under a provision of the contract similar to the one in this case. On appeal, the award of attorneys' fees was challenged on the exact grounds argued here: defendants should not be awarded attorneys' fees because they elected to 'rescind' the contract and hence should not be allowed to rely upon the terms of the agreement.

Plaintiff's argument was rejected. The Oregon Supreme Court upheld the attorneys' fees award and explicitly discussed

why the reasoning of cases like BLT Investments was not applicable:

> Pickinpaugh is distinguishable from the case at bar. In that case plaintiff came into court seeking a rescission of the contract. The trial court allowed rescission and this court affirmed. We relied upon 3 H. Black, Rescission and Cancellation § 583 (1916) for the proposition that the plaintiff could not assert that the contract should be rescinded and at the same time rely on a provision therein for the recovery of attorney fees. In this case, the plaintiffs contend there was a contract and ask for specific performance. This requires the defendant to come into court and defend, also relying on the contract by stating that it was not performed in accordance with its terms. Defendant does not disaffirm the contract but relies on the exact terms thereof. Therefore, the provision in the contract providing for attorney fees applies. (emphasis added)

Usinger at 1023.

The reasoning of Usinger was followed and expanded by the Oregon Court of Appeals in Anaheim Co. v Elliott, 609 P.2d 382 (Or. App. 1980). In that case, plaintiff sued to foreclose a mortgage on real property held by defendant. Defendant denied plaintiff's general allegations and counterclaimed for rescission or cancellation of the mortgage. The trial court dismissed plaintiff's cause of action and awarded defendant attorney's fees based on a provision in the mortgage. Plaintiff argued on appeal that since defendant asserted that the mortgage was void and unenforceable, he should not be allowed to "[avail] himself of the attorney's fees provision." Id. at

386. The Court of Appeals upheld the award because the trial court never ruled on the rescission claim:

> As in Pickinpaugh, the defendant here sought through his counterclaim to rescind the instrument which provided for recovery of attorney's fees by the prevailing party. However, the counterclaim was not tried, and the prayer for rescission of the mortgage is effectively mooted by the dismissal of the cause of suit for foreclosure....As in Usinger the issue which was tried here was plaintiff's claim that a document...should be enforced...[w]e interpret Pickenpaugh as being inapplicable to cases like the present one which are initiated to enforce contracts which provide for attorney's fees. (citations and footnotes omitted).

Id. at 386.

Finally, the Washington Supreme Court, in Woodruff v. McClellan, 622 P.2d 1268 (Wash. 1980), went even a step further and awarded attorneys fees to the successful defendants even though the trial court had found that the contract was rescinded. As in Usinger, plaintiffs sued for specific performance of an earnest money agreement. The trial court found that plaintiffs had breached the agreement by not making a timely proffer of money and therefore, the agreement was rescinded. Attorneys fees were awarded to defendants. Plaintiffs appealed, arguing that the trial court could not rely on a provision in the rescinded contract to make the award. Although an intermediate appeals court agreed, plaintiffs' reasoning was rejected by the Supreme Court. The Court reasoned that since plaintiffs sued to enforce the agreement they had not agreed to rescind the agreement. Therefore, the

clause providing for an award of attorney's fees remained in effect. See also, the other cases cited on page 11 of this brief.

2. There was no Finding that the Earnest Money Agreement was Void, Rescinded Or Abandoned.

Even if this court decided that the reasoning of BLT Investment should not be limited, Judge Banks' award to respondents is proper. The rationale of BLT Investment applies only where the entire contract, including the attorneys' fees provision, is void or extinguished. In this case, however, neither the jury nor the court found that the earnest money agreement was void or extinguished. Rather, the only findings were that a condition precedent to defendants' purchase obligation had not been met (Special Verdict No. 2, R. 556), and that there was a settlement on this issue (Special Verdict No. 4, R.556). These findings are, of course, entitled to a presumption of validity. Kohler v Garden City, 639 P.2d 169 (Utah 1981), Charlton v Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961). Since the entire "Earnest Money Receipt and Offer to Purchase" agreement was not extinguished, the trial court correctly relied upon the attorneys' fees provision to make the award.

Contrary to plaintiffs' arguments, condition precedents do not necessarily relate to the validity of a contract. A valid, fully enforceable contract may contain conditions, the occurrence or non-occurrence of which determine only whether

future performance is necessary. The following excerpt from 5 Williston on Contracts, Third Edition, Section 666, explains:

> In the law of contracts, conditions may relate to the existence of contract or to the duty of immediate performance under them. It is a source of confusion of thought that the word "condition" is frequently used without exact recognition of what the supposed condition qualifies. Generally in contracts, when reference is made to conditions, what is meant are the conditions which become operative after formation of the contract and qualify the duty of immediate performance of a promise or promises thereunder -- not conditions which qualify the existence of a contract or promise. . . . (emphasis added)

Sweet v. Stormont Vail Regional Medical Center, 647 P.2d 1274 (Kansas 1982) (cited on p. 15, Appellants' Brief) illustrates that failure of a condition precedent does not destroy the remaining provisions of the contract. In Sweet, appellant claimed she was entitled to vacation pay upon termination, even though she had not given two weeks notice as required in the contract. The court decided that the two weeks notice was a condition precedent to receiving vacation pay. Since appellant had failed to satisfy this condition, she was not entitled to an award of vacation pay. However, the employment contract was not voided. See also Hurt v. New York Life Ins. Co., 51 F.2d 936 (10th Cir. 1931), Engle v. First National Bank of Chugwater, 590 P.2d 826 (Wyo. 1979).

The failure to procure residential zoning (Special Verdict Nos. 1 and 2, R. 556) did not go to the existence of

the contract. The parties reached agreement on the sale of appellants' property in the Summer of 1976, at which time the "Earnest Money Receipt and Offer to Purchase" agreement was executed. Both parties spent the next year operating under the terms of the agreement. Respondents expended considerable sums of money and time to acquire the necessary zoning changes (Trial Brief, R. 669-675). The parties agreed upon extensions of the time for performance. The actions of both parties are inconsistent with the argument that the existence of a valid and enforceable contract was conditional. See Davis v. Dunigan, 205 P.2d 839 (Oregon, 1949).

In this case, the limited effect of the condition precedent is evidenced in the instruction given to the jury regarding condition precedent (Jury Instruction No. 18, R.540). The instruction reads as follows:

> In the law of contracts, a condition precedent is a fact or event, not certain to exist or occur, which the parties to a contract intend must exist or occur before performance under the contract becomes due. If the condition precedent is not fulfilled, or the fact or event does not exist or occur, the right to enforce the contract does not arise.
>
> Because parties to a contract can only be held liable according to the terms of the promises they make, no liability can arise on the promises which the conditions precedent qualify. (emphasis added)

Appellants also misunderstand the impact of an accord and satisfaction (Special Verdict No. 4, R-556). An "accord" and "satisfaction" does not necessarily discharge an entire

contract. Jury Instruction No. 21 (R.543), quoted by Appellants on Page 17 of their brief, clearly reflects this:

> An accord and satisfaction is a method of [either] discharging a contract, or settling a claim arising from the contract, by substituting for such a contract or claim an agreement for the satisfaction thereof . . . (emphasis added).

Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1386 (Utah 1977).

The breadth of the accord is limited to those disputes and claims which were contemplated by both parties at the time the accord was reached. Mullins v. Evans, 560 P.2d 1116 (Utah 1977); Plywood Marketing Assoc. v. Astoria Plywood Corp. 558 P.2d 283, 289 (Wash. App. 1976); Scantlin v. Superior Homes, Inc., 627 P.2d 825 (Kansas 1981). This is because the accord "must be consummated, by the assent or the meeting of the minds of the parties, to the agreement." (Emphasis added). Cannon v. Stevens School of Business, Inc. at 1386. If the scope of the agreement is not understood by both parties, there is no "meeting of the minds", and hence no "accord".

In this case, when the accord was entered into, the only issue in dispute was respondents' obligation to purchase the property. Settlement of any claims for attorneys' fees was neither contemplated nor agreed upon. Therefore, it was not within the scope of the accord entered into by the parties. The accord had the limited effect of discharging some of the mutual obligations surrounding purchase of appellants' property.

C. THE LANGUAGE OF THE ATTORNEYS' FEES PROVISION OF THE "EARNEST MONEY RECEIPT AND OFFER TO PURCHASE" AGREEMENT REQUIRES AN AWARD OF ATTORNEYS' FEES TO DEFENDANT

1. Respondents have enforced a right arising out of the Agreement.

The only reasonable interpretation of the attorneys' fees provision of the "Earnest Money Receipt and Offer to Purchase" agreement (lines 45-48, Exhibit "2-P") is that the prevailing party is entitled to an award of attorneys' fees. This interpretation is clearly "in accordance with the ordinary and usual meaning of the words used", [Plain City Irrigation Co. v. Hooper Irrigation Co., 11 Utah 2d 188, 191, 356 P.2d 625, 627 (1960)], and was adopted by Judge Banks.

For the purposes of this discussion, the attorneys' fees provision is set out once again:

> We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or warranty deed in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorneys' fee.

Only the first part of the first sentence ("We do hereby agree to carry out and fulfill the terms and conditions

specified above") and the last sentence (starting with "If either party . . .") are important in this case. The second part of the first sentence deals with marketable title and conveyance by warranty deed, neither of which is at issue here. By the terms of the first part of the first sentence, both parties are required to abide by the terms of the agreement. The results or consequences of not doing this are set out in the second sentence. Per that sentence, both parties ("If either party fails so to do . . . ") agree to pay expenses which arise out of their non-compliance with the terms and conditions of the agreement. Attorneys' fees are expressly included in "expenses" by the last part of the sentence (". . . including a reasonable attorneys' fee"). Each party is entitled to attorneys' fees, whether incurred in enforcing rights created by the agreement, or created by breach of the agreement (". . . arising out of the breach . . .").

Judge Banks correctly concluded that an award of attorneys' fees to respondents was proper under this provision. The Judge's interpretation is supported by the language of the agreement and by substantial evidence, and should not be disturbed. Kohler v Garden City, 639 P.2d 162 (Utah 1981); Car Doctor, Inc. v Belmont, 635 P.2d 82 (Utah 1981). Appellants had an obligation to fulfill and carry out the terms and conditions of the agreement. They failed to do so by not obtaining zoning assurances required by clause 52.j, which excused

respondents' further performance. By the terms of that clause, respondents had the right not to purchase appellants' property if proper zoning was not obtained. Yet appellants filed suit anyway. Respondents were required to incur the attorneys' fees at issue to enforce their contractual right not to purchase the property. It would be contrary to the purposes of the attorneys' fee provision in the standard "Earnest Money Receipt and Offer to Purchase" agreement if attorneys fees are not awarded to respondents in these circumstances. See, Hackford v. Snow, 657 P.2d 1271 (Utah 1982) discussed below.

2. The Trial Court Properly Interpreted the Agreement as Requiring a Reciprocal Right to Attorneys' Fees.

Even if the language of the attorneys' fees provision is not totally clear, a reciprocal right to attorneys' fees should be implied from the language. Appellants admit (Plaintiffs' Memorandum in Opposition To Award of Attorneys' Fees, R. 710, and Transcript re. Attorneys Fees, July 2, 1982, pp. 1-b and 1-c, R. 713-714) that an award of attorneys' fees is proper in this type of action under the provisions of the "Earnest Money Receipt and Offer to Purchase" agreement. Indeed, appellants have stated that if they "had prevailed on all issues . . . and had presented evidence as to attorneys' fees, [they] could have been awarded such fees and other expenses of enforcement." (Memorandum in Opposition To an Award of Attorneys Fees, R.718)

However, appellants contend that respondents, who did prevail in this suit, are not entitled to an award of attorneys' fees under the same contractual provision. Appellants' interpretation of the contract is wrong and would lead to an inequitable result in this case, as well as many other cases arising under this widely used "Earnest Money Receipt and Offer to Purchase" agreement.

Respondents did not institute this lawsuit. Rather, they were forced to defend themselves against appellants' claims which the jury and the court determined were unfounded. The successful defense was expensive and inconvenient. An interpretation of the contract that appellants are the only ones that may be awarded attorneys' fees effectively penalizes respondents for being the targets of an unsuccessful lawsuit. This is clearly not what the agreement intended.

United States v. Peter Kiewit & Sons Co., 235 F. Supp. 500 (D.Alaska 1964) is a case that is not directly on point but does point out some criteria that should be considered in reaching a reasonable and equitable interpretation of the language at issue. In that case, defendants successfully defended against an action brought under the Miller Act, 40 U.S.C. § § 270a-270e, and requested an award of attorneys' fees. Under the Act, attorneys' fees could be awarded if provided for by the law of the state in which the action arose. Sam Macri & Sons, Inc. v United States, 313 F.2d 119,

130 (D. Alaska 1963). Under Alaskan law, Court Rule 82, an award of attorneys' fees is discretionary with the trial court in cases where there was no monetary award to the prevailing party. The court rejected plaintiffs' argument that attorneys' fees should not be awarded because the action was not frivolous nor lacking in merit, and made the following comments:

> Defendants recognize that awarding costs and attorney's fees is discretionary with the court. They contend that they are entitled to recover costs and attorney's fees as a matter of fairness and equity. They make reference to the fact that the prayer of plaintiff's complaint requests judgment, interest, costs and attorney's fees. They contend that if plaintiff had been the prevailing party an award of costs and attorney's fees would have been entered in favor of plaintiff. They argue that it would be an extremely unfair rule or practice to award costs and attorney's fees when plaintiff prevails and to deny them when defendant prevails.
>
> The court is impressed with defendants' arguments and recognizes that a rule of practice awarding costs and attorney's fees should not be applied unilaterally and only in favor of prevailing plaintiffs.
>
> Plaintiff elected to commence this action. Defendants did not voluntarily become parties to this suit. They were summoned into court and are parties to this action solely by reason of proceedings initiated by the plaintiff. As a consequence thereof defendants have been put to the expense of engaging the services of counsel for the purpose of preparing and presenting their defense. (emphasis added).

Id. at 503. Although the court was applying the language of a statute rather than a contract, rules of construction discussed below support a similar approach to the interpretation of the contract at hand.

Hackford v. Snow, 657 P.2d 1271 (Utah 1982) affirmed a reciprocal construction of the very contractual language at issue. As in this case, the controversy centered around the sale of property and the interpretation of a standard "Earnest Money Receipt and Offer to Purchase" agreement. The trial court decision that was affirmed awarded attorneys' fees to the successful defendants. Although the defendants had counter-claimed for specific performance, this Court's reasoning was based entirely on the fact that plaintiffs had "failed to comply with the terms and conditions of the agreement." Id. at 1277. This court emphasized that "the [trial] court erred in not awarding attorney fees to the prevailing party." Id. at 1277. This Court did not tie its decision to the fact that defendant had sought affirmative relief from plaintiffs. See also, Taylor National, Inc. v. Jensen Brothers Construction Co., 641 P.2d 150 (Utah 1982).

A reciprocal right to attorneys' fees interpretation is also supported by ordinary rules of construction. First, a provision in a contract should be construed "so as to give effect to what the parties intended at the time it [the agreement] was made." Dubois v. Nye, 584 P.2d 823, 824 (Utah 1978). See also Wells Fargo Bank, N.A. v. MidWest Realty & Financial, Inc., 544 P.2d 882 (Utah 1975); Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981); Nixon and Nixon, Inc. v. John New & Associates, 641 P.2d 144 (Utah 1982);

Wingets Incorporated v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972). Here, the parties obviously intended that the agreement encourage performance by both parties. A reciprocal interpretation satisfies this purpose since nonperformance by either party carries with it the risk of paying the other party's expenses of litigation.

Second, a reciprocal interpretation leads to a more equitable and just result, in this and other cases. Such a result is clearly preferable to a harsh or inequitable one. Wingets Incorporated v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972); Plain City Irrigation Co. v. Stoopes Irrigation Co., 11 Utah 2d 188, 356 P.2d 625 (1960); Continental Bank & Trust Co. v. Stewart, 4 Utah 2d 228, 291 P.2d 890 (1955). See also, the factors discussed in U.S. v. Peter Kiewit & Sons, Inc. at 503.

In Foy v. Anderson, 580 P.2d 114 (Mont. 1978), the court discussed the following equities in favor of awarding attorneys' fees to a prevailing defendant:

> If equity is to be done in a situation such as this, the attorney fee must be sustained. Plaintiff Anderson sought to bring defendant Eggan into the lawsuit when she had asserted no claim against him and had no intention of doing so. For this reason she submitted a motion to dismiss which was granted by the trial court. Plaintiff Anderson forced her to secure the services of an attorney to examine the case and submit a motion to dismiss and through no fault on her part to incur attorney fees and costs. If defendant Eggan is dismissed from the case and not awarded attorney fees, she will not be made whole or returned to the

> same position as before plaintiff Anderson attempted to bring her into the lawsuit.

Id. at 117.

Appellants' argue that the attorneys' fees provision should be construed against respondents, who, they claim, drafted the agreement. This argument is without merit because:

(1) The rule of construction referred to by appellants aids a court only in construing the meaning of an ambiguous provision or contract. When a clause is not ambiguous or unclear (as is the case here) the rule is not invoked. Camp v. Deseret Mutual Benefit Association, 589 P.2d 780, 782 (Utah 1979); Auto Lease Co. v. Central Mutual Ins., 7 Utah 2d 336, 325 P.2d 264 (1958).

(2) Even if the clause is ambiguous, the trial court's interpretation is controlling. Litho Sales Inc. v Cutrubus, 636 P.2d 487 (Utah 1981); Car Doctor Inc. v Belmont, 635 P.2d 82 (Utah 1981).

(3) Respondents were not the "drafters" of the agreement within the meaning of the rule. Seal v. Tayco, Inc., 16 Utah 2d 323, 400 P.2d 503 (1965); Huber Rowland Construction v. City of Salt Lake, 7 Utah 2d 273, 323 P.2d 258 (1958). The agreement was not written by respondents but was executed on a standard form that is intended to protect both parties and was supplied by appellants' real estate agent. If

interpreted against anyone, it should be the sellers, as the dominant parties. Both parties made additions to the agreement, none of them relevant to attorneys' fees.

(4) The only case cited by appellants, Johnson Tire Service, Inc. v. Thorn, Inc., 613 P.2d 521 (Utah 1980) does not support their argument at all. In Johnson Tire the issue was contract formation between two merchants under the Uniform Commercial Code. It had nothing to do with interpreting the language of a contract.

In sum, as the trial court found, there is no support for the one-sided interpretation offered by appellants. Accordingly, respondents should also be awarded attorneys' fees incurred on this appeal. North Park Bank of Commerce v. Nichols, 645 P.2d 620 (Utah 1980); Alexander v. Brown, 646 P.2d 692 (Utah 1980); Edwards Pet Supply v. Bentley, 652 P.2d 889 (Utah 1982).

CONCLUSION

The award of attorneys' fees by Judge Banks was proper. Respondents were forced to defend against appellants' groundless claims at great expense. The trial court awarded respondents their attorneys' fees based on a reasonable interpretation of the "Earnest Money Receipt and Offer to Purchase" agreement as applied to the evidence. That determination is controlling.

Throughout the trial, appellants insisted that the agreement was binding and enforceable, but now argue, for the first time on appeal, that defendants' award was improper since the contract had really been extinguished. It is their position that is inconsistent, as well as belated.

Appellants attempt to portray themselves as the victims here. The jury found otherwise and that finding is not disputed by this appeal. It is respondents who have been victimized, as the result of the assertion of their rights under the contract. The contract calls for an award of fees in these circumstances to the prevailing party, regardless of whether that party is the defendant

Accordingly, respondents respectfully urge that the trial court be affirmed and that they be awarded reasonable attorneys' fees on this appeal, as well.

DATED this 11th day of July, 1983

PRINCE, YEATES & GELDZAHLER

By _____
Gordon Strachan

By _____
James A. Boevers
Attorneys for Respondents

MAILING CERTIFICATE

On this 11th day of July, 1983, I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF RESPONDENTS, to the following parties of record:

Don B. Allen
Tara D. Anderson
RAY, QUINNEY & NEBEKER
Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111