1966

John J. Sweeney v. Happy Valley, Inc., A Utah Corporation : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JOHN J. SWEENEY,
Plaintiff and Appellant,

vs.

HAPPY VALLEY, INC., a Utah corporation,
Defendant and Respondent.

Case No. 10259

BRIEF OF RESPONDENT

Appeal from Order of Third District Court
for Salt Lake County
Honorable Merrill C. Faux, District Judge

NATHAN J. FULLMER,
400 Executive Building,
Salt Lake City, Utah,
ROBERT S. CAMPBELL, JR.,
520 Kearns Building,
Salt Lake City, Utah,
Attorneys for Respondent.

NIELSEN, CONDER & HANSEN,
510 Newhouse Building,
Salt Lake City, Utah,
Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

AUTHORITIES CITED

CASES CITED

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS — Continued

CONSTITUTION, STATUTES AND RULES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JOHN J. SWEENEY,
Plaintiff and Appellant,
vs.
HAPPY VALLEY, INC., a Utah corporation,
Defendant and Respondent.

Case No. 10259

BRIEF OF RESPONDENT, HAPPY VALLEY, INC.

STATEMENT OF THE CASE

Appellant, John J. Sweeney, will be referred to in this Brief as "Sweeney"; the Respondent, Happy Valley, Inc., will be referred to as "Happy Valley". This is an action for an accounting, for a declaration of contractual rights and for injunctive relief, all of which were demanded of Happy Valley by Sweeney in the portion of his Complaint which went to trial, Count 1, second cause of action of the Second Amended Complaint. The contest between the parties arises out of a Contract dated August 8, 1957.

DISPOSITION OF THE CASE BY LOWER COURT

Upon trial before the Court, without jury, in December 1963, District Judge Faux entered Findings, Conclusions, and a Decree directing Happy Valley to render an accounting to Sweeney of gross proceeds received by Happy Valley in the sale of certain real properties, declaring Sweeney's rights in the 1957 Contract, and denying his claim for an injunction against Happy Valley (R. 211-221). In accordance with the Decree, Happy Valley has completed its accountings of gross proceeds of sales and has tendered to Sweeney the representative amounts due him thereunder (R. 223-229).

RELIEF SOUGHT ON APPEAL

By this Appeal, Sweeney apparently seeks a new trial by jury so that a jury may interpret the 1957 Contract and determine a proper accounting by Happy Valley thereon.

Sweeney also asks of this Court a determination that the trial Court erred in its Findings that the Contract of the parties required an accounting by Happy Valley of "gross proceeds" as distinguished from "market value" of real property sales made. He further seeks herein a de novo review of issues of fact and law in the matter.

It is the position of Happy Valley that the lower Court's determination of fact and law should be, in all respects, affirmed.

STATEMENT OF FACTS

The original Complaint of Sweeney, filed in August of 1962, demanded from Happy Valley and Owen W. Bunker, C. Taylor Burton, and G. Kirk Graff, an account-

ing under the 1957 Contract, judgment against each of the named-defendants for the amounts which the accounting reflected, and a declaratory judgment of Sweeney's future rights under the Contract (R. 1-3). After Answer and discovery, Sweeney was permitted to file an Amended Complaint (R. 38-62) wherein it was demanded that the same defendants be required to render an accounting, judgment, that said defendants be enjoined from making future real property sales at prices less favorable than average on the general market, that the individual defendants be restrained from causing Happy Valley to further breach its contract with Sweeney, and for declaratory judgment of Sweeney's future rights under the Contract.

After answer to that Complaint was filed, (R. 177-80), Sweeney, by new counsel, filed a Second Amended Complaint (R. 121-167) in May 1963, against the same defendants, setting forth four Causes of Action, the Second Cause containing two counts. Pursuant to Motions of the defendants at the Law and Motion and Pre-trial Divisions of the lower Court, the Second Amended Complaint was dismissed as to the individual defendants with prejudice, and the same was also dismissed with prejudice with respect to Happy Valley with the exception of Count 1, Second Cause (R. 175-6, 194-201). Sweeney does not allege in this appeal, error of the lower Court in the dismissal of his other claims as against Burton, Bunker, Graff and Happy Valley.

Under Sweeney's remaining Count 1 of the Second Cause, it was demanded:

(a) That "Happy Valley render a true and proper accounting" of all sales under the 1957 Contract; (R. 134).

(b) That "judgment be entered against Happy Valley for the amount shown by such accounting"; (R. 134-5).

(c) That Happy Valley be enjoined from making further sales at prices less favorable than that available in the general market; (R. 134).

(d) For an order declaring Sweeney's future rights under the Contract;

The Pre-trial Order of September, 1963, defined the triable issues as:

> "* * * an action for an accounting, for declarative relief as to the rights of the Plaintiff and for injunctive relief, all of which arises out of the * * * 1957 Agreement" (R. 195).

Happy Valley cannot agree with the presentation of facts underlying Count 1, as set forth in the Sweeney Brief. That Statement, some 14 pages in length, contains erroneous and misleading citations of fact, and is so intermingled with conclusions, innuendos and argument that it neither defines accurately the issues raised by the pleadings and developed at pre-trial conference nor reflects the record of facts presented to the trial Court. Accordingly, Happy Valley, pursuant to Rule 75(p)(2) U.R.C.P., submits the following Statement of Facts in the matter:

1. On August 8, 1957, Happy Valley (as First Party), and others, including Sweeney, a partnership, a corporation, and individuals (as Second Party), entered into a written contract concerning the develop-

ment of some 366 acres of land in the vicinity of Willow Creek Country Club as now located at 8300 South and 2700 East, Salt Lake County (R. 237-241a). Sweeney has never been a stockholder, officer or director of Happy Valley, and has never made a monetary contribution to or investment in Happy Valley, or its acquisitions (R. 1117). His representative shares in Second Party under the 1957 Contract was 31.8 per cent (R. 237).

2. The Contract provided, inter alia, that Happy Valley would purchase under contract from third parties the selected acreage and thereafter sell a portion to Willow Creek Country Club, a corporation to be organized by the interests in Second Party. It was further covenanted that the balance of the acreage, some 200 acres, would be developed and sold for residential purposes and, after deducting a prescribed adjustment factor, Second Party was to receive 25 percent of the *gross proceeds* of such sales and Happy Valley was to receive 75 percent of such gross proceeds (R. 239-240).

3. Under Paragraph 8 of the Contract, Sweeney's 31.8 percent of Second Party entitled him to 7.95 percent (not 7.75 percent as erroneously asserted on page 4 of his Brief) of the gross proceeds of property sales (R. 241-254). Sweeney is, and has been since January of 1962, the sole survivor of the Second Party under the Contract, Happy Valley having acquired all other interests in Second Party (R. 212).

4. Owen W. Bunker, C. Taylor Burton and Kirk Graff were the original directors and stockholders of Happy Valley. Graff withdrew in both capacities in 1961 (R. 321, 506).

5. Subdivision planning and promotional sales activity were commenced by Happy Valley in 1957, but due to unforeseen difficulties with County planning agencies, subdivision plats were not completed, approved and recorded until November, 1959 (R. 360-367, 1131-37).

6. It was proposed under the 1957 Contract that costs of acquiring the 366 acres as well as subdivision and development expenses of the residential properties were to be substantially financed through proceeds from property sales within the development (R. 367).

7. A series of unforeseen events in 1959 and 1960 placed demands, unanticipated by the Contract, upon Happy Valley for land payments and residential subdivision costs (R. 366-70, 522-35). Those facts were:

(a) Sweeney, acting for Second Party, notified Happy Valley that Willow Creek Country Club required fee title to the property underlying the golf course facilities. This was not envisioned by the 1957 Contract (R. 534, 1145).

(b) The market for the developed residential lots was completely inactive and expected sales did not materialize (R. 521, 1133-1140).

(c) In addition to cash demands for street, sewer and other off-site improvements in the developed subdivisions, extra improvements were required of

Happy Valley to serve the Country Club (R. 1131-1133).

(d) Contract payments were, during this time, due from Happy Valley to original landowners and some of those had to be renegotiated because of the title needs of Willow Creek Country Club (R. 1145).

8. To meet these unexpected financial obligations, Bunker, Burton and Graff in their individual capacities, made cash contributions to Happy Valley, but for which Happy Valley would not have met its accounts and obligations (R. 522, 528). In consideration of such cash advancements, Happy Valley, in November, 1959, and May, 1961, sold and conveyed to Bunker, Burton and Graff a total of 96 improved lots. The stated, agreed and accepted gross proceeds received by Happy Valley for said conveyances were $3,000.00 per lot. In determining the price to be paid Happy Valley by Bunker, Burton and Graff for each lot, the following was done by Happy Valley:

(a) Real estate opinions were solicited by Happy Valley and received from land developers and builders (Manford Shaw and Holmes and Jenson), a banker (William A. Myrick), and real estate appraisers (Edward M. Ashton and Don Stahle) (Ex. 8D-13D).

(b) Individual lots were offered for sale on the open market between 1959 and 1962 at prices higher than $3,000.00. No sales were made. Although Happy Valley accepted deposits from four prospective lot buyers in 1958, only one ripened into a bona fide sale and option prices on the other three were refunded because of subdivision changes (R. 377-86, 529, 1140).

(c) Discounts in lot prices were offered to charter members of Willow Creek Country Club, the discount price being above $3,000.00. Sales could not be made (Ex. 22).

(d) Sweeney did not want to buy any lots at $3,000.00 and did not offer to buy after they were plotted and available for sale (R. 1083, 1089-90, 1141).

9. In September of 1962, Happy Valley sold and conveyed four additional improved lots each to Burton and Bunker, the stated, agreed and accepted gross proceeds received by Happy Valley for such conveyances being $3,000.00 per lot. As in 1959 and 1961, Burton and Bunker were, at the time of said conveyances, directors of Happy Valley.

10. In addition to the conveyances referred to above, Happy Valley sold and conveyed other properties involved in the accounting:

(a) In January, 1962, Happy Valley sold and conveyed to 25 Associates, Inc., and R. E. McConaughy (each of whom held an interest in Second Party) some 31 acres for residential purposes, the gross proceeds received by Happy Valley therefor being the transfer of the respective interests of the grantees as part of Second Party in the 1957 Contract. Said interest constituted 50.9 percent of Second Party and had a reasonable cash value of $42,908.00 (R. 1152-3).

(b) In May 1962, Happy Valley sold and conveyed to Estates, Inc., some 2.5 acres of land for

residential purposes necessary to the completion of Willow Creek Subdivision No. 4 developed by Manford A. Shaw, which adjoined the Happy Valley property on the south. The stated and accepted gross proceeds received by Happy Valley for this conveyance was the cost of completion by Shaw of off-site improvements, street, curb and gutter, adjacent to Lots owned by Happy Valley in said subdivision, or $13,742.85 (R. 1161, 1172).

(c) In April 1959, Happy Valley conveyed a parcel 100 feet by 130 feet to Salt Lake Water Conservancy District as a well site and location for a pump house (said conveyance being made with the knowledge and acquiescence of Sweeney for the Second Party), as part of a program to provide water for Willow Creek Country Club (R. 418-19). In April 1961, Happy Valley conveyed to Jessup a triangular shaped parcel (less than an acre) for the purpose of straightening an irregular boundary. Happy Valley received no proceeds from either the Conservancy District or Jessup conveyances (R. 1156, 392, 418).

(d) From 1961 through 1963, Happy Valley sold certain lots in Willow Creek Subdivision 1, 2, 3 and 4 to third parties on deferred payment contracts and otherwise. These transactions and the gross proceeds therefrom are not a matter of contest in the case.

11. When lot sales did not develop as contemplated under the 1957 Contract, negotiations ensued between Happy Valley and Second Party with respect to the satisfaction and retirement of the latter's 25 percent interest in gross proceeds (R. 1147-1155). By January 1962, Happy Valley had acquired all outstanding interests of Second Party except for that of Sweeney, 7.95 percent (R. 421-22, 602-4). Prior to trial, Happy Valley tendered various accountings to Sweeney of the gross proceeds received from sales and conveyances of lots referred to in Paragraphs 8, 9 and 10(d) of this Statement. During trial, Happy Valley tendered an accounting to Sweeney of the gross proceeds received from the transactions set forth in Paragraphs 10(a) and (b) (R. 1152-3, 1162). Since Happy Valley received no proceeds from the conveyances referred to in Paragraph 10(c) above, no accounting as to those transactions was or has been made.

The trial Court, in review of the Complaint, the Pre-trial Order and opening statement of counsel, determined the issues as requiring a legal interpretation of the 1957 Contract and an equitable accounting and proceeded to try the matter without jury. After some ten days of trial and a view of the premises, the Court filed a Memorandum Decision (R. 206-9) and entered Findings of Fact, Conclusions of Law, and a Decree (R. 211-21) in which it:

(a) Determined that Happy Valley and Sweeney were separate contracting parties and rejected

Sweeney's contention that Happy Valley was a fiduciary to Sweeney (R. 206).

(b) Determined that the action was one for an accounting, for a declaration as to future rights under the 1957 Contract, and injunctive relief (R. 206).

(c) Determined that the 1957 Contract required an accounting by Happy Valley to Sweeney of *gross proceeds of sales* and rejected Sweeney's theory that Happy Valley must account on the basis of "fair market value" (retrospectively determined) of the properties sold (R. 207).

(d) Determined that the gross proceeds test was binding on the parties under the 1957 Contract unless it was shown that Happy Valley, in making conveyances to the Directors, Bunker, Burton and Graff, was guilty of dishonest, unfair, unconscionable or overreaching conduct. In such event, an accounting would be required of Happy Valley on an equitable basis (R. 207).

(e) Determined that market value of the properties at the date of conveyance was relevant as one of the factors bearing upon the good faith of Happy Valley in the transactions between it and its Directors (R. 208).

(f) Determined that Sweeney carried the burden of proof in showing that Happy Valley was not in good faith or that its conduct was unconscionable and dishonest in the lot sales to the Directors (R. 349, 207, 216).

(g) Found the issues of good faith in favor of Happy Valley and against Sweeney in connection with the lot sales from the Corporation to Bunker, Burton and Graff (R. 215-16).

(h) Found that Sweeney's expert witnesses on market value had been given "more than necessary instruction" by Sweeney, himself, "in the hope that they would reproduce his views" (R. 208).

(i) Determined that the testimony of Happy Valley's witness, William A. Myrick, carried weight as a practical expression of whether Happy Valley's conduct was reasonable and in good faith in the conveyances to the Directors (R. 208).

(j) Determined that the testimony of Happy Valley's witness, C. Francis Solomon, Jr., (to the effect that the Happy Valley project had been promoted four or five years sooner than the market warranted) was of substantial weight (R. 209).

(k) Required Happy Valley to promptly account and pay to Sweeney 7.95 percent of the gross proceeds of the contested sales (R. 209).

(l) Determined that the 1957 Contract imposes no obligations on Happy Valley to develop the premises on a time schedule and rejected Sweeney's contention that he was entitled to a veto over future sales by Happy Valley (R. 218).

(m) Refused to enjoin Happy Valley from otherwise selling property in the normal course of business (R. 218).

(n) Determined that each party should pay his own costs in the matter (R. 221).

Thereafter, Happy Valley tendered an accounting along with a money deposit with the Clerk of the Court (R. 223). Sweeney's Motion to Amend Findings, Conclusions, Decree and, in the alternative, for a new trial (R. 230-4) was denied by the trial Court (R. 242).

From the Decree entered, Sweeney takes this Appeal.

ARGUMENT

POINT I.

UNDER THE ISSUES RAISED BY THE SWEENEY COMPLAINT, THE PRE-TRIAL ORDER, AND THE TESTIMONY, THE TRIAL COURT DID NOT ERR IN DETERMINING THAT SWEENEY WAS NOT ENTITLED TO A JURY TRIAL.

(1) *The case is involved solely with matters of accounting and equitable relief under the* 1957 *Contract.*

In Point I(A) of his Brief, Sweeney claims that the trial Court was in error in denying him a jury trial on the issues raised by the pleadings and the Pre-trial Order. His Brief is less than clear, however, in specifying the particular issues as to which a jury trial is, as a matter of right, required. The remains of his Second Amended Complaint at the trial stage demanded:

(1) "That Happy Valley be ordered to render a true and proper *accounting,* including all sales, * * * as required by said agreement.

(2) "That judgment be entered against Happy Valley * * * for the amount shown by such *accounting* * * *.

(3) "That the Court enter an order *enjoining and restraining* Happy Valley from conveying lands * * * subject to the agreement * * *.

(4) "That the Court enter an order *enjoining and restraining* Happy Valley from neglecting or refusing to carry out its obligations under the agreement.

(5) "That judgment be entered declaring Plaintiff's rights under the agreement, including his right to regular and complete *accountings,* his right to share in *gross proceeds* from future sales of lands * * *" (R. 134).

Thus, it is a fair conclusion that Sweeney's Complaint, alone, fixed the case as equitable in nature, and for which right of trial by jury does not exist. *Norback* v. *Board of Directors of Church Extension Society,* 84 Utah 506, 37 P. 2d 339 (1934). The related questions of law, involving the interpretation of the 1957 Contract as to whether Sweeney was entitled to an accounting on "gross proceeds of sales" or "market value of the properties" or some other standard, as well as the issue of the good faith of Happy Valley in the sales to the Directors, were legal and factual issues appendent and ancillary to the accounting and injunctive actions. That the nub of the suit was for an accounting and

injunction, both equitable, is witnessed not only by Sweeney's Complaint, but also by the Pre-trial Order:

> "The Second Cause of Action is an action for an *accounting,* for *declaratory relief* as to the rights of the Plaintiff and for injunctive relief, all of which arises out of the * * * 1957 Agreement" (R. 195).

Such was the posture of the case, an accounting and injunction action, at the time of trial.

(2) *Breach of Contract by Happy Valley was not before the Court.*

Sweeney claims on appeal that the trial Court was "confused" as to the nature of the action because, it is argued, the gravamen of Count 1 of the Second Cause was Happy Valley's breach of the 1957 Contract (App. Br., pp. 18, 22, 23, 29). Sweeney thus contends that since an action for breach of contract is one at law and not equity, the right of trial by jury was reserved in the suit (App. Br., p. 23). The difficulty with Sweeney's argument, of course, is that the pleadings, the Pre-trial Order, the issues framed, and the Record all belie a breach of contract theory.

To begin with, not one count of Sweeney's Complaint, Amended Complaint, or Second Amended Complaint remotely suggests or raises an ex contractu claim; nor does the prayer in any of the Complaints demand the payment of damages for breach of contract. Secondly, counsel for Plaintiff at the pre-trial conference did not propose as an issue Happy Valley's breach of the 1957 Contract, and the Pre-trial Order did not so much as insinuate that the re-

maining Count 1 of the Second Cause involved the breach of contract. The trial Court was genuinely concerned with Sweeney's claim that the action was for breach of contract, even though such claim was not made until the first day of trial (R. 260). Of particular concern was the fact that although counsel for Sweeney then argued a breach of contract, he did not seek to recover damages occasioned by the breach. This caveat was not answered by Sweeney when queried by the Court. Hence, the trial Court drew the triable issue as:

> "THE COURT: I fail to see, in your prayer, in the pleadings — in your prayer — a contention that this is a breach of contract, and, certainly, Judge Hansen, in his pre-trial order, Page 2, 'The Second Cause of Action is an action for —' (reading)
>
> "I am going to proceed as though this were an action in equity for an accounting between the parties" (R. 267).
>
> * * * * * *
>
> "Now, with respect to the basis or claim — the standard — which I must use in determining whether or not plaintiff is entitled to relief on the basis of the pleadings and the pre-trial conference, I have rejected that this is an action of breach of contract.
>
> "I take the view that plaintiff comes here appealing to equity. It is clear that, if there is fraud, deceit, or over-reaching in what the seller has done so that a reasonable person would be shocked at the nature of their transaction, that equity will intervene and require the defendant to make a fair and reasonable accounting of the sales made.

> "Accordingly, it appears to me that, if plaintiff shows fraud, deceit, overreaching — possibly, unreasonable standards — in the sales that have been made, equity will require the seller to re-make the accountings on a reasonable basis; that one of the things that will be helpful to the court in determining whether, under all the circumstances, the transactions were unreasonable to the point that equity will intervene, is fair market value" (R. 348).

The Pre-trial and trial Court's determination that the case was one for an accounting and injunction and not breach of contract was borne out by the testimony of Sweeney at the trial. The totality of that evidence was directed to the question of whether Happy Valley had engaged in unconscionable, inequitable, or fraudulent conduct in the lot conveyances to its Directors, so as to require an accounting upon a basis other than gross proceeds received from sales. It is worthy to note that although Finding of Fact No. 2 of the lower Court affirms that the suit was for an accounting, declaratory relief and injunctive relief (R. 212), Sweeney, in his Motion to Amend the Findings, registered no objection to it on that basis (R. 230).

It is safe to say, therefore, from a survey of the case in its entirety, that the suit involved an accounting under the 1957 Contract and declaratory and injunctive relief, and did not encompass an action for breach of contract. Ergo, Sweeney has no standing now to claim denial of jury trial on the theory that such contract issue was before the trial Court.

(3) *Under the issues thus defined, trial by jury was discretionary with the trial Court and not a matter of right.*

Simply drawn, the question to be put is whether an action for an accounting is of an equitable or legal nature. If it lies within equitable cognizance, a trial by jury is not required. *Holland* v. *Wilson,* 8 U. 2d 11, 327 P. 2d 250 (1958); *Norback* v. *Bd. of Directors of Church Ext. Society,* 84 Utah 506, 37 P. 2d 339 (1934). Sweeney, on pages 19 and 20 of his Brief, argues that the suit is a legal rather than an equitable accounting. In so doing, he ignores the hard core of decisions from this Court which, without exception, has treated actions for an accounting as equitable. *Kimball* v. *McCormack,* 70 Utah 189, 259 Pac. 331 (1926); *Lane* v. *Peterson,* 68 Utah 585, 251 Pac. 374 (1926). The most recent holding in this regard is *West* v. *West,* 16 U. 2d 411, 403 P. 2d 22 (1965) wherein this Court stated:

> "Inasmuch as this is a suit over an accounting in a partnership, it is a suit in equity and it is the responsibility of this Court to review questions of both law and fact."

Sweeney argues further that because Count 1 demanded judgment for "the amount shown by such accounting" and because 78-21-1, U. C. A. 1953, accords a jury trial in a suit "for money claimed due upon contract," that the case is at law and not equity. The four corners of Sweeney's claim were squarely before this Court and rejected in *Lane* v. *Peterson,* 68 Utah 585, 251 Pac. 374 (1926) wherein the prayer for relief was:

> "That Dastrup be required to *account* to Plaintiff for all moneys received by him under the aforesaid contract for the sale of said property, and that the Plaintiff have a *decree* against said Dastrup for *any such sum as may upon an accounting be found due and payable to him.*"

This Court through Gideon, C. J., determined the facts in *Lane* to present a case in equity:

> "This is an equitable action, and this Court is therefore required to examine the evidence to determine whether the facts found are contrary to the weight of the evidence, keeping always in mind that a finding of a trial court upon conflicting evidence will not be disturbed unless it is made to appear that the Court has misapplied proven facts or made findings clearly against the weight of the evidence."

See also *Blake* v. *Amreihen,* 36 N. E. 2d 797 (Ohio 1941), wherein it was said:

> "The fact that this accounting may result in a money judgment against him does not change the action from equity to law entitling him to a jury trial."

The fact that Sweeney's suit is founded upon the 1957 Contract is no panacea to his present claim of right to jury trial, nor does it invoke the provisions of 78-21-1, U. C. A. 1953. Such does not rob the suit of its equitable nature. What his argument fails to appreciate is that in practically every instance, an action for an accounting is grounded upon a contractual relationship between the parties. If the contractual relation were to automatically activate the con-

ditions of 78-21-1 so as to strip the suit of its equitable character, the concept of an equitable accounting would be gone. Once it is determined that equity jurisdiction attaches, the trial Court may also hear and resolve ancillary and subordinate questions of law within the equitable framework. The leading case of *Norback* v. *Bd. of Directors of Church Ext. Society*, 84 Utah 506, 37 P. 2d 339 (1934), requires nothing less:

> "If the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply."

The pleadings, pre-trial Order and evidence of trial are all witness to the fact that Sweeney, under Count 1, demanded an accounting pursuant to Paragraph 6 of the 1957 Contract. Stated in yet another fashion, Sweeney has asked for specific performance of that contractual provision. It is not open to argument in this State that a suit for specific performance is, by definition, equitable and not legal. *Close* v. *Blumenthal*, 11 U. 2d 51, 354 P. 2d 856 (1960). Accordingly, the trial Court was correct in ruling that Sweeney did not have a right to trial by jury in the case.

(4) *Complexity of the suit, alone, is sufficient to justify equitable rather than legal cognizance.*

The accounting action of Sweeney made necessary the inquiry, testimony, and evidence with respect to better than 105 separate real estate transactions between Happy Val-

ley, its Directors, and others. Each sale and the gross proceeds received therefrom was a separate transaction, having taken place on different dates and representative of varying marketing conditions. Examination of evaluation witnesses on market value (as the latter related to the issue of good faith) was of necessity, lengthy. In such cases, the judicial process is served by the efficiency of a non-jury trial and the authority is substantial that the multiplicity of factual issues is, by itself, a basis for equity jurisdiction. Thus, in *Jackson* v. *Gardner*, 197 Wash. 276, 84 P. 2d 992 (1938), the Supreme Court of Washington stated:

> "Manifestly the right of the parties could not be determined except by taking an accounting between them, and, as the transactions appeared by the pleadings extensive and varied, it necessarily involved a long and complicated accounting. It has long been the rule that these conditions *alone* justified the assumption of jurisdiction by a court of equity."

The Washington Court continued:

> "Jurisdiction of equity in this class of cases had its rise in the inadequacy of the common-law remedy. A court of law sitting with a jury is not a tribunal constituted so as to try an action involving a long account and reach an accurate result. The jury has no adequate facilities for keeping records of the several items going to make up the account, and the ordinary mind cannot keep them in memory. The result must necessarily be a verdict without adequate consideration of the matters involved, resulting, oftener than otherwise, in rank injustice to one party or the other.

> "We are satisfied that the court did not abuse its discretion in treating the case as one of equitable cognizance, triable without a jury."

To the same effect is *Sunset Pacific Oil Company* v. *Clark*, 171 Wash. 165, 17 P. 2d 879 (1933). If for no other reason than the complexity of facts, the trial Court in this case was justified in trying the matter before the equity side of the Court.

(5) *Authorities relied upon by Sweeney do not support a right to jury trial in this case.*

Some attention, but small, should be given to the citation of cases claimed in support of Sweeney's right to jury trial under Point I(A) of his Brief.

It is said that the decision of this Court in *Halloran-Judge Trust Co.* v. *Heath*, 70 Utah 124, 258 Pac. 342 (1927) is to the effect that an accounting is a proceeding at law. A review of that case does not permit such a finding. In point of fact, this Court in *Heath* recognized the accounting action to constitute "an equitable proceeding" but went on to say that since there existed a lack of mutuality of obligation, equitable relief could not be granted. So far as the character of the action was concerned, however, *Heath* is clearly in line with the equity doctrine of *West* v. *West*, 16 U. 2d 411, 403 P. 2d 22 (1965) and *Lane* v. *Peterson*, 68 Utah 585, 251 Pac. 374 (1926).

Sweeney also claims that Rule 38, U.R.C.P., guarantees his right to trial by jury in this suit. The swift answer to that argument is that Rule 38 does not grant or create any right whatsoever to a jury trial. Professor

Degnan, in his review of the Utah Law on the right to trial by jury, records the accurate view of the Rule:

> "It must be observed that the rule (Rule 38) seems carefully non-commital. It does not attempt to define the right which is to be preserved. It seems to go no further than to say that the right declared, *if any*, should be preserved." Degnan, *Right to Jury Trial in Utah*, 8 Utah Law Review 109 (1962).

Nor is the case of *Valley Mortuary* v. *Fairbanks*, 119 Utah 204, 225 P. 2d 739 (1950), cited in Sweeney's Brief, appropriately considered. That is so because the Complaint in *Fairbanks* sought recovery of damages for breach of contract, an element which divorces it as precedent in this Appeal.

Finally, the decision of the United States Supreme Court in *Dairy Queen* v. *Wood*, 369 U. S. 469, 8 L. Ed. 2d 44 (1962) is quoted extensively by Sweeney in an attempt to buttress his jury trial argument. While the rationale of that case may possess some abstract interest to the reader, it is of no precedent in any way binding upon this Court. It was established at an early date that the guarantees of the 7th Amendment to the United States Constitution discussed in the *Dairy Queen* decision, do not apply to the courts of the several states. *Walker* v. *Sauvinette*, 92 U. S. 90 (1875). Moreover, the right to trial by jury under the 7th Amendment is not applicable to the states through the Due Process Clause of the 14th Amendment. *Snyder* v. *Mass.*, 291 U. S. 97 (1934). So far as the federal constitutional law is concerned therefor, the sovereign states have

no obligation to follow the notions as to jur
in the *Dairy Queen* case. Utah has establish
stitutional precedent in that regard, *West*
Lane v. *Peterson,* supra, *Kimball* v. *McC*
which does not fit with the Dairy Queen Do
accounting is a proceeding at law requiri
Then too, the simplicity of facts in the *Da*
sets it apart from the detailed issues before
in the case at bar. It is a fair presumption
Supreme Court would have taken a differ
jury trial question had the facts therein b
those now before this Court.

On every front, Sweeney was not entit
a trial by jury on the accounting, declarat
tive issues before the trial Court.

POINT II.

THE TRIAL COURT WAS CORREC DETERMINATION THAT THE BU PROVING THE LACK OF GOOD THE CONVEYANCES FROM HAPPY TO ITS DIRECTORS WAS WITH S

(1) *The burden of proof to show good with Happy Valley only if there iary relationship between it and*

Under Point I(B) of his Brief, Sween
claim that Happy Valley (or its Director
party-defendants) should have carried the
at the trial to show that the conveyances f

ation to its Directors, Bunker, Burton, and Graff, were not in bad faith, unconscionable, unfair or fraudulent. Such claim it is argued, is founded on the principle that directors owe a fiduciary duty to prove the fairness of their personal transactions with the corporation. The authorities cited by Sweeney verify, as a general proposition of law, that directors, as trustees, owe a fiduciary duty to the corporation and its stockholders and by virtue thereof, have the responsibility of proving the fairness and adequacy of their individual bargains with the corporation. *Glen Allen Mining Co.* v. *Galena Mining Co.*, 77 Utah 362, 296 Pac. 231 (1931); *Hansen* v. *Granite Holding Co.*, 117 Utah 530, 218 P. 2d 274 (1950); 3 *Fletcher on Corporations*, §949 (Perm. Ed.); *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 281 (1939). While that legal precept is sound in principle, it is clearly inapplicable and irrelevant under the facts of the instant case.

The fiduciary relation of which the cases speak is that of the directors of the corporation as trustees on the one hand, and the corporation or its stockholders as the cestui que trust on the other. Thus, in *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 281 (1939), relied upon by Sweeney, the action was brought by the Trustee in Bankruptcy, as the representative of the corporation, against the directors of the bankrupt company. A fiduciary association between the corporate directors and the trustee was found to attach. In *Hansen* v. *Granite Holding Co.*, 117 Utah 530, 218 P. 2d 274 (1950), a derivative action was instituted by stockholders in behalf of a corporation against corporate offi-

cers. Upon concluding that "a fiduciary relation exists between the Board of Directors and the stockholders", this Court held that the directors had the burden of proof as to the fairness of their dealings with the corporation. Again, in *Glen Allen Mining Co.* v. *Park Galena Mining Co.*, 77 Utah 362, 296 Pac. 231 (1931), also relied upon in Sweeney's Brief, the corporation, itself, questioned the propriety of the transactions of certain corporate officers. In passing upon the question of burden of proof, this Court said:

> "The authorities everywhere recognize the rule that, *where a fiduciary relation is shown to exist*, the burden is upon the *fiduciary* to show good faith and fair dealing in his relations with his cestui que trust." (Emphasis added.)

In each of the cases cited by Sweeney, therefore, the suit was between the corporation (or its representative, such as a trustee in bankruptcy or a derivative stockholder) on the one hand, and directors or officers of the corporation on the other. There is nothing magic about the assignment of the burden of proof to the directors in such cases to show good faith, it being merely a normal extension of the principle that where the fiduciary relationship exists, the burden in evidencing the adequacy of the transaction is upon the fiduciary. *Perry* v. *McConkie*, 1 U. 2d 189, 264 P. 2d 852 (1953).

The burden of proof issue in the case at bar may now be quickly framed: Does there exist a fiduciary relationship between Happy Valley and Sweeney so as to place upon the Corporation the burden to prove the good faith

of the corporate sales and conveyances to the Directors, Bunker, Burton and Graff? The answer is a negative one. There is no evidence in the record of this cause that would begin to support a finding that Happy Valley now stands or has stood in a fiduciary capacity to Sweeney. In all transactions and relations with the Corporation, Sweeney has been and is an independent contractor under the 1957 Contract. At the outside, his status becomes one of a creditor of Happy Valley upon a land sale being made by the latter. He comes no closer than that. It is manifest that there is no fiduciary relationship between a corporation and an independent contractor or a corporate creditor. As stated in *Briggs* v. *Spalding*, 141 U. S. 133, 35 L. Ed. 662 (1890), as between contract creditors and a corporation, vis-a-vis, "the relationship is that of contract and not of trust". In *Lane* v. *Peterson*, 68 Utah 585, 251 Pac. 374 (1926), this Court had before it analogous facts to the present case. Plaintiff, a contracting party with Defendant, sought an accounting as to certain property transactions carried out by Defendant, it being claimed that the accounting was improper because of the Defendant's fraud. Examining the burden of proof applicable in that case, this Court said:

> "The burden of proving the alleged fraud is upon him who asserts it; moreover, the fraud must be established by clear and convincing evidence."

The trial Court left no uncertainty in defining the relationship between Happy Valley and Sweeney:

> "* * * The parties here in this lawsuit are not joint adventurers. They are independent con-

> tractors; and I am required to determine the meaning, and so interpret their contract.
>
> "As I have stated, it is fundamental that this Court will not re-make the contract for the parties" (R. 346).

Furthermore, in the Court's Conclusions of Law, it is provided in Paragraph 5:

> "The relationship between Plaintiff and Happy Valley is a contractual one only, and is not a joint venture and is not a fiduciary relationship" (R. 233).

Sweeney, in his Motion to Amend the Conclusions of Law, (R. 230-4) did not set out this Conclusion as error.

There being no fiduciary relationship in the case, the doctrine and authorities upon which Sweeney depends have no application. But the argument of Sweeney in Point I(B) of his Brief does not stop here. He seems to claim, in addition, that a fiduciary obligation is due from the Directors of Happy Valley to Sweeney (App. Br., pp. 32, 33, 34, 38). The fallacy of that argument is that the directors are not parties to the accounting or to any aspect of the litigation. Furthermore, it is an established rule of law that there is no fiduciary relationship between directors of a corporation and contract creditors of the corporation. *Patterson* v. *Stewart,* 41 Minn. 84, 42 N. W. 926 (1889). The Wyoming Supreme Court, in *Webb* v. *Cash,* 35 Wyo. 398, 250 Pac. 1 (1926), said it this way:

> "It is difficult to perceive upon what principle a director of a corporation can be considered a trustee of its creditors. * * * he has no

> contractual relation with the latter; he represents a distinct entity, the corporation and his relations to its creditors is exactly the same as the agent of an individual bears to creditors of such individuals; and it is not pretended that in the latter case the agent would be the trustee of the creditors of his principal * * *."

The lower Court was correct in determining that the burden rested with Sweeney in proving that the sales and conveyances from Happy Valley to Bunker, Burton and Graff were not in good faith so as to require a different accounting.

Lastly, Sweeney takes time out in Point I(B) to argue the weight of the expert testimony on market value (App. Br., pp. 38-40). While such evidence has no direct or indirect connection with the burden of proof issue and is subject to a motion to strike, the following is a rebuttal to such collateral matter. Contrary to the notions of Sweeney's present counsel, it was clearly understood by the parties in the trial Court that testimony on market value was not received as independent evidence upon which the accounting of Happy Valley was to be predicated. Its admissibility was of a more refined purpose, viz., as but one of a number of factors which the trial Court would weigh in determining whether the conveyances of Happy Valley to its Directors were unfair, unreasonable or unconscionable so as to require a different accounting. Most of the evaluation testimony was of an ex post facto nature. That is to say, the appraisal judgments were formed after the time, the legal effect of which was in question. The ap-

praisal of William A. Myrick, made at the request of Happy Valley Directors and prior to the time when the conveyances were made, revealed a market value of $3,000.00 per lot. The trial judge found Myrick's testimony to be of "practical" significance in the decision of what was fair and wise at the time the sales and conveyances were made to the Directors.

Although this Court will review the evidence in an equity proceeding, it will not disturb the findings of the trial Court unless they are clearly against the weight of the evidence. *Hart Bros. Music Co.* v. *Wood,* 14 U. 2d 366, 384 P. 2d 591 (1963); *Nunley* v. *Walker,* 13 U. 2d 105, 369 P. 2d 117 (1962).

POINT III.

THE TRIAL COURT CONSIDERED AND MADE EXPRESS FINDINGS ON SWEENEY'S RIGHTS UNDER THE 1957 CONTRACT FOR FUTURE DEVELOPMENT AND SALE OF PROPERTY.

In Point I(C) of Sweeney's Brief, it is asserted that the lower Court "refused to consider any testimony regarding the terms of the Contract with respect to the development of the properties and made no findings in reference to the rights of Appellant in respect thereto" (App. Br., pp. 40-1). Conspicuously, however, Sweeney fails to make reference in this phase of his Appeal to any testimony offered by him during the ten-day trial on such issue. Sweeney had an obligation to present testimony in the trial

Court in support of his theory in this regard, rather than proposing the same for the first time on appeal. *Hamilton v. Salt Lake County Sewage Improvement Dist.*, 15 U. 2d 216, 390 P. 2d 235 (1964).

Contrary to the self-sustained assertions in Sweeney's Brief, the trial Court made the following express conclusions regarding his rights under the Contract:

> "6. The Agreement of August 8, 1957 imposes no obligation on Happy Valley to develop or sell the premises on any time schedule and plaintiff has no right of veto over Happy Valley's actions with regard thereto, save and except that plaintiff's prior consent is required in the event Happy Valley seeks to sell or develop said premises other than for residential purposes and a shopping center.
>
> "7. Plaintiff is not entitled to any injunctive relief as prayed."

The answer to Sweeney's claim in Point I(C) is complete by the statement that the lower Court did consider and interpret Sweeney's rights under the Contract and incorporated the same within the Decree. Reduced to more practical considerations, his claim is not that the trial Court did not find on the issue, but that the finding was not to his liking.

POINT IV.

THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING SWEENEY'S OFFER OF PROOF AS TO SALES OF OTHER PROPERTY.

(1) *At the time of the proffer, there was no foundation as to the terms of the sales, the relationship of the buyer and seller and other factors necessary to determine comparability.*

The opening sentence in Point I(D) of Sweeney's Brief is classic:

> "By the Court limiting the trial to a hearing of an equitable accounting at the outset of the trial, Appellant was very limited in the nature of the testimony which he could adduce. * * *" App. Br., p. 43).

Under the broad daylight of the transcript made in this case, such a remark is ludicrous. Sweeney was given leave to call witnesses and present testimony in whatever order desired. Time and again, witnesses were called and recalled out of turn by his counsel (R. 509, 537, 541, 578). Sweeney was even permitted to employ (what he admittedly called) "discovery" during the course of the trial (R. 339-41).

The source for his statement above-quoted is not easily ascertained. It cannot stem from the trial Court's refusal to admit into evidence Sweeney's offer of proof (through the testimony of Bunker) of certain sales (Nicolaides, Prows, Inc., Johnson, Rowley, McKay, and Award Homes), and from the further proffer (through the testimony of Burton) of other sales (Gordon, Ferre, Manley, Gordon and Bush, and Dyson), because the ruling made by the lower Court thereon is consistent with the decisional law in

this jurisdiction. There is no doubt from the record that Sweeney made the proffer to evidence that such sales were comparable to the subject properties in litigation and relevant in determining market value of the latter (R. 581-91). Counsel for Sweeney began his offer of proof by saying:

> "MR. HATCH: I have an offer of proof I would like to make, your Honor, and, if we could do this a little before trial in the morning, be a lot easier.
>
> "THE COURT: All right; are you going to make an offer of proof; why don't you put your witness on?
>
> "MR. HATCH: This, your Honor, merely refers to the *direct evidence of comparable sales* which the Court has not permitted me to bring in.
>
> "THE COURT: Direct evidence of comparable sales?
>
> "MR. HATCH: Yes; * * *" (R. 581-82).

Upon objection, such offers of proof were refused because there was no foundation at that point from expert witnesses that the sales contained in the proffer were, in fact, comparable to the properties in litigation. The law is settled in this State that as a condition to the admissibility of sales of collateral property, it must be evidenced by competent expert testimony that such sales, their location, terms and parties are, in fact, of reasonable comparison with the property before the Court. *State Road Comm.* v. *Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961); *Southern Pacific Co.* v. *Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960); *State of Utah* v. *Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953).

Absent such foundation, a sale is not admissible as direct evidence of market value. *State Road Comm.* v. *Woolley*, 15 U. 2d 56, 390 P. 2d 860 (1964). Both Burton and Bunker testified as laymen, not as experts. It is difficult to perceive Sweeney's concern on the question, since the sales within the proffer were ultimately received by the Court as bearing on market value through subsequent expert witnesses of Sweeney and under his cross-examination of Happy Valley witnesses (R. 479, 482, 484, 485-91, 556-563, 629, 631-40, 865-880, 1237-1241).

Sweeney further argues that it was error not to receive evidence with respect to negotiations between Happy Valley and the Federal Government over tax liabilities on the properties sold by Happy Valley to the Directors. It is said that the lower Court foreclosed cross-examination of C. Taylor Burton as to appraisals (Ex. 8D-13D) obtained by the Directors and "used" in connection with "difficulties with the Federal Government", in the re-evaluation of the lots under litigation for tax purposes (App. Br., p. 45-6). While Appellant makes no reference to that portion of the Record wherein the cross-examination and error is said to have taken place, it is assumed, for purposes of this rebuttal, that such is found at R. 1170. Sweeney's argument on this score is much more sophisticated than a fair reading of the Record allows. There is no evidence, as his contention would infer, that Happy Valley obtained the concerned appraisals for tax negotiation purposes. The testimony is all to the contrary. Mr. Burton at R. 371, indicated that such appraisals were merely "referred to" in

negotiation with federal tax personnel. But the cross-examination of Burton at R. 1170, of which Sweeney now complains, did not concern appraisal data at all. It was directed at the evaluation of 24 subdivision lots for the compromise of a tax liability:

By Mr. Hatch for Sweeney:

> "Now, following the transfer of twenty-four lots in Subdivision 1 from the corporation to you and to the two directors of the corporation, did not the Federal Government for tax purposes, require that you re-evaluate those at a different figure?" (R. 1170).

There was clearly no foundation before the Court to suggest that such a question was germane to the issues of market value or good faith, and until such foundation was presented, the possible compromise of subsequent tax liabilities was properly excluded as irrelevant. 2 *Jones on Evidence*, 726, Sec. 390 (5th Ed., 1958).

POINT V.

THE LOWER COURT DID NOT ERR IN ITS INTERPRETATION THAT THE 1957 CONTRACT CALLED FOR AN ACCOUNTING BASED ON "GROSS PROCEEDS OF SALES."

Point II of Sweeney's Brief argues that the trial Court failed to interpret properly the 1957 Contract between the parties in that it did not accept Sweeney's theory as to the basis for the accounting. Capsulized, that theory was two-fold: (1) that he is entitled to an accounting predi-

cated upon the *"fair market value* of the property, at the time of the conveyance, as residential lots" and (2) that any sale made is subject to his retrospective determination of market value. Although Sweeney was willing to accept an accounting on the Estates, Inc., transaction on the basis of gross proceeds rather than market value because gross proceeds yielded a larger return in that instance, his objections to Happy Valley's accounting and request for declaratory and injunctive relief were fastened, in the main, to these two proposals.

The 1957 Contract makes it crystal clear that Sweeney is wrong on both arguments. Paragraph 6 of the Contract expressly provides that the accounting is to be based upon gross proceeds of sales and not fair market value:

> "The *gross proceeds* of sales of all of such properties sold for residential lots shall be divided into two portions, one equal to seventy-five percent (75%) and the other equal to twenty-five percent" (R. 80).

Whatever the gross proceeds of a particular sale consummated by Happy Valley is, Sweeney is entitled to an accounting of those proceeds and a tender of money from Happy Valley of 7.95 percent thereof. So far as fair market value of the property sold may be related to the gross proceeds received from the sale, all that the Contract fairly implies and imports is that Happy Valley transact the sales fairly, reasonably and in good faith. To that end, however, Happy Valley is free to exercise its own business judgment — and such may be more or less than what Sweeney or

anyone might later peg as market value. If Happy Valley consummates a sale for an amount in excess of a property's fair market value, Sweeney is entitled to 7.95 percent of the gross proceeds, nothing less. By the same mark, if a sale is made by Happy Valley and later determined to be less than fair market value, Sweeney is entitled to the same percentage of the gross proceeds of such sale, nothing more. The bitter goes with the sweet. To construe the 1957 Contract as requiring a division between the parties on a basis other than gross proceeds would be to rewrite and reform the Agreement, a theory which not even Sweeney, to this time, has asserted.

As to the second part of his argument, the Contract does not grant to him a right to concur in the terms or nature of sales made by Happy Valley. No clause entitles him to veto a transaction or to accept it on his conditions. Nor does the Contract in any degree afford him the luxury of a "second guess" as to whether a sale made by Happy Valley was the right thing to do under the circumstances. The lower Court was of this conclusion (R. 218).

The trademark of the gross proceeds test under the Contract is that sum received by the Corporation in the sale consummated and not the value of what it conveyed. To insure that the gross proceeds received by Happy Valley were fair and in good faith, the Court took evidence concerning four categories of transactions, the accountings as to which Sweeney objected. Each is discussed in chronological order.

Lot sales to Directors. As set forth in the Statement of Facts, Happy Valley sold and conveyed numerous lots to its Directors, Burton, Bunker and Graff, at $3,000.00 per lot. Sweeney admitted at one point of the trial that had the sales been consummated with third parties, he would have been bound thereby and entitled to 7.95 percent of the gross proceeds (R. 345). That the sales were, in fact, made to the Directors of Happy Valley does not warrant a different result since there is no fiduciary relationship between Happy Valley and Sweeney.

Why did Happy Valley sell the lots to the Directors? The reasons were that the initial demands for cash on Happy Valley were far greater than anticipated, having been accelerated by requests from Willow Creek Country Club for fee title conveyance rather than on extended real estate contract as originally planned (R. 360, 365, 522, 532-5, 1131-3, 1145). The lot sales program had not materialized and there was no ready market for them at a price less than $3,000.00 (R. 366-70, 372-86, 514-28, 599, 1163-4). Faced with an almost certainty that the project would fail if funds were not provided, the Directors bought the lots themselves at a price fair and reasonable at the time.

There is a plethora of evidence that the lot price of $3,000.00 was established not arbitrarily or collusively, but only after consideration of the foregoing factors and the opinions of disinterested parties, i. e., William Myrick, a banker; appraisers, Stahle, Nelson and Ashton; and realtors and builders, Manford Shaw and Holmes (R. 1173-83, Ex. 8D-13D). Sweeney's answer to this testimony came in

the form of retrospective appraisals of three individuals, Tucker, Teerlink and Kiepe. The testimony of each had the air of advocacy and, as the trial Court put it in its Memorandum Decision, gave the impression:

> "That the witnesses had been given more than necessary instruction by Plaintiff himself in the hope that they would reproduce his views. I think I detected frustration in these witnesses attempting to develop for the Court the blueprint which Plaintiff himself had insisted upon, rather than giving a more spontaneous expression of comparative values which finally would have been more helpful to me. * * *" (R. 208).

Mr. Kiepe, who had appraised the properties in 1959 prior to retainment by Sweeney, initially evaluated the land at substantially less than $3,000.00 per lot. His 1962 and 1963 appraisals of the same properties as of the 1959 date reflected values five times the greater (Ex. 1P, 38P, 22P). Of further interest was the fact that the Second Party, including Sweeney, in May, 1960, equated $275,000.00 to the value of 75 lots in the subdivision, or $3,333.00 per lot (R. 1095, Ex. 52D). Although Happy Valley offered to sell lots to Second Party at $3,000.00 (R. 1058, Ex. 42P), neither Second Party nor Sweeney, individually, accepted the offer.

The trial Court found from these and other facts that the sales from Happy Valley to its Directors were not unfair, unreasonable, shocking, unconscionable or fraudulent (Findings 17-20, R. 215-16). It is the settled law of the case that those Findings will not be overturned by this

Court unless the same are found to be clearly in error. *Hart Bros. Music Co.* v. *Wood,* 14 U. 2d 366, 384 P. 2d 591 (1963); *Metropolitan Investment Co.* v. *Sine,* 14 U. 2d 36, 376 P. 2d 940 (1962); *In re Drainage Area of Bear River,* 12 U. 2d 1, 361 P. 2d 407 (1961).

Thirty-one acre sale to Second Party interests. Seemingly, Sweeney claims that Happy Valley was not entitled to dispose of property covered by the 1957 Contract as undeveloped acreage. The position is fallacious. The Contract provides and the lower Court found that property could be sold "for residential lots" and not merely "as residential lots". The Contract does not condition a sale upon the existence of subdivided lots, nor would it assume that an accounting thereon would be, as contended by Sweeney, predicated upon a de facto subdivision.

The hard facts of the thirty-one acre sale are that the buyers or grantees were all members of and comprised 50.9 percent of the Second Party under the 1957 Contract. Happy Valley, seller, then owned an additional 17.3 percent of the Second Party interest. Accordingly, the transaction was entered into and approved by 68.2 percent of Second Party. Nowhere does the 1957 Contract give Sweeney, by his minority interest, a veto power to thereby frustrate the intent of the majority of Second Party.

Under the accounting, Sweeney was entitled to his 7.95 percent of the computed gross proceeds, having a reasonable cash value of $42,908.00. Such was the determination of the trial Court (R. 213).

Estates, Inc., transaction. The undisputed testimony and the stipulation of the parties shows that the costs of the off-site improvements which Estates, Inc., (through its principal officer, Manford A. Shaw) constructed for Happy Valley properties in consideration of the 2½ acre conveyance, were $13,762.85. That sum constituted the gross proceeds received by Happy Valley from the transaction. It is at this stage that the consistency and "good faith" of Sweeney is put to the rack. Under the testimony of Sweeney's own witnesses, the value of the 2½ acres was $10,000.00. It turns out that in this instance, adherence to the "market value" test ($10,000.00) yields a lesser return to Sweeney than does the "gross proceeds" standard ($13,-742.85). Finding such to be the case, Sweeney acknowledged before the trial Court that he would accordingly accept an accounting on the Estates, Inc., transaction based on gross proceeds:

> "For the Estates, Inc., tract at the north end of Sub. 4, the defendant received improvements worth (according to Manford Shaw's stipulated testimony) $13,742.85. *We would accept this as gross proceeds*" (Para. 16, Sweeney's Tr. Br., p. 10).

On appeal, Sweeney has taken a slightly different stand than that in the lower Court (App. Br., p. 54). Happy Valley, however, has tendered its accounting on the premise that yields the larger return to Sweeney, gross proceeds.

Water Conservancy and Jessup transactions. Happy Valley, at an early stage in development, conveyed a well

site to the Salt Lake Water Conservancy District and later, an irregular parcel to Jessup. As to the former, the conveyance was made in furtherance of Happy Valley's obligation to furnish water for the Willow Creek Country Club, the chief negotiator for the Club being Mr. Sweeney. The property underlying the well site was not considered part of the residential development by the parties under the 1957 Contract (R. 1108-9, Ex. 22P). The conveyance of the small triangular parcel to Mr. Jessup was realized for the purpose of establishing a stable boundary and property description for the greater Happy Valley holdings.

The Corporation did not receive any proceeds or assets for either the well-site transaction or the Jessup conveyance. The trial Court found, upon ample evidence, that said conveyances were made by Happy Valley in good faith and for the purpose of stabilizing the properties held for residential purposes (Findings 10, 11, R. 214). Happy Valley has tendered no moneys to Sweeney representative of these transactions. The reason is elementary: 7.95 percent of nothing is nothing.

Of course, Sweeney claims his "fair" share of these no-proceeds transactions. While demand for 7.95 percent of the fair market value of the two parcels was vigorous in the trial Court, his Brief on appeal barely touches the matter (App. Br., p. 54). The inconsistency of his approach to these tracts is met by the incongruity of his theories and arguments on the case in its entirety.

Sweeney's arguments on the Contract can be won not by interpretation, but only by reformation. The lower

Court refused to rewrite the Contract and we respectfully submit that this Court should not do otherwise.

CONCLUSION

Counsel for Sweeney, in his Summary, lament of the "extreme difficult circumstances under which Appellant had to present his evidence". It is said that the trial in the lower Court was frequently interrupted for "so-called voir dire examination" so as to bring it within the remarks of Henroid, C. J., in *Bd. of Ed. of Salt Lake City* v. *Bothwell and Swaner Co.*, 16 U. 2d 341, 400 P. 2d 568 (1965). Such an attack is unwise. True enough, counsel for both parties had their hand at voir dire examination from time to time during the trial and Sweeney's counsel even engaged in some discovery. But the suit was in equity for an accounting and injunctive relief, tried without a jury and in an informal atmosphere. Both parties were given substantial latitude in the mode of presenting their evidence.

For that matter, Happy Valley has, itself, shouldered a few unusual burdens in this suit. One is that since the original Complaint was filed by Sweeney, three separate counsel have, at one stage or another, appeared in his behalf to urge new and sometimes diverse claims. That is not to critique the conduct of such counsel in any way, for all have been able lawyers. It is, nevertheless, a fact that Happy Valley has been put to the defense of its accounting and the case in a different manner by each appearance. Sweeney's Brief has, in substantial respects, been presented to this Court on Appeal as though the matter was on a de

novo hearing. Not once is reference made to specific errors claimed of the lower Court in the Findings, Conclusions and Decree as entered. The Appeal is substantively deficient in that regard.

Sweeney is not entitled to a jury trial on the accounting or other equity issues. The accounting, as determined by the trial Court, was proper and the Findings and Conclusions made with respect to the 1957 Contract should be, by this Court, in all respects affirmed and the case remitted accordingly.

Respectfully submitted,

NATHAN J. FULLMER,
400 Executive Building,
Salt Lake City, Utah,

ROBERT S. CAMPBELL, JR.,
520 Kearns Building,
Salt Lake City, Utah,

Attorneys for Respondent, Happy Valley, Inc.