1972

University Club v. Invesco Holding Corporation And Wasatch Realty Corporation : Brief of Appellant

In The Supreme Court of the State of Utah

UNIVERSITY CLUB, a non-profit Utah corporation,

Plaintiff-Appellant,

vs.

INVESCO HOLDING CORPORATION, a New York corporation, and WASATCH REALTY CORPORATION, a Utah corporation,

Defendants-Respondents.

Case No. 12[illegible]

BRIEF OF APPELLANT

Appeal from a Summary Judgment of the [illegible] Judicial District Court, Honorable Bryan [illegible] Judge.

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In The Supreme Court of the State of Utah

UNIVERSITY CLUB, a non-profit Utah corporation,
Plaintiff-Appellant,

vs.

INVESCO HOLDING CORPORATION, a New York corporation, and WASATCH REALTY CORPORATION, a Utah corporation,
Defendants-Respondents.

Case No. 12792

BRIEF OF APPELLANT

NATURE OF CASE

This action arose out of a breakdown of an air conditioning system in a building wherein Plaintiff-Appellant was lessee and Defendants-Respondents were lessors. Plaintiff-Appellant commenced this action to recover damages for breach of the lease agreement; obtain reimbursement in accordance with the lease agreement; recover damages for negligence on the part of the lessor; and, obtain reimbursement by reason of Defendants-Respondents' unjust enrichment.

DISPOSITION IN THE LOWER COURT

The lower court granted the motion of Defendants-Respondents for summary judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the summary judgment rendered by the lower court.

STATEMENT OF FACTS

Plaintiff-Appellant (hereinafter referred to as "Club") and 136 East South Temple, Inc., a Utah corporation, entered into a lease agreement dated November 7, 1963, wherein the Club leased the top two floors of a building then to be erected at 136 East South Temple (the building is now commonly known as the University Club Building). A copy of the Lease is found at R. 43. The lease was later amended on October 1, 1967, but said amendment has no particular significance with regard to the issues involved in this appeal (R. 62). (The lease and the October 1967 amendment are hereinafter referred to as "Lease"). Defendants-Respondents (hereinafter referred to as "Lessor") subsequently acquired all rights and assumed all obligations of the Lease.

The Club used the premises to conduct the business of operating a private club. This business operation consisted mainly of providing facilities for the

comfort and relaxation of its members (R. 80). An important part of the operations of the Club is the service of food and providing a place for meetings and parties for organizations with which members are affiliated.

In the hot summer months of 1969, and more particularly on July 18, 1969, the air conditioning system in the building became totally inoperable (R. 80). The breakdown of the system rendered the portion of the building occupied by the Club unsuitable for conducting its business operation (R. 80). The walls surrounding the floors occupied by the Club consisted mainly of glass which provided little insulation from the heat of the sun (R. 64). Moreover, the windows were designed so that they would not open and thus there was no air circulation whatsoever (R. 64). During the time the system was inoperable, the temperature, on the premises averaged 103° F. during the afternoon hours (R. 80).

The breakdown of the air conditioning system occurred by reason of faulty maintenance (R. 17-18). Proper maintenance was the duty of Lessor (R. 50-51).

The breakdown did not involve any wrongdoing on the part of the Club or any of its agents and employees (R. 34-35; R. 17-18; Miller deposition, p. 19-21). The damage which caused the breakdown was so extensive that the unit had to be replaced (R. 80; Miller deposition, p. 33).

The obligations of the lease which are relevant to the issues involved in this appeal are as follows:

"10. QUIET ENJOYMENT. Lessor agrees that Lessee . . . shall peaceably and quietly have, hold and enjoy the premises for the full term of this Lease (R. 47).

16. UTILITIES. Lessor shall furnish at its expense . . . air conditioning for the premises and shall maintain a comfortable temperature therein at all times. . . . (R. 49).

19. REPAIRS. Lessor shall maintain and keep in good repair all portions of the building . . . including . . . all machinery and equipment provided for the use of the entire building such as . . . air conditioning. Neither Lessor nor Lessee shall be liable to the other for any damages sustained to the property of the other resulting from the failure of either to make any repairs required to be made hereunder, except that the one failing to make such repairs shall be liable to the one suffering such damage if the latter has given written notice to the former of the need for such repairs and the former has failed to make the same with due diligence. If by reason of making of repairs required to be made by Lessor hereunder, Lessee is deprived of the use or benefit of all or a substantial part of the premises, rent shall be abated or reduced according to the extent to which Lessee is deprived of such use or benefit (R. 50-51).

20. DAMAGE OR DESTRUCTION. If the demised premises, or the building of which the demised premises are to be a part, is destroyed or damaged, Lessor agrees to replace or repair the same with reasonable promptness and dispatch, and to allow Lessee an abatement in the rent for such time as the leased premises are untenantable or proportionately for such portion of the leased premises as shall be untenantable, and the parties covenant and agree that the terms of this lease shall not be otherwise affected (R. 51).

29. UNPERFORMED COVENANTS OF LESSOR. If, after Lessee has occupied the premises, Lessor fails to make any repairs or do any work required of Lessor by the provisions of this Lease, or in any other respect fails to perform any of the covenants, terms or conditions of this Lease to be performed by Lessor and such default continues for a period of thirty (30) days after written demand for performance is given by Lessee, then and in any of such events, Lessee may make such payments and cure such defaults on behalf of Lessor and, in connection therewith, do all work and make all payments deemed necessary by Lessee, including costs and charges in connection with any legal action which have been commenced or threat-

ened. Lessor agrees to reimburse Lessee upon demand the amounts so paid by Lessee, together with interest thereon at the rate of six percent (6%) per annum and, regardless of who may own Lessor's interest in this Lease at the time, Lessee may withhold all payments of rent or other sums then or thereafter due Lessor until the amounts withheld equal the amounts so paid by Lessee, with interest thereon as aforesaid, which have not been reimbursed by Lessor. . . ." (R. 55-56).

At the time of the breakdown, representatives of the Club immediately contacted representatives of Lessor in an attempt to work out a plan where the air conditioning system could be restored as soon as possible. The Club representatives were informed by representatives of Lessor that the air conditioning service could not be restored within the 30 day period specified in paragraph 29 of the Lease; restoration of service would involve two or three months (R. 80).

The failure of the air conditioning system and the resulting intolerable temperatures on the Club premises, caused a complete cessation of business (R. 80). The prospect of a prolonged shutdown of two to three months threatened the good will and survival of the Club and created an emergency situation which demanded immediate solution (R. 80).

On July 22, 1969, the Club, through its president, Frank C. Colladay, prepared and delivered a letter to

Lessor notifying Lessor of the default and demanding that the same be remedied (R. 64-65). The letter called attention to the provisions of paragraph 29 of the Lease wherein the Club had the right to cure the defect at the expense of the Lessor and further noted that substantial damage would be incurred in the event of a prolonger period without air conditioning service (R. 65).

The parties joined efforts to remedy the problem (R. 80-81; Miller deposition, p. 13). The main emphasis of the joint effort was to locate another air conditioning unit sufficient to service the portion of the building occupied by the Club (R. 80-81). All of these efforts to locate a new unit were made contemporaneously with the discussion of the Club's right under paragraph 29 of the Lease (R. 81).

It was apparently acknowledged by both parties that since more than 30 days would be required to replace the inoperative unit, the Club had the right to purchase a new unit and thereby cure the Lessor's default in accordance with paragraph 29 of the Lease (R. 80; Miller deposition, p. 11-13). Mr. Ronald Jefferies, an officer of Lessor, informed the Club of the availability of an air conditioning unit adequate to cool the premises occupied by the Club (R. 80). Representatives of the Club investigated the information and learned that such unit was in fact available, but that it had to be immediately purchased (R. 80-81). The failure of an immediate purchase would result in a further delay of 30 days. The Club was therefore in a position where it was required to act immediately or

take the risk of irresparable loss that may result from the Lessor's breach of the Lease (R. 80-81). After the Club had sent communications wherein it had stated its position as to the responsibility for curing the breach and pursuant to the combined efforts of the Club and Lessor, the Club purchased the available unit and arranged for its installation (R. 79-82).

With complete knowledge of the precarious position in which the Club had been placed by the Lessor's breach of the lease, and with full realization of the purchase of the replacement unit pursuant to the joint efforts of the parties, representatives of Lessor called a meeting for July 23, 1969 (R. 81; Miller deposition, p. 8). The meeting was attended by Marion Miller (Lessor's building manager), Mr. Ronald Jefferies (an officer of Lessor who was visiting from out of state), Frank C. Colladay (the Club president), Tad Bullen (the Club manager), and Ray Willey (a member of the Club (Miller deposition, pp. 7-9).

Prior to the meeting, Lessor employed its attorney to prepare a letter agreement (Miller deposition, pp. 7, 9; R. 81) wherein it was stated that the *Club* would purchase the available air conditioning unit and waive all rights for reimbursement under the paragraph 29 of the Lease! (A copy of the letter may be found at R. 66). There was no advance notice of this proposal; the letter agreement was first presented at the opening of the meeting (R. 81; Miller deposition, p. 10). Lessor stated that unless the letter agreement was signed by the Club,

the Lessor would not allow space for installation of the new unit (R. 81).

Since no notice of the proposed agreement had been given to the Club representatives, the Club had not employed an attorney to be present to examine the document.

Despite the precarious position of the Club and the emergency circumstances existing at the time of the meeting on July 23, 1969, the representatives of the Club refused to agree to waive their reimbursement rights of paragraph 29 of the Lease (R. 81). After some discussion, the parties agreed to add a clause reserving all of the Club's rights under the Lease (R. 81). The following paragraph was added at the bottom of the second page of the letter agreement:

> "It is mutually understood and agreed that this letter does not waive any of the rights or covenants entitled to by the Lessee under its lease agreements for the premises leased in the University Club Building." (R. 67).

Several times during the course of the meeting, the representatives of Lessor stated that they had no intention whatsoever of in any manner altering or amending any terms of the lease or waiving the Club's rights under the Lease (R. 81-82; Miller deposition, pp. 11-13).

The presentation of the letter was made without any previous notice of the content of the letter or the

proposal therein contained (R. 80). The timing of the letter is very significant to the case in that it was presented after the Club had already committed itself to purchase the new unit and arrange for its installation (R. 81). There was nothing which prevented Lessor from presenting the letter prior to the time the Club had committed itself to the purchase and installation of the new unit (Miller deposition, p. 15).

After reaching the agreement stated in the addendum above quoted and with knowledge of the Club's representations that no amendment or waiver was intended by the letter of July 23, the Club had the new air conditioning unit installed. The purchase price and installation costs of the unit amounted to in excess of $16,000 (R. 18). Subsequently, the Club demanded reimbursement pursuant to its rights under paragraph 29 of the Lease, but the Lessor refused, claiming that the Lease had been amended and that all obligation of the Lessor had been waived by the letter which had been signed at the meeting.

This action was then instituted to recover damages for the Lessor's breach of paragraphs 10, 16, and 19 of the Lease; for reimbursement pursuant to paragraph 29 of the Lease of monies expended by the Club in curing the Lessor's defect by the purchase of the air conditioning unit; for negligence on the part of the Lessor in causing damage to the Club; and for unjust enrichment of the Lessor arising out of the performance by the Club of the Lessor's obligation under paragraphs

10, 16, and 19 of the Lease. Lessor responded by asserting that the Club had waived all of its rights under the Lease by reason of the letter agreement above referred to, and claimed further that paragraph 19 of the Lease precluded recovery and that paragraph 20 of the Lease constituted an exclusive remedy in such situations.

SUMMARY

There is no dispute over the fact that Lessor had the obligation to provide and maintain air conditioning on the premises. There is no dispute over the fact that Lessor breached this obligation when the air conditioning system failed on July 18, 1969.

The controversy arises out of the Lessor's claim that: (a) The Club is not entitled to damages for the breach because its exclusive remedy under the Lease is rent abatement; (b) the Club is not entitled to damages by reason of the breach because the Lease exculpates Lessor of all liability for any breach arising by failure of the Lessor to make repairs; (c) the Club is not entitled to reimbursement for curing Lessor's breach of the Lease because the Club did not wait 30 days before curing said default and the Club waived its rights by signing a letter agreement of July 23, 1969.

There is no provision in the Lease which limits the Club's remedy to rent abatement. The Lease merely allows the Lessor to elect rent abatement among other remedies available at law.

The exculpatory provisions of the Lease can be imposed only after certain factual issues are resolved. The summary judgment ignores these factual disputes. The exculpatory provisions do not constitute a blanket release from damages arising from any and breaches of the Lease contract. The Lease provisions are not broad enough to release Lessor from liability for damages in this case.

Even if the Club were limited to rent abatement, and even if the Lessor were released of all damages arising out of the breach of the Lease, paragraph 29 of the Lease specifically provides for the Club's reimbursement for curing the Lessor's breach.

There is no dispute that paragraph 29 provides for reimbursement regardless of the effect of other provisions of the Lease. There is no dispute over the fact that the Club complied with the written notice provisions of the Lease. The dispute centers in the Lessor's claim that the Club should have waited 30 days before curing the Lessor's default and that paragraph 29 was amended by a purported letter agreement of July 23, 1969.

The law is clear that the Club was not required to wait the 30-day period when the Lessor acknowledged that it could not make the necessary repairs within the 30-day period specified in paragraph 29.

The claimed letter agreement of July 23, 1969, was not intended by either of the parties to amend the Lease and did not amend the Lease. Even if the parties had

intended the claimed agreement to amend the Lease, there are factual issues which must be resolved before th purported agreement can be given effect.

Regardless of the Lease provisions, the Lessor was unjustly enriched by the Club's performance of the Lessor's obligations under the Lease.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN HOLDING THAT THE CLUB'S EXCLUSIVE REMEDY IS RENT ABATEMENT.

In granting Lessor's motion for summary judgment, the lower court held that the Club was not entitled to recover any of the items of damage suffered by reason of the Lessor's breach of the Lease (damages enumerated at R. 18) and that the Club's sole and exclusive remedy was rent abatement during the period from July 18 (the date of the breakdown) to July 30 (the date of completion of the installation of the new unit purchased by the Club).

The apparent basis of this holding was the provisions of paragraphs 19 and 20 (quoted in the Statement of Facts). Such a holding imposes terms upon the parties which are not contained in the Lease and constitutes an error in law.

Although paragraphs 19 and 20 provide for rent abatement in the event of repairs which render the prem-

ises partially or totally untenantable, there is no provision in the Lease that even suggests that such rent abatement is to be the *exclusive* remedy.

The law is clear that when a landlord breaches a covenant to repair, the tenant is entitled to recover all foreseeable damages which are sustained by reason of the breach. *Wolfe v. White,* 119 Utah 183, 225 P.2d 729 (1950). The overwhelming weight of authority holds that the measure of damages for a breach of a Lessor's covenant to repair is all damages that "are the direct, natural, and proximate result of the breach, and such as may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract." *Pappas v. Zerwoodis,* 153 P. 2d 170 (Wash. 1944). This includes loss of profit: *Wolfe v. White, supra; Paul v. Camden Motor Co.,* 255 S.W. 2d 418 (Ark. 1953); *Rosen v. Needelman,* 83 So. 2d 113 (Fla. 1955); *Duthie v. Haas,* 232 P. 2d 971 (Ida. 1951); *Hargis v. Sample,* 306 S.W. 2d 564 (Mo. 1957); *Pappas v. Zerwoodis,* 153 P. 2d 170 (Wash. 1944); Loss of use of premises: *Theobald v. Heilman,* 92 S.W. 2d 802 (Ky. 1936); and reimbursement for curing the default: *Beardsley v. Morrison,* 18 Utah 478, 56 Pac. 303 (1899); *Rene's Restaurant Corp. v. Fro-Du-Co. Corp.,* 210 N.E. 2d 385 (Ind. 1965); *Marini v. Ireland,* 265 At. 2d 526 (N.J. 1970).

However, the lower court held that the Club agreed to waive all of these remedies by the mere mention of rent abatement without any reference whatsover in the

Lease that such abatement was to constitute an exclusive remedy, waiver or release.

The purpose of rent abatement is clear: if the tenant is deprived of the use of all or a substantial part of the premises, he should not pay the landlord because usage is the essential element of the lease from the tenant's point of view. This is particularly true where, as here, the loss of use directly results from the action or negligence of the landlord. But when a tenant bargains for and receives such a concession, he does not thereby waive other remedies unless the lease specifically so provides.

A brief consideration of the law in Utah at the time the Lease was drafted establishes that the purpose of the rent abatement provisions of paragraphs 19 and 20 was not to restrict the Club's remedies. In *Warm Springs Co. v. Salt Lake City,* 50 Utah 58, 165 Pac. 788 (1917), the plaintiff leased certain property from the City. The lease provided that a portion of the property could be subleased for a saloon or bar. Subsequently the state passed a law that no bars or saloons could be erected in areas designated by the City Council. The Salt Lake City Council passed an ordinance prohibiting a saloon in the area covered by the lease. The lessee retained the premises despite the passage of the ordinance, but commenced this suit to obtain a recovery of a portion of the monthly rental which had been paid on the premises. The basis of recovery was that the City passed the ordinance and thus could not retain that portion of the rent which represented the value of the priv-

ilege to construct a saloon. By reason of this partial eviction, the plaintiff contended that it was entitled to an abatement of a portion of the rent. This court rejected the plaintiff's contention that it was entitled to any type of rent abatement. The stated basis of this holding was as follows:

> "If the plaintiff desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited by law, it should have provided for that emergency in the lease."

It is apparent from the language above quoted that the rent abatement provisions of the Lease in question were inserted into the Lease pursuant to the law of Utah which requires such provisions to avoid rent obligation in the event of untenantability or eviction. The rent abatement provisions, therefore, were intended to supplement rather than to restrict the Club's remedies in the event of partial or total untenantability. The laws existing when an agreement is made are presumed to have been known by the parties and to have been in mind at the time the contract was made. *Alpha Beta Food Markets v. Retail Clerks Union,* 291 P. 2d 433 (Cal. 1952). Accord, *Yeazell v. Copins,* 402 P. 2d 541 (Ariz. 1965); *City and County of Honolulu v. Kam,* 402 P. 2d 683 (Hawaii 1965); *Nichols v. Cullaway,* 193 P. 2d 294 (Okla. 1948); *Fischler v. Nicklin,* 319 P. 2d 1098 (Wash. 1958); *Application of Hagood,* 356 P. 2d 135 (Wyo. 1960).

The *Warm Springs* case is in agreement with the overwhelming weight of authority which holds that the lessor's covenant to make repairs is independent of the tenant's covenant to pay rent; the obligation to pay rent continues despite the lessor's breach of a duty to repair unless the lease provides otherwise. *Hutcherson v. Lehtin,* 313 F. Supp. 1324 (N.D. Calif. 1970) (applying California law); *Ng v. Warren,* 179 P. 2d 41 (Calif. App. 1947); *Degrey v. Fox,* 205 So. 2d 849 (La. 1968); *Stone v. Sullivan,* 15 N.E. 2d 476 (Mass. 1938); *Dittman v. McFadden,* 15 P. 2d 139 (Okla. 1932); *Community Theaters, Inc. v. Weilbacher,* 57 S.W. 2d 941 (Tex. 1933).

The Club has found no authority for the proposition that a provision for rent abatement during a period of repairs will per se constitute the lessee's exclusive remedy. The only case dealing with the situation, *Ng v. Warren,* 179 P. 2d 41 (Calif. App. 1947) states, by way of dictum, that rent abatement and damages may be recovered simultaneously.

The usual rule is that a contractual remedy exists for the benefit of the party in whose favor the remedy is given and such party may elect a contractual remedy or his remedies at law. *Treadway v. Western Cotton Oil & Ginning Co.,* 10 P. 2d 371 (Ariz. 1932).

The lower court's holding that the rent the abatement provisions of paragraphs 19 and 20 constituted an exclusive remedy is not supported by any provision of the Lease and therefore should not be imposed upon the

contracting parties. The law is clear that a contractual provision or obligation "can arise only by necessary implication from specific language of the lease or because it is indispensable to carrying into effect the purpose of the lease." *Marini v. Ireland,* 265 A. 2d 526 (N.J. 1970). A party to a contract "is bound only to the extent the terms expressly indicate, or at least fairly and reasonable implied." *Kidman v. White,* 14 Utah 2d 142, 378 P. 2d 898 (1963). The imposition of an exclusive remedy provision amounts to the lower court making a new and different agreement not contemplated by the parties.

Paragraph 20 of the Lease, which contains the rent abatement provisions, specifically provides that despite the provision for abatement during the period of repairs, "the terms of this Lease shall not be otherwise affected" (R. 51). Thus, regardless of the provisions for abatement during repairs, the obligation of Lessor to "maintain a comfortable temperature therein at all times," to "furnish at its expense . . . air conditioning", and to allow peaceable and quiet enjoyment of the premises remained in full force and effect.

If it were to be assumed for the sake of argument that the rent abatement provisions were ambiguous so as to allow a reasonable interpretation that said provisions were intended to constitute an exclusive remedy, the uncertainty and doubt thereby created should be resolved against the Lessor. *Estate of Corbin v. McKey and Poaque, Inc.,* 245 N.E. 2d 117 (Ill. 1969). Clauses

which purport to exculpate a party from a wrongdoing are construed strictly against the party in whose favor the exculpatory clause is drafted. *Walker Bank & Trust Company v. First Security Corp.*, 9 Utah 2d 215, 341 P. 2d 944 (1954); *Estate of Corbin v. McKey and Poaque, supra.*

The undisputed facts establish that the Club suffered substantial losses by reason of the Lessor's breach of its duty to provide air conditioning and keep the system in a good state of repair (R. 18). The Club should not be precluded from recovery of these losses by reason of an interpretation which is not supported by the wording of the Lease and not intended by the parties.

POINT II

THE COURT ERRED IN HOLDING THAT THE PROVISIONS OF PARAGRAPH 19 RELEASED THE LESSOR FROM ALL LIABILITY FOR FAILURE TO MAKE REPAIRS.

The summary judgment rendered by the lower court denied the Club any recovery of the items of damage alleged in the complaint (specified at R. 18) and thus apparently was based on a decision that paragraph 19 of the Lease released Lessor from all liability for breach of its duty to make repairs. Such a holding constitutes an error in law.

The provisions of paragraph 19 exculpate the Lessor from liability for failure to make the repairs

specified in said paragraph. There is no language purporting to exculpate Lessor for breach of the Lease for failure to allow quiet enjoyment (Paragraph 10) or failure to furnish air conditioning at the Lessor's expense (Paragraph 16) or failure to maintain a comfortable temperature on the premises at all times (Paragraph 16). The law is clear that an exculpatory clause such as the one in paragraph 19 is to be strictly construed against the Lessor and that such clauses do not release the Lessor from liability for any breach not specifically stated in said clause.

In *Estate of Corbin vs. McKey and Poaque, Inc.*, 245 N.E. 2d 117 (Ill. 1969), the lessor excluded the executor of the deceased lessee from the premises subsequent to the death of the lessee. Later the lessor sued for rent payments from the time of death to the date the premises were again rented. The estate contended that the rent was abated during the period that entry was refused by the lessor. In answer to the claim of wrongful exclusion from the premises, the lessor noted an exculpatory clause which specifically stated that the lessor was not liable for damages which may arise by reason of his failure to repair the premises, by reason of a wrongful eviction, or by reason of "any act or neglect of lessor".

The court held that the lessor could not rely upon this exculpatory clause since said clause did not specifically mention the conduct which the estate claimed as the basis of its recovery. The basis of the holding was as follows:

> . . . doubt or ambiguity as to the meaning of language in a lease is construed most strongly against the lessor and in favor of the lessee . . . exculpatory clauses are to be strictly construed against the party they benefit.

The court further noted that to release the lessor from liability for an obvious and apparent breach of the lease when such an act was not specifically included in the exculpatory clause, would be "ludicrous and unconscionable".

Since the exculpatory provisions of paragraph 19 of the Lease in question do not specifically mention Lessor's obligations as stated in paragraphs 10 and 16 of the Lease, and since the exculpatory provisions are confined only to the obligation of the Lessor to make repairs in accordance with paragraph 19, the Lessor cannot be released from liability for breaches of paragraphs 10 and 16.

Even if the provisions of paragraph 19 were broad enough to cover all of the Lessor's obligations in other paragraphs of the Lease, a summary judgment would still be improper in this case. The provisions of paragraph 19 purport to release the Lessor from liability only for damage to "property". Applying the strict construction rule of the *Estate of Corbin v. McKey and Poaque, Inc., supra,* the "property" should be limited to items normally contemplated as property, i.e., tangible items.

The Club claims a substantial loss of profits (R. 18) which should not be included in the term "property" when strict construction against the Lessor is followed. Moreover, cases considering similar lease provisions have held that the word "property" does not include loss of profits.

In *Hargis v. Sample*, 306 S.W. 2d 564 (Mo. 1957), the lessor had undertaken the duty to make repairs by specific provision in the lease. Subsequently the lessor breached this contractual obligation. The lessee commenced this suit to recover loss of profits sustained by reason of the breach.

In defense of the lessee's claim, the lessor asserted a provision of the lease which stated that "lessor shall not be liable to said lessee or any other person . . . for any damage to their person or property caused by water, rain, snow . . . ."

The court held that the term "property" in the above quoted provision could not be construed to include loss of profits. The basis of the decision was stated as follows:

> "Words used in a written lease are to be interpreted according to their ordinary meaning unless they are defined by the instrument itself." Accord, *Wells vs. Jersey City*, 207 F. 871 (1913), affirmed 219 F. 699 (1915), cert. denied, 239 U.S. 650 (1916).

This Court has held that wording in a contract must be construed in accordance with the "ordinary and

usual meaning of the words used." *Plain City Irrigation Co. v. Hooper Irrigation Co.,* 11 Utah 2d 188, 356 P. 2d 625 (1960).

By reason of the rule of strict construction, and by reason of the rule that words are to be understood in their ordinary usage, the provisions of paragraph 19, if effective at all, do not constitute a release for loss of profits and the dismissal of that claim was improper.

The complaint in this action specifically alleges damages by reason of the negligence of the Lessor. The summary judgment of the lower court dismissed this negligence claim apparently on the basis of the exculpatory provisions of paragraph 19. Such dismissal is improper by reason of the Utah law, which requires that a contractual provision purporting to release a party of the consequences of his own negligence will not be given effect unless the intent to make such release is stated in "manifestly plain and unequivocal" language. *Walker Bank & Trust Co. v. First Security Corp.,* 9 Utah 2d 215, 341 P. 2d 944 (1959); *Union Pacific R.R. Co. v. El Paso Natural Gas Co.,* 17 Utah 2d 255, 408 P. 2d 910 (1965); *Titan Steel Corp. v. Walton,* 365 F. 2d 542 (10th Cir. 1966). There is no language in paragraph 19 which in any manner suggests that the provisions in that paragraph released Lessor of the consequences of its own negligence.

Even if the exculpatory provisions of paragraph 19 were construed to cover the situation at hand, such provisions cannot be enforced on a motion for summary

judgment since there are issues of fact which must be resolved before the paragraph can be applied. Paragraph 19, by its own terms, will *not* release the Lessor from liability for failure to make repairs if repairs are not made "with due diligence" after receipt of written notice. This raises a serious question of fact as to whether Lessor can rely on paragraph 19.

Representatives of Lessor, after receiving notice of the breakdown, stated that air conditioning could not be restored for "two or three months" (R. 80), because the unit had to be replaced (Miller deposition, pp. 32-33). The replacement actually took six weeks (Miller deposition, p. 33).

The long delay involved in restoring the service was necessitated by reason of the fact that the replacement unit had to be custom made (Miller deposition, p. 33). Of course, had the unit been repaired, rather than replaced, the construction of the custom made replacement would have been unnecessary. Apparently, the repair of the unit (as opposed to replacement) was an available opportunity to the Lessor, but was not pursued because of an unspecified difference in cost (Miller deposition, pp. 32-33).

Thus, there is a serious question of fact as to whether the delay of six weeks constituted "due diligence" and whether the delay involved in the decision to replace rather than to repair constituted "due diligence". The Club was entitled to have these questions

considered by a jury to assure that the application of paragraph 19 was proper under the facts of the case.

POINT III

THE COURT ERRED IN DENYING THE CLUB REIMBURSEMENT FOR CURING THE LESSOR'S DEFAULT

Lessor cannot seriously contend that the provisions of paragraph 19 released it from the obligations under paragraph 29 of the same Lease. Moreover, there can be no serious claim that the rent abatement provisions of paragraphs 19 and 20 excluded the Club's remedy under paragraph 29 of the same Lease. Therefore, regardless of the Court's decisions with regard to the interpretation of paragraphs 19 and 20, the Lease specifically states that in the event of a default by the Lessor of any covenant of the Lease, the Club may cure the default and obtain reimbursement for the expenses involved.

As previously stated, when the air conditioning system failed, the Club gave the Lessor written notice of the breakdown and specifically called the Lessor's attention to the Club's rights under paragraph 29 (R. 64). There was also oral notice and extended discussion of the problem (R. 80-81).

After receiving notice of the breakdown, the representatives of Lessor clearly and unequivocally stated that the air conditioning system could not be restored within the 30-day period specified in paragraph 29 of the Lease (R. 80). Using a hind-sight test, service was

in fact not restored within the 30-day period specified in paragraph 29 (Miller deposition, p. 33).

Since repairs could not be made within 30 days, and since this fact had been acknowledged by the Lessor, the Club went ahead and exercised its rights under paragraph 29 and cured the default by the purchase of a replacement unit.

However, after expending substantial amounts in curing the default, the trial court denied the Club's right to reimbursement on the ground that the Club was obligated to wait for 30 days before curing the default. This decision constituted an error in law.

Since the Lessor acknowledged that the replacement would not be made within 30 days, the Club was authorized to act immediately in curing the default. The law does not require the Club to actually wait for the passage of the 30-day period when it is known and acknowledged by all parties that the default will still be existing at the end of such period.

In *Stanford Petroleum Co. v. Janssen,* 116 Utah 352, 209 P. 2d 932 (1949), this Court stated that a party need not adhere to a contractual provision after being advised by the other contracting party that a default will occur regardless of performance. In the course of the opinion this Court quoted with approval the following language from the *Restatement of Contracts,* § 306:

> "When failure of a party to a contract to perform a condition or a promise is induced by a

manifestation to him by the other party that he cannot or will not substantially perform his own promise or that he doubts whether though able, he will do so, the duty of such other party becomes independent of performance of the condition or promise. . .

. . . .

Comment A. No man is compelled to do a useless act, and if performance of a condition will not be followed by performance of the promise which is conditional, it is useless for the intended purpose and it is therefore unnecessary to perform the condition. A promisee in judging whether performance of a condition will not be followed by performance of the promise is justified in taking the other party at his word. . ."

Although not quoted by this Court in the *Stanford Petroleum Co.* case, *supra,* Section 306 of the *Restatement of Contracts* contains the following example which is helpful in disposing of the issues before this Court:

"A, an insurance company provides in a policy that is issued to B, that in case of loss no payment will be made unless notice is given within 60 days after loss, nor except after arbitration as provided in the policy. A loss occurs. The insurance company promptly learns of it, and

> for no adequate reason informs B that payment will not be made. The condition of notice and arbitration are excused."

The doctrine of anticipatory breach allows a party to act immediately when the inevitability of a breach is acknowledged by the other party to the contract. *Jordan v. Madsen,* 69 Utah 112, 252 Pac. 570 (1926).

Therefore, the Club, upon being advised that the default would not be cured within the 30-day period specified in paragraph 29, did not act in violation of the Lease in immediately curing the default.

The Lessor was immediately aware that the Club intended on purchasing a unit prior to the 30 day period specified in paragraph 29 and made no objection. Moreover, the Lessor assisted the Club in making the purchase prior to the 30 day period (R. 80). The first objection from Lessor was made after the unit had been purchased and installed.

The lower court's denial of the Club's right to reimbursement was also based on a decision that the purported letter agreement of July 23, 1969 (R. 66) amounted to a waiver by the Club of its rights under paragraph 29 of the Lease. The rationale which was necessarily involved to arrive at this decision constituted error.

An examination of the letter of July 23, 1969, establishes that it is conflicting in its meaning. The body of the letter purports to completely waive the Club's

rights to reimbursement under paragraph 29 of the Lease. However, the addendum appearing at the end of the letter, which is separately signed by the respective parties, purports to completely reserve all of the Club's rights under the Lease including paragraph 29.

By reason of the obvious conflict within the four corners of the letter, parol evidence should have been considered for the purpose of ascertaining the intent of the parties and thereby determine the meaning of the agreement:

> "Whenever uncertaintly or ambiguity exists with respect thereto, it is proper for the Court to consider all of the facts and circumstances, including the words and actions of the parties forming the background of the transaction." *Radley v. Smith,* 6 Utah 2d 314, 313 P. 2d 465 (1957).

In addition to evidence as to the words and actions of the parties, the Court should employ various rules of construction to ascertain the intent of the parties. *Continental Bank & Trust Co. v. Bybee,* 6 Utah 2d 98, 306 P. 2d 773 (1957).

Extrinsic evidence was submitted to the lower court in this case on the motion for summary judgment. This evidence, together with the accepted rules of construction, establishes that the parties did *not* intend to amend the Lease or waive the Club's rights to reimbursement under paragraph 29 of the Lease. At the very least,

this evidence raises a factual issue as to the intent of the parties and such issue precludes the granting of a summary judgment in this matter.

The uncontroverted facts establish that the Lessor did not intend to amend the Lease by the letter of July 23rd. Note the following testimony of Marion Miller, the building manager employed by Lessor (Miller deposition, p. 4) who was present at the meeting when the July 23rd letter was signed:

"Q. (By Mr. McDonald) So Mr. Jefferies' comment was that he stated that at least it was his purpose not to in any way alter or amend the Lease?

A. I actually can't remember how this—bear in mind I was a very new employee and really wasn't aware of the conditions of the lease and had never met with any of these people before. Mr. Jefferies had. I was totally in the dark.

Q. Did Mr. Jefferies make a statement during the course of this meeting that it was not his intent to alter or amend the lease?

A. I couldn't say that under oath. I really can't remember, *but that was my impression.* (Marion Miller deposition, pages 11-12) (emphasis added)

. . . .

Q. But your impression of what his intent was with this letter was based [sic], was it not, on statements Mr. Jefferies made either to you or to others during the course of this meeting or during the course of your meeting with him?

A. Yes.

Q. Again, what were those impressions that you had of his intent?

A. As my memory serves me, I would assume that Mr. Jefferies first of all wasn't in a position to go ahead and sanction any expense as far as the club installations were concerned. I do feel that he was trying to protect—not protect. That's the wrong word. Trying to agree to anything that was fair and amiable [sic] as far as assistance to the club during this very critical time to the building and to the club.

Q. *Was it also your impression it was his intent that he did not want to alter or amend the provisions of the lease?*

A. *Oh, yes.* (Marion Miller deposition, p. 13) (emphasis added)

It is apparent from this testimony that the stated intent of the Lessor was not to in any way amend the Lease and not to waive any rights under the Lease. The affidavit of Tad Bullen, Manager of the Club, states

that the Club did not intend nor understand that the letter in any way amended the Lease (R. 80-81). Since both parties deny any intent to amend the Lease in any respect, a finding that the conflicting provisions of the letter had the effect of amending the Lease imposes a result not intended by the parties.

A meeting of the minds is a necessary element to a contract. *Radley v. Smith, supra; Valcarce v. Bitters*, 12 Utah 2d 61, 362 P. 2d 427 (1961). It is apparent from the testimony of Marion Miller above quoted, together with the affidavit of Tad Bullen, which constitute the only evidence with regard to the intent of the parties, that there was no meeting of the minds to amend paragraph 29 of the Lease. At the very least, a question of fact exists with respect to the issue of whether a meeting of the minds ever took place with regard to a waiver or amendment of paragraph 29.

In addition to the clear expression of intent not to amend the Lease, the rules of construction clearly establish an intent that the Lease was not to be amended by the July 23rd letter.

The letter was prepared by the attorney for the Lessor (Miller deposition, pp. 7-9). The attorney received help from Mr. Jefferies (Miller deposition, p. 24), a managerial agent for Lessor (Miller deposition, p. 17). Mr. Jefferies also assisted in preparing the addendum appearing at the end of the letter, which purports to retain all provisions of the Lease (Miller deposition, p. 24).

It is well established that any doubt as to the meaning of an agreement must be resolved against the party who prepared the agreement. *Seal v. Tayco, Inc.,* 16 Utah 2d 323, 400 P. 2d 503 (1965); *Maw v. Noble,* 10 Utah 2d 440, 354 P. 2d 121 (1960); *Continental Bank & Trust Company v. Bybee,* 6 Utah 2d 98, 306 P. 2d 773 (1957); *Huber and Rowland Construction Co. v. City of South Salt Lake,* 7 Utah 2d 273, 323 P.2d 258 (1958); *Gregerson v. Equitable Life and Casualty Co.,* 123 Utah 152, 256 P. 2d 566 (1953); *Bryant v. Deseret News Publishing Co.,* 120 Utah 241, 233 P. 2d 355 (1951). Thus, the conflict between the addendum appearing at the end of the letter and the body of the letter should be resolved by giving effect to the addendum.

It is a well established rule of construction that as between two possible interpretations, a fair and equitable one would be preferred over a harsh and unreasonable one. *Plain City Irrigation Company v. Hooper Irrigation Company,* 11 Utah 2d 188, 356 P. 2d 625 (1960); *Caine v. Hagenbarth,* 37 Utah 69, 106 Pac. 945 (1910); *Cummings v. Nielson,* 42 Utah 157, 129 Pac. 619 (1913); *Continental Bank & Trust Company v. Stewart,* 4 Utah 2d 228, 291 P. 2d 890 (1955).

Even where the result is not harsh and unreasonable, but merely unlikely to have occurred under the circumstances, the Court will favor a more reasonable construction. This principle was applied in the case of *Continental Bank & Trust Company v. Bybee,* 6 U. 2d 98, 306 P. 2d 773 (1957). In that case, Bybee purchased carpets for his home from Adams. Bybee paid

a portion of the purchase price in cash and a portion by promissory note. Adams negotiated the note to Continental Bank without recourse. Bybee had knowledge of the transfer of the note. After installation, a separation appeared in the seams of the carpet. Bybee complained to Adams and the two compromised the defect. Adams paid Bybee $100 and signed an agreement releasing Bybee from all further liability on the carpet.

When Continental Bank sued on the note, Bybee filed a third party complaint against Adams alleging that by reason of the settlement agreement, Adams should hold him harmless from the note. The issue presented was whether the settlement agreement which released Bybee from all further obligation on the carpet constituted an assumption by Adams of the note held by the bank.

In deciding the intent of the parties, the court noted that it was not credible that Adams would be willing to forgive the entire obligation and pay Bybee $100 in addition. This fact was considered in ascertaining the intent of the parties.

In the instant case, if the letter is held to supersede paragraph 29 of the Lease, or is held to waive the Club's right to reimbursement, the Club will be required to expend in excess of $16,000 to fulfill an obligation which Lessor undertook at the time the Lease was executed. If the letter is held to amend the Lease, it must follow that the Club agreed to pay approximately $16,000 (R. 18) to rent a small space situated outside the building and

unsuited for any valuable use. In addition, such a holding further places maintenance of the air conditioning system upon the Club when the Lease specifically provides otherwise. It is difficult to imagine the Club could have agreed to such a plan. On the other hand, if the trial court's holding is reversed, the situation is converted to the usual circumstance where a lessee cures a breach of the lessor and is reimbursed by the lessor for fulfilling his obligation.

In determining the intent of the parties to a contract, this court has also applied the rule that where there are conflicting statements of intent, the first expression of intent governs. *Mufflin v. Shiki,* 77 Utah 190, 293 Pac. 1 (1930). This is especially so when the latest expression of intent is on an endorsement or other document not physically included in the contract. *Ibid.* Applying this rule, the first expression of intent, the Lease itself, governs over the later expression of intent, the letter of July 23. This rule is particularly applicable to the situation involved in this case since the letter was not physically attached to the Lease.

One further point should be noted with regard to the alleged amendment and waiver of paragraph 29. Even if the Lease were amended to exclude paragraph 29, the Club had a common law right to reimbursement independent of the provisions of the lease. *Beardsley v. Morrison,* 18 Utah 478, 56 Pac. 303 (1899); *Marini v. Ireland,* 265 A.2d 526 (N.J. 1970); *Rene's Restaurant Corporation v. Fro-Du-Co. Corporation,* 210 N.E. 2d 385 (Ind. 1965).

Even if the letter of July 23 could be construed to mean that the Club waived its rights under paragraph 29, or that the letter amended the Lease, the letter should not be given effect on a summary judgment. There are serious disputes as to material facts which must be resolved before the letter could be enforced.

As noted in the statement of facts, the Lessor gave the appearance of cooperating with the Club in obtaining the replacement unit. During this period of cooperation, there was no mention that the acquisition would not be on the account of Lessor in accordance with the Lease. However, after the unit was purchased, the Lessor presented the letter of July 23 with the threat that if the same was not signed they would not allow the installation of the new unit. Apparently the Lessor relented and the addendum was added reserving all rights. These circumstances raise a factual issue as to the existence of duress and summary judgment is therefore precluded.

The law is clear that if the letter was obtained under circumstances which amount to duress, the terms thereof are voidable. *Fox v. Piercey,* 119 Utah 367, 227 P. 2d 763 (1951); *State v. Barlow,* 107 Utah 292, 153 P. 2d 647 (1944).

This court has adopted the following definition of duress in *Fox v. Piercey, supra*:

> "The tendency of the modern cases, and undoubtedly the correct rule is that any unlawful

> threats which do in fact overcome the will of the person threatened, and *induce him to do an act which he would not otherwise have done, and which he was not bound to do, constitute duress.*" (Emphasis added.)

In the *Fox case,* this Court stated that the threatened breach of the contractual obligation or even a wrongful act in the moral sense constitutes a "wrongful act" within the meaning of the definition above quoted:

> ". . . Acts may be wrongful within the meaning of this rule though they are not criminal or tortious or in violation of contractual duty . . . although the threat need not be criminal, tortious or in violation of contractual duty, it must be at least wrongful in the moral sense."

Some courts have gone further and allowed a party to avoid a purported agreement on equitable principles when there has been undue advantage or overreaching. In *Dittbrenner v. Myerson,* 167 P. 2d 15 (Colo. 1946), the court held:

> "Whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantages taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even

though there be no actual duress or threats, equity may relieve defensively or affirmatively."

In the instant case, the facts establish or at least raise a factual issue, that despite the Lessor's obligations under the lease, and despite its acquiescence in the installation of the new unit for the Club, it denied all duty after the unit had actually been purchased and a situation of financial emergency and distress had been created.

The granting of Lessor's motion for summary judgment prevented the Club from submitting the issue of duress to the trier of fact and therefore the summary judgment should be reversed.

POINT IV

THERE IS NO BASIS IN THE RECORD TO DISMISS THE CLUB'S CLAIM OF UNJUST ENRICHMENT.

Regardless of the manner in which the Lease is construed, the fact remains that prior to the letter agreement of July 23, 1969, the Club expended in excess of $16,000 in the performance of an obligation which was the responsibility of Lessor. The performance by the Club to the Lessor's obligation gives rise to a cause of action for unjust enrichment.

A cause of action for unjust enrichment is created when a person "has or retains money or *benefits* which in justice and equity belong to another." *Baugh v. Dar-*

ley, 112 Utah 1, 184 P. 2d 335 (1947) (Emphasis added). Accord, *Boroughs v. Peterson,* 39 Utah 11, 114 Pac. 758 (1911); *Pardee v. Salt Lake County,* 39 Utah 482, 118 Pac. 122 (1911).

It is clear that Lessor obtained the type of benefit contemplated by the unjust enrichment cause of action. The *Restatement of Restitution,* § 1, Comment b, provides:

> "A person confers a benefit upon another if he . . . satisfies a debt or duty of the other, or in anyway adds to the other's security or advantage."

Even if the lower court's decision as to the contractual issues is upheld, the cause of action for unjust enrichment should remain. Such a cause of action is available despite the existence of an agreement between the same parties, regardless of the enforcability of such an agreement. *Baugh v. Darley, supra; Jensen v. Whitesides,* 13 U.2d 293, 370 P. 2d 765 (1962).

CONCLUSION

The rent abatement provisions are not exclusive remedies but merely an attempt to reserve the contractual remedy not otherwise available at law. The reservation of this remedy could not preclude the Club's remedies at law in the absence of specific provisions to that effect.

The exculpatory provisions of the lease must be construed strictly against the Lessor, and when so construed said provisions do not release Lessor from liability in this case.

The Club has spent considerable sums to cure Lessor's admitted breach of the Lease and should be reimbursed in accordance with the Lease provisions. The parties have never expressed an intent to in any way alter the reimbursement provisions of the Lease, or at least a factual dispute exists with regard to such intent.

The Club has expended over $16,000 for the benefit of the Lessor and should be reimbursed for these expenditures.

The University Club respectfully submits that summary judgment rendered by the lower court should be reversed and the case remanded to the lower court for trial on all of the evidence.

Respectfully submitted,

JONES, WALDO, HOLBROOK & McDONOUGH

By .....
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By .....
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