1972

Fay L. Branch, Phyllis L. Branch, Ray Branch And Sylvia Branch v. Western Factors, Inc., Et Al., And John H. Allen, Trustee For Western Factors, Inc., Bankrupt v. Arnell E. Heaps, And William G. Fowler, Trustee For Western National Investment Corporation : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

FAY L. BRANCH, PHYLLIS L. BRANCH, RAY BRANCH and SYLVIA BRANCH,
Plaintiffs-Respondents,

vs.

WESTERN FACTORS, INC., et al., and JOHN H. ALLEN, Trustee for Western Factors, Inc., Bankrupt,
Cross-Claimant-Respondent,

vs.

ARNELL E. HEAPS, and WILLIAM G. FOWLER, Trustee for Western National Investment Corporation,
Cross-Defendants-Appellants.

Case No. 12761

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court
Honorable James S. Sawaya, Judge

RICHARD L. BIRD
720 Newhouse Building
Salt Lake City, Utah
Attorney for Cross-Defendant-Respondent (Arnell E. Heaps)

G. HAL TAYLOR
Tribune Building
Salt Lake City, Utah
Attorney for Defendant-Respondent

WILLIAM G. FOWLER
340 East Fourth South Street
Salt Lake City, Utah
(pro se, as trustee of Western National Investment Corporation, debtor in Chapter X proceedings)

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NATURE OF THE CASE

The sole appellant is William G. Fowler, in his capacity as trustee of Western National Investment

Corporation, debtor, in proceedings for the reorganization of a corporation pursuant to Chapter X of the Act of Congress relating to Bankruptcy pending in the United States District Court for the District of Utah.

This is an action for a deficiency jugdment arising from the judical foreclosure of a real estate contract. The buyer's interest in the contract was assigned by Arnell E. Heaps to Western National Investment Corporation. Judgment was entered against Heaps, and Western National Investment Corporation was ordered to hold him harmless from the judgment. The judgment constitutes an unsecured claim in the bankruptcy proceedings. The United States District Court which has jurisdiction to consider all claims against the debtor consented that this matter be heard and considered by the state court.

DISPOSITION OF CASE IN TRIAL COURT

The trial court, sitting without a jury, entered judgment in favor of Western Factors, Inc., and John H. Allen, trustee for Western Factors, Inc., bankrupt, and against the cross-defendant, Arnell E. Heaps, and Western National Investment Corporation, jointly and severally, in the sum of $37,357.76, together with interest, and awarded judgment in favor of Heaps and against Western National Investment Corporation, requiring the latter to hold Heaps harmless.

RELIEF SOUGHT ON APPEAL

Cross-defendant Western National Investment Corporation seeks reversal and remand with directions to enter judgment solely against cross-defendant Arnell E. Heaps and in favor of Western National Investment Corporation relieving it of liability.

STATEMENT OF FACTS

The real property which gives rise to this litigation consists of an old, 12 unit apartment building known as the Mecham Apartments situated at 28 East 2nd North Street, Salt Lake City, Utah, which passed through several hands, eventually to be acquired by Western National Investment Corporation (debtor corporation).

The Branches, plaintiffs in this action, were owners in 1960, and on August 15, 1960, as sellers entered into a real estate contract with Western Factors, Inc. (R. 1). Thereafter, on June 27, 1961, and without acquiring title, Western Factors entered into a real estate contract to sell the property to Jack Wilkins and Mary P. Wilkins, his wife. On June 22, 1962, the Wilkins entered into a real estate contract to sell the property to Arnell E. Heaps and Shawna L. Heaps, his wife (Exhibit 1-C, R. 169), and buyers' interest was assigned on September 3, 1963, to Valley-Hi Associates, Inc., (predecessor of Western National), by the terms of which assignment, the "assignees covenant

with the assignors . . . that the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees" (Exhibit CDH-5, R. 170). Shawna L. Heaps is deceased and Arnell E. Heaps acquired her interest.

Payments were not made by Western National to the Wilkins and on March 29, 1967, they commenced a foreclosure action which resulted in the plaintiffs purchasing the property at sheriff's sale for $40,543.68 on May 10, 1968 (R. 153-5). On July 18, 1968, the Wilkins assigned their interest in the contract and their interest in the cross-claim filed against Heaps to Western Factors, Inc. ,and John H. Allen, trustee for Western Factors, Inc., bankrupt (Exhibit 2-C, R. 169).

The Branches have been granted summary judgment against Wesetrn Factors, Inc., and have no interest in this appeal (R. 153). The Wilkins also claim no interest herein (R. 155). Western Factors, Inc., is, in fact, the beneficiary of this action and has an interest only to the extent of who is ultimately liable for the acknowledged obligation owing to it.

On January 5, 1968, Western National commenced a proceeding under Chapter X of the Bankruptcy Act by filing a voluntary petition in the United States District Court for the District of Utah. William G. Fowler was appointed trustee. Hereafter he will be referred to as "trustee."

The schedule of liabilities and assets filed by the debtor and prepared and signed by Richard L. Bird, as secretary of the debtor corporation, disclosed liabilities totaling $1,772,297, and assets totaling $1,176,-966 (Exhibit CDW-6, R. 172). As the schedules reflect, the debtor corporation had several hundred creditors and stockholders at the commencement of the proceeding. At the date of the transaction by which Heaps transferred his interest in the Wilkins contract, September 3, 1963, the debtor had obligations totaling $1,859,422, including claims by approximately 200 debenture holders (R. 238). The debtor likewise had between 100-200 stockholders in September, 1963 (R. 239-40).

The trustee stipulated with counsel for Heaps that at all times material hereto Heaps was a stockholder and member of the board of directors of the debtor corporation (R. 174-6). The transaction by which Heaps acquired his interest in the Mecham Apartments was handled by John Holmquist, a real estate agent who likewise served on the board of directors of the debtor corporation in 1962 and 1963 (R. 179-180).

Holmquist testified that at the time Heaps entered into the purchase agreement with Wilkins his firm held the listing and sold the property to Heaps (R. 180); that he was responsible for drawing the sales agreement; and that he handled the sale as selling agent (R. 181). The purchase price was set forth in the agreement at $93,000, and an existing obligation

to Western Factors was disclosed to have a balance of $70,123 (Exhibit 1-C). According to the witness the listing price was possibly $95,000 (R. 187), and he received a commission from the seller of "either five or six percent" (R. 188).

Between June 22, 1962, when an interest in the property was acquired by Heaps, and September 3, 1963, when his interest was transferred to the debtor corporation, the matter of acquiring the property was discussed by the debtor's board of directors (R. 181-183). The board of directors, with Holmquist present and Heaps not present, on August 8, 1963, agreed to a proposal by Holmquist to offer to Heaps property situated in Davis County, Utah, and owned by the debtor, in exchange for "his equity" in the Mecham Apartments (Exhibit CDW 8, R. 184, 191). The Davis County property consisted of approximately 12 acres and had been acquired by the debtor for $20,000 cash (R. 184). The purchase price of the Mecham Apartments was set at $97,200, subject to the existing indebtedness (R. 184). The Davis County land subsequently was reacquired from Heaps by the debtor corporation in December, 1963, in consideration of the issuance of common stock (R. 186).

At the time of the assignment from Heaps to the debtor corporation no appraisal nor independent estimate of value of the property was obtained nor furnished to the board (R. 192-3). At a meeting of the board held 15 days after the transaction (September 17, 1963) a progress report given by the president of the debtor

corporation, according to the minutes of the meeting, indicated as follows: "We are trying to refinance. There is a possibility that we can cut the mortgage from $78,000 to $65,000. This way we can come up with $10,00 (sic) to $13,000 reduction in principal and also have a small cash flow from the apartment" (Exhibit CDW-9, R. 193).

A pending foreclosure proceeding against the interest of the debtor in the Mecham Apartments was brought to the attention of the board at its meeting of March 17, 1967, and the board was advised that "The company will have to bring the payments current immediately in order to stop the foreclosure" (Exhibit CDW-12, R. 203). At the same meeting counsel for the debtor explained the foreclosure problem and the following transpired:

> "Mr. Dean asked Mr. Barker about the Mecham Apartment transaction and legal proceedings against the apartment.
>
> "Mr. Ryberg explained the court action against WNIC. If WNIC could bring the payments current the problem could be solved. If the problem goes into litigation the firm of Barker & Ryberg cannot handle the suit because they would have a conflict of interest, for Mr. Arnell Heaps would be involved in the suit.
>
> "Mr. Heaps was asked if he would be interested in buying the apartment back at some figure.
>
> "Mr. Heaps stated since he was a board member he would want to have the company decide

what they wanted to do first. After a discussion, Mr. Holmquist made a motion that WNIC try to borrow approximately $50,000 on the property to clear the problem from Tracy Collins or any other loaning institution that might make a loan on the apartment. Motion seconded by Arnell Heaps. Passed. Mr. Holmquist was asked to see if he could make the loan investigations."

The following day the board, at a full meeting, explored all the debtor's financial problems, and the Mecham Apartment aspect was reported as follows:

> "There was a full discussion regarding the Mecham Apartment problem. Mr. Holmquist made a motion to have the management research all of the Mecham transaction and determine what can be done, if anything, to save the apartments from foreclosure. Also, to research any liability that may be against the various equity holders, namely Arnell Heaps, Western Factors, Wilkins and Mr. Branch. Mr. Heaton stated that he would like to have the research done. The motion was seconded by Mr. Smith and passed unanimously" (Exhibit CDW-13, R. 203).

And, again, on October 4, 1967, the board was given the following report by counsel for the debtor, Richard L. Bird, Jr.:

> "Mr. Bird explained the situation of the Mecham Apartment foreclosure. *Mr. Bird explained that Tracy Collins had appraised the apartment at* $50,000. Mr. Branch would be willing to take $33,000, Western Factors $18,000 and Mr. Wilkins will forego his interest in the property. Mr. Branch will Deed the property and take

a second mortgage back if he is able to get approximately $15,000 at the present time.

"Mr. Smith made a motion to negotiate with Arnell Heaps since he has a possible deficiency judgment against him if WNIC is unable to perform to see if he will be willing and able to take over the Mecham Apartments. Seconded by John Holmquist. Passed (Exhibit CDW-14, R. 203, 205; emphasis supplied).

Yukus Inouye became a director of the debtor corporation at the time of the merger between Valley-Hi Associates, Inc., and Model Investment Company in February, 1964, and approximately a year later was employed by the debtor to assist in the management of its properties, including the Mecham Apartments (R. 210-214). He described the property, in 1964, to be "quite an old building," approximately 40-50 years old (R. 211). Shortly after his employment the apartments "had quite a vacancy rate" and "the income did not take care of the expenses and the mortgage payments" (R. 216). The witness identified income and expense records of the Mecham Apartments for the months of October and November, 1963, showing net losses of $230.00 and $65.00, respectively (Exhibit CDW-15, R. 241). In 1965 the debtor corporation was compelled to "subsidize . . . the payments on the mortgage," and the inability of the property to service its debt and expenses continued during the course of its control by the debtor (R. 222).

A document prepared for the board by Yukus Inouye at the end of 1966 or early 1967, was a summary

of the Mecham Apartment situation, including balances due on the respective contracts, and indicated that "The property at the present time is appraised at approximately $50,000.00" (Exhibit CDW-16, R. 223-5). The appraisal amount set forth in the document was furnished by Zions Bank and Trust Company in conjunction with a loan application made by the debtor corporation (R. 226). Between the time the witness first examined the property in 1964 until the time possession was restored to the original contract seller (Branch), pursuant to the foreclosure proceedings, the general condition of the property was "up-graded" (R. 229).

The only independent evidence of value of the Mecham Apartments at the time of the transaction was furnished by Sterling G. Webber, a real estate broker and a professional fee appraiser. Based upon his examination of the debtor's books and records relating to the Mecham Apartments and his personal inspection of the property he fixed the value at September, 1963, at $70,000 (R. 242-248, Exhibit CDW-18, R. 257). The valuation assumed full occupancy, and if a vacancy factor were considered the value would be less (R. 249). The property, according to the witness, had been listed in 1961 by Western Factors at $95,500, but was sold on June 30, 1961, for $80,000, the sale being to Wilkins upon a real estate contract (R. 251).

Arnell E. Heaps, called as a witness in his own behalf, identified himself as a school teacher with some

experience in "buying and selling and managing" real estate, having acquired a duplex and the Mecham Apartments and subdivided a tract of ground (R. 264). He acknowledged being a member of the board of directors of the debtor corporation and deliberately absented himself from the meeting which approved the exchange of property for the apartment building (R. 265, 267-8). Three months later the real property acquired in the exchange was traded back to the debtor corporation for 20,000 shares of its stock at $1.00 per share (R. 266-7, 273-3; Exhibit CDW-10).

At the board meeting of August 8, 1963, prior to the original acquisition by the debtor, the net asset value of the stock was estimated "a little over $2.00 per share at cost [of property] and over $3.00 per share at market [value of property]" (Exhibit CDW-8).

On cross-examination Heaps acknowledged that there was no substantial change in the financial condition of the debtor corporation between September, 1963, and February, 1964 (R. 269); that no independent appraisals had been obtained to support the value placed on the property by Heaps and Holmquist (R. 270); that no consideration was given to submitting the proposal to the stockholders for their approval (R. 270); that in addition to Holmquist he consulted with George Fujii and Kay Allen, other board members, respecting the value of the property (R. 275-6); and, that during his employment by the debtor corporation between January and August, 1966, "To help manage proper-

ties," visual inspection of the exterior of the apartments showed no difference in appearance, although its income fell to $250 per month (R. 268, 276).

POINT I

REFERENCE OF A CONTINGENT AND UNLIQUIDATED CLAIM IN A CHAPTER X REORGANIZATION PROCEEDING FOR EXPEDITIOUS DETERMINATION BY A STATE COURT REQUIRES THAT COURT TO GIVE DUE REGARD TO THE INTERESTS OF THE DEBTOR AND ITS CREDITORS AND STOCKHOLDERS.

The judgment rendered by the trial court against the debtor corporation resulted from the desire of the United States District Court to utilize the state court in seeking the most reasonable and expeditious manner of liquidating as to amount an otherwise contingent and unliquidated claim. The trial court determination is *res judicata* upon the Reorganization Court with respect to the issues as framed and litigated, but the trial court should express its findings, conclusions and judgment with due regard to the interests of the debtor's estate and its creditors and stockholders, and with recognition of the existence of proceedings under the Bankruptcy Act. Approval and allowance of claims in the reorganization proceeding is reserved to the Reorganization Court. 6 A *Collier on Bankruptcy,* ¶ 9.06; 3 *Collier on Bankruptcy,* ¶ 57.15[3.2].

POINT II

HEAPS OCCUPIED A FIDUCIARY RELATIONSHIP AT ALL TIMES MATERIAL TO HIS DEALINGS WITH THE DEBTOR CORPORATION.

Heaps, a stockholder and director of the debtor corporation at all times material hereto occupied a fiduciary relation with the corporation. The extent of this fiduciary relation is summarized in 19 *Am. Jur. 2d, Corporations,* § 1271:

> " . . . The directors and officers of a corporation in charge of its management are, in the performance of their official duties, under obligations of trust and confidence to the corporation or its stockholders and must act in good faith and for the interest of the corporation or its stockholders, with due care and diligence, and within the scope of their authority."

In commenting upon the fiduciary relationship owed to the corporation, the extent of the duty is described by 6 *Cavitch, Business Organizations,* § 127.03, as follows:

> "(1) They must exercise good faith in corporate dealings and meet a strict standard of honesty and fair dealing.
>
> (2) Generally they must act for the benefit of the corporation and not their own.
>
> (3) They must not profit individually as a result of their position.
>
> (4) Profits which they receive from use of cor-

> porate assets or business are subject to the impression of a trust in favor of the corporation."

And, in a suit by a trustee in bankruptcy against the directors of a corporation, the court, citing *Pepper v. Litton*, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939), held the director's fiduciary obligation extended to all those having a community of interest in the corporation—creditors as well as stockholders. *Neese v. Brown*, 405 S.W. 2d 577 (Tenn., 1964).

When a corporation deals with public funds and investments an even higher standard of personal behavior may be imposed upon those occupying a fiduciary capacity so as not to jeoparidize the business and assets of the corporation and certainly to prevent their using the position for their own advantage. See 3 *Fletcher Cyclopedia Corporations*, (Perm. Ed.), § 838; see also *Knepper, Liability of Corporate Officers and Directors*, § 1.02.

POINT III

CLAIMS OF STOCKHOLDERS AND DIRECTORS ARE SUBJECT TO RIGID SCRUTINY BY VIRTUE OF THEIR FIDUCIARY RELATIONSHIP AND PROOF MUST MEET THE HIGHEST STANDARD OF PERSUASIVENESS.

Of course, the claims of persons close to a debtor in bankruptcy proceedings are allowable, but are subject

"to a particularly severe test." *3A Collier on Bankruptcy*, 63.06[5]. *Collier* further observes that "They have to overcome the very natural suspicion that the bankrupt, with their conscious or unconscious cooperation, used them as actors in a scheme to defraud his general creditors." *Ibid.* Thus, the evidence must "meet the highest standard of persuasiveness." *Ibid.*

Further, the courts treat claims of stockholders and corporate officers in much the same way as they treat claims by close relatives. Genuine creditor's claims by these persons will be allowed in appropriate circumstances, "but such claims are subjected to a more rigid scrutiny." *In matter of Burntside Lodge, Inc.*, (D.C., Minn.) 7 F.Supp. 785; *Richardson's Executor v. Green*, 133 U.S. 30, 10 S.Ct. 280, 33 L.Ed. 516.

As observed in 3A *Collier on Bankruptcy*, 63.06 [5.3]:

> "The bankruptcy court should sift the circumstances surrounding any claim to see that no injustice is done, particularly when the claim is one by an officer, director or stockholder, and disallowance or subordination may be grounded simply on violation of rules of fair play and good conscience."

The burden of proving both his own good faith and the fairness of his transactions with the corporation rests upon an officer or stockholder when bankruptcy proceedings intervene. 3A *Collier on Bankruptcy, supra.* Courts look with disfavor upon attempts by stockholders and officers to assume the role of creditors. *Matter of*

Groenleer-Vance Furniture Co., 23 F. Supp. 733 (D.C. Mich.). The bona fides of such a "creditor" must be established beyond cavil. Disallowance may be based upon the violation of rules of fair play and good conscience. 3A *Collier on Bankruptcy, supra.*

Heap's cross-claim against the trustee in this proceeding seeks to enforce a disputed claim against the trustee. The trustee contends that the agreement whereby the debtor corporation covenanted to hold Heaps harmless is wholly unenforceable, and that any burden of liability is exclusively Heaps'. The trial court, as a matter of law, failed to subject the assertion of enforceability to the standard of proof required in such transactions.

POINT IV

AS A MATTER OF LAW HEAPS FAILED TO ESTABLISH THE ADEQUACY OF THE PRICE, THE BENEFITS TO THE CORPORATION AND THE INHERENT FAIRNESS OF THE TRANSACTION.

The undisputed relationship of Heaps to the debtor corporation fixed the burden of proof squarely upon the shoulders of Heaps, who sought by the assignment of September 3, 1963, to shield himself from liability when the Mecham Apartment transaction collapsed. As observed in 3A *Collier on Bankruptcy,* ¶63.06[5.3], " . . . the burden being on him [the director] to prove not only

good faith but inherent fairness from the viewpoint of the corporation."

This general proposition is likewise set forth in 3 *Fletcher Cyclopedia Corporations*, (Perm. Ed.), §913:

> "In other words, the dealings of directors with the corporation are subject to rigorous scrutiny and where any of their contracts or engagements with the corporation are challenged the burden is on the director not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length transaction. If it does not, equity will set it aside" (citing *Pepper v. Litton,* 308 U.S. 295, 84 L.Ed. 281, 60 S.Ct. 238).

Heaps was never divested of the strict and highest standard of persuasiveness. See 29 *Am. Jur.* 2d, *Evidence*, §124, which observes:

> "The burden of proof, in the sense of the burden which rests upon a party to establish the truth of a given proposition or issue by the quantum of proof demanded by the law in the case in which the issue arises, never shifts during the court of the trial, but remains from the first to the last upon the party on whom the law cast it at the beginning of the trial, and the party upon whom the burden rests must sustain his position by the degree of proof which the law requires . . . In short, the burden of proof, in the sense of the ultimate risk of non-persuasion, never shifts from the party who has the affirmative of an issue, although the burden of going for-

ward with the evidence may shift at various times during the trial from one side to the other as evidence is introduced by the respective parties."

Speaking directly to this issue, in a case where a creditor brought an action to have certain deeds of assignment and real estate conveyances declared null and void where its directors had attempted to prefer certain creditors, including themselves, this court, in *W. P. Noble Mercantile Co. v. Mt. Pleasant Coop., Inc.,* 42 Pac. 869 (1895), at p. 872, stated:

> " . . . a court of equity will very closely scrutinize the transactions, and, in case of a contest between a general creditor and a director or other managing officer, will require of the latter very strict proof of good faith, and that the mortgage or other incumbrance was not executed, in expectancy of insolvency, for the purpose of securing an advantage over other creditors, and such transactions may be set aside on slight grounds."

And, in *Glen Allen Mining Co. v. Park Galena Mining Co.*, 296 Pac. 231 (Utah 1931), a director-officer of the plaintiff corporation organized the defendant corporation to take over plaintiff's properties at the conclusion of foreclosure proceedings. In holding the transaction invalid, this court stated:

> "The authorities everywhere recognized the rule that, where a fiduciary relation is shown to exist, the burden is on the fiduciary to show good faith and fair dealing in his relation with his cestui que trust. It is frequently said that the relation of a director to his corporation is

not that of trustee in cestui que trust. But it does not follow from that statement that the director is not bound by the same rules of good faith, full disclosure, and fair dealing as surrounds a trustee in dealing with the cestui que trust" (p. 240).

Further in the same opinion this court, in commenting upon the duty arising from the fiduciary relation, stated:

> "The duty of the directors of a corporation is to further the interests and business of the association and to conserve its property. Any action on the part of directors looking to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and more especially the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors engaged therein. 2 Thompson on Corporations, 1327" (p. 241).

More recently this court decided *Sweeney v. Happy Valley, Inc.*, 417 P.2d 126 (Utah 1966), in which a creditor brought an action against the defendant corporation for an accounting to show the adequacy of consideration for certain real property conveyed to defendant's directors, the court at p. 129 held:

> "We do not question the rule that when a fiduciary deals for his own interest with the beneficiary, in case any question arises, such dealings should be scrutinized with great care, and the burden is upon him to show good faith in the transaction."

The financial jeopardy of the debtor corporation was not only established when it initiated proceedings

under Chapter X of the Bankruptcy Act, but the condition was not much better in September, 1963, when Heaps' interest in the Mecham Apartments was transferred to the debtor corporation at a grossly inflated price, and under circumstances where the property plainly and unequivocably could not support its debt and expenses.

The sole evidence of value at the time of the transaction placed the worth of the Mecham Apartments at $70,000 or less. Within months after the acquisition, and indeed during the period of Heaps' employment, its income fell to $250 per month. Attempts to refinance through Zions Bank and Trust Company and Tracy Collins Bank and Trust Company produced appraisals by each bank of $50,000; and, yet there had been no appreciable change in the condition of the property. The final indication of value was established at the sheriff's sale where the property was bid in and purchased for $40,543.

The damage suffered by the debtor corporation is apparent from the judgment entered against the debtor corporation in this matter in the sum of $48,431. To require that the debtor pay this and hold Heaps harmless would work an unconscionable burden upon creditors and debenture holders who dealt fairly and at arm's length with the debtor, in that their recovery would be materially reduced.

Heaps was obligated to show any evidence that he might have of his good faith and the fairness of the trans-

action. Heaps, however, offered only his testimony and that of Holmquist, the real estate agent who sold the property to Heaps and who was a co-director with Heaps on the board. The record is devoid of credible evidence to establish (1) The adequacy of the price, 3 *Fletcher Cyclopedia Corporation*, (Perm. Ed.) §974, *supra*; (2) The inherent fairness of the trade of the Davis property for his equity in the Mecham Apartment, 3 *Fletcher Cyclopedia Corporation*, (Perm. Ed.) §921; (3) The presence of a disinterested majority of the board of directors at the time of the vote regarding the acquisition of the Mecham Apartments, *McIntyre v. Ajax Mining Co.*, 77 Pac. 613, 616 (Utah 1904), cited with approval in *Brunswick v. Floor*, 208 P.2d 943 (Utah 1949); (4) The benefits, if any, bestowed upon the corporation, *Pepper v. Litton, supra*; and (5) That there was no harm done to the corporation or those interested in its well being, 3 *Fletcher Cyclopedia Corporation*, (Perm. Ed.) §913.

POINT V

ASSUMING THE VALIDITY OF THE JUDGMENT, THE TRIAL COURT ERRED TO THE EXTENT SAID JUDGMENT INCLUDED INTEREST ACCRUED AFTER THE COMMENCEMENT OF THE CHAPTER X PROCEEDINGS.

The Supreme Court of the United States in *Vanston Bondholders Protective Committee v. Green*, at 329

U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946), considered the question of the propriety of permitting the payment of interest and the court stated the general rule is that interest ceased to accrue on the filing of the petition, observing as follows:

> "Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of claims could be avoided.
>
> * * *
>
> "It is manifest that the touchstone on each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. . . . That the proceedings before us have moved from equity receivership through §77B to Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or §77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents."

The general principal applicable to the cessation of interest on the filing of a petition in ordinary bankruptcy applies to the filing of a petition under Chapter X and, thus, the general rule would require that the Bankruptcy Act computes interest as of the date of the filing of petitions with regard to secured, unsecured and tax claims. 6A *Collier on Bankruptcy*, ¶9.08.

CONCLUSION

It is respectfully submitted that the record of trial is wholly devoid of evidence which would support the burden of proof required of Heaps, and that the transaction by which Western National Investment Corporation acquired its interest was neither fair nor beneficial to the corporation, and that equity requires that the assignment and the agreement therein to hold Heaps harmless be deemed null and void and unenforceable as against the corporation.

Respectfully submitted,

William G. Fowler

340 East Fourth South
Salt Lake City, Utah

(pro se, as trustee of
Western National Investment
Company, debtor in Chapter X
proceedings)