

1995

Joseph W. Shields v. Arvil A. Harris : Brief of Appellant

Utah Court of Appeals

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OF APPEAL

IN THE UTAH COURT OF APPEALS

JOSEPH W. SHIELDS,

Plaintiff/Appellee,

v.

ARVIL A. HARRIS,

Defendant/Appellant.

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Case No. 950680-CA

Priority No. 15

BRIEF OF APPELLANT

Appeal from the Judgment of the
Eighth Judicial District Court of
Duchesne County, State of Utah
Honorable John R. Anderson

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW	1
Issue #1	1
Standard of Review and Preservation of the Issue for Issue #1	1
Issue #2	2
Standard of Review and Preservation of the Issue for Issue #2	2
DETERMINATIVE RULES AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. Course of the Proceedings and Disposition Below	3
C. Statement of Facts	4
SUMMARY OF ARGUMENTS	8
ARGUMENT	10
I. THE TRIAL COURT ERRED IN ORDERING SPECIFIC PERFORMANCE OF THE OPTION TO BUY BECAUSE SHIELDS FAILED TO TENDER THE PURCHASE PRICE	10
II. THE TRIAL COURT ERRED IN GRANTING SPECIFIC PERFORMANCE INCONSISTENT WITH THE PARTIES' CONTRACTUAL AGREEMENT	16
CONCLUSION	18

TABLE OF CONTENTS (continued)

ADDENDUM

1.	Option to Buy
2.	May 1, 1987 Real Property Lease
3.	Decision
4.	Findings of Fact and Conclusions of Law
5.	Order on Supplemental Findings
6.	Judgment and Decree Granting Specific Performance

TABLE OF CASES AND AUTHORITIES

UTAH CASES

Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985)	16
Carr v. Enoch Smith Co., 781 P.2d 1292, 1294-95 (Utah Ct. App. 1989)	10-15
Century 21 All Western Real Estate and Investment Inc. v. Webb, 645 P.2d 52, 55-56 (Utah 1982)	10
Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc., 865 P.2d 1382, 1385 (Utah Ct. App. 1993)	2
Eliason v. Watts, 615 P.2d 427, 430 (Utah 1980)	16
Jenkins v. Equipment Center, Inc., 869 P.2d 1000, 1003 (Utah Ct. App. 1994)	10
Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979)	17
Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980)	1
Reed v. Davis County School District, 892 P.2d 1063, 1064-65 (Utah Ct. App. 1995) . .	17
Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980)	17
Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975)	10

OTHER CASES

Cohen v. Rasner, 624 P.2d 1006, 1008 (Nev. 1981)	11
--	----

STATUTES RULES

Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995)	1
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OTHER AUTHORITIES

71 Am. Jur. 2d <i>Specific Performance</i> § 221 (1973)	16
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STATEMENT OF JURISDICTION

Appellant Arvil A. Harris ("Harris") appeals a final Decision, Order on Supplemental Findings, and Judgment and Decree Granting Specific Performance of the Eighth Judicial District Court of Duchesne County, State of Utah in favor of Appellee Joseph W. Shields ("Shields"). The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW

Issue #1

Whether the trial court erred in specifically enforcing a real estate option where the purchaser failed to make a valid tender of the purchase price, as required under Utah law.

Standard of Review and Preservation of the Issue for Issue #1

The first issue should be reviewed for correctness because "when the trial court has based its rulings upon a misunderstanding and misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under correct principles of law." Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980).

This issue was preserved for appeal in the Bench Trial Tr. (hereafter "Tr.") at 182-8; 204-08; 294-95.

Issue #2

Whether the trial court erred in decreeing that Shields could exercise his option on or before "the expiration of the real property lease," contrary to the terms of the option.

Standard of Review and Preservation of the Issue for Issue #2

The second issue should be determined under a "correction of error" standard because "[i]f a contract is unambiguous, interpretation of the contract is a question of law, which we review for correctness." Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc., 865 P.2d 1382, 1385 (Utah Ct. App. 1993).

This issue did not have to be raised at trial because the Plaintiff did not seek, as part of his requested relief, specific performance contrary to the terms of the contract. This issue first arose when the trial court entered its final judgment decreeing performance contrary to the contract terms.

DETERMINATIVE RULES AND STATUTORY PROVISIONS

None

STATEMENT OF THE CASE

A. Nature of the Case

Harris appeals a final judgment and decree of the Honorable John R. Anderson of the Eighth Judicial District Court of Duchesne County, State of Utah granting specific performance of a real estate option against Harris. This action arises under common law.

Harris will show that Shields was not entitled to an award of specific performance of the Option To Buy where (1) Shields failed to make a valid tender of the purchase price, which includes an unconditional offer of payment of the money due, together with the actual production of the money or its equivalent, as required for specific performance; (2) the evidence does not show that tender would have been futile; and (3) the trial court ordered specific performance inconsistent with the parties' agreement. Therefore, this Court should find that the trial court committed error in decreeing specific enforcement of the Option To Buy and deny Shields specific performance.

B. Course of the Proceedings and Disposition Below

Shields brought an action against Harris to compel specific performance of a real estate option. The parties presented evidence and argument at a bench trial on October 17 and 18, 1994. After hearing the evidence, the trial court took the matter under advisement and then issued its Decision on October 24, 1994. The trial court clarified its Decision by an Order on Supplemental Findings, dated June 22, 1995, and also issued a Judgment and Decree Granting

Specific Performance of the same date. The trial court held that the Option To Buy is definite, valid, and enforceable; determined the sales price to be \$202,125.00, less all credits and liens; and did not require Shields to tender the purchase amount. The Judgment also required Harris to sell his property to Shields at a closing date as prayed for by Shields or prior to expiration of "the real property lease."

Harris appealed the trial court's decision to the Utah Supreme Court, which transferred the matter to the Utah Court of Appeals. Harris now asks this Court to reverse the trial court and deny specific performance of the option to convey real estate.

C. Statement of Facts

Harris is the owner of 320 acres of real property, including water shares and an irrigation system, located in Pleasant Valley, Duchesne County, State of Utah. (Real Property Lease dated May 1, 1987, Add., Doc. 2.) Shields is the owner of real property located three miles away from Harris' property. (Tr. at 98.)

Harris, as lessor, and Shields, as lessee, entered into a five-year real property lease on April 1, 1985. (Findings of Fact & Conclusions of Law at 1, ¶ 1, Add., Doc. 4.) After the parties entered into the lease, Harris made substantial improvements on the property, at his own expense, in the form of a renovated irrigation system. (Tr. at 116; Findings of Fact & Conclusions of Law at 1, ¶ 1, Add., Doc. 4.)

On or about February 10, 1987, the parties mutually agreed to terminate the 1985 lease because Harris was interested in selling the property or in obtaining a longer term lease, and Shields was interested in purchasing the property or in having a longer term lease. (Tr. at 156; Findings of Fact & Conclusions of Law at 2, ¶ 2, Add., Doc. 4.) As an incentive to induce Shields to enter into a longer-term lease or purchase the property, Harris executed an "Option To Buy," in writing, on February 12, 1987, and delivered it to Shields. (Tr. at 157-59.) The option proposed a new seven-year lease and an option to buy at any time during the seven years. The terms of the option are as follows:

A. Lessee, Joseph W. Shields would have this Special option to buy said ranch from Lessor Arvil A. Harris for a reasonable price to be negotiated by five independent people, one man from the Federal land Bank, one man from the Soil Conservation Service in Roosevelt, Utah office, one banker from the First Security Bank of Utah loan department, Roosevelt Utah, one farmer in the Myton, Utah area, and one real estate broker in the Myton or Roosevelt area. These five people would make a fair study at the time of purchase to make an honest and fair appraisal of the ranch. All five bids would be added up for a grand total and divided by five to arrive at a selling price.

B. A special consideration would be given to Joseph W. Shields in that \$5,000.00 per year would be given toward the down payment at any year during the course of the seven year lease. For example, if you choose to buy the seventh year of the lease \$35,000.00 would be allowed as a down payment toward the purchase price of said ranch. Said price of the ranch would be based on the appraisal of the five people mentioned in Paragraph A. If for example, the average of these five appraisals came to \$300,000.00, then you could apply the \$35,000.00 as part of the down payment. The balance due would be \$265,000.00.

(Option To Buy, Addendum, Doc. 1.)

On February 20, 1987, Shields filed a Chapter 12 Plan of Reorganization in the United States Bankruptcy Court. (Tr. at 126-34.) After the dismissal of the Chapter 12 proceedings, approximately 90 days after it was filed, Harris and Shields entered a ten-year lease, which began on May 1, 1987 through May 1, 1997, with annual payments of \$13,000.00. (Real Property Lease dated May 1, 1987, Add., Doc. 2; Tr. at 148-50.)

The ten-year lease, executed in May of 1987, does not make any reference to the seven-year option, executed in February of 1987; nor does the Option to Buy refer to the ten-year lease. (Option To Buy, Add., Doc 1; Real Property Lease dated May 1, 1987, Add., Doc. 2; Tr. at 140.) Furthermore, Shields never discussed the Option to Buy with Harris, nor communicated whether he accepted or rejected the option until 1993. (Tr. at 158, 176-77.)

Shields commenced farming the leased land and made all payments to Harris pursuant to the terms of the lease. (Tr. at 112-14; 169.) In the spring of 1993, Harris approached Shields and told him that Harris was going to sell the property to Burton Dairy, and Harris offered to buy out the remainder of Shield's lease. (Tr. at 142-43.) In response, Shields decided to attempt to exercise the Option To Buy to prevent Harris from selling the property to someone else and sought the assistance of legal counsel to enforce it. (Tr. at 143-44.) Pursuant to the terms of the Option to Buy, Shields obtained four appraisals; he was unsuccessful in obtaining the fifth appraisal from the Soil Conservation District. (Tr. at 145-46, 182-83.) Shields obtained these appraisals without telling, consulting with, or cooperating with Harris. (Tr. at 144-46.) After obtaining the appraisals, Shields had his attorney prepare and mail a

letter, dated August 2, 1993, to Harris' attorney, which communicated Shields' intention to exercise the option. (Tr. at 177-81.) Based on the appraisals he obtained, Shields asserted that the sale price should be \$134,200.00. (Complaint, R. at 6.) Although Shields asserted that he was ready, willing, and able to purchase Harris' property, Shields never did produce or pay any of the purchase money. (Tr. at 146, 183-84.)

Although the option did not require the parties to cooperate in selecting appraisers or specify who was to select the appraisers, after Harris learned that Shields obtained appraisals, Harris procured two appraisals. (Tr. at 167-69.)

The trial court found that "Shields was not required to tender the purchase price under the facts and circumstances of this case because the formula for finalizing the purchase price could not be completed without the cooperation of both parties as specifically set forth in the Option To Buy agreement." (Findings of Fact & Conclusions of Law at 4, ¶ 17, Add., Doc. 4.) However, the trial court did not order the parties to cooperate in selecting appraisers to value the property. Rather, the trial court averaged an appraisal by a neighbor Shield's selected with an appraisal by a neighbor Harris selected to determine one of the required appraised values. (Findings of Fact & Conclusions of Law at 5, ¶ 19(a), Add., Doc. 4.) The trial court did not adhere to the formula set forth in the option in determining this averaged appraisal value. (Option To Buy, Add., Doc. 1.)

The trial court found that the terms of the option were definite, concluded that the Option To Buy is valid and enforceable, and ordered Harris to sell the real property to Shields for a

purchase price of \$202,125.00, less credits and liens, and provide good and marketable title. (Findings of Fact & Conclusions of Law at 4, ¶ 13; 7-8, ¶¶ 2, 6, Add., Doc. 4; J. and Decree Granting Specific Performance at 2, ¶ 2, Add., Doc. 6.) The trial court ordered that the sale take place "within such period of time as demanded by the Plaintiff, but not to exceed the date of the expiration of the real property lease. . . ." (J. and Decree Granting Specific Performance at 2, ¶ 2, Add., Doc. 6.)

SUMMARY OF ARGUMENTS

This Court should reverse the trial court's award of specific performance of the real estate option to Shields because Shields failed to tender the purchase price, as required under Utah Law. Shields alleged that the sale price of Harris' property should be \$134,200.00 and asked the trial court to order Harris to sell his property to Shields at that amount. Utah courts have held that a purchaser seeking specific performance of a real estate contract must make a valid tender of the purchase amount before the court can order specific performance, unless the purchaser is excused because tender would be a futile act. Shields has not made a valid tender of performance, nor does the evidence show that tender would have been futile because Harris retained control of and title to his property and could have performed if Shields had tendered the purchase price. Therefore, Shields is not entitled to specific enforcement of the Option To Buy.

In addition, this Court should reverse the trial court's decree which allows specific performance to occur at any time prior to "expiration of the real property lease" because the trial court awarded Shields a judgment inconsistent with the evidence. Shields prayed for judgment conveying Harris' property to Shields pursuant to the terms of the Option To Buy. The trial court held that the terms of the option were unambiguous and granted Shields' prayer. However, the trial court also ordered that the closing date may not exceed the expiration of "the real property lease." By so doing, the trial court added a term which is inconsistent with the option and which is not in accord with Shields' requested relief. The only reference to a closing date in the Option To Buy is the ability of Shields to exercise the option at any time during "the course of the seven year lease." (Option To Buy ¶ B, Add., Doc. 1.) Harris and Shields never entered into a seven-year lease. Nor does the Option To Buy reference the ten-year lease entered into by Harris and Shields approximately three months after the option was executed. Assuming that the trial court is referring to expiration of the ten-year lease as a closing date, then the trial court is supplying a term not included in the option or requested by Shields. A court of equity is bound to command present performance of acts in conformity with the contract. Here, the trial court ordered Harris to sell to Shields either by a closing date which passed prior to judgment or a date not in accord with the parties' contract.

Consequently, the trial court inappropriately awarded Shields specific performance of the real estate option, and this Court should reverse that order by denying specific performance.

ARGUMENT

I. THE TRIAL COURT ERRED IN ORDERING SPECIFIC PERFORMANCE OF THE OPTION TO BUY BECAUSE SHIELDS FAILED TO TENDER THE PURCHASE PRICE

Shields' failure to make a valid tender of the purchase price for Harris' property precludes specific enforcement of the Option To Buy. Before specific performance will be employed by the courts on a contract for the sale of real estate, the purchaser must show that he paid the purchase price or tendered it to the seller. Century 21 All Western Real Estate and Investment Inc. v. Webb, 645 P.2d 52, 55-56 (Utah 1982). In Century 21, the Utah Supreme Court found that

During the executory period of a contract whose time of performance is uncertain but which contemplates simultaneous performance by both parties, such as the Earnest Money agreement involved in this case, neither party can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance.

Id.

Utah's courts have clarified what constitutes a valid tender as follows: "In order to have a valid tender, there must be 'a bona fide, unconditional, offer of payment of the amount of money due, **coupled with an actual production of the money** or its equivalent.'" Carr v. Enoch Smith Co., 781 P.2d 1292, 1294 (Utah Ct. App. 1989) (emphasis added) (citing Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975)); accord Jenkins v. Equipment Center, Inc., 869 P.2d 1000, 1003 (Utah Ct. App. 1994). For further emphasis, the Carr court

stated that "[i]t is not enough to simply inform the seller that the buyer is ready and willing to perform the contract as planned." Carr, 781 P.2d at 1294.

The rationale for the tender requirement is that the trial court should be certain that if the seller is ordered to perform, the purchaser will be able to pay. Cohen v. Rasner, 624 P.2d 1006, 1008 (Nev. 1981). In Cohen, purchasers contracted for the sale of two vacant lots and construction of apartment buildings on each lot. The contract was contingent on the purchasers obtaining the maximum obtainable loan and the sellers carrying the balance. The purchasers assumed a loan and obtained a building permit on one of the lots. On the second lot, the purchasers applied for a loan, which was never processed, and failed to apply for a building permit, which later became unobtainable when Carson City imposed a moratorium on construction. The purchasers sought specific performance, which was denied because the "buyers' assumption of one loan and their application for another did not constitute performance which would entitle appellants to equitable relief because they had not shown their present willingness and ability to perform their obligation under the contract." Id. at 1007. Even though the purchasers in Cohen did begin financial arrangements for the purchase of real estate, their failure to complete the financial arrangements before seeking specific performance precluded their relief.

In Carr, the plaintiff entered into an earnest money agreement to purchase a home to be built as part of a housing development and paid \$1,000.00 as a down payment. Without any notice to the purchaser, the seller revised the construction of the home to make it suitable for

use as a model home by a real estate agency and returned the purchaser's earnest money deposit. Whereupon, the purchaser had his attorney send a letter to the real estate agency, which expressed the purchaser's intent to perform under the contract. In response, the seller informed the purchaser that the seller considered their agreement to be terminated by the purchaser's failure to obtain a loan for the residence. Then, the purchaser sued for specific performance, seeking to force the seller to convey the home to the purchaser, rather than allowing the residence to be used by the real estate agency as a model home. The purchaser based his action upon two arguments: (1) the purchaser did make a valid tender by his letter expressing his intent to perform the contract; and (2) the purchaser argued that the tender requirement was excused because the seller had repudiated the contract by committing the home for use as a model home.

Both the trial court and the appellate court found no merit to the purchaser's first argument because the purchaser failed to satisfy his tender obligation by simply serving a notice of his willingness to proceed. Carr, 781 P.2d at 1294. The Carr court explained that "the requirement of a tender is well-established," and for a valid tender, the purchaser must unconditionally offer payment of the money due, plus actually produce the money. Id. The Carr court determined that the purchaser's letter expressing his intent to perform the contract "at most expressed a desire on the part of Carr to go forward. . . [and] cannot be viewed as satisfying the tender requirement." Id.

Carr's second argument, that tender was excused, also failed. Utah courts recognize that tender may only be excused where a party demonstrates by "reasonably plain and clear" evidence that tender would have been a futile act. Id. at 1295. The Carr court explained the rule of law as follows:

[t]he familiar rule that the law does not require one to do a vain or useless thing excuses the making of a formal tender which would otherwise be required, where it is reasonably plain and clear that if made, such a tender would be an idle ceremony and of no avail, as where it appears that a tender, if made, will be refused for some reason unrelated to the tender or its sufficiency. . . .

Id. (citations omitted).

In Carr, the evidence showed that although the seller allowed a real estate agency to use the house as a model home, such use did not place it beyond the seller's control. The seller did not convey title, and no evidence suggested that the alterations in the construction of the home could not have been corrected for the purchaser's use. Id. The Carr court held that from this evidence, "the record is not so 'reasonably plain and clear' as to demonstrate that tender would have been a futile act." Id. Based on the evidence before the court, the seller could have performed his obligations had the purchaser tendered the balance of the purchase price. Whether the seller would have performed or even wanted to perform was irrelevant. The court only focused on whether the seller was capable of performing had the seller produced the money in conjunction with the tender offer. The Carr court concluded that the purchaser's duty to tender was neither performed nor excused; therefore, the purchaser was not entitled to specific performance. Id.

The Carr case closely parallels Harris' case. In both cases, the parties contracted for real estate. In the Carr case, it was pursuant to an earnest money agreement, and in Harris' case it was pursuant to an option. In addition, both purchasers had their attorneys inform the sellers that the purchasers were ready, willing, and able to perform the contracts. Nevertheless, both purchasers failed to actually pay any purchase money. In Carr, the purchaser did not tender payment either before or after construction of the home. In Harris' case, although Shields obtained appraisals to figure the purchase price, Shields failed to unconditionally offer payment of the purchase amount **and** produce that amount of money due or its equivalent.

Then, in both cases, the evidence failed to demonstrate that tender would have been futile. In Carr, the evidence showed that the realty was not placed beyond the control of the seller. The use of the home as a model was at the pleasure of the seller, the seller had not conveyed title, and any corrections in construction could have been appropriately made. Even though the seller refused to convey the residence when requested to do so by the purchaser, the seller still was capable of performing; he retained title and the construction was finished. In Harris' case, Harris had not conveyed title, Harris retained control of the land, Harris had not terminated the lease with Shields, and Shields continued to farm the land. Although Harris desired to sell his property to Burton Dairy and offered to purchase Shields' remaining lease term, Harris still retained control of the property, had not repudiated the contract, and would have been able to perform if Shields had tendered payment, even though Harris, like the seller in Carr, did not want to.

Moreover in Harris' case, the trial court did not follow the established law that a purchaser must tender the purchase amount or show that he was excused from tender because of the futility of such an act. In Harris' case, the trial court made no findings or conclusions that Shields was excused from tender because such an act would have been futile. Rather, the trial court found that Shields was excused from tendering the purchase amount "because the formula for finalizing the purchase price could not be completed without the cooperation of both parties as specifically set forth in the Option To Buy agreement." (Findings of Fact & Conclusions of Law at 4, ¶ 17, Add., Doc. 4.) Contrary to the trial court's findings, the option does not require the parties to cooperate in obtaining appraisals; it only requires that appraisals be obtained. (Option To Buy, Add., Doc. 1.) Nevertheless, under Utah law, the only excuse for failing to tender is where the evidence is reasonably plain and clear that an actual tender would have been a futile act. Carr, 781 P.2d at 1295. Like the seller in Carr, Harris has done nothing in this case to excuse Shields' tender.

Because the Harris case so closely parallels the Carr case, this Court should similarly decide that Shields' duty to tender was neither performed nor excused and Shields is not entitled to specific performance.

II. THE TRIAL COURT ERRED IN GRANTING SPECIFIC PERFORMANCE INCONSISTENT WITH THE PARTIES' CONTRACTUAL AGREEMENT

Shields is not entitled to specific performance of the real estate option because the trial court supplied a term inconsistent with the Option To Buy. In cases involving specific performance of a real estate sale agreement, "[s]pecific performance may be granted only if the parties' intent as to the essential terms of the agreement is clear." Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985). Then, when granting specific performance, "it is the obligation of the courts to evaluate the equities of the parties and to formulate a remedy that seeks to place the parties in a position as similar as possible to that which they would have been in had the conveyance been made according to the terms of the contract." Eliason v. Watts, 615 P.2d 427, 430 (Utah 1980). Consequently, when a court decrees specific performance of a real estate agreement, the court must

require the performance of some certain and specific act which ought to be performed by the delinquent party, and it cannot enter a general decree that in the future the delinquent party shall perform the acts required of him by his contract. In entering a decree of specific performance, the court has no power to command the performance of acts except in accordance with the contract.

71 Am. Jur. 2d *Specific Performance* § 221 (1973).

In the instant case, Shields petitioned the trial court for specific enforcement of the Option To Buy. The trial court found that the "[t]erms of the option agreement were definite and enforceable" and held that the option was valid and enforceable. (Findings of Fact & Conclusions of Law at 4, ¶ 13; 7, ¶ 2, Add., Doc. 4.) Therefore, the trial court was bound to

interpret the contract according to the document itself. Reed v. Davis County School District, 892 P.2d 1063, 1064-65 (Utah Ct. App. 1995); see also Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979) (stating "A court will not rewrite an unambiguous contract."); Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980) (explaining that "A court will not enforce asserted rights that are not supported by the contract itself.").

The Option To Buy, dated February 10, 1987, refers to a seven-year lease, which the parties never entered into. Several months afterward, the parties actually entered into a ten-year lease, which expires on May 1, 1997. The option does not refer to this ten-year lease, nor does the ten-year lease refer to the option. The option, itself, clearly does not give Shields any right to a ten-year option.

In ordering Harris to sell his property to Shields, the trial court decreed that the closing date of the option would be pursuant to the terms of the Option To Buy, "but not to exceed the date of the expiration of the real property lease. . . ." (J. and Decree Granting Specific Performance at 2, ¶ 2, Add., Doc. 6.) The trial court never clarified which real property lease it referred to, and maybe with some justification. The trial court could not rule that the lease referred to is the seven-year lease because no such lease existed. Nor could the trial court rule that the lease referred to is the ten-year lease because the court found that the terms of the option were unambiguous, and the option does not reference a ten-year lease at all. The obvious problem is that the option, which was offered by Harris several months prior to execution of the ten-year lease, by its terms has no connection to anything other than a seven-year lease.

Not only did the trial court order Harris to perform on a date that had already past, but the trial court exceeded its authority in extending the closing date beyond that prayed for and contractually agreed upon. The trial court held that the terms of the option were clear, valid, and enforceable. By its terms, the Option To Buy was enforceable only in conjunction with a seven-year lease that never existed. Accordingly, the trial court committed error in attempting to tie the option to a lease not supported by the option itself. Thus, this Court should reverse the trial court's decree of specific performance of the Option To Buy.

CONCLUSION

Shields is not entitled to specific performance of the Option To Buy because he failed to satisfy a condition precedent set forth by Utah's courts which requires a purchaser to tender the actual purchase money before specific performance is decreed. Shields' failure to actually pay the purchase price of the real property to Harris precludes Shields from specific enforcement of the option.

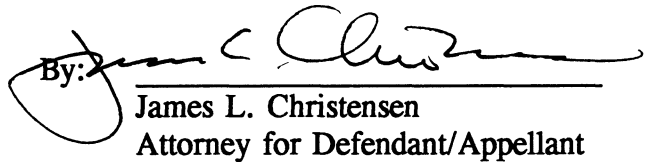
In addition, the trial court erroneously excused Shields from tendering the purchase money based upon an excuse not recognized by Utah's courts and based upon an erroneous interpretation of the Option To Buy. The evidence does not reasonably and clearly show that if Shields would have made a tender of the purchase price it would have been a futile act. Harris retained control of and title to his property and was capable of performing had Shields tendered the purchase price. Furthermore, the trial court ordered performance of the option on

a date that expired prior to trial and on a date that the trial court supplied in contravention of a contractual term in an unambiguous contract. Specific enforcement of an unambiguous real estate option requires specific performance in accord with the contract terms, and this unambiguous option references a seven-year lease, not a ten-year lease.

Based on the foregoing facts and arguments, Harris urges this Court to reverse the trial court's ruling specifically enforcing the Option To Buy and deny specific performance.

DATED this 10 day of March, 1996.

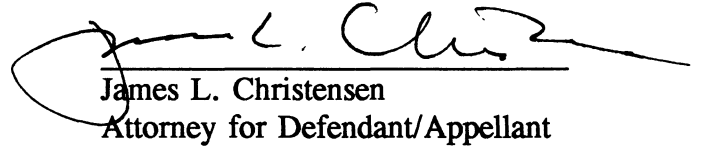
CORBRIDGE BAIRD & CHRISTENSEN

By: 
James L. Christensen
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of March, 1996 I caused to be mailed, by first class mail, postage pre-paid, a true and correct copy of the foregoing Brief of Appellant to the below named counsel:

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139 East South Temple, Suite 510
Salt Lake City, UT 84111


James L. Christensen
Attorney for Defendant/Appellant

2550\2\APPEAL\BRIEF.3

ADDENDUM

1.	Option to Buy
2.	May 1, 1987 Real Property Lease
3.	Decision
4.	Findings of Fact and Conclusions of Law
5.	Order on Supplemental Findings
6.	Judgment and Decree Granting Specific Performance

DOCUMENT 1

ENTRY NO. 297579 DATE 4-20-93 TIME 3:15 p BOOK A224 PAGE 343-344
FEE \$ 90.00 RECORDED AT REQUEST OF Joe Shields
Cathy Madsen DUCHESNE COUNTY RECORDER _____ DEPUT

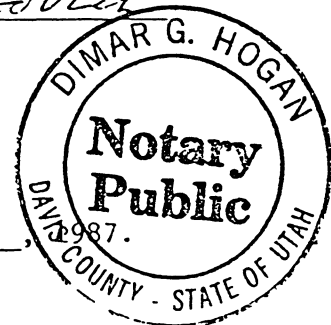
OPTION TO BUY

A. Lessee, Joseph W. Shields would have this Special option to buy said ranch from Lessor Arvil A. Harris for a reasonable price to be negotiated by five independent people, one man from the Federal land Bank, one man from the Soil Conservation Service in Roosevelt, Utah office, one banker from the First Security Bank of Utah loan department, Roosevelt Utah, one farmer in the Motton, Utah area, and one real estate broker in the Motton or Roosevelt area. These five people would make a fair study at the time of purchase to make an honest and fair appraisal of the ranch. All five bids would be added up for a grand total and divided by five to arrive at a selling price.

B. A special consideration would be given to Joseph W. Shields in that \$5,000.00 per year would be given toward the down payment at any year during the course of the seven year lease. For example, if you choose to buy the seventh year of the lease \$25,000.00 would be allowed as a down payment toward the purchase price of said ranch. Said price of the ranch would be based on the appraisal of the five people mentioned in Paragraph A. If for example, the average of these five appraisals came to \$300,000.00, then you could apply the \$25,000.00 as part of the down payment. The balance due would be \$265,000.00.

Arvil A. Harris
Arvil A. Harris

Subscribed before me this 12th day of May, 1987.



Dimar G. Hogan
Notary Public

DOCUMENT 2

REAL PROPERTY LEASE

THIS AGREEMENT entered into this 1st day of May, 1987, by and between ARVIL A. HARRIS, hereinafter referred to as Lessor, and JOSEPH W. SHIELDS, hereinafter referred to as Lessee, for and in consideration of the mutual covenants hereinafter set forth, do hereby agree as follows:

WHEREAS, Lessor is the owner of 320 acres of real property located in Pleasant Valley, Duchesne County, State of Utah, more particularly described as follows:

TOWNSHIP 8 SOUTH, RANGE 17 EAST, U.S.M.

Section 21: Southeast Quarter.
Section 27: West half Northwest Quarter.
Section 28: North half Northeast Quarter

Together with all improvements and appurtenances thereunto belonging and 250 shares of the capital stock in the Uintah Basin Irrigation Company; and

WHEREAS, Lessor is the owner of an underground water system, and seven wheel lines, all of which are now in good condition; and

WHEREAS, Lessee desires to lease said property, together with such water shares and personal property as above described from Lessor.

FOR AND IN CONSIDERATION of the above, Lessor and Lessee do

hereby agree as follows:

1. Lessor shall:

- a. Pay all real property taxes on said property.
- b. Pay all water assessments in regard to said property.

2. Lessee shall:

- a. Furnish all said personal property, which includes seven water lines, which lines, etc. shall be returned to Lessor, at the expiration of this lease, in as good of condition as they are presently, which condition is good, reasonable wear and tear excepted.
- d. Pay all utilities, which includes electricity.

3. Regarding the water pumps and underground lines, Lessor Lessor shall be responsible for the repair of the same.

This lease shall be for a ten (10) year term, beginning May 1, 1987, through May 1, 1997. The payments under this lease shall be made in annual installments of \$13,000.00, the first being due on May 1, 1987, and continuing annually thereafter

during the ten year term. Payment on lease is due and payable the first of May each year, with a ~~30~~^{Thirty} day grace period.

Lessee further agrees to deliver up the said premises to Lessor, at the expiration of this lease, in as good of order and condition as when the same was entered into by Lessee, reasonable wear and tear, damage by the elements excepted and the Lessee will not let or underlet said premises, or any part thereof, without the written consent of Lessor first had and obtained, which consent will not be unreasonably withheld. Lessee notes that 3/4 of property now needs plowed crops rotated and replanted into alfalfa. The Lessor agrees to pay for 1/2 of all alfalfa seed for the duration of the lease, which can be deducted from the lease payment by the Lessor.

In case of failure to faithfully perform the covenants and terms herein set forth, the defaulting party shall pay all costs, expenses and a reasonable attorney's fee resulting in enforcing this agreement or any right arising out of such breach.

Each party hereunder shall be responsible for losses resulting from negligence or misconduct of themselves, their employees or invitees, holding the other party harmless therefrom.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

LESSOR:

Arvil A. Harris
ARVIL A. HARRIS

LESSEE:

Joseph W. Shields
JOSEPH W. SHIELDS
Notary Public Commission Expires 6-17-
Virginia Hagle
Alamogordo, N.M. 88401

STATE OF UTAH
COUNTY OF SALT LAKE

I HEREBY CERTIFY THIS TO BE A TRUE
AND CORRECT COPY OF THE ORIGINAL
INSTRUMENT.

Don Palmer
NOTARY PUBLIC
RESIDING IN Murray, UT
Expires 1-27-90

DOCUMENT 3

IN THE EIGHTH JUDICIAL DISTRICT COURT
in and for Duchesne County and the State of Utah
Duchesne Department

JOSEPH W. SHIELDS,	)	D E C I S I O N
)	
plaintiff	)	Civil No. 940800002PR
)	
v.)	
)	
ARVIL A. HARRIS,	)	Judge John R. Anderson
)	
defendant)	

R U L I N G

The above captioned matter having come on regularly for trial the 17th and 18th days of October, before the Honorable John R. Anderson, setting without a jury. Evidence having been adduced and argument having been made and the court having taken the matter under advisement now makes and enters the following Findings of Fact and Conclusions of Law and Decision:

F I N D I N G S

The parties to this law suit hereafter referred to as Shields and Harris entered into a five (5) year real property lease on April 1, 1985. Because of the economics presented by the condition of the property, substantial improvements were made at Harris's expense.

2. On or about February 9, 1987 the parties mutually agreed to terminate the lease.

3. Harris was interested in selling the property or in obtaining a long term lease to cover his investment costs and Shields was interested in purchasing the property or in having a longer term lease.

4. The parties being in conceptual agreement toward their expectations on or about the date of the termination of the short term lease.



5. Shields and Harris are both held by this court to be above the standard of consumers. To borrow from the uniform Commercial Code special recognition is given to farmers as merchants and from the testimony adduced, Harris was an experienced and successful businessman. This court will not hold the parties however, to standards of knowledge required for real estate brokers or attorneys trained in the special areas of real estate law.

6. Shields was faced with having to file a chapter 12 Plan of Reorganization in the United States Bankruptcy Court at or near this time.

7. From the documents filed with the bankruptcy court, it is apparent to this court that Shields intended to enter into a long term lease or to buy the property.

8. At or about the date of the filing of the chapter 12 Petition, Harris granted shields an option to buy the property.

9. This court finds from the testimony adduced that the option extended from Harris to Shields was a "dangling carrot" to induce Shields to enter into a longer term lease.

10. The option given was therefore for a valuable consideration

11. After the dismissal of the Chapter 12 proceedings approximately 90 days after it had been filed, Harris received from Shields an executed ten (10) year lease pursuant to the evidence adduced and the exhibits received.

12. The option contract was not a mere continuing offer, but an interest in real estate.

13. Terms of the option agreement were definite and enforceable and will be construed against Harris who drafted the document. "Ranch" will include the water stock according to customs and dealings of the parties.

14. No evidence was presented on Harris's counterclaim and therefore it should be dismissed.

15. The ten year lease and the option agreement were not merged, therefore this court finds that there is no provision for the award of attorney fees for enforcing the option contract.

16. This court finds based upon the appropriate case law, and the facts adduced at trial in this case that marketable title need not be such till actual date of closing.

17. Tender of a purchase price was not required under the circumstances because the formula for completing the purchase price could not be completed without cooperation

between the parties. Because the parties were held to the standard of merchants good faith and fair dealing will be implied in their transactions.

18. Since the 5th element of the determination of value was an impossibility the court will not simply exclude its operation from the contract.

19. The court will try and construe the contract without re-writing the contract reading in to the contract a requirement of good faith and fair dealing which is required between these parties. The court is determined that the sales price formula will be determined as follows:

1. It will be the average of two (2) farmers and neighbors obtained by each of the parties, Richens and Roberts.
2. Court will use the Federal Land Bank appraiser of Mr. Warren.
3. The court will use the First Security Bank value
4. The court will use the average of a real estate broker supplied by each of the parties. Those numbers totaled equal \$227,500 divided by four (4) equals \$197,000.00. The court will assign a value to the sprinkler system which is removable from the property and not deemed fixtures to the eight wheel lines of \$8,000.00. Re: value of sprinklers lines, Plaintiff's testimony is inconclusive and Wilkersons @ \$27,000.00. With defendants at \$10,000.
5. Court will exclude the Burton Dairy Deal as
 - a) Not done
 - b) Not relevant to contract interpretation.

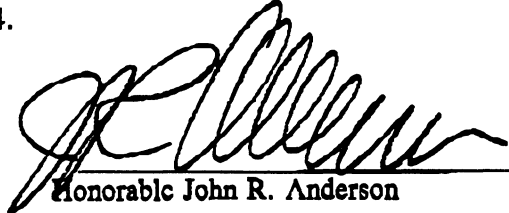
20. Therefore, the value of the property and the purchase price determined from the contract is \$207,000.00.

CONCLUSIONS

1. The counterclaim of Harris is dismissed.
2. The option agreement extended by Harris to Shields is valid and enforceable. Harris must furnish marketable title at date of closing. The purchase price will be \$207,000.00, less credits and liens..

3. Judgment may be entered accordingly, counsel for Shields is directed to prepare inclusive Findings of Facts and Conclusions of Law and a Decree. Present the same to counsel for Harris for approval as to form and present it to the court, whereupon judgment may be entered.

Dated 10-24-, 1994.


Honorable John R. Anderson

copy to:

Richard K. Nebeker
James L. Christensen

DOCUMENT 4

8TH DISTRICT COURT
DUCHESNE

202

95 JUN 12 AIO:40

Richard K. Nebaker
Nebaker, McConkie & Wright
Attorney for Plaintiff
139 E. South Temple, Ste. 510
Salt Lake City, Utah 84111
Telephone: (801) 532-7373

FILED
EIGHTH DISTRICT COURT
DUCHESNE CO. UTAH

JUN 22 1995

BY 7m DEPUTY
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH

JOSEPH W. SHIELDS,
Plaintiff

v.

ARVIL A. HARRIS,
Defendant.

:
:
: FINDINGS OF FACT AND
: CONCLUSIONS OF LAW
:
:
: Civil No. 940800002PR
:
: Judge John R. Anderson
:

The above-entitled matter came on regularly for trial on the 17th and 18th days of October, 1994, before the Honorable John R. Anderson, presiding. From the evidence presented and argument made at trial, the Court rendered a memorandum "Decision" on the 24th day of October, 1994. Based upon the Court's Decision, with its accompanying Findings of Fact and Conclusions of Law, the parties hereto (hereafter, "Shields" and "Harris"), by and through counsel of record, now set forth the inclusive Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties to this law suit entered into a five (5) year real property lease on April 1, 1985. Because of the

Findings of Fact and Conclusions of Law
Case No. 040800002PR
Judge John R. Anderson

economics presented by the condition of the property, substantial improvements were made at Harris' expense.

2. On or about February 9, 1987, the parties mutually agreed to terminate the 1985 lease.

3. Harris was interested in selling the property or in obtaining a long term lease to cover his investment costs and Shields was interested in purchasing the property or in having a longer term lease.

4. The parties, being in conceptual agreement toward their expectations on or about the date of the termination of the 1985 lease, determined to enter into a long-term lease. This long term lease, (for a period of ten years), was entered into between Shields and Harris on or about the 1st day of May 1987.

5. Both Shields and Harris are found to be above the standard of consumers as designated by the Uniform Commercial Code. Harris is found to be an experienced and successful businessman. The parties are not however to be held to the standard of knowledge required for real estate brokers or attorneys trained in the special areas of real estate law.

6. At or near the time of entering the new lease with Harris, Shields was faced with having to file a Chapter 12 Plan of

Reorganization in the United States Bankruptcy Court.

7. From the documents filed with the Bankruptcy Court, it is apparent that Shields intended to enter into a long term lease with Harris and/or to buy the property.

8. At or about the time of the filing of the Chapter 12 Petition, Harris granted Shields an option to buy the property. The "Option To Buy" agreement was given in writing, executed by Mr. Arvil A Harris and delivered to Mr. Shields.

9. The "Option To Buy" granted by Harris to Shields constituted an incentive or a "dangling carrot" to induce Shields to enter into the ten year May 1, 1987 lease with Harris. Shields relied upon the Option To Buy when entering the ten year lease.

10. The "Option To Buy" agreement was given for valuable consideration.

11. After the dismissal of the Chapter 12 proceedings (approximately 90 days after it was filed), Harris received from Shields the executed ten (10) year lease. Shields commenced farming the leased land and made all payments to Harris pursuant to the lease.

12. The "Option To Buy" contract was not a mere continuing offer, but an interest in real property belonging to

Shields.

13. Terms of the option agreement were definite and enforceable and are construed against Harris who drafted the document. The term "ranch" as used in the lease and or option, includes the water stock according to the customs and dealings of the parties.

14. No evidence was presented on the Harris Counterclaim and the same is to be dismissed.

15. The ten year lease and the option agreement were not merged and therefore, there is no provision for the award of attorney fees for enforcing the option agreement.

16. Based upon appropriate case law and the facts adduced at trial in this case, marketable title need not be available until the actual date of closing.

17. Shields was not required to tender the purchase price under the facts and circumstances of this case because the formula for finalizing the purchase price could not be completed without the cooperation of both parties as specifically set forth in the Option To Buy agreement. Since both parties are held to the standard of merchants, good faith and fair dealing is implied in their transactions.

Findings of Fact and Conclusions of Law
Case No. 940800002PR
Judge John R. Anderson

18. Because it was impossible to obtain an appraisal by someone from the Roosevelt office of the Soil Conservation Service (the fifth appraisal in the option formula for determining value and sale price), that element of value determination is excluded by the Court.

19. The formula for price determination as set forth in the Option To Buy agreement will be construed by the Court without re-writing the contract. Based upon the requirement of good faith and fair dealing between the parties, the option agreement sales price is found to be the average price at which the property was appraised, plus the value of the non-fixture sprinkler system, determined as follows:

a. The average of the values placed on the property by two (2) farmers and neighbors, Mr. Richens and Mr. Roberts, one each obtained by each of the parties, in the amount of \$140,000.00 and \$280,000.00 respectively, equals \$420,000.00, divided by two equals: \$210,000.00.

b. The Federal Land Bank appraisal of \$190,000.00.

c. The First Security Bank appraisal of \$177,750.00.

d. The average of the values placed on the property by the two (2) real estate brokers' appraisals, each party having

Findings of Fact and Conclusions of Law
Case No. 940800002PR
Judge John R. Anderson

provided one of the brokers is \$245,500.00 (the Roberts appraisal as given in oral testimony at court) and \$160,000.00 (the Allred appraisal) equals \$405,500.00 divided by two equals \$202,750.00.

e. The sum of the above appraisals is \$780,500 (\$210,000.00 + \$190,000.00 + \$177,750.00 + \$202,750) and when divided by 4 that equals \$195,125.00.

f. The value of the sprinkler system which is removable and not deemed to be a fixture to the eight wheel lines is the sum of \$8,000.00.

g. The Burton Dairy deal is not included in the value determination because the deal was not completed and evidence related thereto was not relevant to the contract.

20. The total value of the property and the purchase price to be paid pursuant to the parties contract is therefore the sum of \$202,125.00.

Findings of Fact and Conclusions of Law
Case No. 940800002PR
Judge John R. Anderson

21. There exists some liens and encumbrances on the title to the leased property which will be removed at the expense of Harris or in the alternative, deducted from the purchase price at the time of closing.

22. The Plaintiff Shields is entitled to a credit on the purchase price of \$5,000.00 per year for each year paid on the lease pursuant to the terms of the option contract.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in the above-entitled matter and subject matter jurisdiction exists. The real property which is the subject of this legal action is located within the Eighth District Court of Duchesne County.

2. The Option To Buy agreement given by Harris to Shields is valid and enforceable.

3. The Option To Buy contract was not a mere continuing offer, but an interest in real property belonging to Shields.

4. Since both parties are held to the standard of merchants, good faith and fair dealing is implied in their transactions.

5. Harris must furnish Shields marketable title to the

Findings of Fact and Conclusions of Law
Case No. 940800002PR
Judge John R. Anderson

property at the date of closing.

6. The purchase price to be paid by Shields at closing is the price of \$202,135.00 less all credits and liens.

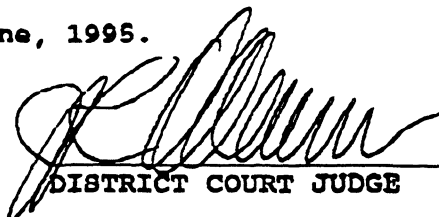
7. The Burton Dairy Deal is unfinished and not relevant to the option agreement.

8. There having been no evidence presented on the Harris Counterclaim, the same should therefore be dismissed.

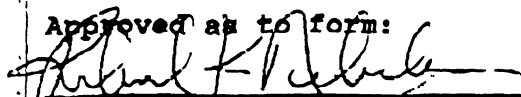
9. Plaintiff is entitled to Judgment and Decree of Specific Performance Ordering that the real property which is the subject of this legal action be sold to the Plaintiff by the Defendant on the terms and conditions as set forth in these Findings and Conclusions.

10. Judgment may be entered for Plaintiff accordingly.

DATED this 22 day of June, 1995.


DISTRICT COURT JUDGE

Approved as to form:

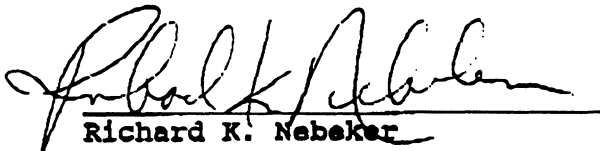

Richard K. Nebeker
Attorney for Plaintiff


James L. Christensen
Attorneys for Defendant

Findings of Fact and Conclusions of Law
Case No. 940800002PR
Judge John R. Anderson

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to James L. Christensen at CORBRIDGE, BAIRD & CHRISTENSEN, 39 Exchange Place suite 100, Salt Lake City, Utah 84111, Attorneys for Defendant, this 15th day of June, 1995.


Richard K. Nebeker

DOCUMENT 5

8TH DISTRICT COURT
DUCHESNE

'95 JUN 12 A10:40

Richard K. Nebeker
Nebeker, McConkie & Wright,
139 East South Temple, Suite 510
Salt Lake City, UT 84111
Telephone: (801) 532-7373

Attorney for Plaintiff

BOOKED FOR
JUN 12 1995

BY *m* DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH

* * * * *

JOSEPH W. SHIELDS,)	
)	
Plaintiff,	)	ORDER ON SUPPLEMENTAL
	)	FINDINGS
)	
v.	)	Civil No. 940800002 PR
)	
ARVIL A. HARRIS,	)	Judge John R. Anderson
)	
Defendant.)	

* * * * *

Pursuant to the Court's Motion, a post trial status conference was held on the 25th day of May, 1995, between the Court and the parties in the above entitled case. The conference was conducted by telephone and participating in the conference call was the Honorable John R. Anderson, District Court Judge, Richard K. Nebeker, attorney for Plaintiff Joseph W. Shields and James L. Christensen, attorney for Defendant Arvil A. Harris. The phone conference was conducted by speaker phone and was recorded by the Court's reporter.

The purpose of the status conference was to assist

counsel in concluding the preparation of the Findings of Fact and Conclusions of Law by clarifying several points in the Court's written "Decision" dated October 24, 1994. Counsel and the Court reviewed said Decision and the Court referenced to his personal trial notes. Based thereon, and pursuant to the records, files and exhibits in this matter, and after discussion and argument by counsel, it was resolved as follows and is hereby;

ORDERED

1. That the appraisal value on the subject real property submitted by the witness Mr. L. Clark Roberts, is determined to be the amount of \$245,500.00. This is the amount that he testified to verbally on the witness stand and this amount varies from his written opinion. The sale price as stated in the Court's written "Decision" dated October 24, 1995, shall be and hereby is amended to reflect this L. Clark Roberts appraisal value of \$245,500.00.

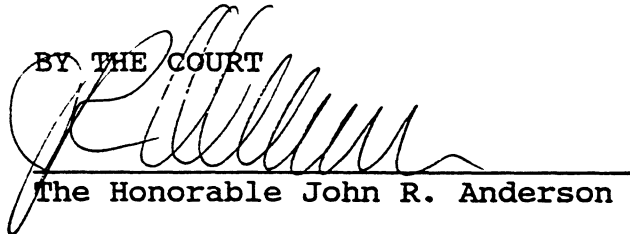
2. That the phrase, "less credits" as stated in paragraph 2 of the Court's written "Decision" under the heading "Conclusions" is hereby clarified to mean that the Plaintiff is entitled to a credit of \$5,000.00 dollars per year for each year in which Plaintiff made a lease payment

to the Defendant Arvil Harris as outlined in the parties option contract. This credit amount shall be deducted from the sales price of the real property at the time of the closing of the sale between the parties.

3. Counsel for the parties are to either agree upon the Findings Of Fact and Conclusions of Law, or in the alternative, submit their own respective Findings Of Fact and Conclusions of Law to the Court for approval on or before the 9th day of June, 1995.

Dated this 27 day of June, 1995.

BY THE COURT



The Honorable John R. Anderson

Approved:



Richard K. Nebeker
Attorney for Plaintiff

James L. Christensen
Attorney for Defendant

Certificate of Hand Delivery

I hereby certify to the above entitled Court that I hand delivered a true and correct copy of the foregoing Order on Supplemental Findings to James L. Christensen at Corbridge, Baird and Christensen, 39 Exchange Place, suite 100, Salt Lake City, Utah, 84111, attorneys for Defendant, this 1st day of June, 1995.


Richard K. Nebeker

DOCUMENT 6

8TH DISTRICT COURT
DUCHESNE

95 JUN 12 10:40

Richard K. Nebeker
Nebeker, McConkie & Wright
139 East South Temple, Suite 510
Salt Lake City, UT 84111
Telephone: (801) 532-7373

Attorney for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH

* * * * *

JOSEPH W. SHIELDS,)	
)	
Plaintiff,	)	JUDGMENT AND DECREE GRANTING
	)	SPECIFIC PERFORMANCE
v.)	
	)	Civil No. 940800002 PR
ARVIL A. HARRIS,)	
	)	Judge John R. Anderson
Defendant.)	
)	

* * * * *

The above entitled action came on regularly for trial before the Honorable John R. Anderson, District Court Judge of the Eighth Judicial District Court, sitting without a jury, on the 17th and 18th days of October, 1994. Plaintiff, Joseph W. Shields was present and represented by counsel, Richard K. Nebeker. Defendant Arvil A. Harris was present and represented by counsel, James L. Christensen. The Court heard the testimony of the parties and their witnesses, examined the exhibits admitted into evidence and allowed closing argument by counsel. The matter was then taken under advisement and the Court issued it's "Decision"

memorandum, on the 24th day of October, 1994. The Decision of the Court was thereafter clarified by that certain Order on Supplemental Findings dated the ____ day of June, 1995. The Court being fully advised in the matter and having filed its Findings of Fact and Conclusions of Law, and having directed that a Decree be entered in accordance with those findings and conclusions; now therefore, it is hereby;

ORDERED, ADJUDGED AND DECREED

1. That the Plaintiff be and hereby is awarded a Decree of Specific Performance requiring that the Defendant sell to the Plaintiff the real property which is the subject of this action. Said real property is fully identified in the Plaintiff's complaint and is set forth on exhibit A attached hereto.

2. That within such period of time as demanded by the Plaintiff, but not to exceed the date of the expiration of the real property lease, the real property shall be sold to the Plaintiff by the Defendant on the following terms:

A. The sale price shall be \$202,125.00, lawful money of the United States of America.

B. The Defendant shall provide good and marketable title to the property, free and clear of all liens and

encumbrances. Any unpaid liens or encumbrances shall be deducted from the purchase price and paid to the respective lien holder at the time of closing.

C. The Plaintiff shall be and hereby is entitled to a credit against the purchase price in the amount of \$5,000.00 dollars for each and every year in which the Plaintiff has made a lease payment to the Defendant, as stated in the parties option contract.

D. The parties shall select a local title company to conduct the closing of the sale, whereupon the purchase price less credits and liens shall be paid to the Defendant, and a Warranty Deed covering the subject property shall be conveyed by the Defendant to the Plaintiff.

3. In the event of the failure of the Defendant to close the sale of the subject property as provided for herein, upon Motion by the Plaintiff, an Order of Quiet Title shall issue from this Court conveying all right, title and interest in and to the subject property to the Plaintiff, and such additional relief shall be granted to carry out this Order and Decree.

4. The Counterclaim of Defendant Harris against Plaintiff Shields shall be and hereby is dismissed with prejudice.

5. Each Party is to pay their own respective costs and attorney's fees.

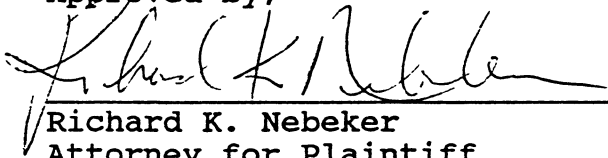
Dated this 22 day of June, 1995.

BY THE COURT



THE HONORABLE JOHN R. ANDERSON

Approved by;

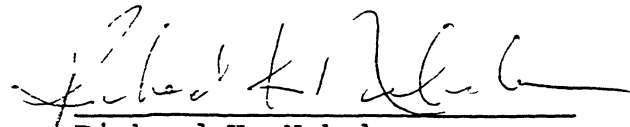


Richard K. Nebeker
Attorney for Plaintiff

James L. Christensen
Attorney for Defendant

Certificate of Mailing

I hereby certify to the above entitled Court that I mailed a true and correct copy of the foregoing Judgment and Decree Granting Specific Performance to James L. Christensen at Corbridge, Baird and Christensen, 39 Exchange Place, suite 100, Salt Lake City, Utah, 84111, attorneys for Defendant, this 2nd day of June, 1995.



Richard K. Nebeker