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Supreme Court of Texas.
Regal Finance Company, Ltd., and Regal Finance Company II, Ltd., Petitioners,
v.
Tex Stars Motors, Inc., Respondent; George McIngvale, Interested Party.
No. 08-0148.

September 9, 2009.

Appearances:
Russell S. Post, Beck Redden & Secrest LLP, Houston, TX, for petitioner.
Eugene B. Wilshire, Jr., Wilshire & Scott PC, Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0148 Regal Finance Company v. Tex Star Motors, Inc.
MARSHALL: May it please the Court, Mr. Post will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF RUSSELL S. POST ON BEHALF OF THE PETITIONER

ATTORNEY RUSSELL POST: May it please the Court, I represent the Regal Finance Companies, which are two Texas partnerships that paid $95 million to purchase car notes from Tex Star Motors under a full recourse guarantee, lost $8 million when Tex Star defaulted on that full recourse guarantee. Recovered four of those $8 million in a judgment that was rendered now almost five years ago and yet somehow stands before the Court today ordered to pay back to Tex Star $1 million out of the reserve funds that were held in escrow to guard against this precise risk. The Court of Appeals committed two distinct errors in reaching that conclusion, but I think that the errors are related, because both the Court of Appeals' mishandling of the commercial reasonableness requirement under Article 9 and its decision with respect to the dealer reserve fund, have the effect of unfairly enriching the party in breach of contract here and frustrate the reliance interest of secured creditors and this is not the time to be undercutting creditor rights. So we submit that both of those decisions need to be reversed and I'd like to suggest a roadmap for decision to the Court this morning. I ask that you decide all the issues related to

commercial reasonableness on the UCC claim. That means the question about the meaning of the relevant statute, the interpretation of the jury instruction and the legal sufficiency challenge on the question of commercial reasonableness. All the other issues related to the Article 9 claim can be left for the Court of Appeals on remand.

JUSTICE NATHAN L. HECHT: Does that include who breached first?

ATTORNEY RUSSELL POST: Your Honor, I don't believe that that issue is even in debate here in the Supreme Court.

JUSTICE NATHAN L. HECHT: But it's mentioned in the brief and response and then never mentioned again.

ATTORNEY RUSSELL POST: I think that's right, Your Honor, it's referenced in the brief and response, but there was a question about which party committed the first material breach. Regal won the verdict on that question and then, in addition, the Court of Appeals correctly held that there was, in fact, no breach under the express terms of the contracts by Regal and, therefore, there was not even a material question to be decided about first material breach. I don't understand the respondent to have cross-petitioned and even brought that issue before the Court so I don't think that's a live issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: So what are the issues that would remain after we decide commercial reasonableness for the Court of Appeals?

ATTORNEY RUSSELL POST: Your Honor, there are a range of alternative arguments that were pressed in the Court of Appeals by Tex Star in opposition to our recovery on the Article 9 claim. They have to do with notice requirements, arguments about acceptance of collateral in satisfaction of these debts, some arguments about other aspects of the jury charge, other aspects of the damages. There's a whole host of issues and, of course, we're happy to have the Court decide all those questions. You certainly have the McKelvy power to take up the Court of Appeals' briefs, but we're respectful of the Court's resources and I think that the two issues that we have framed for the Court are the two issues that are the most jurisprudentially important. I want to begin with the question of commercial reasonableness.

JUSTICE NATHAN L. HECHT: And the other one was? You didn't mention the other one because I interrupted you.

ATTORNEY RUSSELL POST: I'm sorry, Your Honor. The two issues are number one, the question of commercial reasonableness under Article 9 and number two, the Court of Appeals' mishandling of the dealer reserve accounts under the express contracts of these parties and its failure to give effect to the terms of the contracts and this Court's rule as referenced in Fortune and other cases that express contracts supersede any kind of unjust enrichment or quasi contract claim. As I say, those two issues really are of a piece because both of them result in enriching the party in breach and frustrating the reliance interests of the secured creditor. Let me begin then with the question of commercial reasonableness under Article 9 and the jury instruction and I think it's helpful here to begin with what is not in dispute because Tex Star does not deny that the Court of Appeals' decision on this commercial reasonableness question is a novelty in American law. I think Tex Star will not deny that the statute upon which the instruction was based is uniformly understood to be a safe harbor and not an obligation of a commercial secured creditor. Tex Star will not deny that no American court has taken the view that the Court of Appeals took, that proof of that safe harbor was required to prove commercial reasonableness and Tex Star will not deny that it did not even take that position itself in the trial court, in closing argument, not even in the Court of

Appeals.

JUSTICE DAVID M. MEDINA: What is commercial reasonableness here in the context of these facts? You have these cars that were sold and maybe they could have been auctioned or something different could have been done?

ATTORNEY RUSSELL POST: That's exactly right, Your Honor. There is a debate about what would be the proper method, manner and terms of resale of these repossessed vehicles and Article 9 of the UCC sets out a general standard of commercial reasonableness and it's Article 9.610(b) that sets forth the general rule and it simply provides that the disposition of collateral must be commercially reasonable and it leaves open for development on individual cases' facts what constitutes commercial reasonableness.

JUSTICE PAUL W. GREEN: But it's got to be more than this is what we did?

ATTORNEY RUSSELL POST: Yes, I agree, Your Honor, it certainly would have to be more than this is what we do, but you have to provide evidence about in the words of Article 9 and the words of the first sentence in the jury instruction here and that would be about the methods and manner, time, place and other terms of the distribution and then all of the authorities under Article 9 recognize that there's then a balancing about the totality of those facts to determine whether this was reasonable. Remember that the UCC was intended to get away from technical legal rules under ancient common law doctrines and to bring the idea of commercial reasonableness into the forefront of commercial law and so there are no strict bright line rules here. It's a matter of taking into account the totality of all the circumstances and in this case, the jury heard extensive evidence about the practices by which Regal undertook to dispose of these vehicles had all the loan falls from every one of these vehicles before it to consider whether that was commercially reasonable.

JUSTICE DAVID M. MEDINA: Does the jury instruction itself create a problem?

ATTORNEY RUSSELL POST: No, I think not, Your Honor, and, in fact, let me turn precisely to that question because the jury instruction is framed explicitly in the terms of Article 9 itself. The first sentence of the jury instruction is taken from the general rule in Section 9.610(b). The second sentence of the jury instruction submits one of the three safe harbors that Article 9 recognizes will be sufficient in and of themselves to constitute commercial reasonableness. The Court of Appeals has simply misread that language to suggest that it creates a mandatory burden of proof rather than one manner of proving commercial reasonableness and that's erroneous for two distinct reasons.

JUSTICE HARRIET O'NEILL: But what aspect...

ATTORNEY RUSSELL POST:Yes, Your Honor.

JUSTICE HARRIET O'NEILL:What aspect of the jury charge defines reasonableness other than in the dealer context?

ATTORNEY RUSSELL POST: Your Honor, I think the jury charge does not define reasonableness at all. If you look in this very set of instructions in question one, there is a definition of good faith. The instruction says good faith means X, but it doesn't define reasonableness.

JUSTICE HARRIET O'NEILL: But isn't that the problem because it, I can understand how in the context of the entire statute, it looks like a safe harbor provision, but if it's the only standard that's given to the jury and there is no other standard, then how does it become a safe harbor?

ATTORNEY RUSSELL POST: Well, Your Honor, I think two reasons here. First, understanding that language, that commercial reasonableness exists if certain facts are established, misunderstands the plain meaning of the word "if". That's just a mishandling of the technical meaning of the word "if" in American grammar and logic, but I would say even more important, this is exactly the language that Article 9 itself uses. On page 12 of the reply brief, I provide you both the statutory language and the charge language.

JUSTICE HARRIET O'NEILL: Let me grant you, let's say it's a safe harbor. Let's just take our reading at face value. If the only definition they have of commercial reasonableness is the safe harbor provision, then why aren't they held to that standard?

ATTORNEY RUSSELL POST: But, Your Honor, it's not a definition and it's certainly not the only definition. The first sentence of that instruction says all aspects of disposition must be commercially reasonable. The second sentence does not purport to define commercial reasonableness. It simply says that a certain set of facts, that is compliance with dealer practices will be commercially reasonable and I think on this point, it is really important to recognize that you cannot divorce the statute from the instructions. The language of this instruction, particularly the critical word that the Court of Appeals focuses on, the word "if" is taken verbatim from the statute. The Court tells us consistently statutory questions are to be submitted in the language of the statute. There's a reason for that rule. The reason is that we want the rights of Texans to be governed by the rules that the legislature has enacted and here it's an even more powerful policy because we're talking about a uniform act that has been given uniform nationwide applications.

CHIEF JUSTICE WALLACE B. JEFFERSON: Isn't this the kind of case where you really don't need a definition of commercial reasonableness? A jury can, individual jurors sell and buy cars all the time.

ATTORNEY RUSSELL POST: Absolutely, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Go to used car lots, etc. Let me ask, the way it was submitted, there is 906 or 960?

ATTORNEY RUSSELL POST: That's correct, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: And they were each individually submitted, the contracts? I mean what was that checklist? Sometimes the jury said good faith and sometimes not, what was?

ATTORNEY RUSSELL POST: Sure, there are two separate submissions that relate to the commercial reasonableness issues because the Regal partnerships have affirmative claims for the deficiency judgment under Article 9. Tex Star was asserting its own claims for statutory penalties. Tex Star submitted all of those special issues at the end of the charge in order to try and establish its statutory penalty claims. Our Article 9 deficiency claim was submitted in question 6 and instructed the jury correctly. You award damages only for those vehicles for which Regal carried its burden of establishing commercial reasonableness and then the jury was able to look at all the evidence, look at all the vehicles and return a verdict that took into account that requirement and, in fact, the jury returned only $4 million in damages of the $8 million of out-of-pocket losses that Regal had suffered. So really the technical answer to the Court's question is that those are two completely separate series of submissions, the final special issues don't relate to our deficiency claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay then, with respect to question 6, if the jury was, determined damages only for those vehicles that there was a commercially reasonable transaction, why would you be

entitled to $750,000 from the dealer's reserve fund in addition to that?

ATTORNEY RUSSELL POST: I think that's a fair point, Your Honor, and I think that the correct disposition of that would be to provide the dealer reserve fund assets, which are held in reserve to guard against the risk of defaults should be provided as an offset to any recovery by Regal. That is, we hold that money in escrow. It's intended to guard against the risk of defaults and it would be appropriate to say that is an offset against our losses. It's not appropriate to say that we do not recover for the $8 million in losses and we pay out the $1 million that was held in reserve and let me turn to that issue because I think it an important question in its own right.

JUSTICE NATHAN L. HECHT: Do you think it's a credit against the $4 million or not?

ATTORNEY RUSSELL POST: I think it should be credited against the $4 million, Your Honor, I think that's right.

JUSTICE DON R. WILLETT: What do you make of the comment to the UCC to that provision and what measure of deference should we give that?

ATTORNEY RUSSELL POST: Safe harbor?

JUSTICE DON R. WILLETT: Yes.

ATTORNEY RUSSELL POST: Your Honor, I think the comment itself makes explicit that these three manners of proving commercial reasonableness are "neither required nor exclusive" and that comment has, I think, decisive impact because the comments to the UCC are intended to guide a uniform national application of this statute and, in fact, the White and Summers Treatise and all of the authorities that construe it, recognize that comment signals unequivocally that provision is simply a safe harbor. It's not a burden of proof. So with respect then, Your Honor, to the reserve funds, there is I think one ultimate fact that's important for the Court to understand. At the time Tex Star repudiated its obligations under the parties' contracts, there were $20 million worth of car notes that were outstanding that Regal was servicing. The parties had agreed that Regal could maintain reserves to guard against the risk of default. That's what this $975,000 at issue represents. Tex Star's position here and the Court of Appeals' decision is to say not only does Regal not require it's out-of-pocket losses, but it has to surrender the very reserves that were intended to guard against those losses and that's simply contrary to the contract that structure the parties' relationships and, of course, this Court's rule in Fortune and other cases about the express contract rule. Let me take you through, I think, the three essential aspects of this argument. First, there's no controversy here that the purchase sale agreements, the express contracts between Tex Star and Regal provide for the whole bank reserve and provide unequivocally in paragraph 8, that all reserve accounts can be held by Regal until all the car notes are liquidated. Only then can any remaining balance be returned to Tex Star. Number two, the Bank One loan agreement in which the parties' expanded their credit facility and provided Tex Star with a greater opportunity to sell vehicles required that dealer reserve fund to be expanded to 5% of the outstanding car notes that Regal had purchased and in paragraph 5.2(p), that 5% requirement is set forth in the contract and importantly in paragraph 1.23, the dealer reserve fund set for by the Bank One loan agreement is defined explicitly in terms of the reserve account that is created by the PSA. So as a matter of law, these two contracts establish the reserve account created by the contracts between Tex Star and Regal is the very reserve account that Bank One required to be increased and then critically in question one,

this jury found that Tex Star agreed to maintain that reserve account at the 5% level because it allowed Tex Star's principals to avoid personal liability. It allowed Tex Star to increase its own business and to take the benefits of the Bank One loan agreement. With that comes the burden of the requirement that the reserve funds be used for the purpose for which they were intended and so the Court of Appeals' decision here really turns the express contract rule and these parties' contracts upside down.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, counselor. The Court is ready to hear argument from the respondents.

MARSHALL: May it please the Court, Mr. Wilshire will present argument for the respondent.

ORAL ARGUMENT OF EUGENE B. WILSHIRE, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY EUGENE WILSHIRE, JR.: May it please the Court, my name is Eugene Wilshire and I have the honor to represent Tex Star here this morning. Let me just start out by saying that I think we may be getting the cart before the horse when we start talking about definitions and the charge in parsing the Court of Appeals' approval. I think the fundamental issue here is whether or not there is any evidence of commercially reasonableness disposition in this case irrespective of how you define or parse the charge. Now, we are told while they admit, what happened in this case was this. With no expert testimony, no explanation of the market and please understand that we're talking about the used car wholesale car and truck and utility vehicle market.

JUSTICE DAVID M. MEDINA: Why would expert testimony be necessary in this type of transaction? Why couldn't they just bring somebody in with experience of disposing of these type of vehicles?

ATTORNEY EUGENE WILSHIRE, JR.: If he comes in and he testifies on the basis of his experience in disposing of those vehicles and testifies as to the reasonableness of the disposition, I would submit that's expert testimony.

JUSTICE DAVID M. MEDINA: Did you bring someone else to counter that testimony? Could you bring your own expert?

ATTORNEY EUGENE WILSHIRE, JR.: There was no testimony such as that in this record at all. There is absolutely no statement by any person, expert or otherwise, that the procedures that Regal was using are calculated in any way if followed.

JUSTICE DAVID M. MEDINA: There's no testimony by a James Wright as to how these cars were disposed of?

ATTORNEY EUGENE WILSHIRE, JR.: As to how they were disposed of under, no that's not technically correct and what he said was, here are our procedures. Never did he say as to any one of the 906 vehicles at issue that these procedures were applied in this manner to this procedure. He wasn't allowed to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why couldn't? Ok, he's testifying, I've been in this business for almost 30 years and I've handled repossessions and here is how I handled these. You get bids if you can, at least two bids per vehicle after having gone through and done an assessment of them and then you put them up for sale. Why couldn't a jury say well that is a reasonable procedure? How else are you going to sell a car that's been repossessed that's going to have all kinds of problems on the wholesale market. Why isn't that enough in terms of testimony to support a jury's determination that it's commercially reasonable?

ATTORNEY EUGENE WILSHIRE, JR.: Because he never even testified, Your Honor, that this is the way he'd done it in the past. He just said I've been doing it for 30 years and here's the procedures that we put in effect here and he was not allowed specifically not allowed, to testify that that met any industry standard.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, so the jury says I've got no information about industry standards, but I'm listening to this guy who says I take bids on these cars after having refurbished them, if I can, and put them out for sale as is. Why can a jury says that is a reasonable approach to selling old cars?

ATTORNEY EUGENE WILSHIRE, JR.: Well because the cases tell us all of the factors that go into determining commercial reasonableness. Was there advertising? Should the vehicles have been refurbished? Should the vehicles have been sold at auction? Should the vehicles have been put out to retail, put on consignment, any and all of that? Nothing was discussed and what's important here is that it was their burden to show that with respect to 906 individual dispositions, each and every one of those was reasonable.

JUSTICE HARRIET O'NEILL: Well why couldn't you just have an instruction that said just hypothetically, were these sales commercially reasonable period. Here's the file. You look at it and look at the file and see if it was commercially reasonable because they seem to be [inaudible] parsed through to some extent.

ATTORNEY EUGENE WILSHIRE, JR.: The files contain various, they're all thick. We actually had to vacate the jury room so that the jury could have the entire courtroom to look at these files. For example, the jury was, every file was supposed to have a NADA sheet in it according to their procedure and all of them didn't, but that was the procedures. Now how is a jury supposed to know without any testimony whatsoever that when they look at that notice sheet and there's a number there for a loan value that they're supposed to know that that is a NADA wholesale value? Nobody told them that. And then when you look at the totality of what happened here, it's just astonishing.

JUSTICE NATHAN L. HECHT: But the totality is kind of what bonkers me because you said go sell your own cars and you don't like the way they sold them and there, it seems like Tex Star sort of made its bed in this case. [inaudible]

ATTORNEY EUGENE WILSHIRE, JR.: The reason that we didn't do that is because under the purchase and sale agreements, they were required to refund us $2,000 every time we paid them and even after we got sued, Tex Star continued to make these people hold 100% for three months and then when they absolutely, when it reached $750,000 in unreturned money, [inaudible], we're supposed to get $2,000 every time we repurchase a contract and historically, historically, that's really important because the evidence is undisputed that when Tex Star was handling these repossessions, it's average loss was approximately $1600 a vehicle before application of the $2,000 when it disposed of them, but when Regal had it, the average loss is $9,750 a car. Absolutely no explanation to the jury as to how something this bad can happen.

JUSTICE PHIL JOHNSON: Mr. Wilshire, let me ask you just a second.

ATTORNEY EUGENE WILSHIRE, JR.: Sure.

JUSTICE PHIL JOHNSON: Was there, were there interrogatories and discovery about expert witnesses and cut-off dates and things of that nature?

ATTORNEY EUGENE WILSHIRE, JR.: Yes, Your Honor.

JUSTICE PHIL JOHNSON: But no one was designated as an expert witness?

ATTORNEY EUGENE WILSHIRE, JR.: That is correct and at trial and it is in the record, after Mr. Wright had been put on the stand. Well first of all, after motion in limine to exclude any expert testimony because there had been no one designated, which was granted, of course, then they made Mr. Wright's testimony split over two days. They came back before his second day of testimony and made a motion to allow him to testify as an expert and to tell the jury that these procedures are calculated to be adequate and the Judge appropriately denied that. So there was no expert testimony. We have set out. There's a couple of things that we need to talk about though. The one interesting thing about this charge is is the charge didn't ask the jury which vehicles were disposed of in a commercially reasonable matter, which is what the UCC says. Rather, it asked the jury only those that were sold in a commercially reasonable manner and as you can figure out from the attachments to our brief, there were 339 of these vehicles that weren't sold at a deficiency sale. Forty-one of them were not resold at all and the other ones were those in which Regal elected to retain the vehicles in lieu of the obligation and the deficiency and so there's no deficiency sale there. So the charge is really messed up at that point and that's what happens and that's why I think the Court of Appeals' reading of this particular charge is correct.

JUSTICE DALE WAINWRIGHT: Did you object to the charge on that basis?

ATTORNEY EUGENE WILSHIRE, JR.: We objected to the charge issuing it globally and I disagree with Counsel. We tendered the individual 906 vehicles individually to get a granulated finding on every car, but that was denied, but it was allowed on questions of penalties.

JUSTICE HARRIET O'NEILL: Is that the only way you think it would have been proper to ask?

ATTORNEY EUGENE WILSHIRE, JR.: I do, Your Honor. Since it says every disposition. I don't know any other way to do it and we certainly showed it could be done because the jury did it.

JUSTICE DAVID M. MEDINA: What about having like a bellwether trial getting a random sampling of the vehicles that were disposed of and find out if the method was reasonable.

ATTORNEY EUGENE WILSHIRE, JR.: I think that if they had offered that evidence, it might with an appropriate expert, it might well have come in, but there is no such evidence and no such attempt was made.

CHIEF JUSTICE WALLACE B. JEFFERSON: You requested additional instructions on what commercially reasonable means.

ATTORNEY EUGENE WILSHIRE, JR.: Yes we did.

CHIEF JUSTICE WALLACE B. JEFFERSON: And they were, Regal objected to them.

ATTORNEY EUGENE WILSHIRE, JR.: Yes, they did.

CHIEF JUSTICE WALLACE B. JEFFERSON: And they were not submitted. What were they, in general? You don't have to.

ATTORNEY EUGENE WILSHIRE, JR.: Basically, we took it out of the Havens case which everybody has cited in which they listed the factors to be considered as to whether time, place, mode worked and the Court denied that over Regal's objection so the jury was not given guidance as to exactly what they should have examined in order to determine if a sale is commercially reasonable as to time, place, mode of disposition, etc., the five factors that are found in the UCC. Here's what I think's important about the fact that the charge asked those that are sold because as everybody admits, the only definition of sale is it says a sale is commercially reasonable if you meet the safe harbor of doing it in the manner in which the industry accepts and nowhere is the jury

told that now and remember, even though we said sold, sale is a disposition. That's not in the charge and that's why I think the Court of Appeals read this particular charge the only way it can be fairly read and that is that there is a definition of commercially reasonableness for the purposes of this charge and here it is. You've got to meet the uniform standards. But, again, I come back to the fundamental issue. That just brings me right back to where I start every time. Without somebody who has some knowledge and expertise telling this jury that we do is calculated to lead to a commercially reasonable disposition, how can a jury then just take a pile of paper every file of which has different matters in it and its laypeople say well this is commercially reasonable and that one's not. I do not believe that's possible and, therefore, I think in the absence of some guidance to give the jury some nexus between these procedures and how they analyzed the files, there is no evidence.

JUSTICE DALE WAINWRIGHT: If James Wright had been designated as an expert, would you have objected to that designation with his 30 years of.

ATTORNEY EUGENE WILSHIRE, JR.: Yes, I would, on the basis. I'm sorry.

JUSTICE DALE WAINWRIGHT: With his 30 years of experience in the business?

ATTORNEY EUGENE WILSHIRE, JR.: I would have. I deposed Mr. Wright. His 30 years experience in the business bore very little on these particular types of dispositions. He had been a used primarily he had been in management in dealerships and then he had been a wholesaler himself, but he never, to my knowledge, been involved and furthermore, I would have objected because.

JUSTICE DALE WAINWRIGHT: Never been involved in what?

ATTORNEY EUGENE WILSHIRE, JR.: He had very little experience as I recall in disposing of collateral.

CHIEF JUSTICE WALLACE B. JEFFERSON: I thought he did it for Tex Star himself.

ATTORNEY EUGENE WILSHIRE, JR.: No, Tex Star purchased I think it was four vehicles over a 10-year period that he brought to them as a wholesaler. He did not do any selling for Tex Star at all. He never had a position with Tex Star and what's even more importantly.

JUSTICE DALE WAINWRIGHT: But he sold to more than 30 different wholesalers and Tex Star bought some of those cars when he sold them wholesale.

ATTORNEY EUGENE WILSHIRE, JR.: No, he was an independent wholesaler, Your Honor, and so he would go out and find a car and he would bring it to Tex Star and say are you interested in this car and if they were, they bought it. That was not their primary way. It wasn't even the way they got 99% of their cars. They had in-house wholesalers who procured vehicles for them.

CHIEF JUSTICE WALLACE B. JEFFERSON: When Tex Star left this arrangement, was that a breach of a contract when they sent that letter that said we're no longer going to continue this transaction agreement. Was that a breach?

ATTORNEY EUGENE WILSHIRE, JR.: We certainly thought it was not and I certainly don't think it was because we'd already gone three months without being allowed to get our $2,000 each time we tendered 100 percent on the dollar and repurchased the contract at face value. We were at that point down $750,000 in cash flow. We had been funding every one of those $2,000 we were supposed to get out of regular cash flows even though that was the money that was being held was ours. So,

yes, I disagree with that, but the one point that I think needs to be.

JUSTICE NATHAN L. HECHT: I asked the other side, you mentioned in the brief and response that there's an issue on who breached first, but I don't find it argued in the brief. So is that an issue do you think before us or not?

ATTORNEY EUGENE WILSHIRE, JR.: I do not believe it is, Your Honor. I read that as background.

JUSTICE NATHAN L. HECHT: Okay, thanks.

JUSTICE HARRIET O'NEILL: Let me just ask you real quick that commercially reasonableness argument, do you think that the Court of Appeals was wrong in not treating that as a safe harbor provision and I'd particularly like for you to say a word about the amicus brief that was filed in the Court of Appeals by Mr. White.

ATTORNEY EUGENE WILSHIRE, JR.: Well I think the, well, of course they didn't, the amicus brief did not comment on the second opinion, but the amicus brief says that this is going to be precedent for saying that you always have to meet the safe harbor and respectfully neither the first opinion nor the second ever said that. They just said that under this charge, this is the way it has to be.

JUSTICE HARRIET O'NEILL: But that's pretty much what they said because they said this charge, the "if" language means shall.

ATTORNEY EUGENE WILSHIRE, JR.: But they did not say you couldn't write the charge appropriately in the precise form of the UCC and so I don't, respectfully, I don't think it does. I think this is just a case where there isn't any evidence of commercially reasonable disposition. But if I may, I need to comment quickly on the money hadn't received matter. The concept that the agreements that the jury found, the jury found that Tex Star agreed to fund an obligation of Regal. Regal had an obligation to Bank One to maintain Regal funds at a 5% level of principal.

JUSTICE NATHAN L. HECHT: I don't see how that was any different than the holdback account.

ATTORNEY EUGENE WILSHIRE, JR.: Absolutely different.

JUSTICE NATHAN L. HECHT: Were there two account numbers? The 750 and then there was a 5% and there were two different numbers.

ATTORNEY EUGENE WILSHIRE, JR.: No.

JUSTICE NATHAN L. HECHT: Two different check statements?

ATTORNEY EUGENE WILSHIRE, JR.: No, they were handled two different ways completely. The 750 per vehicle was withheld from every purchase that Regal ever made. On the other hand, the Bank One reserve was funded out of pocket by Tex Star. In other words.

JUSTICE NATHAN L. HECHT: But it all went in the same account?

ATTORNEY EUGENE WILSHIRE, JR.: No, it was all held under the same number, but it was not funded in the same way. They would simply give Regal money to put up at the bank to say that they had the reserve there, funded in two totally different ideas. And until we got to time to enter judgment, Regal never contended. In fact, they said repeatedly through the discovery and the pled it this way that there was a separate standalone agreement to fund the Bank One reserve and there's nothing in special issue number one to suggest that the jury was asked if the PSAs had been amended and contrary to what my.

JUSTICE NATHAN L. HECHT: But it seems to me if you're correct, there should have been an account with $750 per vehicle in it and another account with 5% of the outstanding loan balances in it and then that would add up to a whole lot more than 5%.

ATTORNEY EUGENE WILSHIRE, JR.: Well, no, it didn't work that way. Again, we had no control of how Regal kept their books or how they

reported to Bank One.

JUSTICE NATHAN L. HECHT: But just so I'll be clear, the 750 per vehicle was part of the 5%?

ATTORNEY EUGENE WILSHIRE, JR.: No.

JUSTICE NATHAN L. HECHT: So there was actually.

ATTORNEY EUGENE WILSHIRE, JR.: It was all put in, but ultimately the only thing left at the end of the day was the money that Tex Star had put in to fund the 5%.

JUSTICE NATHAN L. HECHT: Well I guess I'm still confused. Was it ever more than 5%?

ATTORNEY EUGENE WILSHIRE, JR.: I can't answer that, Your Honor. I believe it was from time to time.

JUSTICE NATHAN L. HECHT: But it would have been a whole lot more than 5% if it had been 750 per vehicle and 5%.

ATTORNEY EUGENE WILSHIRE, JR.: Yeah, but I apologize. I'd have to go back and look at the statements to answer that question precisely, but I don't think we really even need to get to that issue. Fortune says that if you're going to rely on an express contract to avoid an obligation, to avoid a money you hadn't received, you got to plead it and there is absolutely no pleading that ever invoked the express contract except, which under Fortune and several other cases including the recent Tricon case out of the Fourteenth Court of Appeals that says you got to plead it. You got to prove it and you got to get a jury finding on it. They didn't plead it. They didn't prove it and they didn't get a jury finding on it and their trial pleading, their trial answer can be found at the clerk's record at 1491 and you will not see any pleading whatsoever with respect to express contract, which is under Fortune and under every case that's filed an affirmative defense. It has to be pled. It has to be proven and you have to get a finding. Finally, Your Honors, just by way of settling up, I just reiterate that I think it's important to note that the underlying issue here no matter how you parse the charge is whether or not there's any evidence of commercially reasonable disposition. I suggest to the Court that when all you do is hand a group of laypeople thousands and thousands and thousands of pieces of paper and then tell them well here's what we tried to do, not what we did, just what we tried to do without any showing that you have not done so. And I also suggest that we have, are entitled to our money, Tex Star's entitled to money on hadn't received and I think the Court for their time and pray that the Court of Appeals be affirmed.

JUSTICE NATHAN L. HECHT: Out of curiosity, how long was the jury out?

ATTORNEY EUGENE WILSHIRE, JR.: Five days.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Wilshire.

REBUTTAL ARGUMENT OF RUSSELL S. POST ON BEHALF OF PETITIONER

ATTORNEY RUSSELL POST: Let me begin, I think, by resolving any uncertainty about the money hadn't received because Justice Hecht, I think your question focused on really the central issue. There were not two separate accounts. The financial statements make very plain all of these reserves were aggregated in a single dealer reserve.

JUSTICE PHIL JOHNSON: What difference does that make if they're not in control of it though? If you're in control and the bank's in control and that's your deal with the bank.

ATTORNEY RUSSELL POST: But the difference, Your Honor, that it

makes is that it validates the testimony of our principal, Mr. McMillan, and the jury's finding that Tex Star agreed to fund this dealer reserve account and as the contracts themselves make plain, it's all the same account and all the money was accounted for as the same account. You can look at the financial statements, which are, I think, plaintiff's exhibits 59 and 64 and you can look at Mr. McMillan's testimony in volume 3 of their record at pages 206 to 209 where he explains that Mr. McIngvale on behalf of Tex Star agreed to fund this obligation. It did not change the practices with respect to the way the dealer's reserve account was handled. It simply increased the holdback from $750 per car to 5% total and so to meet that 5% obligation, the parties would make transfers in order to maintain the reserve account at that required level from time to time.

JUSTICE DALE WAINWRIGHT: Let me be clear. Was Tex Star a party to the agreement between Regal and Bank One?

ATTORNEY RUSSELL POST: Your Honor, Tex Star is not technically the party although it is important to know that Tex Star and Mr. McIngvale acknowledges the agreement because they have to give guarantees.

JUSTICE DALE WAINWRIGHT: Did Tex Star sign the agreement between Bank One and Regal.

ATTORNEY RUSSELL POST: The Tex Star principal, Mr. McIngvale, did sign it in the context of acknowledging it and acknowledging his guarantee. I understand the Court's.

JUSTICE DALE WAINWRIGHT: Are you saying his signature line merely said acknowledgment as opposed to party?

ATTORNEY RUSSELL POST: I think that's right, Your Honor. I want to say he acknowledges and is fully aware of the terms of that agreement including its definition of the dealer reserve account. Tex Star is not the obligor, but that's why the answer to question one is so critical because in question one, the jury found that Tex Star made the agreement to maintain that dealer reserve fund. That finding has not been set aside. The suggestion here today that there was some defect in the pleadings, I think, is not sustainable. We pled unequivocally the existence of a contract, which is all we were required to plead and we proved it.

JUSTICE DALE WAINWRIGHT: Let me go back and deal a little bit more with my question. If Tex Star were a party to the agreement, I know what that means.

ATTORNEY RUSSELL POST: Right.

JUSTICE DALE WAINWRIGHT: You're obligated to do what it says and pay what it says, etc.

ATTORNEY RUSSELL POST: Right.

JUSTICE DALE WAINWRIGHT: What does it mean when Tex Star acknowledged the agreement?

ATTORNEY RUSSELL POST: What it means, Your Honor, is simply I don't want there to be any misunderstanding that Tex Star and its principals were strangers to this agreement and had no idea that the agreement was requiring that the dealer reserve fund be increased and then when the jury finds in question one that Tex Star agreed to maintain the fund at that 5% level. You have all the findings that Fortune requires in order to establish the express contract defense. Remember, Fortune says if the subject matter of the claim is covered by an express contract, then a quasi contract claim is barred.

JUSTICE DAVID M. MEDINA: What evidence in the record supports the judgment?

ATTORNEY RUSSELL POST: With respect to commercial reasonableness, Your Honor?

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY RUSSELL POST: Your Honor, I think that the Court's alluded to the testimony of Mr. Wright, who talked about all of the facts and circumstances under the general rule, method, manner, time, places and other terms of the disposition. Also the testimony of Kent McMillan, who testified about the manner of disposition. In that respect, I think it's important to pick up on Justice Hecht's question about the difficult circumstances in which Regal found itself. Remember that Regal had no experience in repossessing and reselling vehicles. Regal had no infrastructure. Regal had no retail sales license.

JUSTICE PHIL JOHNSON: Excuse me and let me interrupt you right there. So how did Regal know what was commercially reasonable and how to dispose this if they had no experience? Did they have to find someone who knew what commercially reasonable was?

ATTORNEY RUSSELL POST: Regal retained Mr. Wright with his 30 years experience.

JUSTICE PHIL JOHNSON: But my question is did they have to find someone who knew what commercially reasonable was?

ATTORNEY RUSSELL POST: Your Honor, I think that they need to act in a commercially reasonable way.

JUSTICE PHIL JOHNSON: Well how did they know what that was?

ATTORNEY RUSSELL POST: I think that there's not any single pure concept of commercial reasonableness where you can say there is an individual out here who knows that commercial reasonableness is. What the White and Summers Treatise indicates is that the real litmus test here is whether the secured creditor acted in good faith in trying to get full value. What Regal did was to retain as its agent a gentleman with 30 years of experience in this field who did the best he could do under difficult circumstances.

JUSTICE HARRIET O'NEILL: Let me just ask you real quick, I think I heard Mr. Wilshire throw out a number of something like the average vehicle deficiency was $9,000 under Regal's sales? Did I hear that right?

ATTORNEY RUSSELL POST: Your Honor, I'm not certain that I can validate or invalidate that number, but I think what is really critical is to remember these are the circumstances that creditors find themselves in and.

JUSTICE HARRIET O'NEILL: But if that were right and the average deficiency when Tex Star was selling them was around $1,600, that's a pretty big difference.

ATTORNEY RUSSELL POST: That might be a big number, but this is exactly what Professor White talks about in the chapter of White and Summers that we've appended to the brief. Reasoning backwards from a low price is inappropriate. You have to take into account the circumstances in which a creditor finds itself and to determine whether the procedures that have been undertaken are a good faith effort to maximize the value of the collateral. I don't want to dignify that assertion as being correct because I'm not certain that we would agree that that's true, but I think the more important point.

JUSTICE DALE WAINWRIGHT: Mr. Summers, you're right in Summers it does say price is very important. In fact, it says to realize a satisfactory price is the reason and the only reason why we force the secured creditor to do a commercially reasonable sale. So validating or invalidating that price differential might be important.

ATTORNEY RUSSELL POST: Your Honor, without question, price is one factor to be taken into the equation and when you read the White and Summers chapter, White and Summers makes clear price is one of the

variables. We all understand it's the ultimate objective, but the question is whether the procedures have been commercially reasonable, not whether the ultimate price is right because that's simply not fair to the secured creditor.

JUSTICE DALE WAINWRIGHT: But one will bear on the other won't it?

ATTORNEY RUSSELL POST: Sure and that is a fact that the jury takes into account and this jury awarded only 50% of the damages.

JUSTICE HARRIET O'NEILL: What evidence was there that these procedures that Mr. Wright used were commercially reasonable?

ATTORNEY RUSSELL POST: Well, Your Honor, there is not a testimony excerpt that I can give you in which anyone intoned a magic word that said, I bless these procedures as commercially reasonable. That's not what the UCC requires. As our brief sets out, there's extensive evidence about the circumstances under which Regal disposed of the vehicles, how they disposed of the vehicles and there's testimony from Mr. Wright about his practices on this lot under these circumstances in the context of his experience. The jury is allowed to draw the conclusion at the ultimate fact from that evidence. I think that's exactly what the drafters of the UCC always contemplated with the requirement of commercial reasonableness.

JUSTICE PHIL JOHNSON: So your position is that this is one of those matters that a reasonable and ordinary juror knows.

ATTORNEY RUSSELL POST: Absolutely.

JUSTICE PHIL JOHNSON: Without being told.

ATTORNEY RUSSELL POST: Absolutely.

JUSTICE PHIL JOHNSON: This is not like a physician to say in a reasonable standard of care is X.

ATTORNEY RUSSELL POST: Absolutely, Your Honor, and let met give the Court just one final illustration of this point. The fight over what type of magic language might be required is really illustrated in volume 6 of the record at pages 103 to 106, you will see a series of objections where Tex Star's counsel is trying to say Mr. Wright could not testify about whether cars that were in deteriorated condition, that were damaged and in bad repair, had lower value. He said that's expert testimony. That testimony can't be offered. Respectfully, that's insane. Any lay juror can draw that conclusion. The lay jurors could draw just the conclusions that the evidence put before them allowed them to draw and they drew it over the course of five days very fairly.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel. The cause is submitted and the Court will take a brief recess.

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