In the United States Bankruptcy Court

for the Northern District of Iowa

CHARLES HERMAN WELTER
Debtor.

Bankruptcy No. 92-3185OXF
Chapter 11
Contested No. 7004

ORDER RE: MOTION FOR RELIEF FROM AUTOMATIC STAY

The matter before the court is the motion for relief from the automatic stay filed by Humboldt Red Power, Inc. (HRP). Hearing on the matter was held February 25, 1993 in Fort Dodge, Iowa. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(G).

FINDINGS OF FACT

Charles Herman Welter (WELTER) is engaged in the business of farming. Welter filed this chapter 11 proceeding on October 9, 1992.

In the spring of 1992, Welter came to HRP, a Case International Harvester farm implement dealership, to negotiate purchase of a tractor. He dealt with Lee Schmidt, an HRP salesman. He chose a Case IH 7120 MFWD tractor because of its versatility for use in his crop and livestock operation. The purchase price of the tractor was $65,211.00.

HRP does not finance sales and usually requires 30% of the purchase price as a down payment for a sale. HRP then helps the buyer prepare a credit application to obtain financing from Case Credit Corporation (CASE CREDIT). Case Credit will finance a maximum of 90% of "dealer net," which is the amount the dealer would pay Case Credit for the tractor after all applicable discounts are credited to the purchase price.

Welter did not have sufficient cash for a down payment or a tractor he wished to trade in. Schmidt and Welter decided to set up a short term lease with option to purchase. They settled on this arrangement because 90% of the lease payments would go toward the purchase price if Welter exercised the purchase option. Welter and Schmidt expected that Welter would lease the tractor for six months and then extend the lease for an additional three months. Exhibits 9, A. Case allows its dealers to lease equipment for a maximum of nine months. Exhibit 18. Schmidt and Welter anticipated that at the end of the nine months, the applied lease payments would be nearly enough to meet the 30 per cent down payment requirement, and Welter could then convert the deal to a sale. Schmidt and Welter drafted the lease agreement intending it to be a way to help Welter purchase the tractor rather than merely leasing it for a short time.

The lease arrangement with Welter was an unusual arrangement. Schmidt has leased a new tractor at an hourly rate for a few days for a person whose tractor had broken down. Other than the deal with

Welter, HRP has never done a short term lease of a new tractor with someone who contemplated purchasing the tractor.

Welter and Schmidt agreed on the arrangement in early April, 1992. Exhibit A. On April 9, 1992, HRP filed financing statement No. K350847 with the Iowa Secretary of State. Exhibits 7, B. After processing the necessary paperwork through Case Company and obtaining the tractor from another dealership, on April 23, 1992, Welter and HRP executed a "Short Term Equipment Lease with option to Purchase" (LEASE) Exhibits 1, 2.

The lease term was six months, from April 23, 1992, to October 23, 1992. The rental rate was $2,000.00 per month, payable on the first day of each month. The option to purchase provided that at any time before expiration of the rental term, Welter could purchase the tractor for the balance of the purchase price after applying 90 per cent of the rental payments. The option to purchase also stated that:

> The remainder of such purchase price shall be paid in cash and/or a time payment purchase contract which effectively reserves title or a prior and paramount security interest in the Lease Equipment to Lessor or his assigns.

Exhibit 1, 4.

On expiration of the lease term, Welter was required to return the tractor, unless he had exercised the purchase option. Exhibit 1, 5. In the event of default, Welter was liable for the rental payments due for the remainder of the lease term, plus costs for any damage done to the tractor and the expense of returning the tractor to HRP. Exhibit 2, 1 10. The lease also stated:

> INTENT: It is mutually understood and agreed that no title or interest in or to the Leased Equipment shall pass or inure to the Lessee except until and unless the Option to Purchase, as hereinbefore provided, shall first have been executed and completed.

Exhibit 2 1 13.

In conjunction with the lease Welter and HRP completed a "Retail Order Form." Exhibits 9, A. This form described the tractor and the equipment that came with it, and listed the purchase price. Under the heading "Pre-Delivery Information", the form also provided:

> Short term lease for 6 months w/3 month extension 2000.00 per month 2,450.00 lst payment includes handling
>
> 90% of lease payment toward purchase price

Chuck gets programs in effect at time of conversion to sale At the time Schmidt prepared the Retail Order Form, he did not discuss whether Case Credit would approve financing, and did not commit Case Credit to financing the sale of the tractor. Nor did he discuss when Welter's credit application would be sent in. The Retail Order Form indicated that if Welter exercised the purchase option and if Case Credit did finance the sale, Welter would receive whatever financing program was in effect at that time, including special rates or discounts.

Prior to his bankruptcy filing and near the end of the original six-month lease term, Welter asked about exercising the purchase option using case credit financing because he was interested in a 3.9 percent APR financing program in effect at that time. Also prior to Welter's bankruptcy filing, Welter told Schmidt that he was having trouble with his bank and that bankruptcy was a possibility. Welter wanted Schmidt to know he still wanted to buy the tractor. Schmidt considered case credit fairly lenient in approving financing and at the time the lease was made, assumed that Case Credit would approve Welter's application. However, after Welter told him of the possibility of a bankruptcy filing, Schmidt told Welter there was a possibility Case Credit would not finance the tractor sale. Schmidt filled out a credit application for Welter before he filed his bankruptcy petition, but Schmidt did not send the application to Case Credit at that time.

On October 20, 1992, after Welter had filed his bankruptcy petition, Schmidt prepared a retail installment sale contract form as part of the credit application process. Exhibit 10. This document would constitute the security agreement between Welter and Case Credit once Case Credit approved the application. Welter signed the installment contract, "subject to bankruptcy court approval." Welter told Schmidt that he would seek court approval to purchase the tractor at which time HRP would try to get financing for him through Case Credit.

On November 6, 1992, Welter requested the court's authorization to assume the "executory contract" with HRP for the tractor, to extend the lease term for an additional three months, to exercise the option to purchase the tractor from HRP, and to incur secured debt for the purchase of the tractor. The court granted Welter's motion by order dated December 14, 1992. Welter and HRP extended the original lease for an additional three-month term from November 1, 1992 to February 1, 1993. Exhibits 3, 4.

On November 18, 1992, Schmidt and Welter prepared a second credit application to submit to Case Credit. Exhibit 13, 14, 15. The documents reveal that Welter is in Chapter 11 bankruptcy reorganization. After Welter received court approval to purchase the tractor, Schmidt sent the credit application to Case Credit.

Case Credit denied Welter's application for financing. Randal Hinton (HINTON), the dealer at HRP, made calls to Case Credit to attempt to obtain financing for Welter, but was unsuccessful.

Welter made all payments due under the lease until the January 1, 1993 payment. On January 13, 1993, HRP notified Welter that it was terminating the lease. Exhibit 8. On January 19, 1993, HRP filed a motion for relief from the automatic stay. On January 25, 1993, Welter tendered the January payment to HRP, which HRP refused. Exhibits C, D and E.

At the time of the original lease, Welter told Schmidt that he contemplated using the tractor approximately 1,000 hours per year. The tractor has approximately 850 hours on it now which is consistent with use at a rate of approximately 1,000 hours per year.

The average use for this type of tractor in a grain farming operation would be approximately 300 hours per year. Welter's use is higher because he uses the tractor for livestock as well as grain operations. He purchased the tractor partly because of its versatility and uses it every day.

Welter has two other tractors that he uses on his farm. One is a 6030 John Deere which is a larger tractor suitable for field work but not for doing chores. The other is a 3020 John Deere which is used as a feed wagon tractor.

The cost to lease this model tractor, a 150-horsepower tractor, at an hourly rate is $22.50, based on 15 cents per horsepower per hour.

The tractor under the agreement between Welter and HRP) is under a warranty for five years or 5,000 hours, whichever occurs first. Schmidt estimates the normal useful life for this model tractor used 1,000 per year would be about 7 to 8 years.

Assuming that the tractor under the agreement would be fully depreciated at the end of the 5,000-hour warranty, the $65,000 purchase price would be depreciated at a rate of $13.00 per hour. Assuming this depreciation rate, the tractor would be worth $53,950 ($65,000 - 850 x 13).

Schmidt estimates that this model, brand and age of tractor with 850 hours of normal use would be valued at $48,000 to $49,000 wholesale or $56,000 retail. Schmidt last saw the tractor at the end of October or first part of November when it had approximately 650 hours on it. He believed it was in about the condition it should have been for that number of hours and was getting the kind of attention it should have received. Hinton made an inspection of the tractor on January 14, 1993, when it had 780 hours on it. Assuming the tractor is depreciating at the hourly rental rate, the value of the tractor would be $45,875.00 (65,000 - 22.50 x 850 hours). Hinton estimates the liquidation value of the tractor is more than $46,000.00.

The original floor plan debt on the tractor, the amount HRP was to pay Case, was $61,013.00. Exhibit 11. HRP assigned the short term lease to Case Credit. HRP paid Case a percentage of the lease payments collected from Welter. HRP was required to make payments under the lease whether Welter paid or not. While Welter made payments under the lease, interest did not accrue on HRP's debt to Case. After Welter defaulted on the lease payments, the amount owed by HRP to Case became due in full with interest accruing on the balance. HRP borrowed money to pay the debt to Case. HRP owes Case $44,539.00 on the tractor.

DISCUSSION

HRP seeks declaratory relief that the lease is terminated by Welter's default under the terms of the lease, and relief from the automatic stay in order to retake possession of the tractor.

Welter argues that the agreement is not a true lease, but rather an installment sales contract under which HRP retains only a security interest. Therefore, he argues, the lease is not subject to the requirement of Bankruptcy Code 365 that a debtor who assumes an unexpired lease must perform the terms of the lease as written. Welter seeks to modify the contract by treating it in his Chapter 11 plan.

The parties dispute initially whether the automatic stay of 11 U.S.C. 362(a) applies.

An interest in property that the estate acquires after the commencement of the case is property of the estate. 11 U.S.C. 541(a)(7). Any act to obtain possession of property of the estate or to exercise control over property of the estate is a violation of the automatic stay. 11 U.S.C. 362(a)(3). Welter's interest in the lease, at the time he assumed the lease, was property of the estate and was protected by the automatic stay. Carroll v. Tri-Growth Centre City. Ltd. (In re Carroll), 903 F. 2d 1266, 1270-71 (9th Cir. 1990) .

The automatic stay "does not enlarge the rights of individuals under a contract nor does it toll the running of time under a contract. It will not prevent the automatic termination of a contract by its own terms." Hazen First State Bank v. Speight, 888 F.2d 574 (Bth Cir. 1989). A lease will terminate by its

own terms at the end of the lease period. There is no "act" involved to which the automatic stay would apply.

The court has been unable to discover cases discussing whether a creditor must obtain relief from the stay to terminate a lease for breach which has been assumed by the debtor postpetition. The general rule is that the debtor must perform an assumed lease according to the terms of the contract, which would include terms giving the lessor the right to terminate on default. Arguably, once the debtor's interest in the lease has been terminated, there is no property of the estate left to be subject to the automatic stay.

However, when a party's right to terminate a contract is qualified, it may be necessary for the party to seek relief from the automatic stay before terminating the contract. Where the right to terminate is for default of the lease terms, exercise of the right may involve an "act ... to exercise control over property of the estate," and a violation of the automatic stay under 11 U.S.C. 362(a)(3). In Carroll, the Chapter 11 debtor had entered a property management contract post-petition which provided "that the owner may terminate the agreement for cause including the event that Manager shall be in material breach of this Agreement upon 90 days written notice to Manager." Carroll, 903 F.2d at 1271. The court found that this language created a conditional right to terminate. Because the contract was property of the estate, the owner should have sought relief from the stay before giving notice of termination. Id. at 1273.

Therefore, if the lease terminated by its own terms because of Welter's default, HRP's notice of termination may not have been subject to the automatic stay. However, the law is unclear on this point. The court concludes that Welter's interest in the lease and option agreement is property of the estate, and any act to retake possession of the tractor requires HRP to obtain relief from the automatic stay. Moreover, termination of the lease was an act to exercise control over property of the estate, and a violation of the automatic stay under 362(a)(3). HRP's actions during January, 1993 purporting to terminate the lease are void. The court will consider HRP's motion for relief from the automatic stay as a request for authority to terminate the lease as well as to obtain possession of the tractor.

The court will next discuss the effect of Welter's November 6, 1992 MOTION to Assume Executory Contract" and this court's order issued December 14, 1992 approving the motion to assume. Welter argues that even if an installment sales contract is "executory", it is not governed by 365. The contract is still the type of transaction that may be modified in a plan and the motion to assume is irrelevant. The court disagrees with this position.

Once the debtor-in-possession assumes a lease, he is estopped to deny the validity of the lease or to rewrite any of the lease terms. He must accept both the benefits and burdens of the lease, and may not pick and choose from the desirable and undesirable portions of the contract. In re Bell & Beckwith, 139 B.R. 647, 649 (Bankr. N.D. Ohio 1991) (citations omitted). Moreover, once the debtor-in-possession has taken the position that an agreement is a lease subject to assumption and has obtained a court order authorizing assumption of the lease, he is estopped to take the position later that the agreement is something other than a lease. In re Rachels Industries, Inc., 109 B.R. 797 (Bankr. W.D. Tenn. 1990).

This situation may not fall precisely under any of the various estoppel or preclusion theories that apply to litigants who plead inconsistent factual or legal theories. See Total Petroleum v. Davis, 822 F.2d 734 (8th Cir. 1987) (discussion of differences between equitable estoppel, collateral estoppel, judicial estoppel and election of remedies). Estoppel results as a matter of application of the general

rule that an executory contract or unexpired lease must be assumed "as is." Rachels Industries, 109 B.R. at 801.

In Bell & Beckwith, the trustee assumed a lease for rental of a commercial building. The trustee claimed the rental payments were more than twice the fair rental value of the building and that the payments had been calculated to equal the mortgage payments owed by a related corporate entity. The court stated that once the lease was assumed, &he trustee was bound by its terms.

In Rachels Industries, a Chapter 11 debtor moved to assume a lease of real property with an option to purchase. After trial on issues of whether the debtor was in default, the debtor submitted a brief arguing that the lease was not a true lease but rather a "structure designed to provide a property tax abatement for the debtor." The court viewed the debtor's change in position as an attempt to preserve certain portions of the transaction and avoid others. The court concluded that once the debtor had stated in its pleadings and in open court that the agreement was a lease, it was estopped to change that position.

Welter is, effectively, attempting to modify the terms of the lease and option agreement. Welter has had the benefit of the use of the tractor during the term of the lease. He may not now avoid the terms of the option to purchase by changing his theory of the nature of the contract.

However, even assuming that Welter is not estopped to litigate the issue, the court finds that the agreement between Welter and HRP is a true lease, not a contract intended to create a security interest.

The Bankruptcy Code does not define the term "lease", and defines "security interest" simply as a "lien created by agreement." 11 U.S.C. 101(51). The legislative history indicates that:

> Whether a ... lease constitutes a security interest under the bankruptcy code will depend on whether it constitutes a security interest under applicable State or local law.

H.Rep. No. 595, 95th Cong., 1st Sess. 314 (1977), quoted in In re Peacock, 6 B.R. 922, 924 (Bankr. N.D. Tex. 1980). The relevant Iowa statute provides:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. ... Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

Iowa Code Sec. 554.1201(37) (1992).

Thus, whether the contract between Welter and HRP is a true lease or an installment sales contract depends upon the intent of the parties, looking at all the facts of the case. The parties' intent is determined by applying an objective standard, and considering the language of the agreement and all the facts and circumstances of the transaction. In re The Answer--The Elegant Large Size Discounter, Inc., 115 B.R. 465, 469 (Bankr. S.D. N.Y. 1990).

Clauses (a) and (b) of the definition state two rules of law for distinguishing between a lease and a financing contract. Neither is determinative here. The inclusion of the option to purchase does not of

itself indicate that the lease between Welter and HRP was a disguised installment sale. The option price in Welter's contract is not nominal. If Welter had made all the lease payments and 90% of the payments were applied to the purchase price, he would need approximately $49,000 to exercise the option ($65,000 - (18,000 x 90%)).

If an option is for a nominal sum, it is a clear indication that the parties intended to transfer ownership under the agreement which may be considered an installment sales contract. In re Berge, 32 B.R. 370, 372 (Bankr. W.D. Wis. 1983). If more than nominal consideration is required to exercise an option, a true lease is usually found. In re Fashion Optical. Ltd., 653 F.2d 1385, 1389 (10th Cir. 1981).

Courts have sometimes found an option price "nominal" in a relative sense. In In re G.A. Giancaterin, 9 B.R. 26 (Bankr. W.D. N.Y. 1981), the court considered the option price of $5,800 for purchase of restaurant equipment nominal in relation to the total obligation of $115,000 over the life of the contract. In In re Washington Processing Co., Inc., 3 UCC Rep. Serv. 475 (S.D. Cal. 1966), the lessee could purchase equipment worth $7,500 to $10,500 at the end of the lease term for an option price of $1,350. The court found the contract created a security interest.

This analysis is sometimes described as the "economic realities test." Even though the option price at the end of a "lease" term is other than nominal, the "economic realities" of the transaction may show the deal is intended as a secured transaction. Fashion Optical at 1389. This test examines whether the terms of the lease and purchase option are such that the only sensible economical course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods. Id.; In re Alpha Creamery Co., Inc., 4 UCC Rep. Serv. 794, 798 (W.D. Mich. 1967).

Welter does not satisfy the economic realities test merely by showing that the lease arrangement was the only way he. could obtain a tractor. The rationale of the test is that the exercise of the option is of such great economic benefit to the lessee that it was part of the price bargained for at the time the lease was entered into, in exchange for which all incidents of ownership would be conveyed. Berge, 32 B.R. at 372.

One "economic realities" test compares the total rental payments to the option price. The contract may be an installment sale if the option price is proportionately small in relation to the aggregate rentals. In re Kempker, 104 B.R. 196, 203 (Bankr. W.D. Mo. 1989). Applying this test to the contract between Welter and HRP shows that the assumed option price of $49,000.00 as calculated above, is quite large in relation to the $18,000 total of rental payments. Some courts have applied a rule of thumb that an option price less than 25 per cent of the list price indicates an intent to create a security interest. Fashion Optical, 653 F.2d at 1389. Welter's option price is approximately 75 per cent of the list price ($49,000.00/ $65,000.00).

Another economic test cited frequently in the case law compares the option price to the fair market value of the equipment at the end of the lease term. "The more closely the option price resembles the property's fair market value, the more likely the rental charges were intended to compensate the lessor for the loss of value during the lease' s term and the option is a real one." Kempker, 104 B.R. at 203, citing Fashion Optical. However, if the option price is much less than the fair market value of the property, then "the lessor has recognized an equity in the lessee, and the lease was intended as a security instrument." In re Wallace, 122 B.R. 222, 227 (Bankr. D. N.J. 1990). In In re Cress, 106 B.R. 246 (D. Kan. 1989), the court found it critical that the option price under a lease agreement for farm equipment was equal to the fair market value at the time the option was to be exercised.

Welter and HRP estimated a fair market value from a low of $46,000 to a high of $56,000. Again assuming an option price of $49,000, the option is between 106% to 87% of the fair market value, which tends to indicate the contract is a true lease. The lease payments appear to be calculated to compensate HRP for wear and tear on the tractor plus a reasonable profit under the lease.

Welter does not satisfy the economic realities test merely by showing that he would be economically compelled to exercise the option or lose the credit toward purchase price of 90 per cent of the lease payments. Welter's lease payments roughly approximated HRP's depreciation loss on the tractor.

If Welter had leased the tractor at HRP's hourly rate of $22.50, he would have paid $19,125 under the nine-month contract for 850 hours. Viewing the contract another way, assuming that Welter and HRP calculated the monthly rate based on 1000 hours per year, the contract provides for payment at a rate of approximately $24.33 per hour ($2000 mo./ 30 days = $66.66 per day; 1000 hours/ 365 days = 2.74 hours per day; $66.66 / 2.74 hours = $24.33 per hour). Under either of these calculations, it is more reasonable to assume that Welter was paying for the depreciation of the tractor as he used it, rather than paying unusually high rental payments which would indicate he was building up equity in the tractor. Cf. In re Puckett, 60 B.R. 223, 238-40 (Bankr. M.D. Tenn. 1986). In Puckett, the monthly payments were calculated to produce twice the retail value of the leased furniture in 18 months. The payments were not related to the lessor's cost of goods or depreciation of the goods, leading the court to conclude that the lessees were accumulating equity with each payment. A decision not to exercise the purchase option would amount to a forfeiture.

Welter was not "building up equity" merely by making lease payments which would be applied to the purchase price if he were to enter into a sales contract with Case Credit at some point in the future. In In re Alpha Creamery Co., Inc., 4 UCC Rep. 794 (W.D. Mich. 1967), under an office equipment lease, the debtor could have applied 75% of the rental payments to the purchase price if the purchase option was exercised within the first year of the lease and 70% of the payments if exercised thereafter. The court compared the option price to the list price and to the fair market value at the time the option could be exercised and concluded that the debtor was not acquiring equity in the property by virtue of its rental payments.

Welter cites Krana v. Equilease Corp., 3 UCC Rep. Serv. 2d 750 (N.D. Iowa 1986), as a case in which the court found a lease was a disguised secured transaction applying an "economic realities" test. The facts in Krana are distinguishable. In Krana, the lessee made an initial payment representing a pre-paid purchase option for 10 per cent of the purchase price. After making all payments, the lessee would become the owner of the equipment at the end of the lease term for no additional consideration. The lessee had spent $11,000.00 for repairs of the equipment, which also indicated the lessee's intent to purchase.

In John Deere Leasing Co. v. Fraker, 395 N.W.2d 885 (Iowa 1986), the court found a combine harvester lease created a security interest despite an option price of $26,242.75. The court did not make an economic realities analysis, but the facts given in the case are consistent with finding a security interest under that test. The option price was 21 per cent of the total contract payments.

Other factors support the finding that the agreement was a true lease. The most significant factor is the absence of any indication that Welter had a duty under the terms of the lease to purchase the tractor. Carlson v. Tandy Computer Leasing, 803 F.2d 391, 396 (8th Cir. 1986). Damages on breach of Welter's lease are limited to the rental payments due under the lease rather than the full purchase price of the tractor (Exhibit 2, 10), indicating a true lease. In re Janesville Lodging, Ltd., 35 B.R. 672, 675 (Bankr. W.D. Wis. 1983). If the lease were a true installment contract with a balloon payment, Welter

would be required to account for the economic value of the tractor at the end of the lease term. Welter could return the tractor and walk away. He does not need to make the balloon payment to free the tractor of a security interest held by HRP. In re Cole, 114 B.R. 278, 285-86 (N.D. Okla. 1990). And see, Livesey Enterprises v. Smith Mgmt., Inc. (In re Smith Mgmt., Inc.), 8 B.R. 346 (Bankr. W.D. Wis. 1980), in which the lease terms obligated the lessee to purchase the equipment at the end of the term, indicating a true balloon payment, not an option to purchase.

In Carlson v. Tandy, the bankruptcy court had allowed evidence that the parties had orally agreed the lessee could purchase the leased computer at the end of the lease term for six or seven percent of its original cost and that 85% of Tandy's lessees eventually purchase the computers at the end of the lease term. The bankruptcy court found the contract was an installment sale. The district court reversed and the Eighth Circuit affirmed, stating:

> The possibility that the parties would enter a separate sales transaction at the termination of the lease agreement, an agreement in which Tandy retained title and the ultimate right to possession, does not transform the lease into an installment sale.

Carlson v. Tandy, 803 F.2d at 396. Similarly, Welter's expectation that he would eventually convert the lease to a sales agreement with Case Credit at some later date did not turn the lease with HRP into an installment sale. Welter was not eligible for financing at the time he made the lease agreement in April, 1992. HRP had no authority to extend credit through Case Credit. Welter could not require HRP or Case Credit to finance the tractor sale. In re Jackson, 105 B.R. 418 (Bankr. S.D. Ohio 1989).

Other factors cited by Welter as indicia of a financing arrangement are not persuasive. Filing a financing statement is not a factor in determining whether the lease was intended as security. Iowa Code Sec. 554.9408 (1992).

Welter's duty to insure the tractor, duty to be responsible for maintenance and repairs, and assumption of the risk of loss (Exhibit 2, 6, 8, 11) are factors not as persuasive as the absence of a duty to purchase the tractor at the end of the lease term. Carlson v. Tandy, 803 P.2d at 395-96. This view is codified in the 1978 revisions to the UCC, not adopted in Iowa, which focus on the economics of the transaction. official Comment to the 1978 Official Text of the UCC, 1-207(37). One court has stated that factors relating to risk of loss, insurance, repair costs and the like are irrelevant. Triple B Oil Producers, Inc., 75 B.R. 461 (Bankr. S.D. Ill. 1987).

The documents used in the transaction employ "lease language" (lessor, lessee, rental rate). The "installment sales contract" form (Exhibit 10) was understood as part of a separate transaction with Case Credit to be completed in the future. The lease expressly reserved title in HRP until the time Welter exercised the option to purchase. Carlson v. Tandy, 803 F.2d at 395. Under a lease not intended as security, reservation of title is not a security interest. Iowa Code S 554.1201(37) (1992).

HRP has not bargained away its ownership rights, including the right to retake control of the tractor. In re Peacock, 6 B.R. 922, 925-26 (Bankr. N.D. Texas 1980) (discussing three types of contracts where lessor has bargained away right of absolute control). The lease restricts the location of the tractor, a factor cited by In re Cress, 106 B.R. 246, 250 (D. Kan. 1989), aff'd, 930 F.2d 32 (10th Cir. 1991). Over half of the tractor's useful life is remaining after the end of the lease term. Id. at 250-51; Peacock, 6 B.R. at 926.

The lease is a true lease. Welter has no right either to force HRP to finance a sale or to treat the lease as a security interest in his plan. Welter has assumed the lease and must perform it according to the

terms of the contract. However, HRP's notice of termination of the contract was a violation of the automatic stay. If HRP had requested relief from the stay directly after Welter's breach of the lease term on January 1, 1993, the court may not have granted the motion on the basis of the technical breach if at that time Welter could show he had the ability to cure the missed payment and exercise the option. HRP would not have been able to show cause for lifting the stay under 362(d). Because HRP declared the lease and purchase option agreement terminated and then moved for relief from the stay to repossess the tractor, the parties' litigation time has been focused on the termination issues rather than on obtaining other financing. For this reason, the court will extend the contract term to allow Welter an opportunity to cure default of the lease and to exercise the purchase option. This will put the parties back in roughly the position they were after the breach and before HRP violated the stay by declaring the lease terminated.

Welter will have 30 days to exercise the option, on the condition that he cures the missed January payment within 10 days. If Welter tenders the January payment, HRP will be required to accept it. If Welter fails to tender the January payment, or if he tenders the January payment but fails to exercise the option, the contract shall be terminated and the automatic stay shall be modified to allow HRP to pursue its state court remedies to obtain full possession of the tractor.

ORDER

IT IS ORDERED that Humboldt Red Power, Inc.'s motion for relief from the automatic stay is granted in part and denied in part.

IT IS FURTHER ORDERED that Welter shall have the right to exercise the purchase option by April 19, 1993 if he cures the default under the lease by paying the $2,000.00 January payment on or before March 29, 1993. HRP shall accept the January payment if tendered.

IT IS FURTHER ORDERED that if Welter fails to meet either of these deadlines, the lease and purchase option agreement shall be deemed terminated and the automatic stay shall be deemed modified to allow HRP to obtain possession of the tractor.

IT IS FURTHER ORDERED that HRP's request for judgment on an administrative expense claim is denied without prejudice.

SO ORDERED ON THIS 19th DAY OF MARCH, 1993.

William L. Edmonds
Chief Bankruptcy Judge