RECENT REAL PROPERTY DEVELOPMENTS: LAW PROFESSORS' REPORT SUMMARY

PAUL BABIE, University of Adelaide (Australia)
ROGER BERNHARDT, Golden Gate University
CAROL N. BROWN, University of North Carolina
PAULA A. FRANZESE, Seton Hall University
JOHN V. ORTH, University of North Carolina

Note. Four cases are common law decisions of Australian appellate courts, for which internet links are provided. A brief introduction to the Australian court system is attached as an appendix to the materials.

1. **Jackson v. Estate of Green, 771 N.W.2d 675 (Mich. 2009) (joint tenancy – termination by partition). JVO**

Plaintiff and defendant purchased two parcels of land taking title as joint tenants. Plaintiff also loaned defendant money in the form of a series of checks. Alleging that defendant had defaulted on the loans, plaintiff sued for breach of contract and sought to force defendant to relinquish his interest in the parcels. (It is unclear from the opinion how the loans were related to the purchase of the land.) The defendant asserted the statute of limitations as a bar to the breach of contract action. The trial court found that defendant was a joint tenant with plaintiff and granted summary judgment to the defendant concerning title to the property. Based on a jury finding that each check was a loan, the trial court rejected defendant's defense based on the statute of limitations and entered judgment on the verdict in plaintiff's favor.

Defendant then filed a separate action to partition the land. At plaintiff's request, the partition action was stayed pending appeal of the judgment on the contract claim. While the appeal was pending, defendant died. The intermediate appellate court affirmed the lower court's ruling that the land was held in joint tenancy and concluded that on defendant's death plaintiff became sole owner. The court of appeals also affirmed the lower court's ruling on the statute of limitations, on the ground that the cause of action did not accrue until plaintiff demanded payment by filing suit.

A divided Michigan Supreme Court, in four separate opinions, affirmed the court of appeals. Because the partition action had not resulted in a final order, the majority held that "nothing remains to partition." "Indeed," the leading opinion said, "the universal rule in the United States is that a pending suit for partition does not survive the death of one of the joint tenants." The division in the court largely concerned the question concerning when the statute of limitations had begun to run, but two justices did argue in dissent that the Michigan survival statute preserved defendant's partition action.

Comment 1. It is important to note that Michigan recognizes two types of joint tenancies. The standard form joint tenancy, similar to the old common law joint tenancy, includes a right of survivorship as a necessary incident of the tenancy without express mention. This is the form of joint tenancy at issue in the present case. The second form of joint tenancy, created by the use of express words of survivorship, is functionally a joint life estate with alternative contingent remainders in the survivor. It is worth noting that in some states the contrary situation exists. In North Carolina, for example, to create an estate functionally similar to the Michigan standard form joint tenancy, the creating instrument must expressly refer to the right of survivorship.

Comment 2. The majority is correct that American courts continue to hold that merely filing a partition action does not sever a joint tenancy. See, e.g., Rusnak v. Phebus, 2008 WL 2229514 (Tenn. Ct. App. 2008) (matter of first impression); Mercurio v. Headrick, 983 So.2d 773 (Fla. Ct. App. 2008) (matter of first impression). But this "universal rule" stands in conflict with the developing adherence in some states to an "intent-based approach" for recognizing the existence of a joint tenancy. See, e.g., Estate of Johnson, 739 N.W.2d 493 (Iowa 2007); Taylor v. Canterbury, 92 P.3d 961, 962 (Colo. 2004). Concern about the uncertainty created by the emphasis on intention led Colorado to reaffirm by the statute the mechanical common law requirement of the four unities of time, title, interest, and possession for the creation and continuance of the joint tenancy based. Colo. Rev. Stat. § 38-31-101(1.5)(a) (2008). For a discussion of this and related issues, see John V. Orth, The Perils of Joint Tenancies, 44 *Real Property, Trust & Estate Law Journal* 427 (2009).

2. Callow v Rupchev [2009] NSWCA 148, http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2009/148.html (New South Wales Court of Appeal, 17 June 2009) (co-owners – ouster – occupation fee – set-off). PB

The parties, who lived together in a domestic relationship, purchased a house in joint names. The relationship fell apart and Ms Callow ('Callow') left the premises, which remained in the occupation of Mr Rupchev ('Rupchev'). The premises were sold and the present action involved the distribution of proceeds. In two judgments, the Supreme Court of New South Wales, Common Law Division, held that the proceeds were to be distributed as to 50% to each party, subject to the following: (a) Rupchev was entitled to recover 50% of the mortgage payments made by him alone; (b) Rupchev did not have to account to Callow by way of a notional occupation fee to be set-off against the mortgage payments; (c) Rupchev was entitled to a further contribution of 50% of the acquisition costs of the property; (d) interest was payable on the amounts due to Rupchev for the period during which each amount had been outstanding up to judgment, and (e) Callow should pay Rupchev's costs of the proceedings. Callow appealed each finding.

The focus of the case at trial was that Callow was entitled to set-off a notional occupation fee as a consequence of being involuntarily excluded from the property by violence or the threat of violence from Rupchev. The traditional grounds for charging an occupying co-owner with an occupation rent, for the benefit of a co-owner who was not in possession, were an actual ouster by the occupying co-owner by threat of violence which prevented the other co-owner from exercising the right to possession, a constructive ouster by denial of title, or a claim by the

occupying co-owner to be recouped for expenditure on permanent improvements which had increased the value of the property. The Court of Appeal, however, relied on principles dating to the 1970s that a forceful ouster is not necessary to establish the liability for an occupation rent where a domestic relationship has broken down rendering departure of one co-owner reasonable in the circumstances. These principles should be applied where the co-ownership flowed from a marital or equivalent domestic relationship and they should be applied in the present case. As such, a notional occupation fee may be set-off against the claim of the tenant in occupation for a contribution to expenses or improvements, including mortgage payments.

In applying these principles, the question arose whether the occupation fee should be payable only during the time that Rupchev made mortgage payments, or for the entire period of time during which Rupchev occupied the property and Callow was absent, including the period of time leading up to sale during which Rupchev was also absent. The Court of Appeal held that while there was no reason to limit the time during which the fee was payable solely to that during which mortgage payments were made, it should accrue only during the period of Rupchev's sole occupancy, and not once Rupchev was absent prior to sale.

In relation to the payment of interest on the mortgage payments made by Rupchev, the Court of Appeal held that Callow's liability to contribute arose at the time payment was made solely by Rupchev. Conversely, in relation to the notional occupation fee, in each case the financial benefit was obtained by Rupchev, and alternative expenses incurred by Callow, from week to week, as the arrangements proceeded. It was therefore appropriate that interest be calculated on each fee, payable on a monthly basis, from the date at which each payment accrued.

3. **Mastroianni v. Wercinski, 965 A.2d 1139 (N.H. 2009). Affirming the majority rule, the Supreme Court of New Hampshire held that two adjoining landowners' mutual mistake as to the location of their property line did not defeat the requisite adversity for the possessing party to claim land by adverse possession. The plaintiff, combined with the plaintiff's predecessor in title, had used the land continuously and openly for over twenty years, and the parties' subjective beliefs about the location of the property line were irrelevant in determining whether the plaintiff had acquired the property. PF**

In 1998, the Mastroiannis ("Plaintiffs") acquired a parcel of residential real estate. The Wercinskis ("Defendants") acquired an abutting parcel in 2005. The parties and their predecessors in title mistakenly believed that a preexisting stone wall marked the boundary of the parties' parcels. Because of this mistake, Plaintiffs and their predecessor in title treated as their own a .02 acre piece of property that actually belonged to Defendants and Defendants' predecessor in title. Upon discovering the true boundary in 2006, Defendants, in an effort to reclaim the land, relocated the stone wall and removed flower beds Plaintiffs had planted.

Plaintiffs brought an action to quiet title and asserted title by adverse possession. While finding that Plaintiffs' predecessor had made exclusive and continuous use of the property for twenty years, the trial court ruled that Plaintiffs failed to demonstrate notorious possession because Defendants were mistaken about the location of the actual property line. Following the minority

position, the trial court ruled that, as a matter of law, Plaintiffs' possession could not be adverse when the parties mislocated the property line.

The Supreme Court of New Hampshire reversed, holding that neither party's beliefs about the property line's real location were relevant; indeed, the Court cited case law holding that, in the case of mistake, it does not matter if the possessor would not have entered the land had he or she been better informed. As long as the claiming party satisfies the elements of adverse possession—identified by this court as possession that is adverse (or notorious), continuous, exclusive, and open—then the party acquires the land. Citing New Hampshire precedent, the Court held that the use of land is adverse when it is made under a claim of right where no right exists. Plaintiffs satisfied the adversity element because, ultimately, they made use of the land when they in fact had no right to do so. Because the trial court also found that they satisfied the remaining elements of an adverse possession claim, the Court found that Plaintiffs had acquired the property through adverse possession.

The Court further supported its decision in discussing the aspect of "notoriety," which rests on the policy that a landowner should not lose his or her rights in the land unless he or she was sufficiently put on notice. The possession was notorious here, however, because Defendants' predecessor in title was aware of Plaintiffs' possession of the disputed property. Because there was no concealment of this possession, Defendants and their predecessor in title had actual notice, and thus, Plaintiffs met the element of notoriety.

4. **Reliastar Life Insurance v Home Depot USA, 570 F3d 513, 2d Cir. Court of Appeals, June 2009 (commercial leases – constructive eviction – attornment – estoppel certificate). RB**

In 1989, Home Depot Home Depot rented property in New York from G&S for a home improvement center under a lease which required G&S to provide a building pad for the center. In 1995, Home Depot discovered a defect in the building pad and, after spending $750,000 in an attempt to remedy the condition, vacated the premises and stopped paying rent.

In 1993, however, G&S had mortgaged the premises and assigned its lease to Reliastar, at which time Home Depot had executed an estoppel certificate, declaring that Home Depot had fully inspected the premises and found them in good order and repair; and it had also executed a recognition agreement, providing that it was "unconditionally and absolutely obligated to pay rent directly to the mortgagee… without any reduction, set off, abatement, or diminution whatever" (a "hell or high water" clause).

When Reliastar brought this action for rent and Home Depot raised constructive eviction as a defense, the District Court granted summary judgment to Reliastar on the ground that Home Depot's defense was barred by the provisions in its estoppel certificate and recognition agreement. The Second Circuit Court of Appeals vacated the judgment and remanded the matter for trial.

Applying New York law, the court first held that Home Depot was not prohibited from asserting constructive eviction as a defense by Commercial Code section 9 - 403 (c). While that provision permits an assignee to take free of ordinary defenses, it provides that defenses such as "fraud, duress, *or the like"* are preserved to the debtor. Constructive eviction, the court held, is similar to fraud and duress "in that it goes to the very existence of the agreement, rather than a failure to perform in accordance with the terms of the agreement." Therefore, if there was a constructive eviction, then Home Depot was entitled to vacate the premises and stop paying rent.

Next, the court held that although Home Depot's estoppel certificate did cover the building pad as well as the building, it only expressed Home Depot's knowledge at the time the certificate was executed, and therefore did not cover defects that were unknown to Home Depot at the time it executed that certificate. Consequently, notwithstanding the estoppel certificate, Home Depot could raise the defense of constructive eviction.

Finally, the hell-or-high-water clause in the recognition agreement also did not preclude Home Depot from claiming constructive eviction. The clause may be effective in a lease of real estate (even though it is generally applied to finance or equipment leases), but Home Depot's unconditional promise to pay rent in that document does not apply when no rent is due because of a constructive eviction, if such existed.

5. **Bloch v. Frischholz, 587 F.3d 771 (7th Cir. Nov. 13, 2009) (FHA provides a cause of action to homeowners for discrimination that occurred *after* acquisition of a their condominium, under some circumstances). CNB**

The Bloch family (Plaintiffs) lived in a Chicago condominium building for approximately thirty years. The Plaintiffs are observant Jews and during this entire time, they displayed mezuzot on the doorpost on the outside of their condominium unit, without protest or objection from the Condominium Association (the Association). In 2001, the Association enacted a new set of rules and regulations; Lynn Bloch chaired the committee that enacted the "'Hallway Rules.'" In relevant part, Hallway Rule 1 states that "'Mats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors.'" *Id.* at 773. From the date of enactment until the middle of 2004, the Association did not remove the mezuzot; it primarily relied on Hallway Rule 1 to clear the hallways of clutter. The Association renovated its building's hallways in May 2004, after which the Association began removing the mezuzot. It interpreted Hallway Rule 1 as prohibiting mezuzot on exterior doorposts. The Association also removed and confiscated political posters, crucifixes, Christmas ornaments, wreaths, and Chicago Bears pennants. The Plaintiffs voiced their concerns to the Association President, Frischholz and to the Association (Defendants) and received no relief.

Plaintiffs filed a lawsuit seeking injunctive relief and damages for distress, humiliation, and embarrassment on federal and state grounds. Their federal claims alleged violation of various provisions of the Fair Housing Act. A magistrate judge enjoined the Defendants from removing the mezuzot which was consistent with a rule change that was under consideration by the Association's board of managers. Subsequently, the board of managers modified Hallway Rule 1, creating an exception for religious objects. *Id.* at 774. The City of Chicago later amended its

code to prohibit condominiums and rental properties from placing restrictions on affixing religious symbols or signs to the exterior of doorposts. The legislative claims mooted the Plaintiffs' claim for injunctive relief but not for damages.

The district court granted summary judgment in favor of the Defendants on the federal claims and declined to exercise supplemental jurisdiction on the remaining state claims. *Id.* at 775. Relying on *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n,* 388 F.3d 327 (7th Cir. 2004), the district court held that the Fair Housing Act only prohibited discrimination at the time of sale so that claims based upon discrimination that occurred after Plaintiffs purchased their units were precluded under the Fair Housing Act. The Plaintiffs appealed and the Seventh Circuit initially affirmed the district court, with a split panel. *Id.* at 775. On rehearing, en banc, the Seventh Circuit reversed the summary judgment granted against Plaintiffs, reinstating some of the claims.

First, the court of appeals considered the Section 3604(a) claim under the Fair Housing Act which states that it is unlawful "'[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'" *Id.* 776. The court observed that housing availability is the heart of this Section and that, consistent with *Halprin*, "'the statutory language might be stretched far enough to reach a case of 'constructive eviction.'" *Id.* at 776. Though the court held that Section 3604(a) reached *post-acquisition* discrimination that makes housing unavailable, similar to a constructive eviction, the court held that a reasonable jury could not find that the Defendant's conduct rendered the condominium "'unavailable'" to the Plaintiffs. *Id.* at 778. The Plaintiffs compared their plight to constructive eviction; however, they never vacated their condominium. Moreover, Plaintiffs' argument that Hallway Rule 1 made their unit unavailable to observant Jews was unavailing as the court found no evidence that Plaintiffs intended to sell their units. *Id.* at 778-779.

Second, the court considered the Plaintiffs' claim that the Defendants violated Section 3604(b) of the Fair Housing Act which states that it is unlawful "'[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.'" *Id.* at 779. The court held that the Plaintiffs' action was within Section 3604(b). The Plaintiffs alleged discrimination by the Association in the enforcement of the Association's rules and agreed to be governed by the Association at the time of the purchase. According to the court, this agreement by the Plaintiffs constituted a "term or condition of sale" which made Section 3604(b) applicable. *Id.* at 779-780.

The Plaintiffs' final Fair Housing Act challenge arose under Section 3617 which states that it is unlawful "'to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise of enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.'" The court held that Section 3617 applies to post acquisition discrimination and that, with sufficient evidence, the Plaintiff could proceed under Section 3617 based upon the Defendant's interference with Plaintiffs' Section 3604 rights. According to the court, Section 3617's prohibition on interference with the exercise

or enjoyment of fair housing rights "reach[ed] a broader range of post-acquisition conduct" than Section 3604. *Id.* at 782. And, a Section 3617 claim of interference with Section 3604 rights did not require the Plaintiffs to vacate. *Id.*

6. City of Charlotte v. BMJ of Charlotte, LLC, 675 S.E.2d 59 (N.C. App. 2009) (easements – termination – overburden by division – overburden by overuse). JVO

City commenced condemnation proceeding for a temporary construction easement adjacent to its railroad right of way and for a permanent utility easement within the temporary construction easement. Defendants, the burdened landowner, counterclaimed for inverse condemnation, alleging that the right of way no longer existed because it had been terminated or abandoned or, in the alternative, that if the right of way still existed, the present use City was making of it exceeded its scope (that is, overburdened the easement). The superior court dismissed the counterclaim, and defendants filed an interlocutory appeal, which was allowed.

The right of way at issue goes back to before the Civil War when the N.C. General Assembly chartered a railroad to connect Charlotte and South Carolina. It was originally acquired by the Charlotte & South Carolina RR by "statutory presumption" – that is, a presumption of a grant that became irrebuttable after two years if there was no claim for compensation from the burdened landowner. Its duration was for "as long as the same be used only for the purposes of said railroad… and no longer." In 2003 Southern Railway, successor in interest to Charlotte & South Carolina RR, granted a license to one of the defendants to use the right of way for access to its commercial premises. Later in 2003, Norfolk Southern Railway, successor in interest to Southern Railway, quitclaimed an interest in the western half of the right of way to the City. Norfolk Southern continues to operate on the eastern half of the right of way; approximately 10 trains pass each day. (The validity of the Norfolk Southern right of way is not contested.) In November 2007 the City began operation of Light Rail, a commuter railroad with many scheduled trains. Two commuter trains pass every 7 minutes during peak times (6:00 am to 9:00 am) and every 15 minutes during non-peak times (3:00 or 4:00 pm to 6:30 or 7:30 pm). A fence was erected between the Light Rail tracks and the Norfolk Southern tracks, making it impossible for defendant to use any portion of the Norfolk Southern right of way for access.

Defendants argued that the western half of the right of way had terminated automatically when it was no longer used for "the purposes of said railroad," that is, for the railroad that connected Charlotte and South Carolina. The Court easily rejected this argument on grounds of charter construction: whatever the motive for the charter, its operative provisions spoke generally about rail transportation. Defendants then argued that the right of way had been abandoned when it was conveyed to the City or, in the alternative, that it had not been effectively conveyed because the conveyance was by quitclaim. The Court rather easily rejected these claims too. The conveyance was to an entity that provided rail transportation, and although the charter referred expressly only to conveyance by "execution sale," the power of sale was not limited to that means alone. (It is not irrelevant that the whole right of way had already passed through repeated sales extending over a century and a half.) The Court also seems to have treated the Norfolk Southern conveyance as an implied revocation of the license it had given defendants.

Defendants' overburden argument was not so easily dismissed. Fifty years ago the North Carolina Supreme Court held in Grimes v. Virginia Electric & Power Co., 96 S.E.2d 713 (N.C. 1957), that the grantee of an express utility easement could not license an additional utility operator to use the same easement. "Two power companies enjoy an easement over [plaintiff's] land. He granted only one." The Court of Appeals distinguished *Grimes* on three grounds – (1) that the Norfolk Southern easement had been acquired by "statutory presumption," not express grant; (2) that Norfolk Southern, unlike the Virginia Power Co., had not licensed an additional user, but had transferred all its right in half of the easement; and (3) that a railroad right of way is "very different" from a utility right of way. It is the third ground that seems most important. As another panel of the Court of Appeals noted forty years ago, a railroad right of way gives the railroad "the complete and perpetual right to occupy and use the land to the total exclusion of the owner of the fee." City of Statesville v. Bowles, 169 S.E.2d 467, 470 (N.C. App. 1969). In other words, a railroad right of way is, in the language of easements, "exclusive" – exclusive, that is, of the rights of the burdened (servient) landowner. (On this point, see Schwarz & Schwarz v. Caldwell County RR Co., 677 S.E.2d 546 (N.C. App. 2009).)

The Court went on to consider the argument that the right of way was overburdened by overuse, not merely by the addition of a second easement, when only one was granted. Reviewing the caselaw, the Court found only two scenarios of "misuse or overburdening": First, using the easement to access property other than the benefited (dominant) parcel. This was irrelevant in the present case, since the right of way was an easement in gross, without a benefited parcel. In any event, the railroad use did not deviate from the original route. Second, using the easement for a kind of use not contemplated in the easement. This did not apply in the present case, since the right of way was being used, as originally intended, for railroad purposes. Increasing use of a right of way is not a legal overburden.

Comment 1. The second type of overburdening requires careful attention. A recent Mississippi case allowed the installation of underground utilities in a prescriptive right of way as necessary for modern access. Keener Properties v. Wilson, 912 So.2d 954 (Miss. 2005).

Comment 2. One issue that was not discussed was the divisibility of easements. Easements in gross – that is, easements that are not appurtenant to any particular benefited (dominant) estate – have generally been regarded as indivisible in use, although their ownership can be shared. In other words, an easement owner may transfer the easement to two or more, but they must use it together as a unit ("as one stock"). See Miller v. Lutheran Camp Conf., 200 A. 646, 130 A.L.R. 1245 (Pa. 1938). See also Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 9:9 (2001) (describing *Miller* as "the landmark case"). But the "one stock rule" does not apply to exclusive easements, such as railroad rights of way.

7. **St. James Village, Inc. v. Cunningham, 210 P.3d 190 (Nev. 2009). In considering the question of whether a servient estate owner may unilaterally relocate an easement, the Supreme Court of Nevada adopted the rule in the Restatement (Third) of Property § 4.8, which states "Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows: (1) The owner of the servient estate has the right**

within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude. (2) The dimensions are those reasonably necessary for enjoyment of the servitude. (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created." PF

Jennifer A. Cunningham, Craig Cunningham, James H. Saladin, and Thelma L. Saladin (the "Cunninghams") own land adjacent to parcels owned by St. James Village, Inc. ("St. James"). The Cunninghams hold an easement, obtained and recorded in 1974 by their predecessors in interest, across the land owned by St. James. The Cunninghams' conveyance, in turn, included the metes and bounds of the easement and was recorded in 1997. The original deed describing the easement was silent on the issue of relocation by the servient estate owners, but included the location.

St. James sought to relocate the easement to develop lots on its parcel pursuant to its master plan. The Cunninghams, however, refused to consent to the proposed changes. In response, St. James sued for declaratory judgment that it could unilaterally relocate the easement where no material inconvenience would be wrought upon the easement holder. The Cunninghams countered that, pursuant to *Swenson v. Strout Realty, Inc.*, 452 P.2d 972, 974 (Nev. 1969), the consent of the easement holder is always required for relocation. When the court denied declaratory judgment and held that consent was indeed required, St. James appealed.

St. James argued, *inter alia*, that the rule in *Swenson* was dictum and therefore not controlling. St. James also contended that the Restatement (Third) of Property, § 4.8, as interpreted by the Supreme Court of Nevada, should govern, and that unilateral relocation of an easement by the servient estate owner is permissible when the instrument creating the easement does not expressly prohibit such relocation. The Cunninghams, in contrast, posited that the *Swenson* holding was not dictum, and that even if it was not controlling and the Court were to embrace the Restatement rule, the deed's contents preclude the rule's application in the present case.

The Court addressed these arguments in turn. First, the Court considered the *Swenson* rule. In *Swenson*, as explained in the *St. James* opinion, resolving a counterclaim required the Court to determine whether a real estate broker correctly stated the law when she said that an easement could be unilaterally relocated. The Court found that she had misstated the law, and, *inter alia*, that neither party to an easement may unilaterally change its location once chosen. Given its importance to the holding, this statement was controlling and not dictum. However, the Court in *St. James* declared that the rule was overbroad and that the Restatement rule may be applicable in certain situations.

Next, the Court considered the policy reasons for and against adoption of the Restatement rule and found that the Restatement rule struck an appropriate balance between the property rights of each party to the easement. The Court, citing a comment to the relevant Restatement section,

also noted the rule's potential to "increase overall utility." Further, the rule's benefits, the Court continued, would outweigh its disadvantages, including the potential for increase in litigation. The Court addressed other concerns as well, including a reduced certainty of property rights for dominant estate owners and the possibility of denying them the benefit of their bargain, stating that only reasonable changes would be permitted and the purpose for the easement would continue to govern its use. Moreover, noting that state law traditionally promoted fixed property rights and strictly construed express easements, the Court suggested that the Restatement rule appropriately permitted development of the servient land without trammeling the rights of the dominant estate owner.

Finally, the Court addressed the application of the Restatement rule in the factual circumstances presented. Over St. James's arguments that the Cunninghams' reading of the Restatement section would make its language inconsistent and that a deed must expressly prohibit unilateral relocation for such a ban to be effective, the Court held that the prefatory language of Restatement (Third) of Property § 4.8 states that the rule will only apply if the deed is silent as to location and dimensions. This reading, the Court noted, comports with the language's plain meaning and the majority of other jurisdictions' holdings. Thus, because the deed governing the Cunninghams' easement set forth the parcel's metes and bounds, indicating an intent to specify the easement's location, the Restatement rule is inapplicable and St. James may not unilaterally relocate the easement.

8. **First American Title Ins. Co. v XWarehouse Lending Corp., 177 CA4th 106, 98 CR3d 801 (California Court of Appeal, Aug. 28, 2009). (title insurance – fraudulent mortgage loans – successors). RB**

Access Lending Corporation warehoused real estate mortgage loans between the time of their origination and their later sale in the secondary mortgage market. Its agreement with CHL provided for the loans to be assigned to it and later repurchased by CHL when a secondary market sale was ready to close. Funds were to be transmitted from Access directly to the closing agent on behalf of CHL after Access had verified possession of the closing documents by the closing agent and the mortgage documents were to be sent to Access within 3 business days of closing. The funds were thereafter often released directly to CHL, for it to refinance the borrowers' existing loans. First American issued title policies on these loans, naming CHL as insured. Because many of these loans were entirely fraudulent – CHL having forged the borrowers' names and pocketed the funds itself, the ostensible borrowers refused to pay and challenged Access' foreclosure proceedings against them. Access tendered its defense of these claims to First American, who refused to accept it, which led to this litigation. The trial court granted summary judgment for First American, holding that Access was not an insured and thus was not entitled to coverage under the policies. The court of appeal affirmed.

The policies named CHL as the insured but also defined the insured (and its successors) as the owner of the indebtedness secured by the mortgage. Access argued that this definition covered the fund transfers made by it through escrow to CHL but the court rejected that concept. The term "indebtedness" reasonably can only refer to the obligation reflected in the "insured mortgage", defined in the deed of trust as the indebtedness from the borrower to CHL, which in these cases did not exist. Access could not claim to be a successor to CHL under the policy as

there was no valid underlying indebtedness. Access's losses were not sustained or incurred by reason of the invalidity or unenforceability of the lien, but rather by the absence of any existing indebtedness between CHL and the borrowers. Access's losses were not recoverable under the policies because they were not caused by any defect in the title or in the mortgage liens. The losses were rather due to the failure of the indebtedness between the named borrowers caused by CHL.

In a related case, decided by a different district of the court of appeal (but unpublished), another lender defrauded by CHL failed, for similar reasons, to recover from either its title insurer or the escrow agents who had handled the transactions. Gateway Bank v. Ticor Title Company, 2009 WL 4190455.

9. **Investec Bank (Australia) Limited v Glodale Pty Ltd & Ors [2009] VSCA 97, http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2009/97.html (Supreme Court of Victoria, Court of Appeal, 14 May 2009) (mortgage – mortgagee's duty in exercising power of sale – sale at market value). PB**

Investec ('the Bank'), as mortgagee in possession, sold by tender two holiday apartment blocks owned by Glodale. At trial in the Supreme Court of Victoria, Glodale argued that the Bank had failed to take reasonable care to ensure that the properties were sold at market value, pursuant to a statutory duty to do so (Property Law Act 1992 (Qld), s 85, and Corporations Act 2001 (Cth), s 420A). The Trial Judge gave judgment against the Bank, finding particular faults with the sale process, specifically the appointment of valuers who were in one state (Victoria) while the properties were situated in another (Queensland), although it was further held that the method of sale chosen ('in one line' (the properties were sold together) rather than 'gross realisation' (selling each property individually)), which resulted in a lower sale price, did not constitute a breach. The Trial Judge held the bank liable to pay damages to Glodale assessed at $2,714,250 and, on the Bank's counterclaim, that Glodale pay $462,544 plus interest pursuant to the loan agreement. The Bank appealed, arguing that it had taken reasonable care.

The Court of Appeal held that the duty to take reasonable care to ensure a sale at market value relates to the acts which are to be done, not to the appointment of a person to do them. Thus, a sale below the estimated market value of the property does not of itself mean that the duty to take reasonable care has not been satisfied. Rather, the question to be answered is whether the process utilised to effect the sale of the property for market value was undertaken with reasonable care. In determining breach, the court looks at the process that has been conducted in selling that property and whether, in the course of that process, all reasonable care to sell the property for not less than its market value has been taken. A range of matters must be taken into account. While the fact that the sale is by a mortgagee is a relevant consideration in determining whether reasonable care has been taken in all the circumstances, the statutory duty does not detract from the common law principle that the mortgagee may sell at the time chosen and does not have to wait until a time when a better price may be obtained. In this case, notwithstanding that this was an 'in one line' sale, once it was accepted that the relevant market was separate and distinct from that in which the Bank operated, there was an obligation cast upon the Bank and its agents to give consideration to the engagement of an agent from the market in which the property

was located. As no such consideration was given, the Trial Judge correctly decided that reasonable care had not been undertaken by the Bank in ensuring that market value was obtained.

The Trial Judge was correct, though, in concluding that it was open to the Bank to sell in one line provided that the circumstances demonstrated that such a course was reasonable. This is particularly so given the finding that the loan was in default, debt was increasing rapidly and there had been a failed attempt to sell the properties. A relevant consideration, unquestionably, was the significant increase in interest (in excess of $100,000 per month) with no evidence of the loan or the ongoing payments of interest being repaid absent a prompt sale.

Having established a breach of the duty, and in the absence of statutory guidance and in all of the circumstances, the Trial Judge was correct to order an award of damages rather than a taking of accounts.

10. Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. v Love Funding, 591 F3d 116, Second Circuit Court of Appeals, January 11, 2010. (Secondary market – conduit lending -- champerty). RB

Love Funding made a $6.4 million loan to Cyrus, secured by a mortgage on Louisiana property. Pursuant to Master Purchase Agreements (MPA), the loan was first transferred to PaineWebber (later USB), retransferred to Merrill Lynch, and then to the Merrill Lynch Trust, whereupon commercial mortgage backed securities were issued and sold to investors. The loan went into default, the Trust foreclosed and obtained a fraud judgment against Cyrus for $10 million. The Trust then sued PaineWebber under its MPA and settled its cause of action on this loan by taking an assignment of PaineWebber's rights against Love under its MPA. The Trust then brought this action against Love for breach of that MPA but the District Court accepted Love's defense of champerty, declaring that the Trust had impermissibly taken the assignment from PaineWebber merely to buy a lawsuit.

PaineWebber appealed and the Second Circuit Court of Appeals certified to the New York Court of Appeals the validity of its champerty defense. The state court responded by holding that an assignee's acquiring a cause of action in order to protect an independent right it held did not constitute champerty. Since the Trust had a pre-existing proprietary interest in the loan, it's taking an assignment of PaineWebber's rights under its MPA did not violate the New York champerty statute, even if the motivation was to recover a larger amount than would have otherwise obtained by a cash settlement with PaineWebber. Therefore the Trust was entitled to recover from Love under its indemnification agreement in the PaineWebber MPA.

11. Matter of Goldstein v. New York Urban Development Corporation, 13 N.Y.3d 511 (N.Y. 2009). In deciding the state-law counterpart of the contentious Atlantic Yards case, the New York Court of Appeals held that Eminent Domain Procedure Law § 207(A)'s timing provision is subject to tolling under C.P.L.R. 205(a) and that the condemnation did not violate certain provisions of the New York State Constitution. PF

This case concerns privately-owned land in Brooklyn sought to be condemned to make way for a development that would include, among other features, a sports area and commercial and residential buildings. 13 N.Y.3d at 517. Petitioners previously challenged the condemnation determination in federal court on Fifth Amendment grounds. *Id.* at 518-19. Although petitioners also asserted a state law claim in that action, the federal District Court "declined to exercise its supplemental jurisdiction" over it. *Id.* at 518 (citation omitted). After the Court of Appeals for the Second Circuit affirmed dismissal of petitioners' federal claims, they filed a petition with the Appellate Division in New York state court. *Id.* at 518-19. When the Appellate Division held for respondents, petitioners appealed. *Id.* at 519.

The Court of Appeals was charged with determining whether the exercise of eminent domain power under the present facts would comport with the New York State Constitution. *Id.* at 517. Resolving this question required decision on three specific issues. First, the Court, in an opinion by Chief Judge Lippman, addressed a timeliness challenge. *Id.* at 519-22. Second, the Court was tasked with determining whether the condemnation would violate Article I, § 7(a) of the state constitution. *Id.* at 519, 523-28. Third, the Court discussed whether the project would violate Article XVIII, § 6 of the state constitution. *Id.* at 519, 528-30. The Court concluded by affirming the Appellate Division's decision in favor of respondents. *Id.* at 530.

As to the timeliness of filing issue, the Court recognized that the state's Eminent Domain Procedure Law requires that a challenge to a condemnation determination be filed "within thirty days following the determination's completion and publication." *Id.* at 520. The Court, however, also recognized that the Civil Practice Law and Rules typically apply in such proceedings, and found that "CPLR 205(a) effectively tolls the running of a statutory period to permit refiling within six months when an action" was initially commenced in a timely fashion and was not dismissed on one of the grounds enumerated in the rule. *Id.* The federal dismissal—or decision not to exercise supplemental jurisdiction—did not fall into any of the listed categories and indeed "the dismissal explicitly contemplated the refiling of the state law claim in state court." *Id.* The Petitioners did refile within six months. *Id.*

The Court rejected an argument that the special time limit in the Eminent Domain Procedure Law precluded application of N.Y. C.P.L.R. 205(a), noting that the tolling provision has a remedial purpose and should be construed broadly. *Id.* at 520-21. The Court likewise rejected a policy-based argument that condemnation proceedings and challenges thereto are to be handled expeditiously. *Id.* at 521. All statutes of limitation, the Court suggested, indicate a policy-grounded preference for "expeditious resolution" in "certain kinds of cases." *Id.* Accordingly, such policies cannot justify denying "the remedial benefit of CPLR 205(a)" and its "'vitally important' policy preference for the determination of actions on the merits," even where the result is a substantial tolling of a "designedly brief limitations period." *Id.* (citations omitted). Finally, the Court determined that the timing provision in N.Y. Em. Dom. Proc. Law § 207(A) was not a condition precedent to suit, or a "substantive component of the claim rather than a limitation on the availability of a remedy," which would preclude the application of tolling provisions such as that in N.Y. C.P.L.R. 205(a). *Id.* at 521-23.

Addressing the concerns of the concurrence that "failure to bar this proceeding because it was not commenced within 30 days . . . will impair the Legislature's comprehensive plan for prompt adjudication" of condemnation determinations, the Court suggested that the "availability of a federal forum" and certain federal law—i.e., matters outside the power of the state legislature—provided the reason for the delay, rather than N.Y. C.P.L.R. 205(a). *Id.* at 522. Moreover, the Court stated that the concurrence "overstated" the possibility of "serial federal/state litigation in condemnation proceedings" and suggested that "resort to the federal courts to litigate state condemnation challenges will be as rare subsequent to our decision as it had been before." *Id.* at 522-23.

After determining that the claim was not time-barred, the Court considered petitioners' argument that the condemnation was unconstitutional because it was not for "public use," as required by Article I, § 7(a) of the state constitution. *Id.* at 523-24. The Court interpreted petitioners' argument as advocating for a narrow conception of "public use," under which condemnation is constitutionally permissible only if the land "will actually be made available for public use," so that, with rare exceptions, a "public purpose" is insufficient. *Id.* The Court, citing *Matter of New York City Hous. Auth. v. Muller*, 270 N.Y. 333 (1936), rejected this cabined view of public use, but found that, even under such a standard, "the removal of urban blight" would pass constitutional muster. 13 N.Y.3d at 524 & n.3. Further, the Legislature had the authority to engage in "clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas" and may delegate its eminent domain power to a "public corporation," here, the Empire State Development Corporation. *Id.* at 524 (citing New York State Constitution, Article XVIII, §§ 1, 2) (internal quotations omitted). The latter seeks to use its power to accomplish the constitutionally-sanctioned end of "rehabilitating a blighted area." *Id.*

Over petitioners' objection that the area is not blighted, the Court suggested that the requisite blight conditions are more broadly defined and need not approach "the dire circumstances of urban slum dwelling described by the *Muller* court in 1936, and which prompted the adoption of article XVIII at the State Constitutional Convention two years later." *Id.* at 524-26 (citation omitted). In any event, however, the Court expressed deference to the Legislature and, in turn, to the designated administrative agencies, on the "precise content" and definition of the terms. *Id.* at 526. The judiciary may opine as to the "adequacy" of the claimed public purpose only when "there is no room for reasonable difference of opinion as to whether an area is blighted." *Id.* That is not the case here. *Id.* Further, even if the standard for blight is currently too low, reform would be a matter for the Legislature. *Id.* at 526-27. The Court also disagreed with the dissent that enough remains of the notion of "public use" to justify a contrary decision and again referred to the constitutionally broad power of the government "to take and clear substandard and insanitary areas for redevelopment" to the exclusion of a judicial role. *Id.* at 527.

The Court did, however, leave the door open to intervening on "public use grounds" in an extreme case where "it would be irrational and baseless to call [an area] substandard or insanitary." *Id.* at 527 (citing *Kaskel v. Impellitteri*, 306 N.Y. 73, 80 (1953)) (internal quotations omitted). The instant facts posed no such case, as the only issue was "a reasonable difference of opinion" on the question of blight. *Id.* at 527-28.

In dissent, Judge Smith maintained that the majority was unduly deferential to the administrative determination of blight and that the Court should have held that the condemnation was not, in fact, for a public use. *Id.* at 551-53 (Smith, J., dissenting).

12. In re Parminder Kaur v. New York State Urban Development Corporation, 892 N.Y.S. 2d 8 (App. Div. Dec. 3, 2009) (The dissent in *Kelo v. City of New London* vindicated -- the taking of property in the Manhattanville area of West Harlem for the development of a new campus for Columbia University was held to violate the Takings Clause of the U.S. Constitution). CNB

The *Kaur* decision is an important recent case striking down an attempted exercise of the power of eminent domain to acquire land for Columbia University. The case was decided one week after The New York Court of Appeals decided *Goldstein v. New York State Urban Dev. Corp*. (Nov. 24, 2009) which is presented by Professor Franzese. Together, these cases lend important insight into the certainty or lack of certainty regarding New York state's eminent domain law.

In a four to one decision, the New York Supreme Court, Appellate Division (First Department) held that the exercise of the power of eminent domain by the New York State Urban Development Corporation d/b/a Empire State Development Corporation (ESDC) to acquire property in the Manhattanville area of West Harlem (Project Site Area) to benefit Columbia University (Columbia) violated the Takings Clause of the United States Constitution as well as provisions of the New York State Constitution. Several issues were before the court. The principal issue for purposes of this summary is the *Kelo v. City of New London* issue – whether the proposed acquisition served sufficient public uses, benefits or purposes. *Id.* at 15. Petitioners owned property within the Project Site Area that was subject to condemnation. They alleged that the expansion of a private university did not justify the use of eminent domain as it was neither a "'civic project'" nor did the project have a sufficiently public use or benefit. *Id.* at 15-16. The Urban Development Corporation Act (UDCA) defines a "'civi[c] project'" as one "'intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes.'"*Id.* at 16. Also, under the UDCA, the ESDC is authorized to acquire property by eminent domain if the property is blighted. *Id.* at 20.

Columbia sought to acquire nearly seventeen acres in the Project Site Area by voluntary transfer and condemnation for the development of a new campus. Beginning in 2001, Columbia and the New York City Economic Development Corporation (EDC) began working together to redevelop the West Harlem area. The EDC issued a West Harlem Master Plan (the Plan) for the area. Data collected for the Plan indicated that a significant majority of the lots in the area (54 of 67) were in either fair, good, or very good condition. *Id.* at 12.

Columbia began purchasing property in the Project Site Area consistent with its expansion plans. By 2003, it owned 51 percent of the property in the Project Site Area; 33 percent was still privately owned. *Id.* In early March 2004, Columbia, ESDC and EDC began meeting regarding the condemnation plans. EDC issued a "'Blight Study'" in August 2004 which concluded that the Project Site Area was blighted. In September 2006, ESDC retained

Columbia's consulting firm to evaluate the conditions at the Project Site Area. *Id.* at 13. As a result, the Manhattanville Neighborhood Conditions Study (the Neighborhood Study) was issued in November 2007. According to the Neighborhood Study: (1) Columbia owned or had contracts to purchase 72 percent of the lots; (2) 51 percent of the lots were in poor or critical condition; (3) and the Project Site Area was "'substantially unsafe, unsanitary, substandard, and deteriorated.'" *Id.* at 13.

In December 2007, the City Council approved the rezoning of thirty-five acres of West Harlem, including the Project Site Area. Subsequently, ESDC retained Earth Tech, Inc. to study the Project Site Area. ESDC retained Earth Tech, Inc. in response to concerns about the neutrality of the entity retained to perform the Neighborhood Study. The Earth Tech, Inc. study was called the Manhattanville Neighborhood Conditions Study (Neighborhood Conditions Study). The Neighborhood Conditions Study was issued nearly six years after the EDC Plan and five years after Columbia had acquired a majority of the real estate in the Project Site Area. *Id.* at 14. The Neighborhood Conditions Study found: (1) that 55 percent of the sites were in poor or critical condition and (2) a "'long-standing lack of investor interest in the neighborhood. . . .'" *Id.* at 14.

The court applied *Kelo*, after acknowledging that *Kelo* did not concern an area that had been designated as blighted, and noted the ways in which the Columbia project was in contrast with the *Kelo* facts. First, Manhattanville was not depressed economically when Columbia, EDC and ESDC targeted the area for condemnation; rather the area was experiencing an economic renaissance. Second, EDC and ESDC did not produce a comprehensive plan for Manhattanville. Third, no public funds were committed to redevelop Manhattanville; Columbia underwrote all of the planning and study costs. Fourth, there were no competing plans for Manhattanville's redevelopment. *Id.* at 20.

Based upon these facts and the other items of record, and after applying *Kelo*, the court found that the ESDC's determination of blight was "mere sophistry" and that the entire plan was "nothing more than mere economic development wearing a different face." *Id.* at 16. The court noted that none of the record before ESDC contained a blight finding before Columbia gained control over the majority of the land in the Project Site Area. *Id.* at 20. The EDC's 2002 West Harlem Master Plan described the area as having great potential for development that could be aided by rezoning. *Id.* at 21. The court determined that, having committed to allowing Columbia to annex the Project Site Area, the EDC and ESDC "engineer[ed] a public purpose for a quintessentially private development: eradication of blight." *Id.* The court also observed that Columbia, to aid its own cause, allowed it properties in the Project Site Area to deteriorate. *Id.*

The court also rejected the claim that underutilization of the permitted floor area ratio to which lots were built supported a finding of blight. *Id.* at 22. In fact, the court stated that it was time to categorically reject eminent domain takings that were based solely upon findings of underutilization. *Id.* at 23.

Finally, the court found that there was no civic purpose to justify the exercise of eminent domain. *Id.* Acknowledging a lack of precedent on this issue, the court agreed with the petitioners that a private university did not constitute a facility for a "'civic project'" as defined by the UDCA. The court held that the NY Legislature had explicitly failed to grant civic purpose status to

private universities for purposes of eminent domain and noted that in this case, any public benefits were "incrementally incidental" to Columbia's private benefits. *Id.* at 24.

One justice dissented. He found that the blight argument was sufficient as a matter of law (that there was a sufficient public purpose) and that there was an insufficient showing of bad faith on the part of ESDC. He also rejected the majority's finding that the project did not qualify as a civic project.

13. Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272, [2009] HCA 8, http://www.austlii.edu.au/au/cases/cth/HCA/2009/8.html (High Court of Australia, 12 February 2009) (landlord & tenant – tenant's covenant – substantial alteration to premises without consent – reinstatement damages for breach). PB

Tabcorp ('the Tenant') leased commercial premises from Bowen ('the Landlord'). The lease contained a covenant, cl 2.13, forbidding the Tenant to alter the premises without the Landlord's prior written approval. After the Landlord expressly withheld its approval, the Tenant knowingly violated cl 2.13 by destroying an old foyer and attempting to install a new one. Of the several claims pursued by the Landlord against the Tenant in the Federal Court, the Trial Judge upheld only that for common law damages in relation to two breaches by the Tenant of cl 2.13: the destruction of the old foyer and the construction of a new one. Having found that the Tenant acted with 'contumelious disregard' of the requirement to obtain the Landlord's approval, the Trial Judge gave judgment for the Landlord in the sum of $34,820, most of which constituted the difference between the value of the property with the old foyer and the value of the property with the new foyer. The Full Court increased the judgment to $1.38m, comprising $580,000 as the cost of restoring the foyer to its original condition and $800,000 for loss of rent while that restoration was taking place. The Tenant appealed, seeking restoration of the Trial Judge's figure. The High Court dismissed the appeal.

The High Court held that cl 2.13 was an express negative covenant providing the Landlord the capacity, in the form of an interlocutory negative injunction, to preserve the physical character of the premises leased. While an injunction was not possible due to the Tenant's clandestine action, that did not detract from that aspect of cl 2.13 in assessing damages for breach. The 'ruling principle' was stated as follows: A party who sustains a loss by reason of a breach of contract is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. This does not mean merely the same financial situation; rather, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the same situation as if the contract had been performed.

The present case is an exception to the ruling principle. As such, because the Landlord was contractually entitled to the preservation of the premises without alterations not consented to, its measure of damages was the loss sustained by the failure of the Tenant to perform that obligation, and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached (reinstatement damages). In order to secure

the benefit of the covenant in cl 2.13 to the Landlord, it was necessary that reinstatement damages be paid, and it was not unreasonable for the Landlord to insist on their payment.

14. Butcher v. Beatty, 2010 WL 987048 (Ark. 2010) (tenancy by the entirety – termination by agreement to sell). JVO

Husband and wife held rental property as tenants by the entirety. Wife became incompetent and a guardian was appointed. Husband initiated divorce proceedings. Husband and the wife's guardian agreed to dissolve the tenancy by the entirety and vest sole title in the wife in return for payment by the husband to the wife of one-half the appraised value of the property. The wife's guardian executed the deed dissolving the tenancy by the entirety, but before the husband could execute the deed – and before the divorce proceedings resulted in a final decree – the husband died.

The personal representative of husband's estate sought specific performance of the agreement, that is, payment by the guardian of the agreed sum. Although specific performance was decreed by the court of first instance and the decree was affirmed by the intermediate appellate court, the Arkansas Supreme Court reversed. At the time of the husband's death, the tenancy by the entirety had not been dissolved by deed or by operation of law on divorce. Thus the wife became sole owner by right of survivorship. Specific performance was not appropriate because performance by the husband of his promise had become impossible.

Without expressly saying so, this decision seems to answer the question of what is required to sever a tenancy by the entirety: an act that terminates a husband and wife's legal title. The doctrine of equitable conversion provides that equitable title passes on the execution of a specifically enforceable contract for the sale of land. In this case, the contract was no longer specifically enforceable at the time for performance. Left to be answered in another case is the question of when a married couple's tenancy by the entirety is terminated if they jointly execute a contract for the sale of the property: Is it at the date of the contract? Or, is it at the closing, when the legal title is delivered? The answer would determine how to divide the sale proceeds if one of the spouses died between contract and closing.

15. St. Louis Union Station, Inc. v. The Discovery Channel, Inc., 301 S.W.3d 549 (Dec. 15, 2009) (appeals court affirms the trial court and holds that the statute of frauds does not apply to a motion to enforce the settlement of a lawsuit seeking only monetary damages). CNB

The Discovery Channel was the tenant under a lease with St. Louis Union Station, Inc. (Union Station). The Discovery Channel defaulted under the lease in August 2007. Union Station filed a verified petition against The Discovery Channel seeking the payment of rent due under the lease in September 2007. Later that same month, representatives of the parties engaged in settlement discussions by e-mail. The relevant portion of the email conversation is as follows: [From Union Station's Representative to The Discovery Channel's broker]

> I am aware that you have had conversations with both my colleague, John Fee as well as our attorney, Michael Wolff representing St. Louis Union Station regarding the lease termination of Discovery Channel Store, and thus after most recently speaking with our ownership, our owner will agree to counter your previous offers with $220,000.00.

[From The Discovery Channel's broker to Union Station's Representative]

> Your lease termination counter offer of $220,000 "all inclusive and as is condition" is accepted for Discovery Channel St. Louis Union Station. Kindly prepare the lease termination agreement and e-mail it to me for processing and review by Discovery.

It seems that problems arose and in January 2008, The Discovery Channel filed a motion to enforce the settlement. The trial court entered an order and judgment granting The Discovery Channel's motion, enforcing the settlement agreement, and dismissing the cause of action. Union Station appealed the decision.

Union Station's first argument on appeal was that the court erred in enforcing the settlement agreement because the settlement agreement was barred by the statute of frauds. *Id.* at 5 – 6. It argued that because the statute of frauds was not satisfied, (there was no written lease termination that was signed by Union Station) there was no enforceable settlement or agreement.

The court held that the statute of frauds applies to lease termination agreements. But, according to the court, Union Station mischaracterized the agreement at issue. The court said the agreement that was the subject of appeal was the agreement to settle the lawsuit filed by Union Station against The Discovery Channel. The court noted that the lawsuit sought only monetary relief for breach of The Discovery Channel's lease agreement; it did not seek to modify or terminate the lease nor did it involve any dispute regarding modification of the lease. *Id.* at 7. The court concluded by stating that the statute of frauds does not apply to motions to enforce lawsuit settlements where only monetary relief is sought. Accordingly, The Discovery Channel was not required to satisfy the statute of frauds by establishing the existence of a written document signed by an agent of Union Station who was authorized to settle the lawsuit. *Id.* at 8.

The case leaves unanswered the question of whether the settlement of the monetary claim also terminated the lease. The answer to this question could be very important to a tenant if there is time remaining on a lease and the landlord can bring another lawsuit to collect further rent (especially if the landlord has no duty to mitigate and can leave the premise empty).

16. Lee v HSBC Bank, 218 P.3d 775 (Supreme Court of Hawaii, November 5, 2009) (Foreclosure sales – prior reinstatement – effect of void sale on high bidder). RB

On August 22, 2008 the mortgagors properly reinstated their defaulted $135,000 loan. However on August 26, the bank's servicing agents, unaware of the reinstatement, nonjudicially foreclosed and sold the property at auction to Lee for $302,000. Lee's down payment of $33,000 was accepted and he received a document saying that title would be conveyed to him on payment of the full amount, but the foreclosure servicing agents thereafter returned his check (together with an interest payment of $99) to him and asserted that the sale was void because of the mortgagors' previous reinstatement. Lee then brought this action for specific performance or damages because his bid had been accepted. His action was originally filed in state court and

then removed to federal court, whereupon the District Court certified to the Hawaii Supreme Court a question as to the validity of the foreclosure sale.

The Supreme Court held that pursuant to the Hawaii statutes authorizing nonjudicial sales under power of sale clauses in mortgages, a condition precedent is that there be a breach; there was a similar condition in the power of sale clause in this mortgage document. Thus, once the mortgagors had reinstated, the mortgagee could not invoke the power of sale clause, and the foreclosure sale was therefore void.

Although Hawaii statutes do not explicitly so hold, any contract for the purchase of the property at an invalid foreclosure sale is also void, given the purposes of the foreclosure laws. In reaching that conclusion, the court followed decisions by appellate courts in California, Oregon and Idaho, while rejecting a contrary decision by the District of Columbia Court of Appeals. Such a holding is unlikely to discourage competitive bidding at future foreclosure sales, given the rarity of the situation.

The court also held that, although generally a purchaser whose contract is breached may recover benefit of the bargain damages (the "American" rule) from the vendor, in this case the purchaser was entitled only to return of his down payment and interest on it.

17. Bank of Oklahoma v Red Arrow Marina, 224 P.3d 685, Oklahoma Supreme Court, Oct 31, 2009) (Foreclosure sales – deficiency judgments – guarantors – fraud). RB

The bank sued to foreclose its mortgage and also to recover damages from the borrower and its guarantor. Following a foreclosure decree the bank conducted seven sheriff sales before it was finally able to collect $280,000 on its $1.4 million loan. The sale was confirmed by the trial court but the bank did not move, within 90 days of the sale, as required by statute, for entry of a deficiency judgment. Because of that, the borrower and guarantor contended that they were absolved from any further liability to the bank. The Supreme Court of Oklahoma rejected their contention.

The bank's claim of liability for fraud against the mortgagor, guarantor and third parties is not barred by the fact that no deficiency judgment is now permitted. Fraud damages and deficiency liability are different remedies, with distinct measures of damages. The bank's recovery for fraud is to be calculated by the difference between the actual value of the mortgaged property and the value it would have had if it had been as represented at the time the loan was made, and such relief is not prohibited by the statutory bar on deficiency judgments.

With regard to the bank's claims against the guarantor, its failure to obtain a deficiency judgment against the mortgagor could exonerate a guarantor by virtue of the Oklahoma statutory scheme that regulates guarantees (on the ground that the guarantor's recourse against the mortgagor had been impaired) but such defenses may be waived. A guarantee is to be interpreted in favor of the creditor and this one provided, among other things, that the bank could delay or forgo all rights without thereby losing or impairing them. A guarantor may - unlike a mortgagor - waive his rights, as was done here.

The decision appears to have been rendered by the court on a 6-3 vote, although no concurring or dissenting opinion was published.

18. Boss & Ors v Hamilton Island Enterprises Ltd [2009] QCA 229, http://www.austlii.edu.au/au/cases/qld/QCA/2009/229.html (Supreme Court of Queensland, Court of Appeal, 11 August 2009) (landlord & tenant – covenants – consent to assign or sublet). PB

Hamilton ('HIE'), which held a Perpetual Country Lease over the whole of Hamilton Island, granted Harrison a sub-lease, which sub-lease was assigned, following Harrison's death, to the trustees of the estate, the first respondents, and subsequently replaced by a new sub-lease granted by HIE to the trustees on substantially the same terms. Clause 1.1(g) of the new sub-lease provided that it was assignable with the consent of HIE, with such consent not to be arbitrarily or capriciously withheld in the case of an assignment to a respectable person acceptable to the Minister for Lands (the lessor of the Perpetual Country Lease), entitled to hold the sub-lease, and financially sound. The Property Law Act 1974 (Qld), sub-s 121(1)(a)(i), further provided that such consent was not to be unreasonably withheld. The trustees entered a contract to sell to Northaust, the second respondent, the sale being subject to HIE's consent to the assignment of the sub-lease, which consent was given upon conditions. The contentious condition was that Northaust execute a deed binding it to comply with an extensive set of regulations allowing HIE to govern the conduct of residents and others present on the island ('HIE's regulations'). Northaust was not prepared to execute the deed and HIE therefore refused to consent to the assignment. In proceedings brought by the trustees in the Queensland Supreme Court, Trial Division, the Trial Judge declared HIE's withholding of consent unreasonable within the meaning of the Property Law Act 1974 (Qld) and that the trustees were entitled to assign the sub-lease to Northaust without HIE's consent. Subsequently the trustees did assign the lease. The Minister for Lands consented to the transfer, which was registered under the Land Act 1994 (Qld). HIE appealed, seeking an order that Northaust reconvey the sub-lease to the trustees.

The Court of Appeal held that the natural meaning of clause 1.1(g) was that even where the proposed assignee was acceptable to the Minister, financially sound and respectable, the sub-lessor is entitled to withhold approval, provided that its withholding is not arbitrary or capricious. The Court of Appeal held that the Trial Judge was correct in concluding that the clause was not violated.

In respect of sub-s 121(1)(a)(i), however, the Court of Appeal held that the reasonableness of the lessor's refusal of consent be considered in relation to the particular assignment—ultimately a question of fact upon which HIE failed to demonstrate any error in the Trial Judge's findings. Rather, the Trial Judge was correct in finding that HIE's withholding of consent was unreasonable because HIE's regulations would impose obligations upon the sub-lessee which substantially eroded the rights under the sub-lease, including by requiring that any building or further development be only as HIE permitted and by permitting HIE to refuse entry to the sub-lessees' invitees or to have them removed from the island. HIE imposed the condition not because of any characteristic of Northaust but because HIE believed that it was in its own

interests to impose the condition in all cases and regardless of any assignee's personal characteristics. Nothing in the agreement for a sub-lease originally concluded between HIE and Harrison affected this outcome; rather, it depended only upon the proper construction of the terms of the sub-lease which, the Court of Appeal held, contained nothing that would restrict building and further development as contained in HIE's regulations.

The Court of Appeal also held that in withholding consent HIE was not merely 'upholding the status quo and preserving the existing contractual arrangements' but, rather, seeking to put into effect an entirely new and very extensive contractual regime which was well outside the contemplation of the sub-lease. In those circumstances, what in substance would be assigned would not be the sub-lease, qualified only by covenants designed to overcome any potential disadvantage to HIE arising from the manner in which Northaust might exploit the rights granted by the sub-lease, but the sub-lease so heavily qualified as to alter the legal effect of essential rights of the sub-lessee granted by the sub-lease. HIE sought to deprive the sub-lease of its assignability by insisting that every intended assignee first agree to vary the terms in a way that substantially affected the enjoyment of the land.

19. **Calemine v. Samuelson, 171 Cal. App. 4th 153 (Ca. Ct. App. 2009). In considering the question of how much information a home seller is required to reveal on a state mandated property disclosure statement, the Court of Appeal of California, Second District, held that a seller must disclose prior material litigation regarding flooding on the property. Summary judgment for defendant was reversed when the Court found that seller has a common law duty to disclose lawsuits affecting the value and desirability of the property and that non-disclosure of such lawsuits presents a triable issue of fact. PF**

Samuelson ("Defendant") purchased a three-story condominium unit in Woodland Hills 1983. He sold the unit to Calemine ("Plaintiff") in 2002 after owning it for almost 20 years. During that time, Defendant, along with several other condominium unit owners in the complex, experienced significant water damage in their units as a result of water coming into the lowest level of the unit. In 1986, he along with the other unit owners and the HOA sued the developer alleging construction defects, While the litigation was pending, the HOA hired a contractor ("Westar") to fix the damage.

Westar completed repairs to Defendant's unit in 1992. However, their work in other units was not successful and the HOA had to commence additional legal action against Westar. In 1998, the litigation against the developer was settled and the HOA received $410,000. When the settlement was received, another contractor was brought in to fix Westar's work. Defendant was on the HOA Board serving as Treasurer during the contractor negotiations and took the leading role in selecting the contractor and making sure the repairs were done properly.

In 2001, Defendant decided to sell his unit to Plaintiff and signed a real estate disclosure agreement in November of the same year. In the agreement, Defendant specifically mentioned flooding, drainage, and grading problems but he did not cite the lawsuits with the developer or contractor. Plaintiff's general home inspector who found evidence of prior water damage and

leakage and instructed Plaintiff to directly ask Defendant about these issues. Defendant was upfront about the water damage and repairs and stated that he had no problems since their initial repair.

Plaintiff bought the unit in 2002 and subsequently had flooding in 2005 and 2006. He brought suit against Defendant in 2005 asserting negligence, breach of contract, nuisance, misrepresentation and concealment. Both parties moved for summary judgment, but the trial court held for Defendant stating that Defendant made sufficient disclosures leaving no triable issue of fact.

The Court of Appeals reversed, citing *Shapiro v. Sutherland*, 64 Cal.App.4th 1534 (1998), which outlines the common law duty that the seller must reveal "facts materially affecting the value or desirability of the property. . . and also knows that such facts are not known to, or within the reach of diligent attention and observation of the buyer." Continuing, the Court stated, "Undisclosed facts are material if they would have a significant and measurable effect on market value."

The Court then went on to state that while California Civil Code Sections 2079 and 1102 require the seller to fill out the disclosure statement, they do not alter the common law. A seller is required to disclose if he or she is "aware of any significant defects/malfunctions" in slabs and walls and any "lawsuits by or against the Seller threatening to or affecting this real property." (Civ. Code, §1102.6.)

Defendant contends that the water damage was the only material fact that needed to be disclosed. The Court of Appeals disagreed, citing *Shapiro* again when they stated that in a real estate transaction, "whether the matter which was not disclosed was of sufficient materiality to have affected the value or desirability of the property is. . . a question of fact." Even though the details of a lawsuit affecting the property may not need to be disclosed, where seller has knowledge of its existence, the seller must disclose and then it is up to the buyer to assess the details of the litigation themselves.

While Defendant disclosed the water damage and the repairs, he left out the context under which they were made which would be seen as a "partial disclosure." 171 Cal. App. 4th at 165. Here, the Court found that the information could have had an impact on the buyer's decision and was therefore a material fact affecting the value and desirability of the property. Summary judgment for the Defendant was reversed and the case was remanded.

20. URI Student Senate, v. Town of Narragansett, __ F.Supp. 2d __, 2010 WL 785328 (D. R.I. Jan. 22, 2010) (court upholds "unruly gatherings" ordinance against facial due process, equal protection and First Amendment challenge by college students). CNB

The Plaintiffs are students, residential landlords, and the University of Rhode Island student government. The town of Narragansett (Defendant) enacted a nuisance ordinance that was targeted at "unruly gatherings" (the Ordinance). More specifically, the Ordinance was designed

to deter large gatherings of people, overcrowding, excessive traffic, noise, litter, public drunkenness, fights, underage drinking, and property abuse. The Defendant's town council blamed students, who occupy a significant portion of the 22 percent of the rental units in the town during the school year, for sponsoring rowdy parties that encourage lawbreaking conduct such as fighting and underage drinking. *Id.* at 2.

The Ordinance defines a public nuisance as a gathering of five or more persons on private property which is conducted in such a manner as to result in a substantial disturbance of the quiet enjoyment of public or private property as a result of conduct that constitutes a violation of law. *Id.* at 3. The police may intervene in such instances and when they intervene, the police are required to post a notice on the property stating that their intervention was necessitated by the public nuisance occurring on the property. *Id.* at 3-4. The Ordinance requires the notice to remain posted in a prominent location on the property for a period of time as set forth in the Ordinance. Residents and owners of the property, guests who cause the nuisance, and sponsors of the gathering are jointly and severally liable under the Ordinance. *Id.* at 3-4.

The Plaintiffs brought a facial challenge against the Ordinance. In their complaint, the Plaintiffs alleged that the Ordinance: (1) violates their substantive due process rights under the Fourteenth Amendment; (2) violates their due process rights under the Fourteenth Amendment for undue vagueness; (3) violates their First Amendment rights because it is overbroad; (4) deprives them of procedural due process under the Fourteenth Amendment because orange notice stickers can be posted on property where a nuisance has occurred without a hearing; (5) deprives them of equal protection under the Fourteenth Amendment; and (6) is preempted by the Rhode Island Landlord-Tenant Act.

The parties filed cross-motions for summary judgment. The court concluded that the Ordinance was constitutional on its face:

Allegations One and Two: The court held that the Plaintiff's substantive due process claims were baseless. The Plaintiffs alleged that the ordinance targeted their fundamental rights of privacy and association; the court rejected this argument. The court held that the Ordinance did not target constitutionally protected privacy or association rights; rather, it targeted nuisances at gatherings of five people or more that are caused by some type of underlying misdemeanor. Moreover, the court held that the void-for vagueness argument failed because the Ordinance provided "sufficient guidance to satisfy requirements of due process." *Id.* at 12. According to the court, in cases such as this where the law does not affect protected conduct, to prevail, a Plaintiff "'must demonstrate that the law is impermissibly vague in all of its applications.'" *Id.* at 14.

Allegation Three: The Plaintiffs alleged the Ordinance was over-inclusive because the Ordinance punishes individuals who have not committed a crime but have simply been present at, or associated with an event. The court stated that to invalidate the Ordinance because of overbreadth, the Plaintiffs would have to demonstrate that "'the impermissible applications of the law' [are] 'substantial when judged in relation to [its] plainly legitimate sweep.'" *Id.* at 21. The court concluded that the Ordinance did not reach a "'substantial'" amount of constitutionally protected activity or conduct. As a result, there was no problem with overbreadth.

Allegation Four: The Plaintiffs argued that because the orange stickers could be placed on property without a hearing or opportunity to challenge the posting, the Ordinance violated their procedural due process rights under the Fourteenth Amendment. This claim focused on the stigmatizing effect of the posting, maligned reputations of owners and residents, and censures placed upon students and property owners after receiving an orange sticker such as academic discipline, suspension from the school hockey team, evictions from apartments and inability to rent apartments. *Id.* at 27. The court found that the Plaintiffs did not identify "a specific 'liberty' or 'property' interest harmed by the enactment." *Id.* at 23. The court noted that to prevail in a defamation action against state officials, the Plaintiffs would have to demonstrate "'stigma-plus'" which is a standard that requires the Plaintiffs to show, in addition to stigma, that "'a government actor adversely impact[ed] a right or status previously enjoyed under state law.'" *Id.* at 24. The Plaintiffs failed to meet the stigma-plus standard, in part, because the claimed harms involved third parties (the university, prospective tenants, and landlords) who were distinct from the Defendant. *Id.* at 27. The court was concerned about the impact of improperly placed stickers, especially if they were permanent. The court noted that under these facts, the Plaintiffs might have a viable takings claim; however, the action was not pled as a takings case and the court refused to import per-se takings rules into the due process analysis. *Id.* at 39.

Allegation Five: The Plaintiffs cited to what they termed "evidence of anti-student animus" and alleged that the Ordinance violated their equal protection rights. *Id.* at 40-41. The court stated that the Ordinance was equally enforceable against students and non-students, seasonal renters and permanent homeowners. The court applied rational basis review and denied the Plaintiff's rational basis claim.

Allegation Six: Finally, the Plaintiffs asserted that the Ordinance was preempted by the Rhode Island Residential Landlord and Tenant Act. The court said the Plaintiffs had to prove either that the Ordinance conflicted with the Act or that the state legislature intended the Act to completely regulate in this field. The court held that the Plaintiffs failed to meet their burden.

APPENDIX

The Australian Court System: A Brief Introduction
By Paul Babie

Australia is a federal entity; as such, its court structure is not unlike that found in the United States. Australia consists of six states—New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia—and two federal territories—Australian Capital Territory and Northern Territory. Each state and territory has its own judicial hierarchy, inherited from their colonial origins. The colonial forebears of the states and territories had superior courts with plenary original jurisdiction over all matters of common law and equity. At Federation under the Australian Constitution in 1901, each state and territory inherited that court structure and its jurisdiction. Over the last century, each state and territory has gained substantial federal jurisdiction over matters referred to them by the federal government pursuant to the Constitution.

To take one state, South Australia (my home state), as an example, the court hierarchy begins with a range of administrative tribunals and inferior courts of limited jurisdiction—The District and Magistrate's Courts. Appeals, both *de novo* and as to matters of law, are available from these tribunals and courts to the South Australian Supreme Court, a superior court of plenary jurisdiction which is the highest court in the state. Its jurisdiction can be divided very roughly as follows: original jurisdiction in most matters of common law, equity and state law, original jurisdiction in those federal matters referred to it, and plenary appellate jurisdiction. When exercising its original jurisdiction, the court is styled the 'Supreme Court of South Australia' and one judge sits to hear such matters. When exercising appellate jurisdiction, it is styled the 'Full Court of the Supreme Court of South Australia' and three or, exceptionally, five judges sit. It is important to note that the Supreme Court's judicial personnel is common; any of the judges of the Court may sit either as a sole judge exercising original jurisdiction or as a member of a panel of the Full Court (although the same judge will never sit at both trial and on appeal). In some Australian States, there exists a separate superior court, with its own judicial personnel, such as the New South Wales Supreme Court, and a superior appellate court, with its own judicial personnel, such as the New South Wales Court of Appeal. By way of comparison, the South Australian Supreme Court sitting in original trial jurisdiction is an Australian equivalent to an American superior court such as the California superior courts, for example, while the Full Court is an Australian equivalent to an amalgam of state appellate courts, such as the California Courts of Appeal and the California Supreme Court.

The Constitution allows the federal government to establish superior and inferior courts of limited jurisdiction as it deems necessary. The federal government has shown itself reluctant to do so over the course of Australia's history, preferring instead to refer federal jurisdiction in a range of matters to the state or territory judicial systems. Still, the federal government has established two superior courts of limited jurisdiction—the Federal Court and the Family Court—and one inferior court of limited jurisdiction—the Federal Magistrate's Court. The Federal Court is structured much like the South Australian Supreme Court. Thus, the Federal Court has a common judicial personnel—when a sole judge of the Federal Court exercises limited original jurisdiction, the court is known as the 'Federal Court', while a panel of three or five judges exercising appellate jurisdiction is styled the 'Federal Court Full Court'. The former is the Australian equivalent to the United States District Courts while the latter are the Australian equivalent of the United States Circuit Courts of Appeal.

Above both court hierarchies, the state and territory and the federal, sits the High Court of Australia, which enjoys some original jurisdiction granted it by the Constitution, and is the final court of appeal for Australia in all matters of common law, equity, state and federal. The High Court is the Australian equivalent of the United States Supreme Court.