

2009

Holladay Towne Center, L.L.C., v. Brown Family Holdings, L.C., a Utah limited liability company : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,

Plaintiff/Appellant and Cross-Appellee,
Petitioner,

vs.

BROWN FAMILY HOLDINGS, L.C., a
Utah limited liability company,

Defendant/Appellee and Cross-Appellant,
Respondent.

Case No. 20090050-SC

BRIEF OF APPELLEE

On Certiorari to the Utah Court of Appeals

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PARTIES TO THE PROCEEDING

The following are the only parties to this appeal:

1. Defendant and Respondent Brown Family Holdings, L.C.
2. Plaintiff and Petitioner Holladay Towne Center, L.L.C.

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STATEMENT OF JURISDICTION

Jurisdiction is proper before the Utah Supreme Court in this case under Utah Code § 78A-3-102(3)(a).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUE #1: Whether the Court of Appeals erred in holding that under a lease designed to secure a dependable retirement income to the Brown family; that obligates the Tenant to pay rent each month “without offset;” that consistently requires that “the amount of annual rent will be paid without offset and that tenant will pay all imposition and cost relating to the property *so that the Landlord has no cost or expense relating to the property during the term or an extension of the lease*” and which entitled the tenant to contest any covenant, restriction or condition “now or hereafter of record,” so long as it did so at “its own expense,” the Tenant had a duty not to embroil the Landlord in a costly dispute over a chimerical easement.

Standard of Review: This question is a mixed question of fact and law which this Court reviews for clear error and correctness, respectively. Vial v. Provo City, 2009 UT App 122, ¶ 10, 210 P.3d 947.

ISSUE #2: Whether a long term lease, with an option to purchase, may confer legal standing on a tenant to litigate property rights originally possessed by a landlord.

Standard of Review: This question is a question of law which is determined by this Court under a correctness standard. Mellor v. Wasatch Crest Mut. Ins. Co., 2009 UT 5, ¶ 7, 201 P.3d 1004.

CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no applicable constitutional or statutory provisions involved in this appeal.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner Holladay Towne Center, L.L.C., (“HTC”) is the tenant under a long term lease agreement (“Ground Lease”) with an option to purchase entered into between HTC and Brown Family Holdings, L.C. (“Brown”). HTC brought this action claiming that Brown breached the Ground Lease by refusing to pursue a quiet title action against a person unknown to either party, who had never asserted an easement over the leased property, where an easement was not visible on the ground, and where the supposed easement was never recorded against the property.

In granting Certiorari, this Court delineated two issues:

1. Whether the court of appeals erred in holding the lease at issue in this case encompassed any subsequently discovered potential encumbrances and assigned the responsibility for legally resolving them to the tenant Petitioner.
2. Whether a lease may confer legal standing on a tenant to litigate property rights originally possessed by a landlord.

See, Supreme Court Order granting Certiorari, attached as Addendum C to Appellant’s Brief. Significantly, whether there is an easement on Lot 27 is not among the issues for which Petitioner sought for or was granted Certiorari review. Yet, in the relief sought, Petitioner asks this Court to:

...reverse the decision of the Utah Court of Appeals and remand this matter with instructions for the trial court to enter a judgment determining the easement to be an encumbrance on Brown's fee simple ownership that Brown is required to remedy in order to comply with representations made in the Lease as to the quality of title held.

See, Appellant's Brief, p. 29.

Petitioner no doubt senses that success on any of the issues for which it sought Certiorari review would be only a Pyrrhic victory since a remand on either of those issues would result in reinstatement of the judgment below on the Trial Court's alternative ground that there is no easement on Lot 27. The linchpin of every argument made by HTC is the false assumption that there is an easement across Lot 27. Put this fact away and all of HTC's arguments fail. Unfortunately for HTC, the Trial Court did exactly that. The Trial Court specifically found that "[t]here is no easement on lot 27. There is no evidence of an easement on the ground and to the extent that an easement purporting to affect lot 27 is recorded against lot 26, that easement is void because it was not recorded against lot 27." R. at 827, Conclusions of Law, ¶ 1. It further found that "Because there is no easement affecting lot 27, there is no basis for HTC's claims against the defendant and this action should not have been brought against the landlord, causing the landlord to incur costs." R. at 827, Conclusions of Law, ¶ 2. These findings by the Trial Court are not at issue on this petition for review. The effect of this unchallenged fact is obvious. Brown cannot have breached the Ground Lease by refusing to bring a quiet title action with regard to an easement that does not exist under Utah law. Similarly, the question of standing becomes academic when there is no easement to challenge.

Petitioner should have been more honest in its petition for Writ of Certiorari and asked this Court to review the issue of whether there was an easement across Lot 27 rather than trying to get the Trial Court's decision on this central issue reversed through the back door.

Petitioner's failure to be completely candid in what it was requesting this Court to do in its Petition for Certiorari leads to another difficulty for this Court. That is, the Court is being asked to render what is essentially an advisory opinion. This Court's "settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us." Summit Water Distribution Co. v. Summit County, 123 P.3d 437, 452 (Utah 2005), citing, Savage v. Utah Youth Vill., 2004 UT 102, ¶ 25, 104 P.3d 1242. Since a perusal of Petitioner's brief reveals that there is no way that a decision on any of the issues for which Certiorari review was granted can result in a judgment in favor of the Petitioner when there is an unchallenged finding by the Trial Court that there is no easement affecting the property in this case, an opinion on any of the issues granted would be an advisory opinion.

B. COURSE OF PROCEEDINGS

HTC filed suit against Brown on August 9, 2006, asserting claims for declaratory judgment, breach of contract, and specific performance. On September 18, 2006, Brown filed a motion to dismiss HTC's claims. The motion to dismiss was converted into a motion for summary judgment because the parties submitted affidavits supporting their claims. On November 15, 2006, Brown filed a counterclaim against HTC because HTC

would not dismiss the lawsuit brought on August 9, 2006, and had engaged in a regular pattern of withholding rents causing Brown to incur the additional expense of having to hire a lawyer to demand payment. HTC filed a motion to dismiss Brown's claims. At about the same time, HTC filed a motion for summary judgment and then Brown filed a motion for summary judgment. All the claims were combined into the summary judgment motions. On March 12, 2007, oral argument was held before the Trial Court. Oral argument regarding the proposed order and attorney fees was also heard on May 1, 2007.

After a review of the pleadings and oral argument before the Trial Court on March 12, 2007, the Trial Court determined not only that HTC did not have a claim against Brown, but that in fact there is no easement on Lot 27, the parcel of land that is the subject of the Ground Lease entered into between these two parties. (R. at 827). The Trial Court determined that Brown was the prevailing party and awarded attorney fees to Brown. (R. at 928). The Trial Court also determined that even though HTC's conduct was not excusable in withholding payments and filing a meritless lawsuit against Brown, it was not a material breach of the lease agreement because the damages caused to Brown could be compensated in an award of attorney fees, and the Trial Court dismissed Brown's counterclaims. (R. at 928). HTC then contested the award of attorney fees and the proposed order and another hearing was held on May 1, 2007 regarding the order and the amount of attorney fees awarded. (R. at 928). The Trial Court made a specific award of attorney fees excluding attorney fees expended after HTC began making rent payments

on time. HTC filed a Notice of Appeal on June 18, 2007. Brown filed a Notice of Appeal on June 27, 2007.

The Court of Appeals, after a review of the pleadings and oral argument, affirmed the Trial Court's dismissal of HTC's claims and Brown's counterclaim, and they affirmed the determination that HTC had not materially breached the Ground Lease. They also affirmed the Trial Court's decision to award attorney fees to Brown below but reversed the Trial Court's determination of the amount of those fees and remanded for further proceedings on the amount. They awarded Brown their reasonable attorney fees incurred in successfully defending against HTC's appeal but declined to award fees to either party in regards to Brown's cross-appeal. The matter was ordered remanded to the Trial Court for a determination of fees. See, Court of Appeals' Opinion, ¶ 26, attached as Addendum B to Appellant's Brief.

On April 23, 2009, the Utah Supreme Court granted HTC's Petition for Writ of Certiorari.

C. STATEMENT OF FACTS

This case arises out of a lawsuit asserted by Holladay Towne Center, L.L.C., a large developer, against Brown Family Holdings, L.C., an LLC set up by the Brown family to manage their retirement assets. In March of 2005, HTC and Brown entered into a lease agreement ("Ground Lease"). The Ground Lease covers only what is described in the Ground Lease as Lot 27. The Ground Lease expressly gives HTC the right to challenge, at its own expense, any restrictions or conditions relating to the Subject

Property. (R. at 20-21).

The purported easement which HTC claims to be an encumbrance on the Subject Property does not appear of record on Lot 27. (R. at 543). The only documents of record with any mention of an easement were recorded against Lot 26, and not Lot 27. (R. at 603-605). None of the conveyances of Lot 27 ever included a reference to the purported easement on Lot 27. (R. at 613-624). Neither Brown nor HTC had notice of the supposed easement at the time the Ground Lease was entered into. (R. at 548 and 575). Indeed, Petitioner obtained a title report from its title insurer before entering into the Ground Lease. This purported easement was not listed as an exception. (R. at 531 and 591-601). There is no physical evidence of this purported easement. In fact, the path of the claimed easement has been blocked for over twenty years by impassable berms, and for the past ten years the path has been blocked by storage units that Brown lawfully constructed on Lot 27. (R. at 544). The Trial Court found that:

There is no easement on lot 27. There is no evidence of an easement on the ground and to the extent that an easement purporting to affect lot 27 is recorded against lot 26, that easement is void because it was not recorded against lot 27.

(R. at 827). HTC has never challenged the Trial Court's finding that Lot 27 is not subject to an easement.

The Ground Lease was drawn with provisions making it clear that whatever HTC decided to do with the property, it could not do anything that would cause Brown to incur any cost, and that rent would be paid each month without any offset. (R. at 14). In that

regard, the Ground Lease was written as a triple net lease, with the added proviso that rent would be paid each month without offset, and “tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all imposition and cost relating to the property *so that the Landlord has no cost or expense relating to the property during the term or an extension of the lease.*” (R. at 14) (Italics added). In the event of any condition, restriction, or covenant that might later be discovered that would interfere with Petitioner’s plans, the Ground Lease provided that the tenant could deal with those as it pleased so long as it did so without cost to the Brown family. (R. at 14).

In violation of the clear purpose of the Ground Lease to preserve the Brown Family retirement income, Petitioner HTC, in an effort to renegotiate the lease terms, intentionally and repeatedly withheld rent payments until after Brown incurred attorney fees to demand payment, then filed this frivolous lawsuit which it has now pursued all the way to this Court, and has refused to shield Brown from cost as it agreed to do in the Ground Lease. (R. at 14).

SUMMARY OF ARGUMENT

The Petitioner Holladay Towne Center, L.L.C., prophecies gloom and doom for the law of Landlord and Tenant in this state if the Court of Appeals decision is not reversed. HTC can only reach this dire prophecy by leaving out the undisputed and salient facts of this case. HTC’s entire argument relies on their unsupported assertion that there is an easement on Lot 27, the piece of real property that is the subject of the Ground Lease between HTC and Brown, when, in fact, there is none.

There is no easement on Lot 27. There is no easement recorded, there is no easement on the ground, there is not even a beneficiary of the supposed easement asserting its existence. There is no easement anywhere except in the imagination of a tenant who is trying to force its landlord into renegotiating a lease with an option to purchase; a lease/option that represents the retirement fund of the Brown family. Given these undisputed facts, the Trial Court specifically found that there was no easement on Lot 27. In its petition for Writ of Certiorari, HTC did not challenge the Trial Court's finding that there is no easement on Lot 27. Yet now, HTC's entire argument hinges on there being an easement on this property. Because there is no easement on Lot 27, HTC's entire argument is pointless.

Petitioner further argues that the Court of Appeals, in its decision, failed to apply the plain meaning of the term covenants, conditions and restrictions (CC&Rs). Problematically, that term exists nowhere in the Ground Lease and the context of the Lease where the separate terms are used makes it clear that the language was designed to put the burden of all such concerns on the Tenant. Indeed, to get to the heart of the matter, the Ground Lease specifically stated that the "tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all imposition and cost relating to the property *so that the Landlord has no cost or expense relating to the property during the term or an extension of the lease.*" (R. at 14) (Italics added). Whatever might be the technical arguments relating to the meaning of this lease as it relates to this imaginary easement, HTC has pursued a course of action that has imposed

costs and expenses relating to the property during the term of the lease. This course of action by the Tenant has effectively deprived the Brown family of the benefit of their bargain—a steady retirement income stream on which they could rely.

Similarly, Petitioner HTC tries to argue that this case would have a negative impact on the law relating to standing. HTC makes this argument by ignoring the reality that Petitioner holds a long term Ground Lease with an option to purchase that gives it the right, should it someday exercise that option, to become the fee holder of the property. This argument also ignores the fact that HTC has the right, under the terms of the Ground Lease, to contest conditions or restrictions on the property. Given these rights under a long term Ground Lease with an option to purchase, HTC has standing under Utah law to deal with this imaginary easement as it sees fit.

ARGUMENT

I. THERE IS NO EASEMENT ON THE REAL PROPERTY LEASED BY HTC FROM BROWN.

In March of 2005, HTC and Brown entered into a Ground Lease wherein HTC leased from Brown a piece of real property described on Exhibit A which is attached to the Ground Lease (attached as Addendum D to the Appellant’s Brief) and legally described as Lot 27, Peony Gardens (“Lot 27”). The only property that was leased to HTC by Brown was Lot 27. There is no other real property that was subject to the Ground Lease entered into between these two parties.

No easement has been recorded against Lot 27. HTC has tried to create a cloud on

the title of Lot 27 by reference to documents recorded against a different lot which reference a purported easement over Lot 27. (R. at 603-605). The documents, entitled notice of contracts, were recorded against Lot 26, not Lot 27, and included in the legal description a purported easement over Lot 27. (R. at 603-605; see also R. at 535-536). After recording the notice of contract on Lot 26, nothing happened for several years (R. at 535). Then, the owner of both Lots 26 and 27 conveyed Lot 27 free and clear of any easements in 1984.¹ (R. at 606 and 535). After this point in time, Ralom Investment Company, the owner of Lot 26, did not own Lot 27 and thus could not thereafter convey an easement over Lot 27. (R. at 535). See also, Salt Lake County v. Metro West Ready Mix, 89 P.3d 155 (Utah 2004) (stranger to record title cannot convey interest in property). In 1993, nine years after Lot 27 had been conveyed free and clear of any easement, Ralom Investment Company who no longer owned Lot 27 and thus had no interest in Lot 27 to convey, purported to convey Lot 26 with an easement over Lot 27 to Ben Aire Associates via warranty deed. (R. at 608-610). That warranty deed was not recorded against Lot 27. (R. at 613-624). None of the conveyances of Lot 27 ever included a reference to the purported easement. (R. at 613-624).

Additionally, HTC procured a title report from its title insurer covering Lot 27

¹ This factual scenario extinguished whatever might have existed of the easement by Merger. “A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefited or burdened parcel into separate ownership does not revive a servitude terminated under the rule of the section.” RESTATEMENT (THIRD) OF PROPERTY § 7.5 2000.

prior to entering into the Ground Lease. The purported easement on Lot 27, mentioned only in documents recorded against Lot 26, is not “excepted” from HTC’s title insurance policy.² (R. at 531 and 591-601). Nor would one expect it to be. Utah has a race-notice recording statute. U.C.A. § 57-3-103 (2000). An encumbrance or restriction on the use of real property such as an easement recorded on the wrong parcel of real property might just as well not be recorded at all. Ault v. Holden, 44 P.3d 781, 791 (Utah 2002) (recorded deed that fails to describe “the same real property . . . or any portion of it,” has no effect on validity of later recorded deed). Utah law simply does not recognize an encumbrance or restriction, such as the purported easement in this case, that is not recorded on the property it purports to encumber as such a recording gives no notice to someone investigating title to the property. Utah title insurers rely on this principle of law in performing their businesses. (R. at 544).

Not only is there no easement recorded against Lot 27, but there is no evidence on the real property that an easement exists. There is nothing on the ground that would give a purchaser notice that there was an easement on Lot 27. Indeed, the route of the

² HTC relies on expert opinion from Joseph Capilli for the proposition that somehow this unrecorded easement of which no one had notice, and for which there has never been evidence on the ground, might nevertheless constitute a “cloud” on Brown’s title. Interestingly, before he was a paid expert in this case for the Petitioner, Mr. Capilli’s title company issued a title policy to HTC that did not except the supposed easement. (R. at 531 and 591-601). Under these facts, the Trial Court appropriately rejected Mr. Capilli’s paid opinion testimony in favor of his title company’s opinion before this dispute arose. Actions, especially those taken before a suit begins, speak louder than words. See, Coray v. Ogden Union Ry. & Depot Co., 180 P.2d 542, 549 (Utah 1947)(“his actions speak louder than words”).

purported easement has been impassable since before Brown purchased the property. Storage units have now been on the real property covering the path of the purported easement for over ten years and the purported easement has never been used. (R. at 544). Not only is there no indication that an easement ever did exist, there is nobody claiming an easement over the property. (R. at 928, Transcript of Summary Judgment Hearing, pp. 6-8). Petitioner never articulated to the Trial Court or to the Court of Appeals any legal argument that under Utah law subjects Lot 27 to any easement.

In the Findings of Fact, Conclusions of Law, and Order of May 1, 2007, Third Judicial District Court Judge John Paul Kennedy stated unequivocally that there is no easement on Lot 27. See, R. at 827, Conclusions of Law, ¶ 1, “There is no easement on lot 27. There is no evidence of an easement on the ground and to the extent that an easement purporting to affect lot 27 is recorded against lot 26, that easement is void because it was not recorded against lot 27.” See also, R. at 827, Conclusions of Law, ¶ 2, “Because there is no easement affecting lot 27, there is no basis for the HTC’s claims against the defendant and this action should not have been brought against the landlord, causing the landlord to incur costs.” The Court of Appeals affirmed “the district court’s ruling dismissing HTC’s claims.” See, Court of Appeals’ Opinion, filed November 20, 2008, ¶ 13, attached as Addendum B to Appellant’s Brief.

HTC has continued to pursue claims based on an easement that does not exist in their title insurance policy, that has never been recorded against the real property in question, for which there is no evidence on the property, which has been found by the

Trial Court not to exist, which finding has never been challenged. Its efforts are all aimed at forcing Brown to renegotiate a lease with an option to purchase that was written in such a way as to preserve the Brown family's limited retirement fund.

II. BY THE TERMS OF THE GROUND LEASE, HTC HAS STANDING TO PURSUE A QUIET TITLE ACTION.

HTC's argument that they do not have standing to pursue a quiet title action is, like all of HTC's arguments, academic at best as it relies on HTC baseless assertion that there is an easement over Lot 27. Because there is no easement on Lot 27, there is nothing for either Brown or HTC to challenge.

The Court of Appeals specifically noted in its Opinion that this standing issue need not be answered in abstract terms because the specific language of the Ground Lease resolves this issue as to these parties. See, Court of Appeals' Opinion, filed November 20, 2008, ¶ 9, attached as Addendum B to Appellant's Brief. The parties agreed that HTC would have the right to contest the legality of a covenant, restriction, or condition of record should the situation arise during the course of the lease term: "[t]enant shall have the right, at its own expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any" (R. at 20-21)(Emphasis added). "Covenants, restrictions, and conditions *now or hereafter of record* which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises," even if compliance with such requirements "results in interference with the

use or enjoyment of all or any portion of the Premises.” (R. at 11)(Italics added). Having conveyed a long term lease with an option to purchase the property to Petitioner, it only makes sense that Brown would also confer upon Petitioner the right to protect those existing and potential interests, particularly where the lease was intended to preserve the Brown’s limited retirement fund against cost or offset. None of the cases cited by Petitioner support the contention that a party, such as Petitioner, who has a long term lease and an option to purchase this property, has an insufficient interest in this property to confer standing. Indeed, the very quote cited by Petitioner in its Petition for Writ of Certiorari but conveniently not included in its Appellant’s Brief, answers the question: “[s]tanding to bring a quiet title action to perfect title is limited to parties who could acquire an interest in the property created by the court’s judgment or decree.” Elder v. Nephi City, 2007 UT 46, ¶ 20, 164 P.3d 1238. Petitioner already has an interest in the property as the holder of a long term lease. Petitioner “could acquire” even the fee interest by exercise of the option. This Court has already determined that the interest HTC has would be sufficient to bring a quiet title action, if there were an actual easement on this property, which there is not. Given the facts of this case, the standing issue is another red herring.

Contrary to what Petitioner would have this Court believe through its citations to non-Utah cases, the Utah Supreme Court has not categorically rejected the notion that standing can arise from an agreement and has, in fact held that “[a]s in many states, we find that in Utah standing acquired by stipulation is enforceable.” In re E.H., 2006 UT

36, ¶ 52, 137 P.3d 809, 820 (2006). By both parties agreeing to the language of the Ground Lease which clearly indicates that HTC may, independently of the Browns, challenge an easement, “to the extent it may have any validity” (See Court of Appeals Opinion, ¶ 12, attached as Addendum B to the Appellant’s Brief), the parties stipulated to give HTC standing to quiet title should it have been necessary.

III. “COVENANTS, RESTRICTIONS, AND CONDITIONS” AS REFERRED TO IN THE GROUND LEASE ARE NOT CC&R’S -- A LEGAL TERM OF ART.

Petitioner argues that the Trial Court and subsequently the Court of Appeals, by finding that an easement falls under the definition of “Legal Requirement” as defined in the Ground Lease, would wreak “havoc” on landlord/tenant contract law. HTC argues, referring to the application of the Plain Meaning Rule, that the Court of Appeals “disregarded this principle by failing to recognize the well-established distinction between the meaning of the terms ‘easements’ and ‘covenants, conditions, and restrictions.’” See, Appellant’s Brief, p. 14. The problem with this argument is that in making it, Petitioner refers to a term that is nowhere contained in the Ground Lease. For the first time in these proceedings, HTC argues that the contract language “covenants, restrictions, and conditions” is a reference to the legal term of art “CC&R’s.” The record does not support such an assertion. Covenants, Conditions, and Restrictions when referred to in that order have come to be known in the law as CC&R’s and have in fact become a legal term of art. See, Moler v. CW Management Corp., 190 P.3d 1250, 1251 (Utah 2008)(“At the time the Molers first met with Redfeather Estates' real estate

agent, Christopher McCandless, the homes in Redfeather Estates were burdened with covenants, conditions, and restrictions (“CC & Rs”)); See also, Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 963 (Utah 2007)(“The Association seeks to levy such fees against Petitioner Forest Meadow Ranch Property Owners Association, L.L.C. (“Forest Meadow”) based on covenants, conditions, and restrictions (“CC & Rs”)”); Dansie v. Hi Country Estates Homeowners Ass’n, 92 P.3d 162 (UT App. 2004)(Court of Appeals makes reference to “CC & Rs” in opinion without any reference to the fact that CC&R refers to covenants, conditions, and restrictions).

The universality of the order in which these words are used when invoking the legal term of art argue against construing the Ground Lease in light of the law governing CC&R’s because the legal term of art was not used. The Ground Lease does not employ the legal term of art “covenants, conditions, and restrictions” or CC&R’s as they have come to be known. Rather, the Ground Lease never uses the acronym, CC&R, and refers to the individual terms covenants, restrictions, and conditions in the much broader sentence “all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the premises . . .” (R. at 11). It is illogical to conclude that by the mere use of three words that, when used in a specific order, form a legal term of art with a specific meaning, the parties intended that same meaning when they changed the order of the words so as not to state the term of art. Had the parties intended to refer to CC&R’s, a concept with a specific legal meaning, they would have used those specific words in the specific order in which they are used when

referring to the term of art. Instead, the Ground Lease used those three words- covenants, restrictions, and conditions - in a different order, emphasizing the plain meaning of the individual words rather than invoking the term of art. As a result, the Court of Appeals conclusion that “[t]he Easement, to the extent it may have any validity, is clearly a covenant, restriction, or condition of record...” is based on the plain meaning of the terms contained in the Ground Lease. See, Court of Appeals’ Opinion, ¶ 12, attached to Appellant’s Brief as Addendum B.

IV. THE SUPPOSED DICHOTOMY BETWEEN AN EASEMENT AND OTHER CONDITIONS OR RESTRICTIONS OF TITLE IS AS IMAGINARY AS THE SUPPOSED EASEMENT IN THIS CASE.

Much of the weight of Petitioner’s argument rests on the supposed dichotomy between an easement on the one hand and restrictive covenants or restrictions on the other. Petitioner posits that if the Court of Appeals is upheld in this case it will plunge this heretofore clear area of the law into chaos.

Actually, the law in this area has been less than lucid since the various doctrines of covenants running with the land, easements, and restrictions emerged in the English common law. This Court recognized this confusion over terms in Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618 (Utah 1989), with the following caricature of one of the nations most revered jurists: “The ‘spell of the dry grins’ which a reference to covenants running with the land provoked in Mr. Justice Holmes may be taken as indicative of that great jurist's fortitude; tears of frustration might be a more characteristic reaction of less Spartan spirits attempting to investigate the subject.”

It is clear from a short perusal of the law in this area that, as stated by the Utah Court of Appeals in Canyon Meadows Home Owners Ass'n v. Wasatch County, 40 P.3d 1148 at n. 5 (Utah App. 2001), “the terms negative easement and restrictive covenant are often used interchangeably.” Nor does Petitioner’s forced dichotomy appear any more pronounced in jurisdictions outside Utah. See, e.g., Petty v. Hill, 2006 WL 2808626 (Cal.App. Oct. 3, 2006) (restrictive covenants are enforced as equitable servitudes). Indeed, easements, covenants, and restrictions are all treated with equal dignity even under the tax codes; Whitehouse Hotel Ltd. Partnership v. C.I.R., 131 T.C. No. 10, 2008 WL 4757336, (U.S. Tax Ct., Oct. 30, 2008) (“A perpetual conservation restriction is a qualified real property interest . . . A ‘Perpetual conservation restriction’ is a restriction granted in perpetuity on the use which may be made of real property-including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude)”).

This is not to say that this Court would be incapable of untying the Gordian knot and lending clarity to what has never been all that clear, but this case may not be the best vehicle for undertaking such a task. Here the distinction between a covenant running with the land and an easement or a restriction on use of the property is not germane to the question faced by the courts below, i.e., whether Brown is in breach of the lease by not pursuing an unrecorded, unused and blocked easement against parties unknown that have never asserted the easement. Whatever the Petitioner imagines this supposed condition to be, it falls within the parties’ contemplation that the tenant could contest it, abide it, or

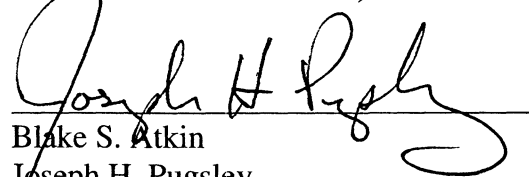
ignore it, so long as they did not deplete the Brown family's retirement fund in the process.³ An advisory opinion in this would not appear to be the kind of decision that would lend clarity to this tortured area of the law.

CONCLUSION

For the reasons set forth above, Respondent Brown Family Holdings, L.C., respectfully requests that the Court of Appeals decision in this matter be affirmed.

RESPECTFULLY SUBMITTED and DATED this 12 day of August, 2009.

ATKIN LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read "Joseph H. Pugsley", is written over a horizontal line.

Blake S. Atkin

Joseph H. Pugsley

Attorneys for Respondent/Appellee

Brown Family Holdings, LC

³ HTC simply cannot square its actions in this case with its agreement that "tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all imposition and cost relating to the property *so that the Landlord has no cost or expense relating to the property during the term or an extension of the lease.*" See, R. at 14. Italics added.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2009, I served a true and correct copy of the foregoing **BRIEF OF APPELLEE** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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