

# Contract Interpretation Problems and the Dual Option Lease

---

## Repository Citation

*Contract Interpretation Problems and the Dual Option Lease*, 14 Wm. & Mary L. Rev. 457 (1972),  
<https://scholarship.law.wm.edu/wmlr/vol14/iss2/11>

## CONTRACT INTERPRETATION PROBLEMS AND THE DUAL OPTION LEASE

Many domestic fuel oil companies have made a practice of leasing land from private owners for the operation of local filling stations. Generally, the leases are long term<sup>1</sup> agreements prepared by the lessee-oil company on a standard form giving the company both an option to purchase the leased realty for a specified fixed price<sup>2</sup> and an option to exercise first refusal rights.<sup>3</sup> The use of these dual purchase option provisions has provided a source of interesting litigation in recent years. Judicial interpretation of the inter-relation of the two provisions has yielded remarkably inconsistent results due to a fundamental divergence of attitudes toward the dual option lease. This Comment will compare the different judicial interpretations of the clauses and will suggest that one view is clearly superior to the other.

---

1. The average term for leases of this type appears to be about 10 years. Additionally, many service station leases grant the lessee an option to renew the lease for some period shorter than or equal to the initial term. *See, e.g.,* *Texaco, Inc. v. Rogow*, 150 Conn. 401, 190 A.2d 48 (1963) (10-year lease with no provision for renewal); *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 89 N.E.2d 392 (1949) (six-year lease with option to renew for additional five years); *Imperial Refineries Corp. v. Morrissey*, 254 Iowa 934, 119 N.W.2d 872 (1963) (seven-year lease with option to renew for additional four years).

2. For the sake of clarity, this common provision hereafter will be referred to as a fixed price option to purchase the leased premises. The provision which appeared in *Shell Oil v. Prescott*, 398 F.2d 592 (6th Cir. 1968) is typical:

Thirteenth: At any time during the term of the lease or any extension or renewal, [lessee] Shell shall have the option to purchase the leased premises for the sum of Thirty Two Thousand Five Hundred Dollars (\$32,500.00) exercisable by notice to Lessor.

398 F.2d at 592.

3. The proper characterization of this typical lease clause is problematic. It has been said that the promise does not always create a true option. 1A CORBIN ON CONTRACTS § 261A at 485 (2d ed. 1963). Nevertheless, for ease of discussion in the present context, the provision will be referred to as an option and as a right of first refusal. A typical provision was interpreted in *Shell Oil v. Blumberg*, 154 F.2d 251 (5th Cir. 1946):

If Lessor at any time during the term of this lease should desire to sell said property to a prospective purchaser, able, willing and ready to buy the same, Lessor shall so notify Lessee. Said notice shall give the name and address of the prospective purchaser and be accompanied by an affidavit by the Lessor that such prospective offer is bona fide, and the Lessor intends to sell and convey said property. Lessee shall thereupon have the right and option to purchase said property at the price and upon the terms offered by the prospective purchaser.

154 F.2d at 252.

## CLAY AND BLUMBERG

The divergent interpretations of dual option provisions are best illustrated by two leading cases, *Sinclair Refining Co. v. Clay*<sup>4</sup> and *Shell Oil Co. v. Blumberg*.<sup>5</sup> In *Blumberg*, the lessee bargained for typical dual option privileges. The fuel oil company succeeded in retaining the right to purchase the leased premises at any time during the term of the lease for a fixed price of \$10,000. In addition, Shell retained a right of first refusal which obligated the lessor to inform lessee of any bona fide third party offers to purchase the demised premises. Upon such notice from lessor, Shell was afforded first refusal rights to purchase the realty on the same terms as those offered by the third party. The contract also provided that "[l]essee's failure to exercise any option herein contained shall not in any way affect this lease or the rights of Lessee in the estate hereby created."<sup>6</sup>

When lessor gave notice of a bona fide offer from a third party prospective purchaser, Shell declined to exercise its right of first refusal, specifically stating that such election was made without prejudice to any of its other rights under the lease. Lessor consummated the sale (for \$25,000) to the third party, who took a warranty deed subject to Shell's rights under the original recorded lease.

Three years later, still during the term of the lease, Shell wrote to the purchaser and informed him of Shell's election to exercise its outstanding fixed price option to purchase the premises at the \$10,000 figure. The purchaser refused to recognize Shell's right to purchase the premises at the \$10,000 price, and Shell commenced action in the federal district court for declaratory judgment, praying for specific performance of the fixed price provision. In an unreported decision, the court refused Shell's prayer for relief and said Shell's option rights were extinguished by the prior sale following its election not to exercise the contractual right of first refusal.<sup>7</sup> On appeal, the Court of Appeals for the Fifth Circuit affirmed the district court reasoning:

The [purchase option], standing alone, confers upon appellant an

4. 102 F. Supp. 732 (N.D. Ohio 1951), *aff'd mem.*, 194 F.2d 532 (6th Cir. 1952).

5. 154 F.2d 251 (5th Cir. 1946).

6. *Id.* at 252. Similar provisions appear in all reported decisions construing the dual purchase option instrument as used by domestic oil companies. It should be noted, however, that minor variations in the language used in such clauses can be crucial to a proper disposition of rights created in the lease.

7. Cf. *Manasse v. Ford*, 58 Cal. App. 312, 208 P 354 (1922); *Harding v. Gibbs*, 125 Ill. 85, 17 N.E. 60 (1888).

option to purchase the premises for \$10,000 during the term of the lease, but the [right of first refusal] limits or modifies the [purchase option]. Upon the notice to [Shell] of a bona fide prospective sale, and upon its being given the opportunity to exercise its option to purchase the property at the same price offered, and [Shell's] refusal to purchase, the [purchase option] lapsed. Thereafter [Shell's] remaining rights were under the [right of first refusal] paragraph.<sup>8</sup>

The court explained that Shell Oil retained its right of first refusal, so that Shell could buy from the appellee-purchaser for the same price offered by a *subsequent* offerer, but that its fixed price purchase option rights were extinguished. To justify its conclusion, the circuit court pointed to contract language<sup>9</sup> and cited the following "general rule"

When the lessee is given the first privilege of purchasing the premises, he must, after notice from the lessor of the receipt of a bona fide offer, elect to exercise his privilege in accordance with the terms of the lease or the right is lost.<sup>10</sup>

This statement may be a valid characterization of property law, but it is submitted that the rule was not intended to—and does not—embrace situations where contracting parties have made express contrary provisions. Where parties to a recorded instrument provide for continuing rights to run with the land, the rule used by the court seems inapplicable.<sup>11</sup> It is recognized that the application of such reasoning in *Blumberg* would

---

8. 154 F.2d at 252-53.

9. The court construed the sentence "Lessee's failure to exercise any option herein contained shall not in any way affect this lease or the rights of Lessee in the estate hereby created." It held that this sentence, which appeared immediately after the clause creating the right of first refusal, operated only to reserve the first refusal right and not the fixed price option right. 154 F.2d at 253. Apparently, the court reasoned by negative implication—since the clause reserving future rights appeared only after the first refusal clause, and since no such clause was included after the fixed price option clause, the fixed price option was not intended to survive a sale to a third party. It is submitted that this interpretation was much too restrictive. The broad language of the sentence indicates very clearly that the parties intended to preserve *all* of the lessee's rights even after lessee declined to exercise the right of first refusal. Lessee's option rights should be considered an integral part of the estate that was created by the lease instrument. Lessee's estate was intended to survive any sale to third party purchasers.

10. *Id.* at 253. The court quoted from 3 THOMPSON ON REAL PROPERTY § 1329 at 492 (1959).

11. A later court properly invoked a different rule of property law which clearly is applicable to such problems. See discussion of the *Simclair* case, note 12 *infra* and accompanying text.

have had a harsh effect on the third party purchaser. (He would have been forced to sell for \$10,000 property which he had just purchased for \$25,000.) However, if the integrity of contractual agreements and recorded instruments is to be maintained, such a result seems warranted. The original parties to the lease had agreed that lessee's options would "not in any way" be affected by a sale to a third party. This provision was contained in a recorded instrument, and, indeed, the purchaser took lessor's warranty deed with actual knowledge of Shell's rights under the lease.

In *Sinclair Refining Co. v. Clay*,<sup>12</sup> normal dual option provisions were included in a lease of realty for the operation of a neighborhood filling station. As in *Blumberg*, the lessee retained the right to purchase the demised premises for a fixed price at any time during the term of the lease and reserved the normal right of first refusal.

Lessor sold the premises to a third party after Sinclair had declined to exercise its right of first refusal. Five years after the sale, lessee notified the new owner of its intention to exercise the fixed price option. The new owner immediately solicited other, higher, offers from interested parties and demanded that Sinclair match the higher offers pursuant to the first refusal provision in the original lease. Sinclair asserted its right to purchase the fee for the amount of its fixed price option and brought an action seeking specific performance of that provision. At trial, lessor argued the *Blumberg* reasoning and contended that the fixed price option was extinguished after Sinclair declined to exercise its right of first refusal. Although the court distinguished the *Blumberg* decision,<sup>13</sup> its persuasive holding seems to reject the *Blumberg* reasoning outright:

Purchase option agreements in leases are not separate and distinct offers which can be withdrawn before acceptance. The giving and acceptance of an option to buy is enforceable and the landlord does not have the right to refuse to carry out his agreement after the lessee exercises his option in accordance with the terms of the lease. *Furthermore, such option is a covenant which runs*

---

12. 102 F. Supp. 732 (N. D. Ohio 1951), *aff'd mem.*, 194 F.2d 532 (6th Cir. 1952).

13. The *Clay* court discussed *Blumberg* without criticism, but added that "the court there was not announcing a general principle of law to govern purchase options. . . ." 102 F. Supp. at 734. It is interesting to note that the clause used in *Clay* to reserve lessee's future rights was only slightly more specific than that used in *Blumberg*. In *Clay*, the contract provided that if lessee declined to exercise the right of first refusal, "Lessor may thereafter sell said premises to the party making the offer; subject, however, to this lease and to the leasehold estate herein granted, and to the extension and/or additional purchase options, if any, herein granted to Lessee." *Id.* at 734-35.

*with the land and a grantee of the lessor is bound by the terms of the covenant.*<sup>14</sup>

### THE PROBLEM OF INTERPRETATION

A host of other decisions in recent years demonstrate that the conflicting approaches illustrated by *Blumberg* and *Clay* have not been resolved authoritatively, so that the dual option lease continues to be plagued with an aura of uncertainty. The Supreme Court of Connecticut, for example, has extended the *Blumberg* reasoning to its logical limit. In *Texaco, Inc. v. Rogow*,<sup>15</sup> that court held that a lessee's fixed price purchase option could be exercised only before notice of a bona fide<sup>16</sup> offer from a third party.<sup>17</sup> Upon receipt of such notice, it was held that lessee's only remaining rights were embodied in the right of first refusal provision.<sup>18</sup>

14. *Id.* at 734, citing 3 THOMPSON ON REAL PROPERTY §§ 1325-30 (1959) [Emphasis supplied].

15. 150 Conn. 401, 190 A.2d 48 (1963).

16. The "bona fide" nature of a third party offer seldom has required lengthy discussion in reported decisions. It should be noted, however, that the requirement is important, and can be determinative of the rights of the parties to a dual option instrument.

For example, in *Imperial Refineries Corp. v. Morrissey*, 254 Iowa 934, 119 N.W.2d 872 (1963), lessor apparently understood the significance of the first refusal provision well enough to have solicited third party offers in order to force lessee to act on its options. The highest "offer" received was from lessor's son, and lessor sought to force lessee to exercise the first refusal option by matching the son's offer, which was \$15,000 higher than any other offer. The court held, *inter alia*, that the evidence showed that the son's offer was not bona fide and consequently did not affect the relationship between lessor and lessee.

The requirement that the offer be bona fide also can be of procedural importance. Since many plaintiffs seek equitable relief in connection with dual option instruments, the lack of a bona fide offeror could support a motion to dismiss the controversy based on "clean hands." Moreover, in a declaratory judgment context, the absence of a bona fide offer could support a motion to dismiss based on an argument that no controversy has ripened and that plaintiff merely is seeking an advisory opinion.

17. This result also obtained in *Northwest Racing Ass'n v. Hunt*, 20 Ill. App. 2d 393, 156 N.E.2d 285 (1959), but that decision was controlled by specific contract language providing that lessee's failure to exercise the first refusal option would extinguish all other option rights.

18. *Texaco's* contract gave it the right to purchase the land during the term of the lease for \$16,000 and a right of first refusal. Upon learning of a third party offer to purchase the property for \$44,000, *Texaco* notified lessor of its election to exercise its fixed price option to purchase for \$16,000. In *Texaco's* suit for specific performance of that provision, the court held:

Under the circumstances, it would be unreasonable to hold that, if a lessee is given notice of an offer [from a third party] and refuses to exercise a

On the other hand, the Court of Appeals for the Sixth Circuit recently allowed a lessee to exercise its contractual fixed price option after receipt of a bona fide third party offer. In *Shell Oil v. Prescott*,<sup>19</sup> the court said "Shell's right under the fixed price option was not limited or modified in any manner by the . . . right of first refusal."<sup>20</sup>

In *Prescott*, the court clearly adopted the reasoning of *Clay*. More importantly, the *Prescott* court examined the general purpose of the dual option provisions realistically. Apart from minor variations in contract language,<sup>21</sup> it is clear that divergent judicial conclusions concerning the purpose of the dual option provisions is the single most important factor which gives rise to seemingly inconsistent results. Without exception, courts interpreting the provisions have recognized that their duty is to discern the intent of the parties to the lease when it was executed.<sup>22</sup>

first refusal option it can thereafter purchase the property at \$16,000 despite a prior sale of it to the offeror named in the notice.

The plaintiff's fixed price option could be effectively exercised, practically speaking, only prior to the plaintiff's receipt of a notice from the defendant of a valid and bona fide offer from a third party.

190 A.2d at 52. Of all the decisions construing the dual option lease, this is perhaps the most objectionable. It is discussed with disapproval in 1A CORBIN ON CONTRACTS § 261B at 30 (2d ed. 1963, Supp. 1971). A proper reading of the contract indicates not only that Texaco should have been allowed to exercise the fixed price option against lessor, but also that Texaco could have exercised the option against the third party who offered to purchase the property for \$44,000.

The contract provided that "[a]ny option herein granted shall be continuing and pre-emptive, binding on the lessor's heirs, devisees, administrators, executors, or assigns and the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising during the term of the lease." 190 A.2d at 50.

19. 398 F.2d 592 (6th Cir. 1968).

20. *Id.* at 594. Interestingly, the standard form lease which was the subject of the *Prescott* litigation was different from the Shell Oil contract which was interpreted in *Blumberg*. The *Prescott* lease was more explicit than that in *Blumberg*; presumably, it was drawn specifically to avoid recurrences of the *Blumberg* decision.

21. See Annot., 8 A.L.R.2d 604 (1949), and cases discussed therein. Several cases have recognized that varying contract language can dictate different results in construing the dual option lease. For example, in *Texaco, Inc. v. Rogow*, 150 Conn. 401, 190 A.2d 48 (1963), it was said that "[s]ince such contracts, although often generally similar, are worded differently and executed under varying circumstances, a decision interpreting and construing one contract is far from controlling in a case involving another." 190 A.2d at 51.

22. See, e.g., *Shell Oil Co. v. Prescott*, 398 F.2d 592, 593 (6th Cir. 1968), where the court noted that its duty was to ascertain the intent of the parties by construing the contract as a whole and giving effect to every part of the instrument.

In this regard, the *Prescott* court's statement that the fixed price option "was not limited or modified" by the right of first refusal points the way to an understanding of the fundamental problem of interpreting the proper interplay of the two option provisions. The import of *Prescott* lies in its recognition of the fact that the two option provisions operate independently, and that neither provision is intended to limit or modify the lessee's rights under the other provision.<sup>23</sup> Although the courts in *Rogow* and other similar decisions did not address themselves to this issue specifically, their holdings implicitly reject the *Prescott* reasoning.

The courts in *Blumberg* and *Rogow* viewed the right of first refusal as a *qualification* of lessee's option to purchase during the term of the lease for a stated price. Their interpretation is that the dual purchase provisions grant lessee an indefeasible right to purchase the demised premises at any time during the term of the lease, *subject to* lessor's retained right of alienation to a bona fide offeror if lessee elects not to match the third party offer. This construction interprets the right of first refusal as a provision intended to benefit lessor as well as lessee, by allowing lessor to sell the property under limited circumstances unencumbered by the lessee's fixed price option rights. The courts in *Prescott* and *Clay*, on the other hand, conclude that both option provisions were inserted for the sole benefit of the lessee.<sup>24</sup> According to this view, the right of first refusal merely affords extra protection to the optionee-lessee in the event that the lessor demonstrates a willingness to sell the property for a price less than that provided in the fixed price contract term. In that situation, under *Prescott* and *Clay*, the lessee could exercise his right of first refusal in order to purchase the land at whatever price lessor would accept from a bona fide offeror. If the third party offer were higher than the fixed price option amount, the *Prescott* rationale would allow the optionee to exercise his fixed price option rather than the right of first refusal.<sup>25</sup>

23. See note 20, *supra* and accompanying text.

24. It has been said that "a purchase option is largely for the benefit of the optionee and must be construed with this fact in mind." *Sinclair Refining Co. v. Allbritton*, 147 Tex. 468, —, 218 S.W.2d 185, 188 (1949).

25. The Rhode Island Supreme Court has articulated this interpretation of the interplay of the two provisions very clearly. In *Butler v. Richardson*, 74 R.I. 344, 60 A.2d 718 (1948), for example, the court stated:

[T]he question here is what effect this provision for a first refusal has, if any, upon the provision for a fixed price option. [I]t has no effect whatever. The right of option remains unimpaired. Until the time pre-



The *Prescott-Clay* rationale seems to be supported by a realistic appreciation of the negotiations which precede lease agreements in the fuel oil industry. The mere fact that the two option provisions appear on standard forms prepared by the oil companies should alone suggest that both provisions were intended to operate for the benefit of the lessee.<sup>26</sup> It is also important to note, however, that the lessee's desire to include the provisions is commercially justifiable. As a factual matter, the oil companies generally construct filling station facilities on leased sites shortly after execution of the lease instrument. The company's investment in permanent improvements is enhanced by the protection that the options afford against a sharply rising local real estate market. It is imperative that the oil company-lessee protect against the potentiality of prohibitive rental rates before investing in costly improvements.<sup>27</sup> If the lessee did not have the option to purchase during the term of the lease, he would be in the unenviable position of having to renegotiate the lease after its expiration from an inferior bargaining position—he would have to pay whatever rent the lessor demanded, or else abandon his investment in improvements.

---

scribed for its exercise expires, the [lessor] cannot sell for any amount without [lessee's] consent. However, the provision for a first refusal may nevertheless serve a useful purpose. It provides a means whereby [lessor], if [he] desired, could induce an acceleration of [lessee's] decision to purchase by affording [lessee] an opportunity to purchase at a price more advantageous to [lessee] than the price fixed in the option. Of course the provision could not serve this purpose if the offer was at a higher price, and consequently it is inconceivable that the parties in agreeing to the provision could have contemplated any offer except one that was lower than [the amount of the fixed price option]. We are of the opinion, therefore, that the provision for a first refusal should be construed in that light not so much as an alternative to the provision for an option but rather as a supplement thereto.

60 A.2d at 722. The *Clay* court affirmed this reasoning, stating that: "[T]he first refusal option becomes a device by which lessor could induce an acceleration of Sinclair's decision to purchase by affording it an opportunity to purchase at a price more advantageous to it than the fixed price in the option." 102 F Supp. at 735.

26. The fact that the contract generally is prepared by the lessee might suggest that any ambiguities should be resolved in favor of the lessor. It is submitted, however, that the recognized purpose of an option—to benefit the optionee—negatives the principle that ambiguities in a contract be resolved against the drafter of the instrument. Cf., *Sinclair Refining Co. v. Allbritton*, 147 Tex. 146, —, 218 S.W.2d 185, 188 (1949).

27. In *Texaco, Inc. v. Rogow*, 150 Conn. 401, 190 A.2d 48 (1963), for example, the oil company built a service station on the leased site at a cost of \$12,000. In *Shell Oil Co. v. Boyer*, 234 Ore. 270, 381 P.2d 494 (1963), \$18,000 was spent on improvements by lessor. These figures do not include the time and effort expended by the lessee to begin the operation of a new station.

The practical result of the *Prescott-Clay* rationale is that lessor could never sell the property for an amount greater than the fixed price option price. (Presumably, no well-advised third party purchaser would be willing to pay a price higher than the amount of the lessee's outstanding fixed price option.) The courts in *Blumberg* and *Rogow* balked at such a result. It is interesting to note, however, that Professor Corbin seems satisfied with that result. In his latest treatise, he said:

That is exactly the purpose for which the option was purchased and paid for. That factor largely determined the amount of the rental paid to the lessor. It is that factor that gave security to the lessee in erecting buildings and making permanent improvements. It is that factor that makes it fair and reasonable for the lessee to enjoy the increase in market value, an increase caused by the improvements and by the lessee's successful operation of the station as well as by population and business growth.<sup>28</sup>

This view of the first refusal provision—that it supplements rather than qualifies the fixed price option—is consistent with *Prescott* and *Clay*, and seems to comport with the practical realities of the lease bargaining situation and the intent of the parties to the lease.

#### CONCLUSION

Decisions in recent years have shown that the dual option lease instrument remains unclear in judicial interpretation. For obvious reasons, it is important that the provisions be construed authoritatively to provide certainty to the legal relations of parties to such instruments.

A proper understanding of the objectives of the lessor and the lessee—oil company lead inevitably to the conclusion that the oil company has a legitimate interest to protect—his investment in improvements—when entering into a lease with a local landowner. This interest can best be protected by use of the dual option provisions.

If the *Blumberg* and *Rogow* interpretation of the provisions is accepted, however, the oil company plainly would be stripped of the protection it sought to ensure.<sup>29</sup> The *Rogow* court's view of the right of

---

28. 1A CORBIN ON CONTRACTS § 261B at 31 (2d ed. 1963, Supp. 1971)

29. As noted earlier, the *Rogow* decision was particularly disturbing. See note 17, *supra*, and accompanying text. It may be surmised, however, that the court there recognized its departure from traditional principles of contract law. Texaco sought specific performance, and the court stated that, "[s]pecific performance is not a matter of right, but lies in the legal discretion of the court." 190 A.2d at 53. In arriving at what it believed to be an equitable result, however, the court pursued at least one inquiry that

first refusal as a limitation on the fixed price option would render the latter provision ineffectual and thus should be rejected. The *Clay* and *Prescott* reasoning correctly applies sound principles of contract and property law. Moreover, unless the lessor is able to prove that he failed to understand the terms of the agreement when it was executed,<sup>30</sup> the *Clay-Prescott* rationale clearly comports with the intention of the parties to the agreement.

With this foundation, it is submitted that the dual option provisions are susceptible of only one viable interpretation: The dual option provisions are not inherently inconsistent or complex, and should not be subject to attack for want of clarity.<sup>31</sup> When properly interpreted, the

---

seems wholly inappropriate. The court discussed present fair market value of the subject property, apparently ignoring the well-established principle that any determination concerning adequacy of an option price should be made as of the date the contract was executed. *Imperial Refineries Corp. v. Morrissey*, 254 Iowa 934, 119 N.W.2d 872 (1963). Thus, the court's discussion of present market value was misleading and inappropriate; in many instances, such an inquiry could operate to negate the bargained-for protection that lessee sought to preserve by the use of the dual provisions.

30. Although several litigants have urged varying interpretations of the option provisions, rarely has a party claimed that he did not understand the lease that he signed. In *Shell Oil Co. v. Boyer*, 234 Ore. 270, 381 P.2d 494 (1963), the lessor claimed he did not understand that the lease included a purchase option, even though he had signed the instrument and had separately initialled the option price. The court heard evidence of lessor's assertion, but held in favor of the lessee oil company. The court said, "[Lessors'] denial that they understood the option cannot be taken seriously." It added: "The lessors failed to prove that they did not understand the purchase option." 381 P.2d at 497. The court's conclusions with respect to such controversies also merits discussion. It concluded that "one who assents to a plain statement in an instrument should not later be heard to say that he did not understand what he was agreeing to, unless there is some evidence in addition to his own assertion of facts which would make it inequitable to hold him to his agreement." 381 P.2d at 498. Since some risk of market fluctuation is an essential part of any option bargain, it is submitted that the court's view is correct. Frequently, controversies concerning the option provisions ripen several years after the execution of the lease in question: a lessor could be tempted to complain that he did not understand the importance of the option granted, especially after the market has risen substantially. Thus, the burden of proof should rest with the lessor, and he should be required to bring forth evidence in addition to his own subjective assertions. The *Boyer* decision was approved in 1A CORBIN ON CONTRACTS § 261B at 32 (2d ed. 1963, Supp. 1971). The treatise did not agree, however, with *Boyer* dicta to the effect that "the fact that [lessor was] mistaken about the meaning of the option to purchase, if it were a fact, would not provide a legal basis for refusing to enforce it." 381 P.2d at 497.

31. Some litigants have argued that the two provisions, when contained in the same lease instrument, are per se too ambiguous to support an action for specific enforcement. The argument uniformly has been rejected. See, e.g., *Shell Oil Co. v. Boyer*, 234 Ore. 270, 381 P.2d 494 (1963); *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 89 N.E.2d 392 (1949); *Sinclair Refining Co. v. Allbritton*, 147 Tex. 468, 218 S.W.2d 185 (1949).

provisions ensure the kind of protection that is essential to a lessee contemplating substantial investment in improvements on the rented realty. The two provisions are intended to operate independently;<sup>32</sup> if the right of first refusal is read as a limitation on the fixed price option, the lessee's interests would be impaired substantially, and the fixed price option could be rendered meaningless. Accordingly, a lessee's election not to exercise his contractual right of first refusal should not impair his rights under the fixed price option, especially where contract language specifically provides for continuing rights in the optionee. The fixed price provision is a true option—it is a unilateral offer, supported by consideration, that cannot be withdrawn by the lessor during the option period. As parts of a recorded instrument that imposes a burden on realty, the promises embodied in the option provisions should run with the land;<sup>33</sup> thus, the lessee should be allowed to assert the same rights against subsequent purchasers that he could have asserted against the original lessor. To the extent that *Blumberg, Rogow*, and other similar decisions frustrate this reasoning, those decisions should be rejected.

---

32. Logically, the *Rogow* rationale can be supported only if it is assumed that the right of first refusal should be given precedence over the fixed price option. This assumption was rejected specifically in *Sinclair Refining Co. v. Allbritton*, 147 Tex. 468, 218 S.W.2d 185 (1949), where the court said: "[W]e consider it good authority that the 'Purchase Refusal' article is not to be given precedence over *or even equal dignity with* the 'Purchase Option' article, but is to be regarded merely as a supplement to the latter." 218 S.W.2d at 189. (Emphasis supplied).

33. *Humble Oil & Refining Co. v. Lemmon*, 94 R.I. 509, 182 A.2d 306 (1962) (purchase option is an integral part of the lease and is a covenant that runs with the land unless the language of the lease indicates that the parties meant the covenant to be purely personal).