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Real Property - Condominiums - Merger of Estates - State Savings & Loan Ass'n v. Kauaian Development Co., 445 P.2d 109 (Hawaii 1968)

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erts, and to be prepared for the developments of *Texas Gulf*.²² Similarly, others feel that the issues involved in *Texas Gulf* constitute "no radical departure from the pre-existing rules" and that "[t]he general rules implicit in that case have been operative for a very long time."²³ Still another view is that the SEC's success in prosecuting *Texas Gulf* is a significant change, which will "impose more stringent disclosure and trading requirements on both issuers and those with access to corporate information unavailable to the public."²⁴ Finally, the more moderate (and probably most accurate) opinion is that, while the TGS proceeding is significant, it does not place unreasonable restraints on trading by insiders, for it has long been difficult to justify such trading as is proscribed by the *Texas Gulf* holding.²⁵

In sum, the court of appeals' holding in *SEC v. Texas Gulf Sulphur* has clarified the possible liability of a corporate officer or employee in trading in his corporation's securities on the basis of undisclosed inside information under rule 10b-5 and, in so doing, has extended such liability to certain persons and certain situations not heretofore clearly included. The resulting extension of liability is, however, not unreasonable.

DENNIS C. HENSLEY

Real Property—CONDOMINIUMS—MERGER OF ESTATES. Kauaian Development Co., after acquiring a leaseholding interest in land, executed numerous documents with individual purchasers for the sale of condominium units.¹ Once the corporation submitted the lease to a "horizontal property regime" (the condominium),² the fee to the property

non-officer employees were held liable, but the district court in so holding relied on the district court holding in *Texas Gulf*. See *id.* at 409.

22. Cary, *supra* note 17, at 1011.

23. Fleischer, *Insider Trading in Stocks*, 21 BUS. LAW. 1009, 1020 (1966). It should be noted that Mr. Fleischer's statement was made before the *Texas Gulf* holding under discussion here was rendered and was made only on the basis of the issues raised by the proceeding.

24. Kennedy and Wander, *supra* note 20, at 1058.

25. Fleischer, *supra* note 12, at 1304-05.

1. State Savings & Loan Ass'n v. Kauaian Development Co., 445 P. 2d 109 (Hawaii 1968). An "agreement of sale" normally denotes a transaction whereby the purchaser is entitled to immediate possession; however, in this case the right to possession was not to arise until completion of the construction.

2. The statutory requirements necessary to the creation of a condominium in Hawaii are found in S. L. H. Act. 9, § 8 (1962). This section reads as follows:

A horizontal property regime is created under the Horizontal Property

was conveyed to the corporation.³ Subsequently the plaintiff-mortgagee financed the construction of the condominium but took the mortgage with knowledge of the purchase contracts. Upon default of the mortgage by the corporation, the mortgagee instituted this action to foreclose against the interest of the purchasers of individual condominium units.⁴

The trial court, adhering to strict common-law principles, held that the horizontal property regime was destroyed when the leasehold merged in the fee.⁵ Since the executory purchase contracts could no longer be enforced, they failed to convey any interest in realty and consequently, foreclosure had to be effectuated.

The Supreme Court of Hawaii, in reversing the lower court's decision, held that a contract purchaser of an individual unit in a condominium has, absent subordination,⁶ priority over a subsequent mortgagee who finances the construction and who takes the mortgage with knowledge of the purchase contracts. In buttressing its decision, the court rejected the common-law principle that merger of estates would occur despite the intervention of contract rights of innocent third per-

Regime Act when a developer, sole owner, or co-owners declare their intention to do so by recording a master lease or deed and a declaration of submission which contains the following:

- a. The description of the land, whether leased or in fee simple, and the buildings, expressing their respective areas;
- b. The general description and number of each apartment, expressing its area, location and any other data necessary for its identification; and
- c. The description of the general common elements of the building.

3. HAWAII REVISED LAWS § 170A-34 (1955) provides in part:

The developer shall not enter into a building contract or agreement for the sale of any unit in a condominium project until

- a. A true copy of the commissioners final or substitute public report, there on with all supplementary public reports, if any has been issued, has been given to the prospective purchaser.
- b. The latter has been given an opportunity to read same, and,
- c. His receipt taken therefore.

4. *State Savings & Loan Ass'n v. Kauaian Development Co.*, 445 P. 2d 109 (Hawaii 1968).

5. The common law doctrine of the merger of estates already has been recognized in Hawaii; however, the doctrine's prior recognition did not involve the intervening rights of innocent third parties. *Foster v. Waiahole Water Co.*, 25 Hawaii 726, 733 (1921); *Simerson v. Simerson*, 20 Hawaii 57, 59 (1910).

6. A contract purchaser of an individual condominium unit with interests superior to a subsequent mortgage may voluntarily subordinate his interests to that mortgage. *State Savings & Loan Ass'n v. Kauaian Development Co.*, 445 P. 2d 109, 119 (Hawaii 1968).

sons. In an effort to encourage the development of condominium projects, the Hawaii Supreme Court concluded that the corporate lease continued as an estate distinct from the land company's interest in the fee; therefore, the interest in realty from which the purchasers' rights originated remained intact.⁷

Condominiums or horizontal property regimes have recently emerged through enabling statutory enactment⁸ and, because of post-World War II housing shortages, interest in condominium ownership has increased substantially.⁹ Basic legal theory states that the property interests involved in a condominium project may be defined as a "system of separate ownership of individual units in multi-unit buildings."¹⁰ Thus, individual condominium units are legal entities equivalent to dwellings built as individual structures,¹¹ except that each separate owner has a non-severable interest as a tenant in common with the other owners in such common elements as building entrances, stairways and halls.¹²

In this case, *State Savings & Loan Association v. Kauaian Development Co.*,¹³ the Hawaii Supreme Court rejected the common-law doctrine of merger of estates upon the theory that property rights of the unit owners in a condominium complex should be well protected. At common law the doctrine of merger was an established, inflexible rule. For example, whenever a greater and a lesser estate met in the same person without an intermediate estate, the lesser estate was immediately destroyed,¹⁴ irrespective of the manifest intention of the parties.¹⁵ In

7. *Id.* The court also held that it would apply the old law on mechanics' and materialmen's liens to condominiums; therefore, such liens would attach to the equitable interest of the unit owners in the condominium.

8. Hawaii was the first state to enact horizontal property regime legislation. Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHNS L. REV. 1, 5 (1963).

9. Another reason for the increased interest in condominium ownership is the National Housing Act § 234, 12 U. S. C. § 1715Y (Supp. IV 1963), which includes condominium apartments as an acceptable form of ownership prerequisite for a Federal Housing Administration mortgage loan.

10. ROHAN & RESKINS, *CONDOMINIUM LAW AND PRACTICE*, § 1.01[1] (1965).

11. *State Savings & Loan Ass'n v. Kauaian Development Co.*, 445 P.2d 109 (Hawaii 1968).

12. Bergin, *Virginia's Horizontal Property Act: An Introductory Analysis*, 52 VA. L. REV. 961, 963-64 (1966).

13. 445 P.2d 109, 120 (Hawaii 1968).

14. *Wilson v. Kipp*, 94 Cal. App.2d 426, 210 P.2d 908 (1949); *Alderman v. Whidden*, 142 Fla. 647, 195 So. 605 (1940); *Foster v. Waiahole Water Co.*, 25 Hawaii 726, 733 (1921); *Johnston v. Masterson*, 397 Ill. 168, 73 N.E.2d 401 (1947); *H. C. Frick Co. v.*

order for a merger of legal and equitable estates to take place, however, the estates must be coextensive and commensurate; that is, the estates must be both legal or both equitable.¹⁶ Applying these common-law principles to the present case, there is no doubt that a merger at law would occur, destroying the interests of the purchasers in the condominium leasehold.¹⁷

The modern doctrine, however, is that merger is not favored and that equity will prevent or permit a merger depending upon the intent of the parties,¹⁸ whether expressed or implied,¹⁹ and the facts and circumstances attending the transfer in realty.²⁰ A few courts have gone further by holding that the intention of the parties will not necessarily control the merger of estates when the rights of third persons intervene,²¹ and that a merger will be prevented where such rights would otherwise be prejudiced.²²

The significance of *State Savings & Loan Association*²³ lies in the extension, by the Hawaii Supreme Court, of the protection equity historically has given to rights arising under an executory contract for the sale of land to interests of contract purchasers of individual units in

Laugheed, 203 Pa. 168, 52 A. 172 (1902); *Mobley v. Harkins*, 14 Wash.2d 276, 128 P.2d 289 (1942).

15. E.g., *Mobley v. Harkins*, 14 Wash.2d 276, 128 P.2d 298 (1942).

16. E.g., *Donalds v. Plumb*, 8 Conn. 447 (1831); *In re Dickson's Estate*, 378 Pa. 48, 105 A.2d 156 (1954); *Bowlin v. Rhode Island Hospital Trust Co.*, 31 R. I. 289, 76 A. 348 (1910); *Hilmes v. Moon*, 168 Wash. 222, 11 P.2d 253 (1932).

17. *State Savings & Loan Ass'n v. Kuaian Development Co.*, 445 P.2d 109 (Hawaii 1968).

18. E.g., *Sisson v. Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Bagley v. McCarthy Bros. Co.*, 95 Minn. 286, 104 N.W. 7 (1905); *Dunkrum v. Maceck Bldg. Corp.*, 256 N.Y. 275, 176 N.E. 392 (1931).

19. *Polk Bond & Mortgage Co. v. Dwiggin*, 109 Fla. 443, 147 So. 855 (1933); *Dilts v. Brooks*, 66 Mont. 346, 213 P. 600 (1923); *Barry Inc. v. Baf, Ltd.*, 3 N.J. Super. 355, 65 A.2d 761 (1949).

20. E.g., *Anderson v. Starr*, 159 Wash. 641, 294 P. 581 (1930).

21. *St. Louis Union Trust Co. v. Jolliffe*, 74 F.2d 247 (C.A.N.Y. 1934); *Weisser's Trustee v. Mulloy*, 276 Ky. 427, 124 S.W.2d 496 (1939). In the former case it was held that where a lessor conveys his reversionary interest to the lessee, merger results and rents cease; however, where the lessor mortgages the reversion prior to its conveyance to the lessee, a merger will not occur in order that the rights of the mortgagee are not prejudiced.

22. E.g., *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909); *Frasier v. Martin*, 195 Ga. 683, 25 S.E.2d 307 (1943); *Fortman v. Deters*, 206 Ill. 159, 69 N.E. 97 (1903); *Wertlaufer v. Ames*, 133 Mich. 201, 94 N.W. 950 (1903); *Curtis v. Moore*, 152 N.Y. 159, 46 N.E. 168 (1897); *Waldron v. Wahl*, 286 Pa. 237, 133 A. 252 (1926).

23. *State Savings & Loan Ass'n v. Kuaian Development Co.*, 445 P.2d 109 (Hawaii 1968).

a proposal condominium complex. In protecting the contract purchasers, the court has implemented judicially the legislative desire to encourage the development of condominium projects and, in the same instance, has formulated a progressive standard of statutory construction in an area of law which has profound social and economic implications.

CHARLES F. MIDKIFF

Torts—EMOTIONAL DAMAGE—"ZONE OF DANGER" TEST REJECTED.

Plaintiffs, mother and daughter, brought an action to recover for emotional shock and resulting physical injury occasioned by witnessing the death of a second daughter caused by the negligence of the defendant motorist.¹ The lower court denied defendant's motion for summary judgment as to the plaintiff-daughter who was within the zone of danger, but granted summary judgment against the plaintiff-mother who witnessed the accident while outside the zone of danger.

The Supreme Court of California reversed the superior court in part and awarded recovery to the plaintiff-mother. In overruling the previously controlling California case of *Amaya v. Home Ice, Fuel and Supply Co.*,² the court based its decision on the ". . . hopeless artificiality of the zone-of-danger rule"³ and on the leading English case on this subject, *Hambrook v. Stokes Bros.*,⁴ which allowed recovery in analogous circumstances.

Recovery in actions for emotional shock and resulting physical injury due to witnessing the peril, injury, or death of a third person has generally been denied to bystanders,⁵ parents,⁶ spouses,⁷ or children.⁸

1. *Dillon v. Legg*, — Cal.2d — 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

3. *Dillon v. Legg*, — Cal.2d — 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

4. 1 K.B. 141 (1925).

5. *See*, *Angst v. Great Northern Ry. Co.*, 131 F. Supp. 156 (D. Minn. 1955); *Van Hoy v. Oklahoma Coca-Cola Bottling Co.*, 205 Okla. 135, 235 P.2d 948 (1951); *McMahon v. Bergeson*, 9 Wis.2d 256, 101 N.W.2d 63 (1960).

6. *See*, e.g., *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 215 (W.D. La. 1962); *Rogers v. Hexol, Inc.*, 218 F. Supp. 453 (D. Ore. 1962); *Preece v. Baur*, 143 F. Supp. 804 (E.D. Idaho 1956); *Southern Ry. Co. v. Jackson*, 146 Ga. 243, 91 S.E. 28 (1916); *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952); *Cleveland, C.C. & St. L. Ry. Co. v. Steward*, 24 Ind. App. 374, 56 N.E. 917 (1900); *Vinet v. Checker Cab Co.*, 140 So.2d 252 (La. App. Ct. 1962); *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (1921); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Brennan v. Biber*, 93 N.J. Super. 351, 225 A.2d 742 (1966); *Tobin v. Grossman*, 291 N.Y.S.2d 227 (1968); *Berg v. Baum*, 224 N.Y.S.2d 974 (1962); *Nuckles v. Tennessee Electric Power Co.*, 155 Tenn. 611, 299 S.W. 775 (1927).

7. *See*, e.g., *Redding v. United States*, 196 F. Supp. 871 (W.D. Ark. 1961); *Tyler v.*