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Chapter 6: Real Property

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CHAPTER 6

Real Property

SURVEY Staff†

§ 6.1. **Tenant at Sufferance — Ability to Maintain An Action to Enforce the State Sanitary Code and the State Building Code.*** Technically, a tenancy at sufferance¹ is not a tenancy at all because it involves no privity of estate² or contract³ between the landlord and the tenant.⁴ At common law such a tenant, although not liable for rent, had no more than naked possession of the premises,⁵ and was not entitled to notice to quit, and had no action against her landlord or other person entitled to possession if she was ejected without unnecessary force.⁶ The tenant at sufferance was not liable for criminal trespass, however, because her entry was lawful.⁷ In addition, a landlord was not liable to a tenant at sufferance in tort actions for injuries sustained by the tenant due to the condition of the premises.⁸ The landlord owed only the duty not to injure the tenant wantonly or willfully.⁹

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§ 6.1. ¹ A tenancy at sufferance arises when one in lawful possession of property under authority or title of the owner, that is, a tenant for years or at will, remains in possession after the right under which she entered expires. The landlord does not consent to the continued occupancy, but merely fails to take an affirmative step to oust the tenant. Such a tenancy entitles the tenant only to naked possession. Since the tenancy at sufferance is not based on any contract, express or implied, few rights, duties or liabilities exist. H. STAVISKY, LANDLORD AND TENANT LAW, 33 MASS. PRACTICE SERIES §§ 101, 103 (1977 & 1984 Supp.); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 2:20 (1980).

² H. STAVISKY, *supra* note 1, at § 101; R. SCHOSHINSKI, *supra* note 1 at § 2:20.

³ H. STAVISKY, *supra* note 1, at § 103; Benton v. Williams, 202 Mass. 189, 192, 88 N.E. 843, 844 (1909).

⁴ H. STAVISKY, *supra* note 1, at § 101.

⁵ *Id.* Benton v. Williams, 202 Mass. 189, 192, 88 N.E. 843, 844 (1909).

⁶ Benton v. Williams, 202 Mass. at 192, 88 N.E. at 844 (1909); R. SCHOSHINSKI, *supra* note 1, at § 2:21.

⁷ This common law principle has been codified in G.L. c. 266, § 120. H. STAVISKY, *supra* note 1, at § 103.

⁸ Margosian v. Markarian, 288 Mass. 197, 199, 192 N.E. 612, 613 (1934); R. SCHOSHINSKI, *supra* note 1, at § 2:20.

⁹ Margosian v. Markarian, 288 Mass. at 199, 192 N.E. at 613 (1934). *See also* Carney v. Conveyancers Title Insurance & Mortgage Co., 309 Mass. 197, 200, 34 N.E.2d 654, 655 (1941); R. SCHOSHINSKI, *supra* note 1, at § 2:20.

Over the years, the common law status of the tenant at sufferance in Massachusetts has been altered by statute and decisional law. Section 3 of Massachusetts General Laws, chapter 186 requires that a tenant at sufferance pay rent for the use and occupation of the premises.¹⁰ Another statute provides that the tenant at sufferance may be evicted only by summary process.¹¹ Very early, the tenant at sufferance was entitled, by Massachusetts law, to a reasonable time to remove herself from the premises upon being given notice to quit, though she was not entitled to statutory notice.¹²

In 1977, in *King v. G & M Realty*,¹³ the Massachusetts Supreme Judicial Court suggested that it would be inclined to give tenants at sufferance more than narrow rights to sue a landlord in tort for injuries sustained on the premises.¹⁴ The *King* case concerned a tenant under a statutory 14-day notice to quit who sought to maintain an action in tort against the landlord to recover for injuries sustained on the premises where the 14-day period had not yet expired.¹⁵ While the Court declined to determine whether the tenant's status had been converted to that of a tenant at sufferance by the notice to quit, it noted that the tenant in that situation should not be regarded as a mere trespasser when he could not be lawfully dispossessed of the property until the 14-day notice to quit expired.¹⁶ The Court observed that "even at common law such a tenant was not a trespasser but a 'licensee,' if only a 'bare one,' and that the effect of modern legislation may well be to give him a more honorific status than that [of a licensee]." ¹⁷

During the *Survey* year, in *Brown v. Guerrier*,¹⁸ the Supreme Judicial Court enhanced the rights and status of the tenant at sufferance beyond that granted to the tenant by the *King* decision.¹⁹ In *Guerrier*, the Court held that a tenant at sufferance who continues to pay rent is entitled to maintain an action against the owner for relief from violations of the implied warranty of habitability as determined by the State Sanitary

¹⁰ G.L. c. 186, § 3. The statute provides: "Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same."

¹¹ G.L. c. 184, § 18. The statute provides in relevant part: "No person shall attempt to recover possession of land or tenements in any manner other than through an action brought pursuant to chapter two hundred and thirty-nine or such other proceedings authorized by law." See also H. STAVISKY, *supra* note 1, at § 103.

¹² H. STAVISKY, *supra* note 1, at § 104 and n.84.

¹³ 373 Mass. 658, 664, 370 N.E.2d 413 (1977).

¹⁴ *Id.* at 664, 370 N.E.2d 413, 416.

¹⁵ *Id.* at 663-64, 370 N.E.2d 413, 416 (1977).

¹⁶ *Id.*

¹⁷ *Id.* at 663-64, 370 N.E.2d 413, 416-17.

¹⁸ 390 Mass. 631, 457 N.E.2d 630 (1983).

¹⁹ *Id.* at 634, 457 N.E.2d at 632.

Code, and from a violation of local board of health standards.²⁰ The Court reserved the question of whether a tenant at sufferance has rights to enforce provisions of the State Building Code against the landlord under chapter 186, section 14 of the General Laws, though the Court did discuss how it might decide the issue in future cases.²¹

The plaintiff, Brown, was a tenant at sufferance in premises owned by the defendant landlord.²² Brown filed a complaint in the Boston Housing Court seeking an order that the defendant make certain repairs to bring the premises into compliance with the State Sanitary Code²³ and with the State Building Code.²⁴ Violations found in an inspection then conducted by the Inspectional Services Department of the City of Boston included: defective heating equipment, a front porch not in good repair, defective waste pipes in the cellar, a defective kitchen stove leaking gas, a defective bathroom wash basin and toilet, a defective electrical switch and fixtures, windows not in good repair, need for extermination of insects and rodents, hall walls not in good repair, insufficient receptacles for storage of garbage, and lack of maintenance of the common areas in a clean and sanitary manner.²⁵ At trial, the parties stipulated to the continued existence of these violations of the sanitary and building codes.²⁶ In opposition to the plaintiff's action, the defendant contended that the plaintiff was not entitled to the relief sought because she was a tenant at sufferance, under a court order to vacate the premises.²⁷ The tenant had

²⁰ *Id.*

²¹ *Id.* at 635, 457 N.E.2d at 633.

²² *Id.* at 632, 457 N.E.2d at 631.

²³ 105 C.M.R. § 410.001 (1978).

²⁴ 780 C.M.R. § 100.1 (1980). *Brown v. Guerrier*, 390 Mass. 631, 632, 457 N.E.2d 630, 631 (1983).

²⁵ Brief for Appellant, at 8-9 and Appendix to Brief for Appellant at 8, *Brown v. Guerrier*, 390 Mass. 631, 457 N.E.2d 630 (1983). The defects in the electrical switch and fixtures also constituted violations of the State Building Code. Brief for Appellant at 8 and Appendix to Brief for Appellant at 9.

²⁶ 390 Mass. 631, 632, 457 N.E.2d 630, 631 (1983). See Brief for Appellant at 9.

²⁷ 390 Mass. 631, 632, 457 N.E.2d 630, 631 (1983). In July, 1982, the tenant was served with a 14-day notice to quit for nonpayment of rent by her landlord. The tenant had been withholding rent due to numerous substandard conditions in her apartment. Brief for Appellant at 3. In August, 1982, the landlord obtained a judgment for possession against the tenant in a summary process action. *Id.* at 4. On September 30, 1982, the tenant filed an injunctive action seeking to restrain the landlord from levying execution upon the summary process. *Id.* at 6. The tenant was successful in obtaining a stay against further action by the landlord to obtain possession. *Id.* at 7. This stay was conditioned on payment to the landlord of the contract rent (\$175 per month) for use and occupancy for every month the tenant remained in possession pending appeal. *Id.* at 7. The tenant had already paid to the court \$1,000 in rent she had withheld. *Id.* at 7-8. On October 21, 1982, the tenant filed the action the Court considered on appeal in *Brown v. Guerrier* after the inspection conducted by the Inspectional Services Department of the City of Boston. *Id.* at 8 and 10.

continued to pay rent during her occupancy of the premises and the landlord had accepted the rent payments.²⁸

The Boston Housing Court agreed with the tenant that she was entitled to an injunction restraining the landlord from failing to remedy the building and sanitary code violations.²⁹ It was the intent of the Legislature in enacting the statutes authorizing the codes, the court reasoned, to supersede common law conceptions of the duties landlords owed to tenants at sufferance and to expand the concept of the warranty of quiet enjoyment to cover all foreseeable users of residential rental property and not only those users who have a contractual relationship with the landlord.³⁰ In its order, however, the court noted that a single justice of the Appeals Court had suggested that tenants at sufferance may have fewer rights than other occupants under Massachusetts landlord-tenant statutes.³¹ For this reason, the Housing Court judge referred to the Appeals Court the issue of the interpretation of chapter 186, section 14 and chapter 111, section 127H as these statutes may expand on the common law duties of landlords to tenants at sufferance.³²

The Supreme Judicial Court granted the plaintiff's application for direct appellate review.³³ Since the defendant did not file a brief, however, no

²⁸ 390 Mass. at 633-34, 457 N.E.2d at 632.

²⁹ *Id.* at 631-32, 457 N.E.2d at 631. See Preliminary Injunction and Order for Report of Case under Rule 64, MASS. R. CIV. P., Boston Housing Court, Docket No. 14425 at 6 and 7. in Appendix to Brief for Appellant at 38 and 39.

³⁰ Preliminary Injunction and Order at 6-7, in Appendix to Brief for Appellant at 38-9.

³¹ *Id.* See Brief for Appellant at 10.

³² *Id.* at 7 and 8, Appendix at 39 and 40. See Rule 64, MASS. R. CIV. P.

G.L. c. 111, § 127H provides in relevant part:

Any tenant who rents space in a building for residential purposes wherein a condition exists which is in violation of the standards of fitness for human habitation established under the state sanitary code or in violation of any board of health standards, which condition may endanger or materially impair his health or well-being or the health or well-being of the public, may file a petition against the owner of said building to enforce the provisions of the said code in the superior court.

G.L. c. 186, § 14 provides in relevant part:

Any lessor or landlord of any building or part thereof occupied for dwelling purposes, other than a room or rooms in a hotel, but including a mobile home or land therefor, who is required by law or by the express or implied terms of any contract or lease or tenancy at will to furnish water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service to any occupant of such building or part thereof, who willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service at any time when the same is necessary to the proper or customary use of such building or part thereof, or any lessor or landlord who directly or indirectly interferes with the furnishing by another of such utilities or services, . . . or any lessor or landlord who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant, or who attempts to regain possession of such premises by force without benefit of judicial process, shall be punished . . .

³³ 390 Mass. at 632, 457 N.E.2d at 631.

adversarial proceeding was presented and the Court dismissed the report of the Housing Court judge.³⁴ In an opinion by Justice Wilkins, the Court held that the tenant at sufferance has a right to obtain relief against the landlord for sanitary and local health code violations through actions under chapter 111, section 127H.³⁵ On the issue of tenants at sufferance enforcing the building code through chapter 186, section 14, however, the Court reserved judgment.³⁶

The Court first addressed the question of whether chapter 111, section 127H gave a tenant at sufferance the right to file a petition against the owner of property to enforce state sanitary code provisions and local board of health standards.³⁷ The Court noted that, if this statute were held to apply to a tenant at sufferance, the rights of such a tenant would be far greater than the rights conferred by common law.³⁸ In concluding that tenants at sufferance may enforce the sanitary code against landlords, the Court emphasized that the language of the statute extends the right to enforce the sanitary code to “any tenant who rents space.”³⁹ A tenant at sufferance, the Court stated, was a tenant of sorts, especially since the tenant in this case continued to pay rent during the period of her tenancy at sufferance.⁴⁰

In addition to the words of the statute, the Court relied on the legislative purpose behind the enactment of section 127H.⁴¹ According to the Court, this section was not intended to regulate the individual relationships between owners and tenants. Rather, the statute was designed to serve the public interest by using private tenant initiatives to preserve and rehabilitate the state’s housing stock.⁴²

Finally, the Court found that anyone competent to make an oath, including a tenant at sufferance, may make out a criminal complaint for

³⁴ *Id.*

³⁵ *Id.* at 633-34, 457 N.E.2d at 632.

³⁶ *Id.* at 635, 457 N.E.2d at 633. Before reaching those issues, the Court first held that the report of the Housing Court judge must be discharged because the defendant did not file a brief with the Court and was thus not entitled to a decision. *Id.* at 632, 457 N.E.2d at 631 (citing *Commonwealth v. Petralia*, 372 Mass. 452, 454, 362 N.E.2d 513, 516 (1977)). The Court noted, however, that it has discretion to decide matters not strictly before it, when the case has been fully briefed on the merits, when there is a public interest in obtaining a prompt answer to the question, and when the answer to be given is reasonably clear. 390 Mass. at 631, 457 N.E.2d at 631, (citing *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 305-06, 35 N.E.2d 222, 227 (1941)).

³⁷ 390 Mass. at 633-34, 457 N.E.2d at 632.

³⁸ *Id.* at 633, 457 N.E.2d at 632. See *supra* notes 1-8 and accompanying text for a discussion of the rights of tenants at sufferance at common law.

³⁹ 390 Mass. at 633, 457 N.E.2d at 632.

⁴⁰ *Id.* at 633-34, 457 N.E.2d at 632.

⁴¹ *Id.* at 634, 457 N.E.2d at 632.

⁴² *Id.*

violation of the sanitary code.⁴³ A holding that the tenant at sufferance could maintain an action under section 127H to obtain equitable relief for sanitary code violations, the Court reasoned, would avoid the inconsistency that would result if a tenant at sufferance could not obtain such relief, even though he could make a criminal complaint against the owner.⁴⁴

The Court next considered whether an injunction to correct the building code violations could be issued under chapter 186, section 14. This statute, the Court observed, places criminal penalties on “any lessor or landlord of any building or part thereof occupied for dwelling purposes” who “willfully or intentionally fails to furnish” certain services when the landlord or lessor is required by law to do so, and when the service is necessary to the proper or customary use of the building or any part of it.⁴⁵ The section also provides criminal penalties, the Court explained, for any lessor or landlord who interferes with the quiet enjoyment of any residential premises by the occupant.⁴⁶ In addition, section 14 contains a provision, noted the Court, for the enforcement of its requirements by private actions.⁴⁷

The Court observed that its reasoning concerning the application of chapter 111, section 127H to a tenant at sufferance would be “appropriate” in deciding at a later time whether a tenant at sufferance has rights under the building code.⁴⁸ The Court, however, reserved for future resolution in an adversary proceeding the question to what extent section 14 applies to a tenant at sufferance.⁴⁹ Whether section 14 applies to the building code violations cited in this case, the Court stated, is not so easily determined as to warrant the Court’s opinion.⁵⁰ The difficulty existed, according to the Court, because the record did not show clearly that the defendant was required by law to furnish the light and power unavailable due to the electrical defects.⁵¹ For this reason the Court declined to determine the extent of a tenant at sufferance’s right to quiet enjoyment of the premises as provided in section 14, and whether defective switches interfered with that right.⁵²

In *Brown v. Guerrier*, the Supreme Judicial Court advanced landlord-

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 635, 457 N.E.2d at 632-33.

⁴⁶ *Id.* at 635, 457 N.E.2d at 633.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

tenant law significantly from “medieval to modern times”⁵³ by holding that a tenant’s ability to enforce the sanitary code does not depend on her status at common law.⁵⁴ The *Guerrier* holding continues the judicial transformation of landlord-tenant law⁵⁵ that the Court began with its decision in *Boston Housing Authority v. Hemingway*.⁵⁶ In that case, the Court replaced the doctrine of independent covenants with an implied warranty of habitability in residential leases which predicated the tenant’s obligation to pay rent on the landlord’s obligation to deliver and maintain the premises in a habitable condition.⁵⁷ This shift in doctrine, combined with the gradual statutory alteration of tenants’ common law rights,⁵⁸ has added to the rights of tenants. The Court has applied the implied warranty of habitability doctrine in *Mounsey v. Ellard*,⁵⁹ *King v. G. & M. Realty*,⁶⁰ *Young v. Garwacki*,⁶¹ and *Crowell v. McCaffrey*.⁶² This line of landlord-tenant tort liability cases evidences an effort by the Court to accomplish major changes in landlord-tenant law. The *Mounsey*, *King*, and *Garwacki* cases indicate the Court’s intention to abolish status with respect to land as a precondition to tort recovery against landlords for failure to maintain the premises. In *Crowell*, the Court linked recoveries for the landlord’s breach of the implied warranty of habitability with developments in the

⁵³ See Dillard, *Landlord’s Liability to Tenant’s Guest for Negligence*, 1980 ANN. SURV. MASS. LAW § 6.5 at 246.

⁵⁴ 390 Mass. at 634, 457 N.E.2d at 632.

⁵⁵ See generally Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982).

⁵⁶ 363 Mass. 184, 293 N.E.2d 831 (1973). See Schwartz, *Landlord and Tenant: Expanding Civil Remedies for the Tenant*, 1973 ANN. SURV. MASS. LAW § 1.4 at 12; Student Comment, *Residential Leases: Implied Warranty of Habitability: BHA v. Hemingway*, 1973 ANN. SURV. MASS. LAW § 1.9 at 18.

⁵⁷ 363 Mass. at 199, 293 N.E.2d 831, 834.

⁵⁸ *Id.* at 196, 293 N.E.2d at 840-41 (quoting, Landis, *Statutes and the Sources of Law in HARVARD LEGAL ESSAYS*, pp. 222-23 (1934)).

⁵⁹ 363 Mass. 693, 297 N.E.2d 42 (1973). In *Mounsey*, the Court held that a landlord’s duty to maintain the premises should no longer be predicated on the status of the injured party as either a licensee or an invitee. *Id.* at 707-08, 297 N.E.2d at 51. The Court instead created a duty of reasonable care, which the owner owes to all lawful visitors. *Id.* at 707, 297 N.E.2d at 51. See also Student Comment, *Tort Liability of Occupiers of Land: Duty of Reasonable Care Established for Lawful Entrants: Mounsey v. Ellard*, 1973 ANN. SURV. MASS. LAW § 11.17 at 325.

⁶⁰ 373 Mass. 658, 370 N.E.2d 413 (1977)(tenant, even though a tenant at sufferance, could sue the landlord for injuries caused by the landlord’s negligent maintenance of the premises).

⁶¹ 380 Mass. 162, 402 N.E.2d 1045 (1980)(action in tort against the landlord could be sustained by a tenant’s guest who is injured as a result of negligently maintained premises under the tenant’s control).

⁶² 377 Mass. 433, 386 N.E.2d 1256 (1979)(tenant could sue a landlord for damages in tort for the landlord’s failure to maintain the premises in compliance with the implied warranty of habitability); discussed in Bergstresser, *Torts*, 1979 ANN. SURV. MASS. LAW § 14.8 at 386.

area of landlord-tenant tort law.⁶³ The Court's dicta in *King* strongly implied that a tenant at sufferance would be permitted to sue a landlord in tort.⁶⁴ When the *King* decision is read with *Crowell*, it follows that a tenant at sufferance could sue in tort for the landlord's breach of the implied warranty of habitability.⁶⁵ The Court's decision in *Guerrier* is a logical extension of these cases. If the tenant at sufferance could sue in tort based on the landlord's breach of implied warranty, then allowing the tenant at sufferance the right to sue to enforce the implied warranty of habitability as codified in chapter 111, section 127H before she is injured due to its breach is reasonable.

The Court acted prudently in reserving a decision on the issue of whether tenants at sufferance may maintain actions under chapter 186, section 14 to enforce the building code and their rights to quiet enjoyment of the premises.⁶⁶ To establish a case for relief under section 14, the plaintiff must show that the landlord failed to provide, or interfered with the provision of, certain essential services enumerated in the statute.⁶⁷ These services must be, by the terms of the statute, necessary to the proper or customary use of the premises.⁶⁸ The failure by the landlord to provide the services must be willful or intentional.⁶⁹ All of these tests set out in the statute require the determination of factual issues such as whether the services not provided were substantial enough to cause the requisite injury, and whether the landlord's failure to provide services was willful or intentional. The determination of factual issues is not appropriate outside an adversary context.⁷⁰ The building code violations alleged in this case did not appear to be substantial.⁷¹ Furthermore, the violations alleged may have been resolved by the Court's decision on the sanitary code issue.⁷² The Court was correct not to decide the question in this case where the factual issues were not developed by both parties.

⁶³ *King v. G & M Realty Corp.*, 373 Mass. 658, 663-64, 370 N.E.2d 413, 416-17 (1977); *Crowell v. McCaffrey*, 377 Mass. 443, 445-48, 386 N.E.2d 1256, 1258-60 (1980).

⁶⁴ *King v. G & M Realty Corp.*, 373 Mass. 658, 664, 370 N.E.2d 413, 416-17 (1977).

⁶⁵ In *King*, the Court held that a tenant at sufferance could sue a landlord in tort for injuries sustained due to the landlord's negligent maintenance of the premises. *Id.* at 663-64, 370 N.E.2d at 416-17. The Supreme Judicial Court, in *Crowell*, held that a tenant could sue the landlord in tort for injuries sustained from defects on the premises which resulted from the landlord's breach of the implied warranty of habitability. 377 Mass. 443, 457, 386 N.E.2d 1256, 1261 (1979).

⁶⁶ 390 Mass. at 635, 457 N.E.2d at 633.

⁶⁷ *Id.*

⁶⁸ See G.L. c. 186, § 14.

⁶⁹ *Id.*

⁷⁰ 390 Mass. at 633, 457 N.E.2d at 631.

⁷¹ Defective light switches, while causing inconvenience, may not deprive a tenant of essential services to which the remedy under G.L. c. 186, § 14 is addressed. See 390 Mass. at 635, 457 N.E.2d at 633.

⁷² 390 Mass. at 634-35, 457 N.E.2d at 632.

Even though it did not decide the issue, the *Guerrier* Court did give some guidance regarding the right of tenants at sufferance to enforce the building code through chapter 186, section 14.⁷³ The Court suggested that the factors it considered in deciding the issue of whether tenants at sufferance may sue landlords to enforce provisions of the sanitary code under section 127H are equally “appropriate” in deciding whether tenants at sufferance have rights under section 14 of chapter 186 to enforce the building code.⁷⁴ This statement indicates that tenants at sufferance may be granted at least some rights under this statute, given its broad language and the policy goal of preserving habitable housing.⁷⁵ If the Court applies its dicta in the landlord-tenant tort liability cases and eliminates common law concepts of status as prerequisites to recovery in the enforcement area, then the Court may well give the tenant at sufferance the right to enforce building code violations under section 14.

The *Guerrier* decision has two implications of which the practitioner should be aware. First, the practitioner defending a residential landlord against an action by a tenant to enforce the implied warranty of habitability can no longer rely on the defense that the tenant is a tenant at sufferance and, as such, has no right to maintain an action. Conversely, practitioners representing tenants inhabiting premises afflicted with violations of the implied warranty need not hesitate to bring legal action against the landlord on behalf of the tenant simply because the tenant is a tenant at sufferance. The Court appears ready to expand the rights of tenants at sufferance and enhance the duties owed tenants at sufferance by landlords when an appropriate case arises in an adversarial context.

Whether the tenant at sufferance’s right to quiet enjoyment of the premises under section 14 is equal to her rights under the implied warranty of habitability enforceable through chapter 111, section 127H is left unanswered in *Guerrier*. A decision of a single judge of the Appeals Court has indicated that the rights of tenants at sufferance to quiet enjoyment may be less than the rights of other tenants.⁷⁶ If the Supreme Judicial Court decides to differentiate between the rights of tenants at sufferance to quiet enjoyment and the rights of other classes of tenants, the Court, like the single judge of the Appeals Court in *Harris v. H.J. Davis Development Corp.*, may require that the tenant at sufferance show more substantial interference with the right to quiet enjoyment before relief will

⁷³ *Id.* at 635, 457 N.E.2d at 633.

⁷⁴ G.L. c. 186, § 14.

⁷⁵ See *Simon v. Solomon*, 385 Mass. 91, 100-01, 431 N.E.2d 556, 565 (1982); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 192, 293 N.E.2d 831, 839 (1973); *Angevine & Taube, Enforcement of Public Health Laws – Some New Techniques*, 52 MASS L.Q. 205, 206 (1967).

⁷⁶ See *Harris v. H.J. Davis Development Corp.*, Mass. App. Ct., No. 82-0082-CV, 1. See also G.L. c. 186, § 14, *supra* note 31.

be granted under section 14.⁷⁷ Since factual determinations must be made to decide section 14 claims, such an approach may be difficult for courts to apply. Establishing criteria for distinguishing between the claims of different categories of tenants may involve the problems encountered by courts in the tort area. At the very least, the tenant at sufferance would probably be entitled to use section 14 to hold a landlord liable for willful or intentional interference with the quiet enjoyment of any residential premises occupied by the tenant.⁷⁸ To allow the landlord to interfere with the tenant at sufferance's occupancy to such a degree would emasculate the statutory right of the tenant to be subject to eviction only through judicial process.⁷⁹

Brown v. Guerrier establishes that landlords are obligated to maintain residential properties in compliance with the state sanitary code for all occupants whose entry was lawful.⁸⁰ By making it possible for all occupants, regardless of their status, to enforce the state sanitary code, the purpose of the statute to serve the public interest by preserving and rehabilitating the state's private housing stock is furthered. The next logical movement in this area of landlord-tenant relations will be in the area of rights of tenants at sufferance under the building code. In reaching that issue, the Court will either continue its established pattern of eliminating status concepts from the law of landlord-tenant, as it has done in the area of the landlord-tenant tort liability,⁸¹ or the Court will seek to maintain some differentiation between the rights of different types of tenants to the quiet enjoyment of the premises. The Court is most likely to follow the recent trend of expanding the rights of all tenants in matters regarding the condition of the leased premises and to grant tenants at sufferance the right to enforce the state building code.

§ 6.2. Tenants' Rights — Multiple Damages for Improper Retention of Security Deposits.* For more than a decade, the Massachusetts Legisla-

⁷⁷ *Harris* at 1.

⁷⁸ *Id.* at 2. The Appeals Court actually said: "As the occupants have no entitlement under any contract or lease and little promise of entitlement as tenants at will, it appears the owner owes them something less than the undisturbed possession which the Housing Court's order could be read as requiring. On the other hand the owner cannot make life so unbearable for the plaintiffs that the owner has constructively evicted them." *Id.* at 1-2. The Court is unlikely to use "constructive eviction" as the test for determining whether the landlord has committed a violation of section 14 because the Court has announced its disapproval of the doctrine of constructive eviction in *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 199-200, 293 N.E.2d 831, 843.

⁷⁹ G.L. c. 186, § 14 provides in pertinent part that "[A]ny lessor or landlord . . . who attempts to regain possession of premises by force without benefit of judicial process, shall be punished"

⁸⁰ 390 Mass. at 634, 457 N.E.2d at 632.

⁸¹ *See, e.g., King v. G & M Realty Corp.*, 373 Mass. 658, 370 N.E.2d 413 (1983).

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ture has regulated the use of security deposits,¹ evidencing a concern for one of the problems resulting from the inequality of bargaining positions between landlords and tenants.² Security deposits are a legitimate and perhaps necessary means by which landlords can protect their interest in leased premises.³ These deposits, however, may hinder the efforts of tenants, particularly low-income tenants, to obtain housing and to be treated fairly when leaving that housing.⁴

In 1969, the Legislature set the maximum allowable security deposit as an amount equivalent to two months' rent.⁵ This security deposit law, chapter 186, section 15B of the General Laws, has undergone substantial amendment since 1969.⁶ Presently, the use of security deposits is, in almost all respects, strictly regulated.⁷ In order to foster compliance with section 15B, the statute authorizes courts to award tenants treble damages for a violation by their landlords of specified provisions.⁸ One such provision requires landlords to return security deposits within 30 days after termination of the tenancy.⁹

During the *Survey* year, the Supreme Judicial Court, in *Mellor v.*

§ 6.2. ¹ See G.L. c. 186, § 15B. Section 15B has been amended several times since its enactment. See *infra* note 6.

² See *Goes v. Feldman*, 8 Mass. App. Ct. 84, 91, 391 N.E.2d 943, 947 (1979).

³ See Blumberg & Robbins, *Beyond ULTRA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.L.-C.L.L. REV. 1, 18-19 & n.92 (1976).

⁴ *Id.*

⁵ See G.L. c. 186, § 15B.

⁶ See Acts of 1970, c. 666, § 1; Acts of 1972, c. 639, § 1; Acts of 1973, c. 430, § 11; Acts of 1975, c. 154; Acts of 1977, c. 979, § 1; Acts of 1978, c. 553, § 2; Acts of 1981, c. 82; Acts of 1983, c. 695. For an explanation of the changes made by these amendments, see the editorial note following Mass. Gen. Laws Ann. ch. 186, § 15B (West 1981).

⁷ See Schwartz, *Property and Conveyancing*, 1978 ANN. SURV. MASS. LAW. 1.1, at 3. For a detailed explanation of the provisions in section 15B, see Schwartz, *supra* at 3-10. See also *Hampshire Village Assoc. v. District Court of Hampshire*, 381 Mass. 148, 151-53, 408 N.E.2d 830, 832-33, *cert. denied sub nom. Ruhlander v. District Court of Hampshire*, 449 U.S. 1062 (1980).

⁸ See G.L. c. 186, § 15B(7) which provides:

If the lessor or his agent fails to comply with clauses (a), (d), or (e) of subsection 6, the tenant shall be awarded damages in an amount equal to three times the amount of such security deposit or balance thereof to which the tenant is entitled plus interest at the rate of five per cent from the date when such payment became due, together with court costs and reasonable attorney's fees.

⁹ G.L. c. 186, § 15B(6) provides in pertinent part:

The lessor shall forfeit his right to retain any portion of the security deposit for any reason, or, in any action by a tenant to recover a security deposit, to counterclaim for any damage to the premises if he: . . .

(e) fails to return to the tenant the security deposit or balance thereof to which the tenant is entitled after deducting therefrom any sums in accordance with the provisions of this section, together with any interest thereon, within thirty days after termination of the tenancy.

Berman,¹⁰ resolved two issues concerning the scope of a landlord's liability for improperly withholding a security deposit. The Court held that a landlord who improperly fails to return all or part of a security deposit is liable for treble damages regardless of his or her good faith.¹¹ In addition, the Court ruled that the trial court in *Mellor* did not have the authority to award attorney's fees incurred in defending an appeal of section 15B without such a direction by the Appeals Court.¹²

The plaintiffs in *Mellor* leased residential property from the defendant and gave her a \$500 security deposit.¹³ After the tenants vacated the premises upon expiration of their lease, the lessor inspected the premises, noted damage which she believed was caused by the tenants, and decided that she was entitled to keep the security deposit.¹⁴ The lessor then sent a letter to the tenants stating what damage had been done and the cost of repairs, which she estimated at \$580.49.¹⁵

Disputing the issue of damages, the tenants brought suit in Housing Court seeking treble damages for the improper retention of their security deposit. The Housing Court calculated the damage caused by the tenants to be \$311.44.¹⁷ Because the tenants were entitled to a balance of \$213.56, the judge awarded treble damages in the amount of \$640.68, plus interest, costs, and attorney's fees.¹⁸ On appeal, the Appeals Court affirmed.¹⁹ The

¹⁰ 390 Mass. 275, 454 N.E.2d 907 (1983).

¹¹ *Id.* at 283, 454 N.E.2d at 913.

¹² *Id.* at 284, 454 N.E.2d at 913.

¹³ *Id.* at 276, 454 N.E.2d at 909.

¹⁴ *Id.*

¹⁵ *Id.* The Court also noted that section 15B(4)(iii) requires that a lessor deducting from a security deposit on account of damage provide the tenant with a detailed, itemized list of the damage and of the repairs necessary to correct the damage, and with written evidence of the actual or estimated cost of repairs, such as receipts or estimates. *Id.* at 276-77 n.4, 454 N.E.2d at 909 n.4. The Court added that although the lessor itemized the damages, she did not comply fully with the requirements in section 15B(4)(iii). *Id.* Despite the tenant's contention that the lessor was not entitled to retain the security deposit because of her failure to comply with this subsection, the Court stated that the matter was not before it since the issue had not been raised before the Appeals Court. *Id.*

¹⁶ 390 Mass. at 277, 454 N.E.2d at 909-10.

¹⁷ *Id.* at 277, 454 N.E.2d at 910.

¹⁸ *Id.* Initially, the judge awarded double damages. *Id.* The tenants moved for treble damages based on the Appeals Court's ruling in *Friedman v. Costello*, 10 Mass. App. Ct. 931, 412 N.E.2d 1285 (1980). In *Friedman*, the Appeals Court ruled that the amendment of section 15B(7) by the Acts of 1977, c. 979, increasing recovery from double to treble damages, applied to any security deposit held on or after September 1, 1978. 10 Mass. App. at 931, 412 N.E. 2d at 1286. Agreeing with the tenant's argument, the trial court in *Mellor* amended the judgment and awarded treble damages in the amount of \$640.68. 390 Mass. at 277, 454 N.E.2d at 910.

¹⁹ *Mellor v. Berman*, 13 Mass. App. Ct. 983, 984, 432 N.E.2d 542, 543 (1982). On appeal, the lessor challenged the constitutionality of the amendment increasing damages to treble

tenants then filed a motion requesting attorney's fees and costs arising from appeal.²⁰ The lessor moved for relief from judgment, asserting that a finding of bad faith was required for an award of multiple damages.²¹ The Supreme Judicial Court ordered direct review of the case.²²

The first issue addressed by the Supreme Judicial Court was whether a showing of bad faith is required to impose treble damages.²³ The Court initially examined the language of section 15B and found it to be unambiguous.²⁴ According to the Court, the plain language of subsection 7 indicated that a finding of bad faith is not a requirement for the award of treble damages.²⁵

The Court then turned to the lessor's primary contention that precedent called into question this reading of subsection 7.²⁶ The lessors in *Mellor* argued that language in a case decided previously by the Supreme Judicial Court, *McGrath v. Mishara*,²⁷ suggested that the award of multiple damages was contingent on a finding of bad faith.²⁸ In *McGrath*, the *Mellor* Court conceded, the Supreme Judicial Court had stated that "[a]t a minimum, a landlord must have a reasonable good faith belief that it is entitled to [the] amount deducted"²⁹ The *Mellor* Court noted, however, that the *McGrath* Court had found that the lessor had acted in bad faith by retaining part of the security deposit improperly.³⁰ Therefore,

damages. *Id.* at 984, 432 N.E.2d at 542-43. She contended that the amendment had a retroactive effect. *Id.* The Appeals Court found that claim without merit because the defendant's obligation to return the security deposit arose ten months after the effective date of the amendment. *Id.*

²⁰ 390 Mass. at 278, 454 N.E.2d at 910.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 278-79, 454 N.E.2d at 910-11.

²⁴ *Id.* at 279, 454 N.E.2d at 911. The text of subsection 7 appears *supra* note 8.

²⁵ *Id.* at 280, 454 N.E.2d at 911.

²⁶ *Id.*

²⁷ 386 Mass. 74, 434 N.E.2d 1215 (1982). In *McGrath*, the tenants alleged that their landlord had made improper deductions from their security deposit for unpaid rent in violation of several statutes and an ordinance, including G.L. c. 186, § 15B. *Id.* at 78-83, 434 N.E.2d at 1219-21. The Court ruled in favor of the tenants on the section 15B issue. *Id.* at 80, 434 N.E.2d at 1220. Addressing the issue of whether the landlord's good faith was a defense under this section, the Court explained that the problem with this argument was the trial judge's finding that "the landlord knew or should have known that rent was not in fact due." *Id.* at 80, 434 N.E.2d at 1219-20. In finding bad faith on the part of the landlord, however, the *McGrath* Court did not reach the issue of whether good faith was a defense to section 15B. *Id.* at 79-80, 434 N.E.2d at 1219-20.

²⁸ 390 Mass. at 280, 454 N.E.2d at 911-12.

²⁹ *Id.* at 280, 454 N.E.2d at 911-12, (quoting *McGrath*, 386 Mass. at 80, 434 N.E.2d at 1219).

³⁰ 390 Mass. at 281, 454 N.E.2d at 912.

according to the Court, the language in *McGrath* suggesting a bad faith requirement was merely dictum.³¹

The *Mellor* Court then examined the legislative history of section 15B for evidence that good faith was not a defense to the imposition of multiple damages.³² The Court first commented that the general purpose and use of multiple damages was to deter conduct that the Legislature found particularly reprehensible.³³ The multiple damages provision in section 15B, the Court noted, was aimed at encouraging suits by tenants who might not otherwise litigate, especially if the legal expense could exceed the amount wrongfully retained by the lessor.³⁴ The Court then observed that in 1970, the Legislature enacted a double damage provision for the "wilful" and improper retention of a tenant's security deposit.³⁵ In 1972, however, the Legislature deleted the requirement of a "wilful" violation.³⁶ Although proposals had subsequently come before the Legislature to re-enact a bad faith requirement in section 15B, the *Mellor* Court observed, the Legislature had failed to adopt any of these proposals.³⁷ In addition, the Court asserted, an examination of multiple damage provisions in other statutes indicated that the Legislature knew how to include a bad faith requirement when it wanted to do so.³⁸ Finding that the statute's language and legislative history were both clear on the issue, the Court then concluded that subsection 7 of section 15B could not be construed as containing a bad faith requirement.³⁹

The *Mellor* Court next briefly discussed whether a trial court could award costs and attorney's fees incurred in defending an appeal of section 15B where the Appeals Court had not ordered such an award.⁴⁰ Recognizing that section 15B(7) authorizes trial judges to award attorney's fees incurred at trial, the Court noted that section 15B makes no mention of a trial court's awarding attorney's fees related to an appeal.⁴¹ The Court stated that in a previous case, *Darmetko v. Boston Hous. Auth.*,⁴² it had authorized the trial judge on remand to award attorney's fees arising from

³¹ *Id.*

³² *Id.* at 281-83, 454 N.E.2d at 912-13.

³³ *Id.* at 281-82, 454 N.E.2d at 912.

³⁴ *Id.* at 282, 454 N.E.2d at 912.

³⁵ *Id.* at 282, 454 N.E.2d at 912.

³⁶ *Id.*

³⁷ *Id.* at 282, 454 N.E.2d at 913. The proposed amendments to section 15B containing a wilfulness requirement and cited by the *Mellor* Court may be found at 1972 House Doc. Nos. 248, 1676 and 3122.

³⁸ *Id.* at 282-83 n.11, 454 N.E.2d at 913 n.11.

³⁹ *Id.* at 283, 454 N.E.2d at 913.

⁴⁰ *Id.* at 283-84, 454 N.E.2d at 913-14.

⁴¹ *Id.* at 283, 454 N.E.2d at 913.

⁴² 378 Mass. 758, 393 N.E.2d 395 (1979).

the appeal.⁴³ By contrast, the Court explained, the Appeals Court in *Mellor* did not make such a direction to the trial court.⁴⁴ The Court stated that a litigant must bear the burden of the expenses of litigation unless relieved from paying them by statute or by court order.⁴⁵

The *Mellor* Court's reasoning on both issues examined is correct. In reaching the conclusion that awarding multiple damages is not contingent on a finding of bad faith, the Court properly analyzed both the language and the legislative history of section 15B. The statute contains no language concerning the intent or motivation of the lessor, thus indicating that intent is irrelevant.⁴⁷ Furthermore, there is a lack of positive evidence in the legislative history of section 15B of a bad faith requirement.⁴⁸ Indeed, the legislative history specifically controverts that possibility.⁴⁹ As the *Mellor* Court observed, the Legislature deleted a requirement similar to bad faith, that of wilfulness, for the imposition of multiple damages and subsequently failed to enact proposals containing such a requirement.⁵⁰

By suggesting in dictum that good faith may be a defense to multiple damages, the *McGrath* Court was apparently speaking in generalities, without undertaking a close examination of the language and legislative history of section 15B.⁵¹ Recognizing *McGrath's* language as dictum, the *Mellor* Court accorded only slight precedential value to *McGrath* and instead directly analyzed the plain language and legislative history of section 15B.⁵² This examination demonstrated that neither the statute's wording nor its legislative history indicated that the statute did or should contain a bad faith requirement.⁵³

The issue in *Mellor* of a trial court's power to award attorney's fees incurred on appeal was properly and straightforwardly handled by the Court. A trial court may award attorney's fees incurred on appeal only

⁴³ 390 Mass. at 283, 454 N.E.2d at 913.

⁴⁴ *Id.* at 284, 454 N.E.2d at 913.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See G.L. c. 186, § 15B(7), *supra* note 8.

⁴⁸ See 390 Mass. at 282-83 & n.11, 454 N.E.2d at 912-13 & n.11.

⁴⁹ *Id.*

⁵⁰ *Id.* at 282, 454 N.E.2d at 912-13.

⁵¹ The *McGrath* decision did not examine the legislative history of section 15B. See 386 Mass. at 79-80, 434 N.E.2d at 1219-20. By contrast, the *Mellor* opinion relied heavily on the statute's legislative history in concluding that section 15B did not contain a bad faith requirement. See 390 Mass. at 282-83, 454 N.E.2d at 912-13. In undertaking this examination, the *Mellor* Court acknowledged assistance from a brief filed by the Massachusetts Tenants Organization as *amicus curiae* concerning the legislative history of section 15B. See 390 Mass. at 282-83 n.11, 454 N.E.2d at 913 n.11.

⁵² See 390 Mass. at 278-83, 454 N.E.2d at 910-13.

⁵³ *Id.*

when given this authority by statute or by an appellate court.⁵⁴ Because neither section 15B nor the Appeals Court in *Mellor* granted the trial court this authority, the trial court lacked the power to award attorney's fees other than those incurred at trial.⁵⁵

The *Mellor* Court's construction of section 15B(7) is likely to have adverse consequences for landlords in Massachusetts. When withholding any portion of a security deposit, a landlord must totally comply with section 15B's requirements or else risk paying treble damages.⁵⁶ If a landlord, such as the one in *Mellor*, properly retains a portion of a security deposit but is incorrect as to the exact amount to which he or she is entitled, the landlord may have to pay damages that are greater than the amount of the security deposit withheld. The risk and burden of paying treble damages may be greater than the risk and burden of absorbing the costs of damage or unpaid rent. Faced with this prospect as a result of a possibly innocent miscalculation, a landlord may be impelled to withhold less than he or she believes is due.

Despite the seeming harshness of imposing multiple damages regardless of good faith, there are at least two justifications for such a policy. First, under section 15B(4)(iii), a landlord is required to furnish a list of itemized damages along with written evidence of the actual or estimated costs of repair.⁵⁷ With such written evidence of the costs of repair, a landlord's assessment of damage should generally be accurate.⁵⁸ For this reason, a landlord who complies with section 15B(4)(iii) will not ordinarily be subject to penalty in the form of treble damages.

The second justification for a multiple damages provision operative regardless of good faith is the Legislature's recognition of the unequal bargaining positions of landlords and tenants.⁵⁹ To equalize their relative positions, the Legislature has placed a heavy procedural and monetary burden on landlords with the adoption of section 15B. Landlords must now comply strictly with section 15B and be cautious when deducting any money from a security deposit or else risk paying treble damages. Moreover, section 15B provides tenants with an incentive to protect their

⁵⁴ *Id.* at 284, 454 N.E.2d at 913.

⁵⁵ *Id.* at 283-84, 454 N.E.2d at 913.

⁵⁶ See G.L. c. 186, § 15B(7).

⁵⁷ G.L. c. 186, § 15B(4)(iii). The pertinent portion of this subsection provides:

In the case of such damage, the lessor shall provide to the tenant within such thirty days an itemized list of damages, sworn to by the lessor or his agent under pains and penalties of perjury, itemizing in precise detail the nature of the damage and of the repairs necessary to correct such damage, and written evidence, such as estimates, bills, invoices or receipts, indicating the actual or estimated cost thereof.

⁵⁸ The lessor in *Mellor*, for example, failed to include in her letter to the tenants written evidence of the cost of repairs as required by section 15B(4)(iii). 390 Mass. at 276-77 n.4, 454 N.E.2d at 909 n.4.

⁵⁹ See *Goes v. Feldman*, 8 Mass. App. Ct. at 91, 391 N.E.2d at 947.

rights. Prior to the enactment of section 15B, tenants had little motivation to litigate when their legal expenses might be greater than a judgment which consists of a simple return of the money wrongfully withheld.⁶⁰

In conclusion, the Supreme Judicial Court in *Mellor v. Berman* ruled that good faith is not a defense to the imposition of multiple damages authorized under chapter 186, section 15B of the General Laws. The *Mellor* decision may operate harshly against landlords in limited circumstances. Placing this heavier burden on landlords in handling security deposits, however, is justified as an attempt to equalize the bargaining positions of landlords and tenants.

§ 6.3. Rights of Re-Entry — Duration of Condition — Assignability — Alienability of Enforcement.* At common law, the right of re-entry retained by a grantor who conveys in fee subject to conditions subsequent was not only inalienable *inter vivos* but was also destroyed by an attempted conveyance.¹ This rule of law was consistently applied by Massachusetts courts for over 120 years.² In 1954, the Legislature passed a statute which regulated interests and estates by amending chapter 184A of the General Laws.³ The statute was designed to eliminate the disparity in

⁶⁰ See *id.*

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§ 6.3. ¹ See, e.g., *Rice v. Boston and Worcester Railroad*, 94 Mass. (12 Allen) 141 (1866); *Guild v. Richards*, 82 Mass. (16 Gray) 309, 318 (1860) (rights of entry non-assignable). Most jurisdictions recognize that after the grantor's death, the right of re-entry may be asserted by heirs. Massachusetts, however, had applied the rule of inalienability to attempted transfers.

² See, e.g., *Rice v. Boston & Worcester Railroad*, 94 Mass. (12 Allen) 141 (1866).

³ G.L.c. 184A, §§ 1-3 read as follows:

§ 1 In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time.

§ 2 If an interest in real or personal property would violate the rule against perpetuities as modified by section one because such interest is contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency.

§ 3 A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities.

treatment between rights of entry and possibilities of re-entry, and executory interests.⁴ Before the statute's enactment, executory interests were held void under the rule against perpetuities.⁵ Rights of entry and possibilities of reverter, on the other hand, were traditionally exempt from application of this rule.⁶ During the *Survey* year, in *Oak's Oil Service, Inc. v. MBTA*,⁷ the Appeals Court, construing chapter 184A, sections 1-3 for the first time, interpreted the statute as authorizing the creation of a right of entry for condition broken in a person other than the grantor.⁸

In *Oak's Oil Service*, the Boston and Maine Railroad ("B & M") had conveyed real estate adjoining its right of way in North Beverly to Heath Morse in January 1956.⁹ The land consisted of the North Beverly depot and parking lot and was subject to an express condition.¹⁰ The conditional term required that Morse's heirs and assigns for one hundred years "shall provide to the grantor [B & M], its heir and assigns, for the accommodation of and use by said grantor, its successors, assigns and patrons" facilities to accommodate passengers in the station building and their cars in the parking lot.¹¹ The condition also provided for the right of ingress and egress over the premises without charge to the grantor, its successors, assigns and patrons.¹² The deed stipulated that B & M, its successors, and assigns should have a right of re-entry upon breach of the condition following notice, and allowed for termination if the grantor abandoned passenger service.¹³

In June of 1956, Morse conveyed the premises to the plaintiff, Oak's Oil Service, Inc.¹⁴ Oak's Oil Service in turn leased and later sold a portion of the premises to the defendant, Amoco Oil.¹⁵ In 1976, the railroad conveyed its premises by deed to the defendant Massachusetts Bay Transportation Authority ("MBTA").¹⁶ On one or more occasions between July, 1977 and May, 1980 the MBTA notified the plaintiff that it was in breach of the deed's condition.¹⁷

⁴ See *Oak's Oil Service v. Massachusetts Bay Transportation Authority*, 15 Mass. App. Ct. 593, 597, 447 N.E.2d 27, 30 (1983).

⁵ *Id.* at 597-98, 447 N.E.2d at 30.

⁶ *Id.* at 598, 447 N.E.2d at 30.

⁷ *Id.* at 593, 447 N.E.2d at 27.

⁸ *Id.* at 598, 447 N.E.2d at 30.

⁹ *Id.* at 594, 447 N.E.2d at 28.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 594-95, 447 N.E.2d at 29.

¹⁷ *Id.* at 595, 447 N.E.2d at 29.

In November, 1980 the MBTA, pursuant to the deed, recorded a certificate of entry for condition broken.¹⁸ In response to the MBTA's action, the plaintiff brought suit in district court to remove the cloud on its title and joined Amoco Oil as a defendant.¹⁹ Upon cross-motions for summary judgment, the judge held the certificate of entry null and void.²⁰ The judge rejected the MBTA's argument that because the deed contained the reserved right of entry and because the MBTA was B & M's successor, the MBTA held in fee simple the parcel conveyed to Morse in 1956.²¹ Instead, the judge, relying on a line of cases which held that transfer extinguishes the right of re-entry, concluded that the right of entry in this case could not have been assigned.²² The MBTA appealed.²³

On appeal, the court concluded that the right of entry was assignable in light of chapter 184A, sections 1-3.²⁴ According to the Appeals Court, the statute had two effects on the deed relative to the rule against perpetuities²⁵. First, according to the court, the statute changed the length of the terms of the condition;²⁶ and, second, it validated the assignability of the right of entry for condition broken.²⁷

In applying the statute, the court first shortened the length of the condition to thirty years.²⁸ The parties in this case intended to have the condition last one hundred years.²⁹ The first sentence of the statute provides that if a breach of the condition does not occur within thirty years of the time the estate becomes possessory, the fee shall become absolute.³⁰ Thus, despite the intention of the parties to the original grant, the court held that the statute mandated that the right of entry would have expired if the condition were not broken by 1986.³¹

Second, the court ruled that the statute established that the right of re-entry was alienable. The second sentence of the statute provides that

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 596, 447 N.E.2d at 29.

²¹ *Id.*

²² *Id.* For cases holding that *inter vivos* conveyance destroys the right of entry, see *Dyer v. Siano*, 298 Mass. 537, 11 N.E.2d 451 (1937); *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N.E. 231 (1895); *Rice v. Boston & Worcester R.R.*, 94 Mass. (12 Allen) 414 (1866). For cases holding rights of entry non-assignable, see *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 922 (1950); *Guild v. Richards*, 82 Mass. (16 Gray) 309, 318 (1860).

²³ *Id.*

²⁴ *Id.* at 598, 447 N.E.2d at 29.

²⁵ *Id.* at 598, 447 N.E.2d at 30.

²⁶ *See id.* at 596-97, 447 N.E.2d at 30-31.

²⁷ *See id.* at 597-98, 447 N.E.2d at 30-31.

²⁸ *Id.* at 596, 447 N.E.2d at 29-30.

²⁹ *Id.* at 596, 447 N.E.2d at 29.

³⁰ *Id.* G.L. c. 184, § 3.

³¹ *Id.* at 597, 447 N.E.2d at 30.

“[i]f such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities.”³² The Appeals Court ruled that the intended effect of this sentence was to validate executory interests³³ such as those created by language like that used in *Institution for Savings in Roxbury v. Roxbury Home for Aged Women*.³⁴ In that case, the Supreme Judicial Court found an executory interest where the deed provided, “[t]o the Institution for Savings so long as it shall continue to exist, and then to the Old Ladies Home.”³⁵ According to the Appeals Court, before the statute’s enactment, a provision of this sort would have been held void under the rule against perpetuities.³⁶ Rights of entry and possibilities of re-entry, on the other hand, were traditionally held exempt under the rule.³⁷ Because the statute limited the duration of executory interests to thirty years and allowed enforcement of a condition by one other than the grantor, the Court noted, the statute effectively rendered right of entry and possibilities of re-entry indistinguishable in operation from executory interests created by analogous language.³⁸

Finally, the court reasoned that although the statute did not explicitly address the question of alienability of rights of entry for conditions broken, it removed the underlying common law disability on the creation of rights of entry in persons other than the grantor and his heirs, and destroyed the basis for the rule of non-alienability.³⁹ Consequently, if the parties intended to create a right of entry in a person other than the grantor, the court should give the intention effect.⁴⁰

The *Oak’s Oil Service* Court then turned to evaluate the intention of the parties in the 1956 conveyance.⁴¹ The deed stipulated that in the event of a breach, the “grantor, its successors and assigns” shall have the right of entry and the possibility of re-entry.⁴² In analyzing the deed, the court concluded that the right of entry was not personal to the grantor and that

³² *Id.* (citing G.L. c. 184A § 3) (emphasis added by the Appeals Court).

³³ *Id.* at 597, 447 N.E.2d at 30. Executory interests are all future estates and interests other than reversions and remainders.

³⁴ 244 Mass. 583, 139 N.E. 201 (1928).

³⁵ *Id.*

³⁶ *Oak’s Oil Service v. Massachusetts Bay Transportation Authority*, 15 Mass. App. Ct. at 597, 447 N.E.2d at 30.

³⁷ *Id.*

³⁸ *Id.* at 597-98, 447 N.E.2d at 30.

³⁹ *Id.* at 599, 447 N.E.2d at 31.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 599-600, 447 N.E.2d at 31.

the parties' intent was clear.⁴³ The right of entry in this case was therefore assignable.⁴⁴

Based on the statute and the deed itself, the court reversed and remanded the case for further proceedings.⁴⁵ Because the court found that the right of entry was assignable, a new trial was necessary to determine whether the right was assigned, whether Amoco impaired the enforceability of the right of entry, whether the condition was broken and whether passenger service was abandoned at any time.⁴⁶

The Appeals Court in *Oak's Oil Service* interpreted chapter 184A as limiting the duration of not only executory interests but also conditions to both original and executory interests to thirty years. The court interpreted the statute as allowing the enforcement of a condition by one other than the original grantor.⁴⁷ The court therefore complied with the legislative intent to eradicate the disparity in treatment of rights of entry and possibilities of re-entry, vis a vis treatment of executory interests when it construed chapter 184A as validating certain executory interests as well as rights of re-entry.⁴⁸ With this interpretation, the court eliminated the common law rule of the inalienability of rights of re-entry upon failure of a condition subsequent. The elimination of this rule should serve both to aid draftsmen in fulfilling the intent of their clients and to bring predictability and uniformity to future interests law.

⁴³ *Id.*

⁴⁴ *Id.* at 600, 447 N.E.2d at 31.

⁴⁵ *Id.* The court also based its reasoning on two other considerations. Even if the condition of passenger service were terminated and right of entry lost, another possible source of obligation from the plaintiff to the defendant exists. *Id.* Chapter 160, section 128 requires a railroad which has operated a station for five years to obtain Department of Public Utilities approval before abandoning the site. *Id.* If the North Beverly depot were within the statute, the real estate conveyed by Morse would be subject to a servitude imposed by law. *Id.* at 600, 447 N.E.2d at 32. The parties' private agreement can not divest the railroad of its statutory obligations. *Id.* at 600-01, 447 N.E.2d at 32. Such an easement could be passed on to a successor even if the latter were not subject to chapter 160, section 128. *Id.* at 601, 447 N.E.2d at 32.

The court also noted that in addition to the statute, the language of the deed itself may have effectively created an easement, or covenant that runs with the land. *Id.* According to the court, the language of the deed imposed obligations on Morse and his successors. *Id.* With respect to the maintenance of the depot and the parking facilities, the obligations imposed on Morse were intended for the benefit of B & M's railroad. *Id.* The obligations therefore ran as an appurtenance to those lands. *Id.* Because the private agreement, rather than the statute, stipulated that the easement would be limited to one hundred years from the time of the agreement, the duration would be limited to one hundred years from January, 1956. *Id.*

⁴⁶ *Id.* at 600, 447 N.E.2d at 31.

⁴⁷ See *supra* notes 28-36 and accompanying text.

⁴⁸ See *supra* notes 35-36 and accompanying text.

§ 6.4. Refusal to Accept Title — Undisclosed Encumbrances — Private Restrictions Incorporating Public Law.* Nearly all jurisdictions recognize the principle that a prospective purchaser is justified in refusing to take title to property if it appears that there are undisclosed restrictions in the title which would hamper the purchaser's unrestricted use of the property.¹ Several jurisdictions, however, make an exception to this general rule for private restrictions that impose a limitation which is no greater than the limitations already imposed by public statutes or ordinances on the use of the land.² These courts reason that such restrictions, even though unknown to a prospective purchaser, are not encumbrances on the title and would not justify the purchaser's rejection of the conveyance.³

Massachusetts is among the jurisdictions which have consistently followed the general rule without exception.⁴ Thus, the Massachusetts courts have held that a purchaser may refuse to accept a title which is restricted by a previously undisclosed encumbrance.⁵ That position was reaffirmed during the *Survey* year by the Massachusetts Appeals Court in *Coons v. Carstensen*.⁶ The court in *Coons* also addressed for the first time the question of whether to carve an exception for a use restriction which is the substantial equivalent of a restriction imposed by public law.⁷ While refusing to find on the facts before the court that the restriction was not an encumbrance, the *Coons* court indicated its willingness to adopt such an exception in an appropriate case.⁸

In *Coons*, the Appeals Court considered whether an owner of a parcel of land, which was subject to a restrictive agreement between the owner and a land conservation trust, could deliver good and clear record title to a

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§ 6.4. ¹ See, e.g., *George v. Colvin*, 98 Cal. App. 2d 57, 219 P.2d 64 (1950); *Wheeler v. Sullivan*, 90 Fla. 711, 106 So. 876 (1925); *Stauss v. Kober*, 51 So.2d 121 (La. Ct. App. 1951); *Isaacs v. Schmuck*, 245 N.Y. 77, 156 N.E. 621 (1927); *Lasker v. Patrovsky*, 264 Wis. 589, 60 N.W.2d 336 (1953).

² See, e.g., *Bull v. Burton*, 227 N.Y. 101, 124 N.E. 111 (1919); *Hall v. Risley*, 188 Or. 69, 213 P.2d 818 (1950).

³ Some jurisdictions condition the exception on a finding that the possibility of a change in the statute is remote. See, e.g., *Bull*, 227 N.Y. at 107, 124 N.E. at 115. Other jurisdictions have recognized, however, that public law is not immutable and have therefore limited the exception to those public land use regulations which will never change. See, e.g., *Van Vliet & Place, Inc. v. Gaines*, 249 N.Y. 106, 162 N.E. 600 (1928); *Stauss v. Kober*, 51 So.2d 121, 123-24 (La. Ct. App. 1951).

⁴ See, e.g., *O'Meara v. Gleason*, 246 Mass. 136, 140 N.E. 426 (1923). See generally *Park, Real Estate Law* §§ 951, 953 (2d ed. 1981) (discussing agreements concerning title to be conveyed and defects in the title in general).

⁵ *O'Meara v. Gleason*, 246 Mass. 136, 139, 140 N.E. 426, 427 (1923).

⁶ 15 Mass. App. Ct. 431, 433, 446 N.E.2d 114, 115 (1983).

⁷ *Id.* at 433-36, 446 N.E.2d at 116-17.

⁸ *Id.* at 435-36, 446 N.E.2d at 116.

prospective purchaser.⁹ The court also considered whether such an agreement, which provided for the preservation of the wetland portion of the parcel in its natural state, constituted an encumbrance on the title, when public law imposed substantially similar limitations on the use of the land.¹⁰ In a unanimous decision,¹¹ the court held that the restrictive agreement between the defendant owners and the land conservation trust constituted an encumbrance which prevented the defendants from conveying good and clear record title, despite the fact that the land was subject to a similar restriction under public law.¹²

According to the facts of *Coons*, the defendants, Warren and Evelyn Carstensen, owned several acres of land bordering the Sudbury River in Lincoln, Massachusetts.¹³ This land was subject to the provisions of a Massachusetts statute which authorized the Commissioner of Natural Resources to acquire wetlands in Lincoln for the purpose of preserving the land in its natural state.¹⁴ Consequently, in order to avoid eminent domain proceedings, the defendants executed a restrictive agreement with the Lincoln land conservation trust which limited the wetlands portion of their property to uses which would preserve the land in its natural state.¹⁵

Sixteen years after executing the restrictive agreement, the defendants entered into a purchase and sale agreement with the plaintiff, Nancy J. Coons, in which the defendants agreed to sell their land and the dwelling thereon for \$400,000.¹⁶ The agreement between the parties also provided that the defendants would convey a good and clear record and marketable title, free from encumbrances except for those specified in the agreement.¹⁷ The encumbrances enumerated in the purchase and sale agreement did not include the restrictive agreement with the Lincoln land conservation trust.¹⁸

Upon discovery of the restrictive agreement, the plaintiff declined to accept conveyance of the defendants' title and demanded return of her

⁹ *Id.* at 431, 446 N.E.2d at 115.

¹⁰ *Id.*

¹¹ Judge Kass wrote the decision in which Judges Grant and Rose concurred.

¹² 15 Mass. App. Ct. at 436, 446 N.E.2d at 117.

¹³ *Id.* at 431, 446 N.E.2d at 115.

¹⁴ *Id.* at 431-32, 446 N.E.2d at 115. The land was subject to Acts of 1961, G.L. c. 579, § 3, which provided that the Commissioner of Natural Resources was authorized to acquire approximately 1,000 acres of flood plain marsh and land in the towns of Lincoln and Concord. *Id.*

¹⁵ *Id.* at 432, 446 N.E.2d at 115. The agreement stated, in the language of the statute, that use of the land was limited "to uses which will, insofar as practicable, preserve the same in its natural state" *Id.*

¹⁶ *Id.* The Carstensen entered into the agreement on September 28, 1978.

¹⁷ *Id.*

¹⁸ *Id.*

\$40,000 deposit.¹⁹ The defendants refused to return the plaintiff's deposit, and the plaintiff sued.²⁰ The plaintiff's motion for summary judgment was granted by the trial court,²¹ and the defendants appealed.²² The Appeals Court affirmed, holding that the restrictive agreement with the Lincoln land conservation trust constituted an encumbrance which prevented the defendants from conveying good and clear record title.²³

In deciding the case, the *Coons* court relied on the widely accepted rule that good and clear record title rests on the record alone, which must show an indefeasible unencumbered estate.²⁴ Thus, according to the court, if extrinsic evidence beyond the record is required to support the title, it may be marketable title, but it is not good and clear record title.²⁵ Consequently, the court indicated that the defendants in the present case were not capable of conveying to the plaintiffs a good and clear record title if, on the record alone, the title was encumbered by the restrictive agreement with the Lincoln land conservation trust.²⁶

The Appeals Court determined that the agreement with the Lincoln land conservation trust did constitute an encumbrance on the defendants' title.²⁷ The Appeals Court based this determination on the general principle that all building and use restrictions constitute encumbrances.²⁸ The court cited several Massachusetts cases in support of this rule, including *Gallison v. Downing*²⁹ and *Ayling v. Kramer*.³⁰ In *Gallison*, the Supreme Judicial Court held that a private restriction providing that no buildings could be erected on the land within certain limitations constituted an encumbrance on the title.³¹ Similarly, in *Ayling*, the Supreme Judicial Court construed as an encumbrance language in the title which provided

¹⁹ *Id.*

²⁰ *Id.* The plaintiffs commenced the present action in the Superior Court for Middlesex County.

²¹ *Id.* at 432-33, 446 N.E.2d at 115. The motion for summary judgment was granted by Judge Mitchell of the superior court.

²² *Id.* at 433, 446 N.E.2d at 115.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* The court asserted that it is the word "record" which gives the phrase "good and clear record title" a distinct meaning. *Id.*

²⁶ *Id.* Marketable title designates a title not necessarily perfect, or even good under the law, but so free from all fair and reasonable doubts "that a purchaser should be compelled to accept it in a suit for specific performance. Park, *Real Estate Law*, § 951 (2d ed. 1981).

²⁷ *Coons*, 15 Mass. App. Ct. at 433, 446 N.E.2d at 115.

²⁸ *Id.* The court also cited the language of G.L. c. 579, § 3, which itself referred to the agreement as an "encumbrance." *Id.* at 433, 446 N.E.2d at 116.

²⁹ 244 Mass. 33, 138 N.E. 315 (1923).

³⁰ 133 Mass. 12 (1882).

³¹ 244 Mass. at 36, 138 N.E. at 317.

that the land in question could be used or occupied for no purpose other than as a dwelling house.³²

In *Coons*, the Appeals Court found that the agreement with the Lincoln land conservation trust substantially limited the manner in which the defendants could use their land.³³ As such, the court held that the agreement was a use restriction which constituted an encumbrance on the defendants' title.³⁴ Consequently, the court held that, under the general rule, the defendants could not convey good and clear record title to the plaintiff.³⁵

The *Coons* court then considered the defendants' contention that the restrictive agreement fell within an exception to the general rule governing encumbrances.³⁶ The defendants asserted that a private restriction on use was not an encumbrance if the restriction imposed limitations no greater than those imposed by public law.³⁷ Maintaining that two state statutes provided restrictions substantially similar to those contained in the restrictive agreement, the defendants argued that the agreement was, therefore, not an encumbrance.³⁸

The Appeals Court noted that several jurisdictions had adopted this exception to the general rule regarding encumbrances.³⁹ Nevertheless, the court refused to apply this exception to the agreement in the present case.⁴⁰ The court pointed out that several jurisdictions have been unwilling to adopt the exception, holding that private restrictions are not identical to public use limitations.⁴¹ Further, the court found that the facts in

³² 133 Mass. at 14.

³³ 15 Mass. App. Ct. at 432, 446 N.E.2d at 115.

³⁴ *Id.* at 433, 446 N.E.2d at 115.

³⁵ *Id.* The facts in *Coons* do not indicate whether the restrictive agreement was actually recorded. This note assumes, however, that the court would not have held as it did were the agreement not recorded.

³⁶ *Id.* at 433, 446 N.E.2d at 116.

³⁷ *Id.*

³⁸ *Id.* at 435, 446 N.E.2d at 116-17.

³⁹ *See, e.g.,* *Bull v. Burton*, 227 N.Y. 101, 124 N.E. 111 (1919). In *Bull*, the New York Court of Appeals held that a restriction limiting construction of buildings to brick or stone was so consistent with applicable ordinances that it did not constitute an encumbrance on the title. *Id.* at 106-107, 124 N.E. at 113. *See also* *Hall v. Risley*, 188 Or. 69, 213 P.2d 818 (1950). In *Hall*, the Oregon Supreme Court held that a restriction requiring conformity with applicable zoning law was not an encumbrance because it did no more than incorporate public law. *Id.* at 87-88, 213 P.2d at 826.

⁴⁰ 15 Mass. App. Ct. at 435, 446 N.E.2d at 116.

⁴¹ *Id.* at 434, 446 N.E.2d at 116. *See, e.g.,* *George v. Colvin*, 98 Cal. App. 2d 57, 219 P.2d 64 (1950). In *George*, the California Court of Appeals held that a title to property was rendered unmarketable by restrictions on the type, size, location, and cost of buildings which were permitted thereon, and by a prohibition against keeping certain animals on the premises. *Id.* at 62-63, 219 P.2d at 66-68. The *George* court held that these restrictions constituted encumbrances despite the fact that applicable ordinances imposed substantially

Coons were distinguishable from the other cases where the exception to the general rule had been applied.⁴² In those cases, the defendants had successfully contended that public laws had imposed restrictions on their land which incorporated the limitations provided by their own private restrictions.⁴³ In *Coons*, however, the Appeals Court determined that there was no congruence between the private restrictive agreement and either of the two state statutes upon which the defendants relied.⁴⁴

According to the court, the first statute cited by the defendants, the Wetlands Protection Act, established procedures and standards by which a local conservation commission could set forth the conditions under which wetlands could be altered.⁴⁵ The Wetlands Protection Act, the court stated, did not create absolute use prohibitions on the defendants' land as did the limitations included in the private restrictive agreement.⁴⁶ In addition to the Wetlands Protection Act, the defendants also relied on the state statute under which the defendants had entered into the restrictive agreement with the Lincoln land conservation trust.⁴⁷ The defendants maintained that this statute imposed limitations on the use of their land equivalent to those provided by the private restrictive agreement.⁴⁸ The *Coons* court agreed that the statute had authorized the Commissioner of Natural Resources to acquire wetlands for protection purposes, but found that the statute imposed no restrictions on the manner in which the wetlands could be used.⁴⁹ The court found that the specific limitations under the restrictive agreement were far more onerous than those imposed by public law, and that therefore there was no "parallelism" between the restrictive agreement and either of the two state statutes.⁵⁰

similar limitations on the land. *Id.* See also *Wheeler v. Sullivan*, 90 Fla. 711, 716-17, 106 So. 876, 880 (1925); *Barber Pure Milk Co. v. Goldin*, 218 So.2d 409, 412-13 (Miss. 1969); *Isaacs v. Schmuck*, 245 N.Y. 77, 82-83, 86, 156 N.E. 621, 622 (1927); *Lasker v. Patrovsky*, 264 Wis. 589, 598-99, 60 N.W.2d 336, 341 (1953).

⁴² 15 Mass. App. Ct. at 434-35, 446 N.E.2d at 116-17.

⁴³ The court in *Coons* stated that all of the cases which it had cited as applying the exception only paid "lip service" to considering that exception. See *supra* note 39 for a discussion of *Hall* case. The court asserted that only one case, *Hall v. Risley*, 188 Or. 69, 213 P.2d 818 (1950), actually based its holding on application of the exception. The *Coons* court maintained that *Hall* was distinguishable from the present case, because the restriction imposed in that case was "indistinguishable" from public law. 15 Mass. App. Ct. at 434-35, 446 N.E.2d at 116-17.

⁴⁴ 15 Mass. App. Ct. at 435, 446 N.E.2d at 116.

⁴⁵ G.L. c. 131, § 40, as amended through Acts of 1978, c. 247 (also known as the Hatch Act).

⁴⁶ 15 Mass. App. Ct. at 435, 446 N.E.2d at 117.

⁴⁷ G.L. c. 579, § 3. See *supra* notes 14-15 and accompanying text.

⁴⁸ 15 Mass. App. Ct. at 435, 446 N.E.2d at 117.

⁴⁹ *Id.* at 435-36, 446 N.E.2d at 117.

⁵⁰ *Id.* The court stated that when an owner of land agrees to convey good and clear record title, he or she must do just that. The court asserted that "it does not lie in the mouth of the

Consequently, the court held that, notwithstanding the fact that the manner in which the defendants could use their land had been subject to regulation under two state statutes, the restrictive agreement nevertheless constituted an encumbrance on the defendants' title.⁵¹

The Appeals Court's treatment of the restrictive agreement with the Lincoln land conservation trust was completely consistent with its past decisions on the issue of good and clear record title.⁵² The significance of the *Coons* decision, however, lies in the fact that the Massachusetts Appeals Court considered for the first time whether to follow several other jurisdictions in adopting an exception to the general rule governing encumbrances.⁵³ The court in *Coons* suggested that, in a case where a private restriction did no more than incorporate existing public law, the court might be willing to hold that the private restriction was not an encumbrance on the title to the land.⁵⁴ In such circumstances, the court stated, incorporating a specific public law which was subject to periodic amendment into a private restriction would not constitute an encumbrance on the title. No encumbrance would exist, the court asserted, because the redundancy in the two restrictions would be apparent on the record, and no reference to extrinsic materials would be required.⁵⁵ Consequently, the Appeals Court's decision in *Coons* indicates that, in the proper circumstances, a Massachusetts court faced with this issue might adopt the exception to the general rule that a purchaser may refuse to take title to property which is restricted by undisclosed encumbrances and properly hold that a private restriction which is equivalent to the limitations imposed by public law does not constitute an encumbrance on a title to land.

§ 6.5. Sale of Real Estate — Caveat Emptor Reaffirmed.* Under the doctrine of *caveat emptor*, a seller is not liable to a buyer for the nondisclosure of material defects in an item purchased in an arms length transac-

seller . . . to argue that the defect which clouds [the title] is of little practical consequence.'" *Id.* at 436, 446 N.E.2d at 117.

⁵¹ *Id.* at 435, 446 N.E.2d at 117. The court stated, however, that in the proper circumstances it may be willing to apply the exception on which the defendants in *Coons* had relied. *Id.* See *supra* note 8 and accompanying text.

⁵² See *supra* notes 4-5 and accompanying text.

⁵³ 15 Mass. App. Ct. at 435, 446 N.E.2d at 116. See *supra* notes 2-3 and accompanying text.

⁵⁴ 15 Mass. App. Ct. at 435, 446 N.E.2d at 116. The court stated that it would be willing to adopt such an exception in circumstances similar to those found in *Hall v. Risley*. See *supra*, note 39 for a discussion of the *Hall* case.

⁵⁵ *Id.* If the public law changes, however, so that it no longer overlaps with the private restriction, that restriction then would constitute an encumbrance on the title.

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tion.¹ The doctrine of *caveat emptor* or “buyer beware” has traditionally imperilled not only the purchasers of consumer goods, but the buyers of real estate as well.² Unwary purchasers of real estate, therefore, have been barred from recovery for the nondisclosure of serious defects in property under this doctrine. The Massachusetts Supreme Judicial Court affirmed its adherence to the traditional rule of *caveat emptor* in the sale of real estate in the leading case of *Swinton v. Whitinsville Savings Bank*,³ decided in 1942. In *Swinton*, the Court refused to impose liability upon the seller of a house for not informing the purchaser that the house was infested with termites.⁴ The *Swinton* Court noted that the law had not yet reached the point of imposing an “idealistic” duty upon the seller of real estate to inform the purchaser of material latent defects in the property.⁵

Since the time of the *Swinton* decision, significant changes have occurred in the doctrine of *caveat emptor* in the area of the sale of goods. The old rule of *caveat emptor* in the sale of goods has given way to such new doctrines as the implied warranties of fitness and merchantability, and liability for defects in goods which cause personal injuries.⁶ In addition, the Massachusetts Legislature has enacted chapter 93A, the Consumer Protection Act.⁷ Chapter 93A makes it unlawful for one engaged in trade or business to commit an unfair or deceptive act. A seller violates chapter 93A by failing to disclose to a buyer a fact which might have influenced the buyer not to enter into the transaction.⁸ The act imposes an affirmative duty upon sellers to disclose information to purchasers.⁹ Such a duty is owed by one engaged in trade or business to purchasers of real estate as well as purchasers of goods and services.¹⁰ This enactment of broad consumer protection legislation and the changes in the law regarding the sale of goods, had led some practitioners to believe that the

§ 6.5. ¹ A good general discussion of the doctrine of *caveat emptor* can be found in Schwartz, *Property and Conveyancing*, 1968 ANN. SURV. MASS. LAW, §§ 1.1-15, at 3-10 [hereinafter cited as Schwartz].

² *Id.* at 3.

³ 311 Mass. 677, 42 N.E.2d 808 (1942).

⁴ *Id.* at 678, 42 N.E.2d at 809.

⁵ *Id.*

⁶ For an overview of changes in the law regarding the sale of goods see Calabresi and Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

⁷ G.L. c. 93A. For a comprehensive discussion of the Consumer Protection Act, see generally Alperin and Chase, MASSACHUSETTS CONSUMER RIGHTS AND REMEDIES, MASSACHUSETTS PRACTICE SERIES, Vols. 35, 36 (1979). See also, Rice, *New Private Remedies for Consumers*, 54 MASS. L.Q. 307 (1969).

⁸ See, e.g., *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693, 322 N.E.2d 768, 772-73 (1975).

⁹ *Id.*

¹⁰ G.L. c. 93A § 1(b). See also *Lantner v. Carson*, 374 Mass. 606, 607, 373 N.E.2d 973, 974 (1978).

Supreme Judicial Court would eventually overturn the doctrine of *caveat emptor* in the sale of real estate.¹¹

During the *Survey* year, the Supreme Judicial Court reaffirmed the *caveat emptor* doctrine as it pertains to the sale of real estate in the two related decisions of *Nei v. Burley*¹² and *Nei v. Boston Survey Consultants*.¹³ In these two cases, the Court examined the remedies available to purchasers of a house lot who had not been informed by the broker, the seller, or the seller's surveyor that a seasonal stream ran through the lot and that the lot had other serious water problems. The Court held that the defendants did not commit fraud by failing to disclose the defects to the purchasers¹⁴ and also that the plaintiffs could not recover under chapter 93A.¹⁵ Moreover, in the *Burley* decision, the Supreme Judicial Court determined that no right to a jury trial exists for actions brought under chapter 93A.¹⁶

In *Nei v. Burley*, the plaintiffs purchased a house lot from the defendant seller who had hired the defendant real estate broker to market the lot.¹⁷ Prior to the sale, the sellers of the lot employed a surveyor to perform high water and percolation tests on the land.¹⁸ The tests revealed a water table so high that fill would be required before a septic system could be installed in accordance with the State Sanitary Code.¹⁹ The surveyor also observed that a seasonal stream ran through the property in the springtime, but not during the fall dry season when the plaintiffs examined the property.²⁰ The surveyor prepared a report which noted the presence of water on the lot, but contained no interpretive data or conclusions, and forwarded it to the broker.²¹ The broker gave the report to the buyers without any explanation of its contents.²² Although one of the buyers later met the surveyor on the lot, the buyer failed to question the surveyor concerning the significance of his report.²³

In addition, prior to the *Nei* transaction, another buyer had signed a purchase and sale agreement for the lot, but had withdrawn from the sale

¹¹ See Schwartz, *supra* note 1, at 5.

¹² 388 Mass. 307, 446 N.E.2d 674 (1983).

¹³ 388 Mass. 320, 446 N.E.2d 681 (1983).

¹⁴ *Nei v. Burley*, 388 Mass. 307, 311, 446 N.E.2d 674, 677 (1983); *Nei v. Boston Survey Consultants*, 388 Mass. 320, 323, 446 N.E.2d 681, 683 (1983).

¹⁵ *Burley*, 388 Mass. at 317, 446 N.E.2d at 680; *Boston Survey*, 388 Mass. at 325, 446 N.E.2d at 684.

¹⁶ *Burley*, 388 Mass. at 315, 446 N.E.2d at 679.

¹⁷ *Id.* at 308, 446 N.E.2d at 674.

¹⁸ See *Boston Survey*, 388 Mass. at 321, 446 N.E.2d at 682.

¹⁹ *Id.* at 321, 446 N.E.2d at 683.

²⁰ *Id.*

²¹ *Id.*

²² *Burley*, 388 Mass. at 315, 446 N.E.2d at 679.

²³ *Id.* at 311, 446 N.E.2d at 677.

because a percolation test could not be conducted due to the presence of water on the lot.²⁴ Both the seller and the broker were aware of this fact but neither informed the subsequent purchasers.²⁵ Despite the water problems, the broker had listed the house lot in the Multiple Listing Service book ("MLS"), describing it as a "nice, wooded building site. Tested, surveyed and ready to go."²⁶ The purchasers were shown a copy of the MLS sheet describing the property prior to the sale.²⁷

When the buyers attempted to build a home on the lot, the seasonal stream and the high water table forced them to truck in considerable amounts of land fill. The buyers sought recovery against the sellers and their broker charging fraud in connection with the purchase of real estate and a violation of chapter 93A.²⁸ The buyers claimed damages in the amount of the increase in the cost of construction.²⁹ The allegations of fraud were tried by a jury, and the judge allowed motions for a directed verdict at the close of the buyer's case on the fraud charges.³⁰ The allegation of a violation of chapter 93A was tried by a judge without a jury.³¹ Judgment was entered for the defendants.³²

In addition to their suit against the sellers and broker, the same buyers commenced an action against the surveyor of the property who had been hired by the sellers in *Nei v. Boston Survey Consultants*,³³ again claiming fraud and a violation of chapter 93A. The trial court dismissed the charges against the defendant surveyor.³⁴ The Supreme Judicial Court granted the buyers' motion for separate direct appellate review of both cases.³⁵

In *Nei v. Burley*, the Supreme Judicial Court reviewed four issues: 1) the sufficiency of the evidence of fraud; 2) the sufficiency of the evidence as to the broker's violation of chapter 93A; 3) the denial of a jury trial by the court under chapter 93A; and 4) the determination that the sellers were not engaged in trade or commerce so as to be outside the ambit of chapter 93A.³⁶ Turning first to the allegation of fraud, the Court found that the failure of the sellers and the broker to disclose the information about the water on the property was mere nondisclosure and did not constitute

²⁴ *Id.* at 316, 446 N.E.2d at 679.

²⁵ *Id.* at 308, 446 N.E.2d at 675.

²⁶ *Id.* at 311, 446 N.E.2d at 677.

²⁷ *Id.* at 315, 446 N.E.2d at 679.

²⁸ *Id.* at 309, 446 N.E.2d at 675, 676.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 388 Mass. 320, 321, 446 N.E.2d 681, 681 (1983).

³⁴ *Id.* at 320, 446 N.E.2d at 681.

³⁵ *Burley*, 388 Mass. at 309, 446 N.E.2d at 676.

³⁶ *Id.* at 310, 446 N.E.2d at 676.

fraud.³⁷ The Court found that although the broker and the sellers knew of the existence of the seasonal stream, they were not under an obligation to disclose this to the buyer.³⁸ According to the Court, sellers and their brokers are not liable in fraud for failing to disclose latent defects known to them which materially alter the value of the property.³⁹ The *Burley* Court found that the sellers and the broker did not state half-truths or make partial disclosures, a situation which often requires full disclosure to avoid deception.⁴⁰ Because the parties dealt at arms length with each other, the Court noted, no fiduciary duty to speak arose between the sellers and the buyers or between the broker and the buyer.⁴¹ Furthermore, the Court stated, the buyers could not show reliance upon the broker's statements in the MLS book to the effect that the lot was a tested, approved building lot because they had been given a report about the existence of the excessive water.⁴²

Addressing the second issue of whether the broker had violated chapter 93A, the Consumer Protection Act, the Court found that no such violation had been shown.⁴³ The Court stated that the buyers made no claim that the broker knew or should have known that the test results raised a question of whether the lot was capable of sustaining a proper septic system without the introduction of a considerable amount of land fill.⁴⁴ Moreover, according to the Court, the buyers had not shown that the broker had been unfair or deceptive by providing the test results while not explaining their significance.⁴⁵ The Court also rejected the plaintiffs' argument that the broker violated chapter 93A by failing to inform them that a previous purchaser refused to purchase the lot due to water problems.⁴⁶ This nondisclosure, the Court noted, did not render the broker liable under chapter 93A because the broker was unaware of the culvert under the road which was a major source of the water problems on the lot.⁴⁷

The next issue considered by the Court in *Nei v. Burley* was whether plaintiffs bringing actions under the Consumer Protection Act are entitled to a jury trial.⁴⁸ The Court stated that as originally enacted, chapter 93A enabled a consumer to bring an action "in equity" for damages and for

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 311, 446 N.E.2d at 677.

⁴² *Id.*

⁴³ *Id.* at 316, 317, 446 N.E.2d at 679.

⁴⁴ *Id.* at 315, 446 N.E.2d at 679.

⁴⁵ *Id.* at 316, 446 N.E.2d at 679.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 311-15, 446 N.E.2d at 677-79.

equitable relief, such as an injunction.⁴⁹ The words “in equity,” the Court observed, were struck from part of chapter 93A when law and equity were merged in 1978 under the new Massachusetts Rules of Civil Procedure.⁵⁰ The *Burley* Court stated that it would not infer from the striking of the words “in equity” that the Legislature had thereby granted the right to a jury trial.⁵¹ Noting the equitable relief available under the statute and the silence of the Legislature on this issue, the *Burley* Court concluded that a right to a jury trial is not available under chapter 93A.⁵²

The final issue in *Nei v. Burley* was whether the sellers of the lot could be liable under the Consumer Protection Act for nondisclosure.⁵³ The Court found that the sellers in *Burley* were not engaged in trade or commerce in such a manner to subject them to liability under chapter 93A.⁵⁴ The Court reasoned that in order for the sellers to be liable under chapter 93A the transaction must have taken place in a “business context.”⁵⁵ In determining whether a business context exists, the Court explained, the relevant factors are the nature of the transaction, the character of the parties involved, the activities in which the parties participated, and whether the transaction was motivated by business or personal reasons.⁵⁶ The Court noted that the sellers in *Burley* played a minor role in the sale of the lots, reserving to themselves only the acceptance or rejection of the offers to purchase which the broker submitted to them.⁵⁷ Moreover, the Court said, neither of the sellers devoted any appreciable time to the real estate and both were employed in other capacities.⁵⁸ Although the Court found the issue a close one, it determined that the sellers in *Burley* were not engaged in a trade or commerce within the meaning of chapter 93A, and therefore could not be found liable under the Consumer Protection Act.⁵⁹

⁴⁹ *Id.* at 312, 446 N.E.2d at 677.

⁵⁰ *Id.*

⁵¹ *Id.* at 312, 315, 446 N.E.2d at 677-79.

⁵² *Id.* at 315, 446 N.E.2d at 679. Traditionally, trial by jury has been allowed as a matter of right in “legal” cases but not allowed in “equitable” cases. See Montgomery and Wald, *The Right To Trial By Jury in c. 93A Actions*, 67 MASS. L. REV. 79, 80 (1982).

⁵³ 388 Mass. at 317, 446 N.E.2d at 680.

⁵⁴ *Id.* at 318, 446 N.E.2d at 680. See G.L. c. 93A § 2.

⁵⁵ 388 Mass. at 317, 446 N.E.2d at 680.

⁵⁶ *Id.*

⁵⁷ *Id.* at 317, 318, 446 N.E.2d at 680.

⁵⁸ One of the sellers, the husband, was employed full time as a fluid power engineer while the other seller was a housewife. The lot was part of a tract of land in Carlisle, which consisted of fourteen acres. The tract was conveyed to the sellers by a family member in 1965, with the understanding that the lots would only be sold to help pay the costs of the education of the sellers’ children. They marketed the property through the broker and did not devote any appreciable part of their time to real estate. *Id.* at 317-18, 446 N.E.2d at 680.

⁵⁹ *Id.*

Judge Abrams dissented in part from the Court's opinion.⁶⁰ She argued that the Court should have determined that the sellers were in trade or commerce for purposes of the chapter 93A claim.⁶¹ Judge Abrams reasoned that the sellers were actively engaged in conduct designed to enhance their profit from selling the land.⁶² She pointed out that the sellers had the land surveyed and divided into lots by experts.⁶³ Furthermore, she noted, they had hired a broker to advertise and sell the land.⁶⁴ According to Judge Abrams, the sellers in *Nei v. Burley* were no different from an average developer who holds unimproved land.⁶⁵ She argued that because the sellers had hired experts to assist them, they had expert knowledge equivalent to that of any professional selling real estate.⁶⁶ The sellers, Judge Abrams concluded, treated their land as if it were a business venture and therefore should be within the scope of chapter 93A liability.⁶⁷

In the related case of *Nei v. Boston Survey Consultants*,⁶⁸ the Supreme Judicial Court upheld the dismissal by the lower court of charges that the surveyor who had been employed by the defendant seller in *Nei v. Burley*, engaged in fraud and violated chapter 93A by failing to disclose the existence of the seasonal stream and a high water table on the lot.⁶⁹ Addressing the fraud claim, the Court determined that the surveyor had no duty to speak to the prospective buyers or to explain the significance of the soil report.⁷⁰ Moreover, the Court found, the buyers had not alleged that the surveyor stated half-truths or made partial disclosures or misrepresentations.⁷¹ Accordingly, the Court determined that the buyers had not made out a case of fraud.⁷²

Turning to the chapter 93A count, the Court found unpersuasive the plaintiffs' argument that the surveyor's failure to disclose the existence of the seasonal stream was an unfair or deceptive act under chapter 93A.⁷³ The *Boston Survey* Court determined that the surveyor played only a minor role in the sale of the property to the plaintiffs.⁷⁴ The Court noted

⁶⁰ *Id.* (Abrams, J., dissenting).

⁶¹ *Id.* at 318, 319, 446 N.E.2d at 681 (Abrams, J., dissenting).

⁶² *Id.* at 318, 446 N.E.2d at 681 (Abrams, J., dissenting).

⁶³ *Id.*

⁶⁴ *Id.* at 319, 446 N.E.2d at 681 (Abrams, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 388 Mass. 320, 446 N.E.2d 681 (1983).

⁶⁹ *Id.* at 325, 446 N.E.2d at 684.

⁷⁰ *Id.* at 322, 446 N.E.2d at 683.

⁷¹ *Id.*

⁷² *Id.* at 323, 446 N.E.2d at 683.

⁷³ *Id.* at 325, 446 N.E.2d at 683-84.

⁷⁴ *Id.* at 324, 446 N.E.2d at 684.

that the surveyor did not participate in the negotiations or in the signing of the purchase and sale agreement.⁷⁵ While recognizing that privity of contract is not required under chapter 93A, the Court nevertheless noted that the surveyor had no contractual or business relationship with the plaintiffs.⁷⁶ Consequently, the Court declined to impose the risk of liability under chapter 93A on the surveyor of the land for giving the seller a statement of soil test which, though accurate, did not contain an explanation of the test results.⁷⁷

In summary, *Nei v. Burley* reaffirmed that a seller of real estate or his broker has no duty to reveal latent defects known to them, but not to the buyer, which materially reduce the value of the property.⁷⁸ The Supreme Judicial Court thus refused to join the growing number of other jurisdictions which have retreated from the doctrine of *caveat emptor* in the sale of real estate and have imposed an affirmative duty upon the sellers to reveal latent defects.⁷⁹ The *Burley* decision therefore highlights an unfortunate inconsistency in Massachusetts law. While Massachusetts provides consumers with significant protection against defects in purchased goods, such as through the implied warranties of fitness and merchantability, it gives little protection against the potential of ruinous financial problems attributable to defects in a purchased home.

Criticism can also be made of the *Burley* Court's determination that the broker was not liable for nondisclosure under chapter 93A. In a cursory analysis, the Court stated that it could see no unfair or deceptive act in the failure of the broker to disclose that a previous buyer withdrew from the deal because of water on the lot.⁸⁰ The Court emphasized that the broker did not know about the culvert under the road which was a major source of the water problem.⁸¹ The *Burley* Court was wrong in its assessment of the broker's culpability because whether the broker had an understanding of the source of the water problem or not, she at least knew that there was enough of a water problem to cause a prior interested party to withdraw from the deal. If the broker knew that some sort of water problem existed, it is difficult to see why her ignorance of the source of the water problem should render the nondisclosure, as the Court described it, "particularly innocuous." Moreover it is safe to say that the disclosure by the broker of the withdrawal of a previous buyer due to water problems could have been enough to influence the subsequent purchasers not to enter into the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 324, 325, 446 N.E.2d at 684.

⁷⁸ 388 Mass. at 310, 446 N.E.2d at 676-77.

⁷⁹ See cases cited in Annot., 90 A.L.R. 3d 583-93 (1979). See also RESTATEMENT (SECOND) OF TORTS § 551 comment e (1977).

⁸⁰ 388 Mass. at 316, 446 N.E.2d at 679.

⁸¹ *Id.*

transaction. The information possessed by the broker, therefore, was material information under chapter 93A standards.⁸² Consequently, the *Burley* Court should have found the broker liable for nondisclosure under the Consumer Protection Act.

The Court's reluctance to impose liability on the broker under chapter 93A is inconsistent with the goal of the statute, which is to strike an equitable balance between consumers and the person conducting business.⁸³ The *Burley* Court's holding that the broker did not have sufficient knowledge of the water problem to be liable for nondisclosure gives brokers the license to ignore clear indications that there are problems with the property. The failure of the broker in *Burley* to disclose information about the water problem resulted in the purchasers having to incur thousands of dollars in additional costs when they attempted to build a home on the lot.⁸⁴ The nondisclosure by brokers of serious defects in real estate is the type of unfair and deceptive practice from which consumers most certainly need protection under chapter 93A.

As a result of the *Burley* decision, the Court also limited the ability of purchasers to recover damages for defects in real estate by holding that the sellers of the property were exempt from liability under chapter 93A.⁸⁵ The holding in *Burley* extends the Court's previous decision in *Lantner v. Carson*,⁸⁶ in which the Court found that a homeowner was not in "trade or business" and therefore was not liable under chapter 93A when he misrepresented the condition of his home to a purchaser. The *Burley* decision extends *Lantner* because *Burley* involved not the sale of an individual's home, but the sale of one lot which was part of a 14 acre tract that the owners had partially subdivided and intended to market.⁸⁷ The *Burley* Court was persuaded that the sellers were not "in business" because neither the husband nor the wife spent any appreciable part of their time in real estate dealings and were not actively engaged in the marketing of the lot.⁸⁸ The *Burley* opinion therefore suggests that individuals who subdivide and sell property which they have held as an investment, but who are not actively engaged in the marketing and sale of the real estate, may be exempt from chapter 93A liability.

Following the recent decisions of the Massachusetts Supreme Judicial Court in *Nei v. Burley* and *Nei v. Boston Survey Consultants*, purchasers should continue to beware for their financial well-being when entering into a real estate transaction. Because the traditional rule of *caveat emptor* has

⁸² See *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 332 N.E.2d 768 (1975).

⁸³ See *Rice*, *supra* note 7, at 307.

⁸⁴ See Brief for the Plaintiffs-Appellants at 19, 21, *Nei v. Burley*, 388 Mass. 307 (1983).

⁸⁵ 388 Mass. at 318, 446 N.E.2d at 680.

⁸⁶ 374 Mass. 606, 373 N.E.2d 973 (1978).

⁸⁷ *Burley*, 388 Mass. at 317, 446 N.E.2d at 680.

⁸⁸ 388 Mass. at 318, 446 N.E.2d at 680.

been reaffirmed by the Massachusetts high court, purchasers will have no recourse against sellers who transfer seriously defective real estate unless the seller makes affirmative misrepresentations or half-truths about the condition of the property. Furthermore, purchasers will have limited recourse against real estate brokers under chapter 93A unless the purchasers can show that the broker had at least more knowledge of the defects in the property than did the broker in *Burley*. To protect their interests, prospective buyers of real estate should hire their own surveyors, engineers or qualified housing inspectors to review the property and report any potential problems before entering into an agreement to purchase.