Hofstra Property Law Journal

Volume 2 | Issue 2 Article 6

3-1-1999

You Should See It In Every Clause: Emanuel B. Halper, Ground Leases and Land Acquisition Contracts

Bernard E. Jacob

BOOK REVIEW

YOU SHOULD SEE IT IN EVERY CLAUSE: *Emanuel B. Halper*, GROUND LEASES AND LAND ACQUISITION CONTRACTS*

*Bernard E. Jacob***

Many practitioners will know Emanuel Halper from his extremely good (and successful) reference work on shopping center leases.[1] Without question, that book sets a standard of excellence in that field which other works, more diffuse, can only approach. Manny Halper brings to his present book the same two assets that contributed to the success of his earlier works. He is a lawyer who writes clearly and distinctly, and in a surprisingly direct and informal style. And he thoroughly knows the businesses and law about which he is writing.

Both books are written for the draftsman. They share an attribute unique among lawbooks. They can be read with pleasure. But they are different books both in intention and in coverage. *Shopping Center and Store Leases* is primarily a reference work to which one repairs with a specific problem, for example, what insurance provisions requested by the other side mean or what insurance should be sought. Its ultimate strength is in the richness of the experience it lays open and the diversity of the subjects which it addresses.

Ground Leases and Land Acquisition Contracts also covers

---

* New York: Law Journals Seminar Press, 1989.

** Professor of Law, Hofstra University School of Law.

1. E. HALPER, SHOPPING CENTER AND STORE LEASES (New York: Law Journals Seminar Press, 1979, updates published 1980, 1982, 1983, 1984, 1985, 1988).

most of the clauses that are of substantial importance in ground leasing and provides excellent and clearly drafted forms as an appendage to each of the four important chapters. Nevertheless, the real subject of this book is the manner in which in ground leasing transactions a single theme is persistent and outstanding. In leasing transactions of this kind, the draftsman must keep the arrangements for prospective financing of the proposed development of the property by the developer-tenant *constantly* in mind. This is a point which must be grasped and never let go, if the drafting of a ground leasing transactions is not to be botched, as it often is.

To use a high-flown analogy: the writer Isaiah Berlin once divided all thinkers into those who had one very big idea that for them dominated their conceptions in every area; he called them hedgehogs. Other thinkers, foxes, confronted the world as a series of discrete and separate problem areas and tried to deal well with each area on its own terms. In that same sense this is a hedgehog book. Its most important aspect is that it carries a single theme of great importance through from the beginning of the lease to the end. Such a concentration is justified because the theme in question is supremely important to the success of the transaction and the serviceability of the drafting.

Perhaps the book will be most gratefully received and carefully and seriously read by young lawyers approaching ground leasing for the first time or who have only been around at one or two such negotiations.

I do not mean to suggest by this that this is a beginner's book. On the contrary, it assumes a sophistication that is built on the author's experiences over nearly thirty years. It does not, for instance, start with a misplaced attempt to cover all possible forms of ground leasing. The quasi-literal meaning of a ground lease is a lease which permits or requires improvements to be added by the tenant, for example, the landlord is providing only the ground. The author's sophistication moves us beyond this bare point almost without mentioning it; ground leasing transactions are most usefully approached from the point of view of a typical development transaction.[2] Financing by the tenant is necessary because the transaction contemplates development. What is remarkable is that the landlord in the typical transaction is given reason to assist in placing that financing. The

2. It follows, too, that if what is involved is not a development transaction, the appropriateness of almost all that is being said has to be reconsidered.

landlord's willingness to assist is premised on the landlord's standing to gain through the value of the improvements which will be added to the premises at the tenant's cost. That willingness is the sine qua non of the transaction.

Once that willingness is established, the landlord may extend time and grace periods for a prospective financing institution; the landlord may accept the risk of having to deal with an unknown replacement tenant at any time, including in a construction workout; the landlord may even risk—in the subordinated fee situation[3]—the landlord's own financial interest in the land.

This is the primary theme, but it makes little sense without fair consideration to the non-financing needs of a developer-tenant that must be included in the lease. Thus, the book equally emphasizes along with the central prospective-financing provisions the need for an adequate start-up time at a lowered rent, for a tenant's right to cancel the transaction during an initial evaluation period, and for appropriate room for maneuvering as to the use of the premises and during any construction period. A reader who is without experience has to have these considerations pointed out; one with experience has a check-list to prevent her from forgetting what must be obtained.

All things considered, this is a book that does best on the shelf of experienced practitioners. For the experienced practitioner will want to read it in light of personal experience and to keep it as part of the drill in training new lawyers.

Some experienced practitioners have been negotiating leases for developers or representing local landowners in ground lease transactions. Others are working for financial institutions and considering the device from the point of view of suitability for loan placement. They all will profit by this treatment of the subject. It will take them back to the basics of an extremely complicated transaction and documentation while the treatment keeps the complex business background in view as the only useful context. What such experienced readers will get is a thoughtful and detailed consideration of the drafting consequences of providing in a ground lease for a subordinated fee or, absent that tenant right, a mortgageable leasehold. There is even a virtuoso chapter on providing for subordinated fee

3. Many lawyers have objected, without effect, to this expression. Halper offers a reasonable explanation of the origin of the strange phrase. He also reaches into the law of commercial paper to borrow a more precise name for what the landlord does in the subordinated fee situation: he is an accommodation maker on the tenant's borrowing to the extent of placing an *accommodation mortgage* to help secure repayment of the loan.

financing and mortgageable lease financing in the alternative in the same lease.

The beauty of the treatment lies in the clarity with which the impact of the chosen financing arrangement is shown to affect each clause of the lease. The lessons are at least two. The positive lesson is to learn (or to recollect) that provision for financing arrangements is not only or even primarily a matter of specific mechanics or standard language set forth in a specific clause. Instead, these arrangements profoundly affect every provision of the lease. The prospective financing arrangements for which the parties attempt to provide can reasonably be expected to affect the rent and the term, the use and assignment clauses, the provisions relating to construction, insurance and maintenance of improvements on the premises, clauses governing communications between landlord and tenant, and, most centrally of all, the structuring of remedies for the landlord and for the tenant.

Perhaps the most important single insight this author imparts relates to the structuring of landlord remedies. He is one conveyancer who has managed to tear himself away from the conventional faith that since all the forms provide the landlord with the remedy of leasehold termination, such termination is only boiler plate. According to the conventional faith, the only issue about leasehold termination is an issue of market power and market guile.

Instead, our author makes it a question of what the parties need in order to achieve their respective purposes in the transaction, and, equally, what they can yield without endangering their respective purposes. In turn, this appeal to reason underlines the deep negotiating lesson that lies, mostly unstated, on every page of the book.

Landlord and tenant have separate needs and desires which are always potentially conflicting. It surely would be imprudent not to keep that conflict in view. But the transaction they are discussing is also a cooperative one. It is not only good business in general to maintain cordial relations in this transaction. The reality is that the parties will operate interdependently through the long continued relation to which the leasing applies. The ground leasing structures, and the land acquisition contract which reflects the same development considerations in a less complicated form, are fascinating co-investment transactions that substitute for partnership.

It is true that a deep developer-tenant bias pervades the book. But in the circumstances that is not a problem. The lawyer for the developer-tenant seldom is in a position to prevail on market power

alone or, even if he were willing to, on guile. She or he often lacks the power to impose on owners who are courted by a number of potential buyers and is reduced to reasoning with lawyers who must be weaned away from standard formbooks. And few owners are sufficiently guileless to take the proffered documentation without reference to an attorney who is very conscious of the need to demonstrate what valuable changes legal representation achieves.

I recommend this book. It is a rational adventure into what has proved to be a fruitful way of doing business for land developers in the United States over the nearly two generations since the second World War.

It is not a magisterial treatment of an important field of law. It is rather a lawyer's view of one way of doing business, and an important way of doing business it has proved to be over these last forty years. It is in the best sense a practitioner's book. It certainly does not deal with all of the problems of policy implied in the structure. It assumes a general background of investment policy and financial organization which, though modified in the last fifteen years, continues to prevail. It asks no questions about the wisdom of that policy and organization. The common sense test of profit is decisive.

It does not deal with all of the marginal questions with complete adequacy. It does not, for example, explore such specialized questions as the bankruptcy situation in full detail, but only so far as in the author's pretty sound judgment that situation needs to be understood for the immediate drafting purposes. Novel financing sources and structures are judged to be assimilable into the old pattern, at most mentioned as a new wrinkle in the same old cloth.

Nor is it a full blooded business consideration of the transaction. Business considerations are presupposed rather than thematized. It does not even exhaust the developer-tenant's needs for legal advice. Tax advice is given only the most indirect of considerations, which even today does not reflect the realities of the developers' needs. Again, the whole environmental approval process is treated only as a kind of black box, in that environmental protection and the entire public permit process is simply and misleadingly characterized as one more risk category in the period preceding construction.

There is room for more books dealing with almost every one of these omissions. In many cases they will be written, although few of them will have the authority or the grace or the clarity that this book has within the limits that it accepts.

But I do not want to close without considering one larger prob-

lem that these previous ruminations have called to mind. There is still in 1989 a need to advise that the book in question is a practitioner's book. What else should it be? There is still a color line between the practitioner's world and that of the law schools, and that line has not disappeared despite the increasing sophistication of practice and practitioners and the increasing sympathy with which academic teachers of real estate law try to reach out to and keep up with the facts of present practice.

That line is still there in many important and unexpected ways. It is the persistent product a long and complicated social history in this branch of the law. I want to note an example of its—at least verbal—continuing vitality.

In the American Bar Association a single section, the Real Estate, Trust and Probate Section, serves a peculiarly yoked pair of practice specialties. I do not know the politics that keeps the real estate bar, call them conveyancers, and the probate and trust bar, call them scriveners, together. There certainly is no rational reason based in common interests. The leaders of the Section started the *Real Property, Probate and Trust Journal* in the mid-1960's. For 25 years that Journal grew steadily in breadth of subject matter and sophistication of treatment under a series of remarkable practitioner Section chairmen and diligent editors. Three years ago the Section decided on a splitting of editorial functions. The membership of the Section were told that the more popular, more practitioner oriented articles—indeed, the articles without too many footnotes—would be hived off into a new *Probate and Property: The Magazine for Real Property, Probate and Trust Law* while the mother *Journal* would set about to gain academic respectability. This was the way the change was presented.

The re-orientation could as easily have been presented as giving a forum, in the *Magazine*, for the needs of the general practitioner who does some work in these fields and for the less experienced attorney. From this point of view, the re-orientation would appear to provide for services to a large body of Section members without restraining the trend in the *Journal*, already apparent in the last ten years, to a more thoughtful and complete presentation of problems, which at the same time are problems of a more sophisticated sort, but are still practitioners' problems. But that was not the way the change was presented.

I think that the approach to explaining the change was unfortunate. I do not mean to be misunderstood here. The *Journal* at that

time gained the valuable services of several important, intelligent and energetic Law School professors. The *Magazine* was put on a professional basis and enabled to render a different, but very necessary service. This is all to the good. What I deplore is that the change is phrased as an abandonment of the prospect of the fruitful interaction of practitioner and academic cooperation. Use of a distinction between practitioners and academicians as a way of describing the new division of functions can degenerate easily into a kind of thoughtlessness and conformism. Academic orientation can all too often become a matter of typeface and bluebook rules, if not a matter of hopelessly abstruse subject matter.

Why should one care? First of all, because there is after all no real estate law. There are laws dealing with ownership, torts and contracts which are used in the estate business. The resulting institutional or transactional mix is one in which the application of property, contract, etc. law is flavored by the transactional elements. It makes for fascinating results. But it does not rise to a "separate" law.

Therefore what books and courses about real estate law are probably doing is teaching law students and lawyers what ordinary (and in some cases not so ordinary) real estate transactions look like from a lawyer's working view point. The courses are primarily about the transactions.

Of course, the lawyer takes a specific responsibility in the transactions. The law school courses on real estate rightly assume the lawyer must have something to sell clients in such a transaction. That is the assumption that underlies almost all of the students' initial interest in the course—"it will be part of my practice" or "I want to practice real estate law." All that, however, is being put in a general business background in any good law school course. The lawyer has a specific job, but he or she has no magic and (hopefully) no mumbo-jumbo.

But then the business lifeblood is only barely permitted to flow through the Law School course. There are after all two graduate schools on campus who, from their disparate viewpoints, are looking at real estate transactions. It is amazing how rarely the business school and the law school make instiutional arrangements for cooperative teaching. I am a sinner in this regard no less than and in some cases more than my other colleagues in teaching.

In my mind there is a single great symbol of the disregard in which the academic lawyer has traditionally held the practice of real

estate law. The whole system of the *Restatements* was designed as the ultimate contribution of the academic world to the reform of general law. The First Restaters failed to treat of either the purchase and sale or the financing of land transactions. Instead the *Restatement of Property* elaborated an abstracted and fictional "estate system" that has little to do with either actual historical development or present practices. Even when in the 'seventies a *Second* (and now a *Third*) *Restatement* returned to real estate law, the first subject matter attacked was "landlord and tenant" which was treated more as an exercise in moderate reform in the area of apartment-dwellers' law than as a comprehensive and flexible attempt to deal with the broad spectrum of different, even inconsistent, uses to which the large and simple concept of the lease is put.

Without a primary dedication to those differences, the *Restatement* on this subject is, outside the fiercely debated issues of warranty of habitability, mostly scattered fragments of petrified bones rather than the living organism of the law. What is forgotten in such a treatment is, as Richard Chused once said to me, how limitless the possibilities are that are opened to negotiation in any situation where we begin with leasing.

Of course, most of this is ancient history. If there are still barriers, some argue, they are the result of habit and inertia rather than anything more substantive. Yet we are still being reminded of the limitless possibilities—outside the ring of academic writing. There is, of course, nothing wrong with practitioners' writing. The present instance strongly makes the case for such writing. But, still, there are two things to be regretted when considering the extent to which the old dichotomy still obtains.

First, we academics are denying ourself valuable resources. Second, and more important, the practitioner's conversation is defective in one particular way. As I noted above, Manny Halper presupposes the desirability of the general transaction pattern. Development does not require any justification. It is sensible because it meets human needs and it makes money. Surely, these are both goods.

Of course they are. But they are partial goods. Other questions do arise. Perhaps it is supremely difficult to supply the energy that is necessary for the careful articulation of sophisticated real estate law, documentation and negotiation and, notwithstanding, to keep an open mind about the desirability of development, either in general or in any particular case. Certainly, that is a consideration. This probably goes a long way to explain the one-sided, pro-development stance

of most bar association real estate committees. It explains too how most practitioners consider an article or speech questioning these policy biases as inappropriate as a sermon preached on a weekday. But academics can and ought to re-adjust that one-sidedness. We do, but all too often without even being heard within the real estate bar. If practitioners and academics were more firmly locked together, without raising the old canard of distinction, each would slowly gain from the experience and interests of the other. The *Journal* was rapidly and silently becoming just the forum in which academics and practitioners were increasingly coming together.

Even in a world where the practitioner/academician distinction was really put to rest, Halper's *Ground Leasing and Land Acquisition Contracts* would have an honored place. It tells only a limited, if extremely useful, story. But it tells it with remarkable penetration and drive, and it does so in graceful and readable English prose.