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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BLAIRMONT, LLC et al., Plaintiffs and Appellants, v. DAVID HOROWITZ, as Trustee, etc., et al., Defendants and Appellants.	B221704 (Los Angeles County Super. Ct. No. NC036830)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick T. Madden, Judge. Affirmed in part and reversed in part.

Law Offices of Michael Leight, Michael Leight and John Gloger for Plaintiffs and Appellants.

Garrett & Tully, Ryan C. Squire, Robert Garrett, and Alia S. Haddad for Defendants and Appellants.

This case concerns a 99-year lease executed in 1948 (the lease) encumbering a commercial property at 4918 E. Second Street, Long Beach, California (the property).

Blairmont LLC (Blairmont); Fourth Church of Christ, Scientist (Fourth Church); Frank C. Blair and Ruth C. Blair (the Blairs, and collectively referred to as the Blairmont parties) appeal from a final judgment entered after a bench trial on their claims of declaratory relief concerning the lease. David Horowitz (Horowitz) and Arlene Horowitz, Trustees of the Horowitz Trust (the Horowitzes), and Bernard R. Kaufman (Kaufman) and Judith L. Kaufman, Trustees of the Bernard and Judith Kaufman Trust (the Kaufmans, and collectively referred to as the trustees) cross-appeal from the trial court's rulings disposing of the trustees' cross-complaint against the Blairmont parties.

We affirm in part and reverse in part. We affirm the trial court's decision that the defense of laches bars the Blairmont parties' challenges to the lease and the assignments of the lease. However, we reverse the trial court's finding that a nine-year reduction in the term of the lease is required due to a violation of Civil Code section 718 (section 718).[1] As to the trustees' cross-complaint, we affirm the trial court's summary adjudication of the trustees' claim for intentional interference with contractual relations against the Blairmont parties. However, we reverse the trial court's decisions disposing of the trustees' claims for quiet title, breach of implied covenant of good faith and fair dealing, implied indemnity, and breach of implied covenant of quiet enjoyment against Fourth Church at the pleading stage.

THE BLAIRMONT PARTIES' CONTENTIONS

The Blairmont parties make the following contentions:

1. While the trial court correctly determined that the lease violates section 718, the trial court erred in reducing the lease term by nine years rather than voiding the lease in its entirety;

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[1] Section 718 provides, in relevant part: "No lease or grant of any town or city lot, which reserves any rent or service of any kind, and which provides for a leasing or granting period in excess of 99 years, shall be valid."

2. The 1977 assignment of the lease from Mann Theatres Corporation (Mann Theatres) to South Bay Properties (South Bay) was contrary to public policy and illegal due to breaches of fiduciary duty on the part of Kaufman to his client, Mann Theatres;

3. Because of the purported breaches of fiduciary duty on the part of Kaufman to his client, Mann Theatres, the trustees come to court with unclean hands and may not rely on the defense of laches;

4. The trial court erred in determining that the challenges to the assignments of the lease were barred by laches; and

5. The lease is unconscionable, therefore unenforceable.

THE TRUSTEES' CONTENTIONS

In response to the Blairmont parties' appeal, the trustees argue:

1. Blairmont may not attack the lease or South Bay's conveyance to its partners because Fourth Church has affirmed the lease and acknowledged that the trustees are the lessees;

2. The trial court's determination that laches bars the Blairmont parties' claims is supported by substantial evidence, and should have led the court to reject the Blairmont parties' claim that the lease is illegal under section 718;

3. The trial court correctly found that the lease is not void under section 718, but the court erred as a matter of law when it reduced the lease term by nine years;

4. Because the probate court approved the lease in 1948, the Blairmont parties are estopped from challenging the lease by judicial estoppel, collateral estoppel, and res judicata;

5. Substantial evidence supports the trial court's ruling that the lease was not unconscionable;

6. The Blairmont parties have no standing to argue that South Bay's conveyance to its partners was invalid;

7. South Bay's leasehold estate was validly conveyed to the trustees, and the trial court's ruling that the assignment was ineffective is incorrect;

8. The trial court correctly ruled that Kaufman's status as in-house attorney for Mann Theaters did not render the assignment to South Bay illegal, and the trustees did not have unclean hands; and

9. Blairmont has no standing to attack the assignment of the lease from Mann Theaters to South Bay or to invade Kaufman's attorney-client relationship with Mann Theaters.

As to their cross-complaint, the trustees argue:

1. The trial court erred by granting the Blairmont parties' motion for judgment on the pleadings as to the trustees' causes of action for (1) quiet title, (2) breach of the implied covenant of good faith and fair dealing against Fourth Church, and (3) implied indemnity against Fourth Church;

2. The trial court erred by granting summary judgment in favor of Blairmont and the Blairs on the trustees' claim for interference with contract; and

3. The trial court erred by sustaining the Blairmont parties' demurrer to the trustees' claim for breach of the covenant of quiet enjoyment.

FACTUAL BACKGROUND[2]

1. The lease

On March 16, 1939, Rose Carson Heedwohl leased the property to West Coast Long Beach Theatre Corporation (West Coast) (the 1939 lease). The term of the lease was 10 years, beginning April 1, 1939, and ending March 31, 1949. Ms. Heedwohl died on or about July 8, 1947.

On May 3, 1948, before the expiration of the term of the 10-year lease, L.J. Heedwohl (Mr. Heedwohl or petitioner), a testamentary trustee under the last will and testament of Rose Carson Heedwohl, petitioned the superior court for, and was granted, authority to execute a 99-year lease on the property. In his petition to the superior court, Mr. Heedwohl indicated that the property was "in need of repairs and rehabilitation." The petitioner explained that he had been able to negotiate a lease for a period of 99 years

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[2] These facts are predominantly taken from the trial court's statement of decision, filed September 2, 2009.

with West Coast at a net rental of $1,000 per month, and that the lessee would pay "all taxes, all repairs, and . . . complete and pay for the repair and rehabilitation of said property," according to plans and specifications approved by the petitioner. The petitioner further attested that the proposed lease was "to the best interests of the estate and all of the beneficiaries interested therein," including "Mother Church, First Church of Christ Scientist" and "Fourth Church, Christ Scientist." A copy of the proposed lease was attached to the petition. By signing the lease, the "Landlord and Tenant . . . agreed to terminate" the lease of March 16, 1939, "concurrently with the commencement of the term of this Lease."

The superior court granted the petition. The court found that "all of the allegations of [the] petition are true; and that it is for the advantage of said estate to Lease the real property." The court "authorized, empowered and directed" petitioner to "execute, and acknowledge and deliver" the 99-year lease "beginning May 1, 1948 and ending April 30, 2047." The lease was recorded with the county recorder in 1948.

The lease permits the lessee to cancel the lease, but only after having rehabilitated the property. The lease also grants the lessee a right of first refusal, should the landlord decide to sell the fee.

2. The Heedwohl Trust

The Heedwohl Trust held title to the property for the next 40 years. From 1948 to 1970, the trustee of the Heedwohl Trust was Mr. Heedwohl. During this time, Mr. Heedwohl filed accountings with the superior court. In January 1971, upon the death of Mr. Heedwohl, the court appointed Security Pacific National Bank as successor trustee. The successor trustee also filed accountings with the court. In September 1989, the successor trustee conveyed its interest, as a gift, to beneficiaries First Church and Fourth Church.

There was no evidence that the required rehabilitation of the property was not timely performed. The property functioned as a movie theater through the early 1970's. The Heedwohl Trust continued to accept rental payments in accordance with the lease

from either South Bay, Kaufman, or Horowitz. There was no evidence of any breach or default under the lease.

3. The lessees

The successors of West Coast remained the lessee through 1973. In 1973, Mann Theatres acquired the leasehold via assignment from National General Theatres, Inc., one of West Coast's successors.

In 1977, Horowitz, Kaufman, David Westley (Westley), and David Goodgame (Goodgame) formed South Bay, a general partnership, for the purpose of acquiring the leasehold. On September 6, 1977, South Bay acquired the leasehold from Mann Theatres for approximately $115,000- $125,000. Kaufman and Goodgame were employed by Mann Theatres at the time that South Bay was formed and at the time that South Bay acquired the leasehold. Both men were licensed attorneys at the time. South Bay paid rent of $1,000 per month to the Heedwohl Trust through 1988, and all of those payments were accepted by the successor trustee of the Heedwohl Trust. In 1984, the partnership agreement of South Bay was amended to include the wives of the original partners: Arlene Westley, Arlene Horowitz, Shari Goodgame, and Judith Kaufman.

On February 16, 1989, the Goodgames, Westleys, Kaufmans, and Horowitzes utilized a tax-deferred exchange to effectuate the purchase of the leasehold by the Kaufmans and Horowitzes from the Goodgames and Westleys. In consideration of the transfer, the Kaufman and Horowitz trustees paid the Westleys and Goodgames $960,000. Kaufman, not South Bay, started making the rental payments on behalf of the Kaufmans and Horowitzes. The Heedwohl Trust negotiated the payments without objection to the new assignees.

4. Condition of the property at the time of South Bay's acquisition of the lease

Although the property had been improved after the lease was originally executed, it later fell into disrepair. At the time South Bay acquired the leasehold in 1977, the property was in a dilapidated condition. The interior of the building on the property was gutted, and homeless people lit bonfires in the middle of the building. The purchase of the property was a risky investment. Substantial time and resources would be required to

upgrade the property. Potential use of the property was also restricted by the California Coastal Commission. No improvements to the property were made by any fee owner of the property, including the Heedwohl Trust, First Church, or Fourth Church.

5. 1978 sublease and the Heedwohl Trust's acquiescence

In 1978, South Bay entered into a 30-year sublease with a five-year option with John Doyle (Doyle), who owns and operates the Belmont Athletic Club through its general partner B.A.C. Management. The trustees paid tens of thousands of dollars in broker fees to locate Doyle, and gave him major concessions to sublet the property, including foregoing rent while he built-out the property. The property was converted from a movie theater to an athletic club with other rental spaces. In 1979, Doyle entered into a similar sublease with South Bay for the upstairs portion of the property.

Doyle learned that the property was held in trust by Security Pacific National Bank (Security Pacific). At some time during the early 1980's, Doyle visited Security Pacific and asked to speak with the person in charge of the Heedwohl Trust. Doyle explained that he had converted the theater into a racquetball and athletic club. He was interested in buying the property. The Security Pacific bank representative stated that the Heedwohl Trust did not need any more income and was not interested in selling anything.

Doyle never received a notice to quit the premises from Security Pacific. He never received any communication from them whatsoever. The Heedwohl trustee continued to negotiate the rental checks of $1,000 per month from South Bay without objection.

6. Fourth Church acquires the property, and First Church and Fourth Church acquiesce to the trustee's leasehold

On August 11, 1989, Security Pacific, as trustee for the Heedwohl Trust, quitclaimed to First Church a 72.13 percent interest and to Fourth Church a 27.87 percent interest in the fee title to the property. First Church was aware that the property was encumbered by a ground lease at the time it acquired the fee interest.

From at least October 1989 to September 1993, First Church accepted rent payments from Kaufman in the amount of $1,000 per month pursuant to the terms of the

lease. First Church accepted the checks without objection. There is no evidence that First Church ever questioned the trustee's tenancy, which predated First Church's (and Fourth Church's) acquisition of the fee title, nor did it seek any judicial remedy as to the validity of the lease, its terms, or the status of the trustees as lessees under the lease.

In 1992, First Church sought to sell its interest in the property. Fourth Church made an offer.

First Church was aware of the right of first refusal in favor of the tenants under the lease. First Church engaged in arms length negotiations with Fourth Church, even though Fourth Church was a branch of First Church, the "Mother Church." The right of first refusal to be offered the Kaufmans and Horowitzes was a subject of the negotiations between First Church and Fourth Church. For example, in a letter dated July 31, 1992, a representative of First Church referred to Kaufman as the "lessee" who expressed an interest in purchasing the property; the letter further indicates that First Church would accept an offer from Fourth Church "subject to the lessee right of first refusal." In a letters dated November 4, 1992, and January 8, 1993, there is further reference to the lessee and right of first refusal.

Pursuant to article XXIII of the lease, the purchase and sale agreement contained the following language:

> "B. The Property is subject to a long term Ground Lease (hereinafter referred to as the 'Ground Lease') executed on May 3, 1948 between L.J. Heedwohl, Trustee, and West Coast Long Beach Theater Corporation. The Ground Lease is attached hereto, labelled [*sic*] Exhibit B and made a part hereof."
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> "[¶] . . . [¶]
>
> "2.02 Conditions of Purchase and Sale. Buyer's obligation to purchase the Property is conditional upon the following:
>
> "[¶] . . . [¶]
>
> "(c) A complete release, or, in the alternative, a failure to exercise, by the Tenant, pursuant to the Ground Lease, and/or its successors and assigns, of

> any and all rights it may have, or may claim to have pursuant to the Article XXIII ("FIRST REFUSAL") of the Ground Lease, arising from the tender of an offer to purchase the Property by Buyer to Seller herein. . . ."

On March 4, 1993, counsel for First Church, G. Grant Gifford (Gifford), extended on behalf of First Church the right of first refusal to the Kaufmans and Horowitzes pursuant to article XXIII of the lease. Gifford referred to the trustees as the "tenant or tenant's representative under the existing Ground Lease governing the various leasehold rights and obligations on said property." Initially, Kaufman and Horowitz exercised their right of first refusal. However, they ultimately did not proceed to exercise their right and Fourth Church proceeded with the purchase of First Church's interest in the property.

Kaufman is repeatedly referred to as the "lessee" in Fourth Church's meeting minutes and correspondence. Fourth Church was aware that there was a 99-year lease on the property with 50 years still remaining. When it was first given the property from the successor Heedwohl trustee, Fourth Church was fully aware that it would collect $1,000 rent per month under the terms of the lease. Catherine Wetzell, who was designated by Fourth Church as the person most knowledgeable, was aware that Fourth Church was purchasing First Church's interest in the property at a discounted price because of the lease.[3] The membership of Fourth Church was informed.

One of the documents Fourth Church was required to sign in order to complete the acquisition of First Church's interest in the property was an "assignment of leasehold interest." The document provided that Fourth Church would acquire:

> "All right, title and interest of the undersigned, as Lessor, in and under that certain Lease dated April 30, 1948 executed by and between L.J. Heedwohl, as testamentary trustee of the Estate of Rose Carson Heedwohl, deceased (Lessor) and West Coast Long Beach Theatre Corporation (Lessee) as subsequently assigned to David Horowitz and Arlene Horowitz, Trustees of the Horowitz Trust dated April 12, 1988 as to an undivided 50% interest and Bernard K. Kaufman and Judith L. Kaufman, Trustees of

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[3] Mrs. Wetzell became a member of Fourth Church in 1951 and served approximately four three-year terms on the executive board. She passed away during the course of the litigation in the trial court.

the Bernard and Judith Kaufman Trust as to an undivided 50% interest, Lessees."

Fourth Church explicitly accepted the assignment.

On July 12, 1993, a grant deed conveying First Church's fee interest to Fourth Church was executed by First Church and recorded.

For the next 11 years, Fourth Church's conduct affirmed its explicit consent to the trustees' leasehold estate, including but not limited to its acceptance of monthly rental payments in the amount of $1,000 per month from October 1993 through the filing of the litigation. Rita Joanne Garner, Fourth Church's treasurer and clerk since 1987, testified that the trustees were timely in their monthly rental payment and Fourth Church never had any problems collecting the rent.

7. Negotiations between Fourth Church and Doyle

In November 1994, Doyle contacted Mr. Wetzell of Fourth Church. Mr. Wetzell indicated that he was involved with the board of Fourth Church. Doyle identified himself as the tenant at the Belmont Athletic Club. Doyle spoke with Mr. Wetzell four or five times regarding the possibility of Doyle purchasing the property. They also discussed the right of first refusal that ran in favor of the trustees.

In 1999, Mr. Wetzell contacted Doyle to inquire whether Doyle was interested in purchasing the property. Mr. Wetzell explained that Fourth Church was receiving a small amount of money compared to the price of the property and it was winding down its affairs. Doyle spoke with Mr. Wetzell on about three or four different occasions regarding the purchase of the property. Doyle explained to Mr. Wetzell that he would look into the feasibility of purchasing the property since the property was encumbered by the lease, which contained a right of first refusal. Doyle explained that he would also have to buy Kaufman and Horowitz out of their lease. Doyle and Mr. Wetzell discussed a purchase price of approximately $200,000 to $250,000.

In 2002, Doyle tried to contact Mr. Wetzell, but Mrs. Wetzell informed him that Mr. Wetzell had died the previous year. Mrs. Wetzell indicated that Fourth Church was

interested in selling the property because it received so little money in rent. Doyle and Mrs. Wetzell discussed the value of the property and the fact that the value was affected by the ground lease which had another 40 years on it.

8. The trustees rely on the leasehold as collateral

In July 1998, the trustees entered into a loan agreement with Sumitomo Bank of California (the lender) for the amount of $685,000. The trustees executed two instruments that served as security for the loan in the event of a default.

The first was an "Assignment of Rents and Leases" which referred to the rents that the trustees collect under the subleases on the property. A description of the property was attached as exhibit A. The assignment allowed the lender to collect the rent from the subtenants "[u]pon the maturity of the Indebtedness or a default of the Indebtedness and during the continuance thereof." Until the time of a maturity of the indebtedness or a default under the loan, the trustees were entitled to enforce the leases and collect rent. Kaufman signed the assignment because he understood that the bank wanted it as collateral security for the loan.

The second document was an "Assignment of Lessee's Interest in Ground Lease" which assigned the trustees' interest in the lease in the event of a default on the part of the trustees. Again this document was executed as collateral security for the $685,000 loan.

In preparation for the documentation of a second loan obtained by the trustees in November 2003, letters were executed by Kaufman, Horowitz, and their respective tenants for the bank. The leases referenced were the operative subleases, which became collateral for a loan from Citizens Bank.

Kenneth Coolidge, the deputy chief credit officer at Citizens Bank, testified that the trustees' loan is current and is secured by a promissory note and deed of trust encumbering the trustees' leasehold. Coolidge explained that when Citizens Bank makes a loan against real estate, it takes a deed of trust, along with an assignment of rent, as collateral. As a general rule, Citizens Bank does not collect rent on a property unless there has been a default or there is a receivership. The trustees have honored their obligations to Citizens Bank.

9. Blairmont's offer to buy the property

On October 11, 2004, Mrs. Wetzell, as president of the executive board of Fourth Church, signed a listing agreement with a realtor to sell the property. The stated listing price was $2,500,000.

In 2005, Blairmont offered to buy the property for $1,200,000. On February 16, 2005, Mrs. Wetzell signed a counter offer, indicating that the purchase price would be $1,300,000 and stating: "Upon acceptance of this Counter Offer, Seller shall give the Lessee, now paying the Lease rent, notice as to comply with Lessee's Right of First Refusal." Blairmont's counter offer, dated February 16, 2005, indicated a purchase price of $1,250,000 and stated:

> "Upon acceptance of this Counter Offer Seller shall not give purported lessees which are now paying rent, any notice of the purported right of first refusal and Buyer shall indemnify and hold Seller harmless as a result. Buyer may, at its own expensive and in its sole discretion, select and pay for counsel to defend Seller if it is sued by the purported lessees."

Mrs. Wetzell also testified that, in response to her proposal that the trustees be given notice, Blairmont proposed that the trustees not be given notice, but instead, that Blairmont would indemnify and hold Fourth Church harmless in the event of a lawsuit.

Mrs. Wetzell testified that it was her understanding that the church agreed to accept $1,250,000 for the property, although this was less than the value of the property if it were not encumbered by the lease. The commercial property purchase agreement between Fourth Church and the Blairmont parties was executed on March 1 and March 2, 2005.

On April 14, 2005, after Blairmont had filed its complaint for declaratory relief, Fourth Church sent a letter to the trustees informing the trustees of Blairmont's offer to purchase the property and purporting to comply with its obligation to offer the trustees a right of first refusal pursuant to the lease. On May 11, 2005, the trustees responded, stating their position that the lessor had not complied with the requirements of the lease. Specifically, the trustees stated, the lease requires that the lessor provide the right of first

refusal when the offer on the property is received, and Fourth Church's letter reflected that it already had a binding agreement to sell the property.

PROCEDURAL HISTORY

Blairmont filed its action for declaratory relief against the trustees on April 7, 2005. Blairmont asked the court to declare that the trustees did not succeed to the interest of the original tenant under the lease; that the trustees are not entitled to collect rent; and that the trustees had no valid or enforceable interest in the property. Blairmont further asked the court to declare the lease unconscionable and unenforceable.

The trustees cross-complained against the Blairmont parties for quiet title, breach of implied covenant of quiet enjoyment, breach of implied covenant of good faith and fair dealing, implied indemnity, and interference with contractual relations. The third amended cross-complaint was filed on January 27, 2006. Fourth Church filed a cross-complaint against Blairmont and the trustees, seeking a determination and declaration of the respective rights, duties and obligations of the parties.

Blairmont and Fourth Church demurred to the trustees' cross-complaint. On April 4, 2006, the trial court sustained without leave to amend the demurrer to the trustees' claim for breach of the covenant of quiet enjoyment implied in the lease, finding that Blairmont's and Fourth Church's conduct fell within the litigation privilege of Civil Code section 47.

On August 11, 2006, the Blairmont parties moved for summary judgment, or in the alternative, summary adjudication on the remaining causes of action in the trustees' cross-complaint. The motion for summary judgment was denied, and the motion for summary adjudication was granted in part and denied in part. It was granted as to the trustees' fifth cause of action for intentional interference with contractual relations, on the ground that the litigation privilege provided a complete defense to that tort. It was denied as to the remaining causes of action in the cross-complaint.

The Blairmont parties' claims were tried to the court in May 2008. The court found:

> "Blairmont's claim challenging the validity of assignment is barred by laches. The Trustees and Fourth Church are both bound by the terms of the original lease. The reversionary rights in the sub-tenancy are deemed to belong to the Trustees, and South Bay Properties retains no interest in the leasehold. The sub-tenancy is between the trustees as sub-lessor and Mr. Doyle as sub-lessee. The first nine years of occupancy by the original lessee is deemed to be part of the ninety-nine year term, and the lease will expire on March 16, 2039. If Blairmont elects to purchase the Property, it will do so subject to the lease of the Trustees."

Blairmont requested a statement of decision, which was filed on September 2, 2009.

The Blairmont parties brought a motion for judgment on the pleadings as to the remaining causes of action in the trustees' cross-complaint: quiet title, breach of implied covenant of good faith and fair dealing, and implied indemnity. The motion was granted on November 19, 2009.

Judgment was entered on November 25, 2009.

Blairmont and Fourth Church filed their notice of appeal on January 11, 2010. The trustees filed their notice of cross-appeal on January 25, 2010.

DISCUSSION

I. The Blairmont parties' appeal

In their direct appeal, the Blairmont parties argue that the lease is illegal and void; that the assignment of the leasehold from South Bay to the trustees was contrary to public policy and illegal; and that the trial court erred in determining that the doctrine of laches barred their challenge to the assignment.

In response, the trustees argue that all of the Blairmont parties' challenges to both the lease and the assignment are barred. First, the trustees contend, Fourth Church has affirmed the lease and the trustees as lessees on numerous occasions. Because the Blairmont parties "stand in the shoes" of the prospective seller, they have no greater rights than Fourth Church. Fourth Church's express validations of both the lease and the assignment constitute judicial admissions which are binding on the Blairmont parties, and the Blairmont parties may not take a contrary position.

Next, the trustees argue that the trial court's finding of laches bars all of the Blairmont parties' arguments as to both the lease and the assignment.

Finally, the trustees argue that, because the superior court approved the lease in 1948, the Blairmont parties are estopped from challenging it under the doctrines of judicial estoppels, collateral estoppels, and res judicata.

The trustees argue that because the Blairmont parties' arguments are barred for the reasons set forth above, the trial court's reduction of the lease by nine years should be reversed.

We begin the discussion of the Blairmont parties' direct appeal by addressing the question of whether Blairmont's challenges to the lease and the assignment are barred by the doctrines of laches.

A. Laches

Laches is a question of fact to be determined by the trial court. As the trial court noted:

> "The affirmative defense of laches requires that there be unreasonable delay in bringing suit, plus either acquiescence in the act about which the plaintiff complains, or prejudice to the defendant resulting from the delay. Laches can bar a claim even if brought within the legal limitations period." (Citing *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1150.)

1. The trial court's ruling

The equitable defense of laches was raised by the trustees as to the issues set forth in the Blairmont parties' complaint for declaratory relief. The trial court made an express finding that "both First Church and Fourth Church, by their express agreement and conduct, from 1989 to the filing of this lawsuit, acquiesced to the validity of the Lease and the mesne assignments leading up to and including the Trustees."

The trial court specifically held:

> "Although Blairmont is the nominal plaintiff seeking declaratory relief, its interests are derivative of the Fourth Church's interests; Blairmont 'stands in the shoes' of Fourth Church for the purposes of an equitable analysis. Blairmont is a stranger to the relationship between owner and

tenant and sub-tenant, and its own interests are purely prospective. The Fourth Church has owned an interest in the Property since 1989, and has been the sole fee owner since 1993. There has never been any impediment to its discovery of the facts in this case. Nothing was concealed, and nothing prevented it from challenging the Lease when it first became part owner in 1989. Although Blairmont has not acquiesced to the present state of the tenancy, Fourth Church most certainly has. Fourth Church collected rent without complaint or question until Blairmont expressed interest in purchasing the property.

"The trustees have relied on the validity of the leasehold. The Lease represents a substantial portion of the Trustees' retirement income, and the prejudice resulting from a declaration in plaintiff's favor would manifest. They have managed the Property for 30 years, and invested significant time and money in improving the property. The Trustees are contractually bound to their sub-tenants.

"The Trustees spent almost one million dollars to buy out their partners' interests, and are obligated to their bank to have the Property serve as collateral on their loan that is current, albeit not yet satisfied.

"The court finds that undue delay, coupled with both Fourth Church's acquiescence to the tenancy and sub-tenancy and the serious financial prejudice to the Trustees bar a declaration in plaintiff's favor. The legal defects in assignment and conveyance have not resulted in either damage or prejudice to the owner. At the end of Lease, Fourth Church will obtain a valuable piece of Property, without contributing anything to rehabilitation, repair, taxes, insurance, maintenance, etc. Fourth Church's ownership was a gift, and it took the Property as it found it. Under these facts, defects in the form do not defeat the substance of the transactions.

"The public policy underlying the doctrine of laches is expressed as follows:

"[O]ne is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it.' [Citations omitted.] (*Lundgren v. Lundgren* (1966) 245 Cal.App.2d 582, 592.)

> "Here the value of the Property results from the investment, time, energy, and management by the Trustees."

The court found that the Blairmont parties' claim challenging the validity of the assignment was barred by laches, and that the trustees and Fourth Church are both "bound by the terms of the original lease." Despite this finding, the trial court deemed the first nine years of occupancy by the original lessee to be "part of the ninety-nine year term," and declared that the lease will expire on March 16, 2039.

2. Questions presented

The parties present several issues as a result of the trial court's ruling on the issue of laches.

The trustees argue that the trial court's ruling on laches bars the Blairmont parties from challenging the validity of the lease. Thus, the trustees argue, the trial court should not have reached the issue of whether the lease was invalid under section 718.

The Blairmont parties argue that the trial court erred in determining that laches applies at all. Specifically, the Blairmont parties argue that:

1. Laches is not applicable in declaratory relief actions seeking money judgments, such as this action;

2. Laches is not applicable where, as here, a lease is contrary to an express mandate of law or public policy;

3. The trustees' unclean hands preclude them from raising the defense of laches;

4. Substantial evidence does not support the trial court's finding that the trustees suffered prejudice from any inaction; and

5. Even if it did apply, the doctrine of laches can only bar claims by a plaintiff, it cannot create rights.

3. The trial court's finding of laches is supported by the facts and the law

"'The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the

delay.' [Citation.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) Laches turns on findings of fact and is therefore reviewed for substantial evidence. (*Id.* at p. 67). Where the facts are undisputed, we may review a finding of laches as a matter of law. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 986.) As set forth below, we find that the trial court's finding of laches is supported by the facts and the law.

a. unreasonable delay

First, the trial court found unreasonable delay in the filing of this action. The court noted that Fourth Church had an interest in the property beginning in 1989, and that it became the sole fee owner in 1993. The court found that nothing prevented Fourth Church from discovering the facts in this case. Nothing was concealed, and there was no reason Fourth Church could not have challenged the validity of the lease or the assignments at an earlier date. Under the doctrine of laches, delay is measured by the period from when the plaintiff knew, or should have known, of the alleged claim. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1157.) The Blairmont parties presented no evidence suggesting that Fourth Church was prevented from discovering the facts regarding its claims earlier, or that its failure to challenge the lease or assignments for so many years was excusable. The evidence presented to the trial court supported its finding of unreasonable delay.

The Blairmont parties argue that even if Fourth Church unreasonably delayed taking action, there was no delay on the part of Blairmont. However, as the trial court specifically found, Blairmont stands in the shoes of Fourth Church for the purposes of the laches analysis. We agree. *G.R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289 (*Holcomb*), is instructive. *Holcomb* involved a series of land transfers which occurred "more than ten years, and some of them twenty years, prior to the present attack upon them." (*Id.* at p. 299.) During that time, the predecessor of the plaintiff "undoubtedly had notice of these transactions." (*Ibid*.) However, no action was taken. The *Holcomb* court concluded that the defense of laches was properly asserted against the plaintiffs:

> "Those in control of the bank's affairs are bound by the previous acts, or nonaction, of the former officials of the bank. If laches ran against the latter, and in our opinion, it did, the effect is the same as to their successors." (*Id.* at p. 300.)

(See also *Sierra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667 [prior property owner's failure to pursue its judicial remedies is binding on present landowner]; *San Joaquin & Kings River Canal & Irrigation Co. v. James J. Stevinson (Corp.)* (1917) 175 Cal. 607, 613 ["failure on the part of plaintiff's predecessor to examine Stevinson's title amounted, under the circumstances, to laches"].)[4]

The Blairmont parties do not point to any evidence undermining the trial court's determination that Fourth Church's failure to contest the trustees' leasehold at any time between 1989 to the filing of this action in 2005 was unreasonable. Under the circumstances, Blairmont is bound by this inaction. We find no factual or legal error.

b. prejudice

The trial court found that the trustees have relied on the validity of the leasehold to their prejudice. Specifically, the trustees have managed the property for 30 years, invested significant time and money into improving the property, and entered into binding agreements with their subtenants. In addition, the trustees spent nearly $1 million to buy out their partners' interest, and have used their interest in the property as collateral on a loan that is current, albeit not yet satisfied. This uncontested evidence

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[4] *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal.App.3d 1541 (*County of Fresno*), cited by the Blairmont parties, is distinguishable. There, the California Fair Employment and Housing Commission (Commission) issued accusations against the county on behalf of two individuals. (*Id.* at p. 1545.) The county attempted to raise the defense of laches against the Commission. The Court of Appeal indicated that it would not be fair to preclude the individuals from a remedy when they timely asserted their rights. (*Id.* at p. 1556.) Unlike the present matter, *County of Fresno* did not involve undue delays on the part of a predecessor-in-interest. Similarly, *Philbrook v. Howard* (1958) 157 Cal.App.2d 210, 215, involves the question of whether laches on the part of an individual's guardian would be imputed to the individual. The case assumes, without deciding, that such an imputation would be made. (*Ibid.*) Again, the case does not involve a predecessor-in-interest, and is therefore inapposite.

supports the trial court's finding that "serious financial prejudice" to the trustees bars a declaration in plaintiff's favor.

The Blairmont parties argue that no action or inaction on the part of either Blairmont or Fourth Church caused prejudice to the trustees. They argue that the money the trustees spent to buy out their partners occurred before Fourth Church acquired any interest in the property. However, as set forth above, Blairmont stands in the shoes of Fourth Church, which expressly acknowledged and affirmed the leasehold when it executed the "Acceptance of Lease Assignment" at the time that it bought out First Church's interest in the property in 1993. In addition, Fourth Church's person most knowledgeable admitted that Fourth Church never questioned the trustees' rights as tenants. The trial court found that the trustees relied on these affirmances of their rights as tenants. In addition, the trustees entered into its loans, using the leasehold as collateral, several years after Fourth Church became the sole fee owner. The trustees relied on Fourth Church's acknowledgement of the tenancy, and Blairmont is bound by Fourth Church's inaction.

The Blairmont parties further argue that rather than suffering prejudice from the passage of time, the trustees benefitted from it, because over the years they collected much more in rent from their subtenants than they paid to Fourth Church per month. The trial court did not adopt this interpretation of the facts. Instead, the court focused on the significant time and money that the trustees have invested in the property, and their reliance on the validity of their leasehold. The court's finding that the trustees have relied on the leasehold to their detriment is amply supported by the record.

The trial court's findings of undue delay and substantial prejudice are supported by the record. We find no error in the trial court's decision that laches bars a declaration in favor of the Blairmont parties.

4. Laches is applicable in this declaratory relief action, and was properly raised as a defense

The Blairmont parties attack the trial court's decision that laches bars a declaration in their favor by arguing that laches is not available as a defense in this proceeding.

Laches is an equitable defense, the Blairmont parties argue, available only in equitable proceedings. Citing *Gore v. Bingaman* (1942) 20 Cal.2d 118, 120, the Blairmont parties point out that actions for declaratory judgments are considered "sui generis" rather than strictly legal or equitable. Because their complaint for declaratory judgment also contained an element seeking "damages," the Blairmont parties argue that laches is not available as a defense. (See *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 462).

The paragraph which the Blairmont parties claim seeks "damages" reads as follows:

> "b. [The trustees] are not entitled to collect, nor to have collected, 'rent' or other payments from persons and entities now occupying the Property, nor from persons and entities previously occupying the Property and that Blairmont, as successor to the Church, is entitled to all such rental payments."

This paragraph does not seek "damages," as the Blairmont parties insist. The concept of "damages" "requires there to be 'compensation,' in 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 826, fns. omitted (*AIU*).) Blairmont sets forth no specific loss or detriment it has suffered because of any acts of the trustees. There are no allegations that the trustees have breached their contract with Fourth Church or have otherwise engaged in any illegal acts causing harm to Fourth Church (or Blairmont as successor-in-interest).

Instead, the paragraph seeks restitution. In contrast to damages, restitution is a remedy that seeks specific relief to a thing to which the plaintiff is entitled. As the Supreme Court explained in *AIU, supra*, 51 Cal.3d at page 835, a claim for reimbursement of government response costs is a claim for restitution, not damages:

> "'Our cases have long recognized the distinction between an action at law for damages -- which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation -- and an equitable action for specific relief -- which may include an order providing . . . for "the recovery of specific property *or monies* . . . ."' [Citations.]"

(Citing *Bowen v. Massachusetts* (1988) 487 U.S. 879, 893, original italics.)

Similarly, the Blairmont parties' claim for reimbursement of the specific rental payments that the trustees have received constitutes a claim for restitution, not damages. (See also *Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 891 ["Constructive trust is an equitable remedy to prevent unjust enrichment and enforce restitution, under which one who wrongfully acquires property of another holds it involuntarily as a constructive trustee"].)

Blairmont's equitable request for restitution does not bar the defense of laches. (*Carberry v. Trentham* (1956) 143 Cal.App.2d 83, 90 ["insofar as equitable relief is sought, this defense [laches] is available"].)

The Blairmont parties further attack the trial court's finding of laches by arguing that the trial court erroneously granted the trustees new rights that they did not previously possess. The Blairmont parties focus on the trial court's decision that "the conveyance of the lease by grant deed was error." The trial court further stated that, "[b]ecause the Trustees are not assignees under a purely legal analysis, they have no right to enforce covenants in the lease, and are not entitled to a right of first refusal before Fourth Church sells to Blairmont."[5]

The Blairmont parties argue that, since the trial court determined that the trustees are not legally assignees, the trial court's decision to bar their challenges to the assignment under the doctrine of laches granted the trustees the rights of assignees. The Blairmont parties cite *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 752 (*Lackner*) for the proposition that laches "'can only be set up as a defense to a suit . . . and cannot be invoked affirmatively . . . as the foundation of a right.' [Citation.]"

We find *Lackner*, and the principles of law expressed therein, to be inapplicable in this situation. In *Lackner*, the court determined "whether a successful statute of limitations defense constitutes a favorable termination of an underlying suit so as to support a subsequent action for malicious prosecution." (*Lackner, supra*, 25 Cal.3d at p.

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5 Despite these findings, the court later determined that Blairmont's claim challenging the validity of the assignment was barred by laches.

749.) The plaintiff had attempted to base his malicious prosecution action on a malpractice action brought against him which had been dismissed for limitations reasons. The court found that "plaintiff's attempt to base his action for malicious prosecution on the malpractice action barred by the statute [of limitations] is in effect an attempt to use the statute as a 'sword.'" (*Id.* at p. 752.) Thus, it did not constitute a "favorable termination" for the purposes of a subsequent malicious prosecution claim. (*Ibid.*)

The trustees raised laches as a defense to the Blairmont parties' attempt to invalidate the lease and the assignment. The trial court properly found that the Blairmont parties' challenges to the lease and the assignment are barred by laches. The trial court's finding prevents the Blairmont parties from invalidating the lease and assignment; it does not create new rights. We reject the Blairmont parties' arguments to the contrary.

5. The trial court's finding that the trustees did not engage in unclean hands is supported by substantial evidence

The Blairmont parties next argue that the trustees are barred from asserting laches based on the doctrine of unclean hands. Their argument centers on the fact that Kaufman and Goodgame, two of the original partners of South Bay, were both employed as attorneys by Mann Theatres at the time that South Bay acquired the lease from Mann Theatres. The Blairmont parties suggest that Kaufman conspired with his colleagues, Horowitz, Goodgame and Westley, in order to "*create* South Bay as a stalking horse" and betray his client. The Blairmont parties argue that Kaufman did not give his client, Mann Theatres, the required disclosure, nor obtain the necessary consents, for his alleged conflict of interest. The Blairmont parties argue that Kaufman's actions violated his fiduciary duties to his client as well as the California Rules of Professional Conduct. Thus, the Blairmont parties argue, the purported transfer of the leasehold from Mann Theatres to South Bay was illegal and void. (Citing *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 511.)

The trial court decided this factual issue against the Blairmont parties. Kaufman testified that his client was aware of and consented to the assignment of the lease to South Bay. The Blairmont parties attempted to suggest that Kaufman's inability to recall

specifics of the transaction meant that he was untruthful, but the trial court disagreed, stating: "Mr. Kaufman's inability to recall the specifics of transactions that took place over thirty years ago does not mean he was untruthful; rather, with the passage of time, memories fade." The court found both Kaufman and Horowitz to be credible, and pointed out that the Blairmont parties had produced no evidence that Mann Theatres attempted to void the transaction, or any other evidence of any wrongdoing.

The trial court's factual finding that no ethical violation occurred is supported by substantial evidence. Horowitz testified that he first learned of the property from Goodgame, who mentioned that Mann Theatres was selling its "distressed properties." Horowitz was interested in buying the property himself, but he could not afford it, so he sought investment partners. Kaufman testified that Horowitz approached him about it, but he could not recall the specifics of the conversation. Kaufman and Horowitz had acquired properties together previously as business partners. Kaufman testified that he did not personally handle the transaction between South Bay and Mann Theatres. Kaufman could not recall the details of the formation of the South Bay partnership. While Kaufman knew that at some point South Bay agreed to purchase the lease from Mann Theatres, he had nothing to do with the negotiations. Goodgame and Westley were the individuals responsible for running the day-to-day operations of the partnership.

The Blairmont parties argued to the trial court that the trustees acquired their interest through deception. They drew attention to the fact that the partnership agreement for South Bay was signed just four days before Mann Theatres transferred the leasehold to South Bay. They pointed out that Kaufman had testified that he did transactional work for Mann Theatres. They suggested that Kaufman knew the lease would be a "goldmine." Thus, betraying his client, the Blairmont parties argued, Kaufman conspired with Horowitz, Goodgame and Westley to create a partnership to be used, four days later, to acquire the lease from Kaufman's client.

The trial court's rejection of this argument was not error. The Blairmont parties produced no actual evidence of wrongdoing. The court explicitly noted that it found both Kaufman and Horowitz to be credible. "'[I]t is the exclusive province of the trial judge

or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 161-162.) "'We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*Id.* at p. 162.) Because substantial evidence supported the trial court's factual determination, we find no error.

The Blairmont parties next argue that the transaction between South Bay and Mann Theatres was presumptively invalid, and that the trial court erroneously placed the burden of proving a breach of fiduciary duty on the Blairmont parties, rather than requiring the trustees to prove that they provided full disclosures and obtained written consent regarding Kaufman's alleged conflict.

We reject this argument. First, as the trial court noted, a transaction between an attorney and a client is not automatically invalid, but is voidable at the election *of the client.* (*BGJ Associates v. Wilson* (2003) 113 Cal.App.4th 1217, 1229.)[6] There is no evidence that Mann Theatres ever attempted to void the transaction. The Blairmont parties' argument that unclean hands prevent application of the doctrine of laches fails.

6. The trial court's finding of laches bars the Blairmont parties' challenges to the validity of the lease as illegal and against public policy

Having determined that the trial court's ruling of laches will be affirmed, we turn to the Blairmont parties' arguments that the lease is illegal and void. Specifically, the

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6 The cases cited by the Blairmont parties do not suggest otherwise. All are factually distinguishable and irrelevant. *Remainders, Inc. v. Bartlett* (1963) 215 Cal.App.2d 295, involved a contract of employment between a client and an attorney under which the attorney claimed an oral lien on all of his client's property. *Roberts v. Wachter* (1951) 104 Cal.App.2d 271, similarly involved compensation for services between an attorney and his clients. And *Carlson v. Lantz* (1929) 208 Cal.134, involved a challenge to a will filed for probate by the deceased's former attorney, bequeathing all the deceased's property to that attorney. Finally, *Kallen v. Delug* (1984) 157 Cal.App.3d 940, and *McIntosh v. Mills* (2004) 121 Cal.App.4th 333 both involved disputes over fee-sharing agreements. These cases do not suggest that a third party is entitled to a presumption of undue influence in challenging a real estate transaction under the facts of this case.

Blairmont parties argue that the lease was illegal under section 718 and was unconscionable. As set forth below, we conclude that these arguments are barred.

a. the lease is not automatically void due to a violation of law or public policy

The Blairmont parties argue that the doctrine of laches is not applicable where, as here, a lease is contrary to an express mandate of law or public policy. Where a contract is contrary to a law or public policy, the Blairmont parties argue, it must be deemed automatically void.

In support of this argument, the Blairmont parties cite *Colby v. Title Ins. & Trust Co.* (1911) 160 Cal. 632, 644 (*Colby*). In *Colby*, the appellant claimed that she consented to sign an agreement, deed, and trust declaration under duress and under threat that her daughter would be criminally prosecuted if she did not sign the documents in question. The court identified the key issue as "whether the instruments were executed for an illegal consideration." (*Id.* at p. 646.) If it was found that they were, appellant "would have been entitled absolutely to a decree awarding her the full relief prayed for." (*Ibid.*) *Colby* is distinguishable, as the matter before us does not involve illegal consideration. In fact, the lease was explicitly authorized by the court, which "directed" L.J. Heedwohl to "execute, and acknowledge and deliver" the 99-year lease "beginning May 1, 1948 and ending April 30, 2047." There is no question of duress or illegal consideration.

The Blairmont parties also cite *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 511 (*Downey*). The case involved an insurance contract which expressly purported to cover malicious prosecution actions. The contract violated section 533 of the Insurance Code, which precludes insurance coverage for willful acts of the insured. The insured claimed that the insurance company was bound to provide coverage on the grounds of estoppel. The court disagreed, stating that wrongdoers cannot avoid the public policy set forth in Insurance Code section 533 by invoking the doctrine of estoppel. (*Downey*, at p. 511.) In addition, the court noted that requiring indemnification would amount to enforcement of an illegal contract. The court stated: "It is clear that

estoppel cannot be relied upon to defeat the operation of a policy protecting the public. [Citation.]" (*Ibid*., fn. omitted.)

Downey is also distinguishable as there, the *express* terms of the contract violated Insurance Code section 533. In the matter before us, the express terms of the contract do not violate Civil Code section 718 or any other provision of law. The lease's 99-year term is not void on its face.

Further, the Supreme Court has recognized that the rule requiring that a contract made in violation of a statute be declared void "'is not an inflexible one to be applied in its fullest rigor under any and all circumstances.'" (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.) Specifically, the high court recognized that "illegal contracts will be enforced to avoid unjust enrichment." (*Ibid*.) Here, as the trial court previously determined, the trustees would suffer "serious financial prejudice" resulting from their reliance on the validity of the leasehold. Under the circumstances of this case, even if the lease were illegal, a declaration voiding the lease would impose a disproportionately harsh penalty upon the trustees. (See *Southfield v. Barrett* (1970) 13 Cal.App.3d 290, 294 [where the transaction has already been completed, "no serious moral turpitude is involved . . . and defendant would be unjustly enriched at the expense of plaintiff if the rule were applied, the general rule [voiding illegal contracts] should not be applied"].)

We find that under the circumstances of this case, the lease, which has been in effect for over 60 years, is not automatically void but is "voidable depending on the factual context and the public policies involved." (*Asdourian v. Araj, supra*, 38 Cal.3d at p. 293, italics omitted.) We consider the Blairmont parties' arguments regarding illegality and unconscionability below, and conclude that neither argument should prevail.

b. laches bars the Blairmont parties' claim that the lease is illegal under section 718

The Blairmont parties argue that the lease is illegal under section 718.[7]

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[7] See footnote 1.

The lease does not exceed 99 years, therefore it does not violate section 718 on its face. However, the Blairmont parties cited *Reynolds v. McEwen* (1952) 111 Cal.App.2d 540 (*Reynolds*), for the proposition that, when a tenant is in possession of a premises, and a new lease is executed before expiration of the original term, the law regards the original lease as for a term expiring at the end of the renewal lease. Thus, the Blairmont parties argue, because the original 10-year lease between Rose Carson Heedwohl and West Coast beginning April 1, 1939, had not expired at the time that the new 99-year lease was executed, the effect of the two leases was to tie up the property for a period of more than 99 years.

The trial court agreed that "the net effect of the original occupancy and subsequent 99 years [*sic*] lease was to tie up real property for a term greater than is allowed by law." However, citing *Harter v. San Jose* (1904) 141 Cal. 659, 667 (*Harter*), the trial court determined that "a term exceeding the period allowed by law is void only as to excess." The court concluded that "although the first nine years of tenancy count towards the ninety-nine year term, it does not render the 1948 lease *void ab initio.*" Instead, the court reduced the term of the lease by nine years, holding that "[t]he lease will expire on March 16, 2039, which is 99 years after the first lease between the original contracting parties was effective."

In rendering its decision to reduce the term of the lease by nine years, the trial court did not reference its previous finding that the doctrine of laches applies under the facts of this case. However, in its statement of decision, the court specified that the defense of laches applied both to the "validity of the Lease and the mesne assignments leading up to and including the Trustees." Because of this finding, the trustees argue that the Blairmont parties are barred from challenging any aspect of the lease, and the trial court's nine-year reduction was error.

We agree that the trial court's finding of laches prevents the Blairmont parties from seeking to undo, or shorten, the lease under section 718. As set forth above, on undisputed facts, the doctrine of laches may be decided as a matter of law. (*Cedars-Sinai Medical Center v. Shewry, supra,* 137 Cal.App.4th at p. 986.) It is undisputed that the

court-approved lease was entered into on May 1, 1948. The Heedwohl estate never challenged the lease under section 718 -- in fact, the Heedwohl estate argued to the court that the 99-year lease was "for the advantage of [the] estate."[8] Neither First Church nor Fourth Church ever challenged the validity of the lease under section 718. In fact, the trial court found that both First Church and Fourth Church expressly acquiesced to the validity of the lease. And, as set forth above, the Blairmont parties stand in the shoes of their predecessors. (*Holcomb, supra*, 4 Cal.2d at p. 300.) The trial court's finding that the Blairmont parties and their predecessors engaged in unreasonable delay and acquiescence, to the detriment of the trustees, bars their challenge to the validity of the lease under section 718.

c. the lease was not illegal under section 718

Even if we were to consider the Blairmont parties' argument, we would conclude that the lease does not violate section 718.

The Blairmont parties argue that the purpose of section 718 is to prevent a single tenant from tying up California's urban property for more than 99 years. Permitting purportedly separate leases to circumvent section 718 renders it meaningless. Thus, the Blairmont parties argue, the lease, which in substance permitted a single tenant to tie up the property for more than 99 years, is illegal. The Blairmont parties cite *Epstein v. Zahloute* (1950) 99 Cal.App.2d 738 (*Epstein*), and *Reynolds, supra*, 111 Cal.App.2d 540, in support of their claim.

The Blairmont parties' argument presents legal questions, which we must decide as a matter of law. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) The question is whether the 10-year 1939 lease and the 99-year 1948 lease should be considered as a single continuous possession for the purposes of section 718.

The Blairmont parties point to no law suggesting that, at the time the lease was signed and approved in 1948, the court should have considered the first nine years of

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[8] Because the question of the lease's validity under section 718 was not challenged by any party at the time that the lease was approved by the court in 1948, a challenge under that statute was forfeited by the Fourth Church's predecessors.

tenancy under the prior lease signed in 1939. The Blairmont parties cite two cases in support of their position that the first nine-year lease should be added to the second 99-year lease: *Reynolds* and *Epstein*. These decisions were not available to the court when it approved the 99-year lease in 1948, as they were not issued until years later. Thus no law suggested that the lease was illegal or in violation of section 718 at the time that it was signed and approved by the court. On its face, the lease complied with section 718, and was legal.[9]

Even if we consider the two cited decisions, those decisions do not suggest that the lease was illegal under section 718 at the time it was signed. *Reynolds* involved a dispute over the lease of a sawmill. The landlord sued the tenant for rent due, and the tenant cross-complained for damages alleged to have been suffered by him for attempting to operate the mill without certain equipment which was itemized in the inventory attached to the lease. (*Reynolds, supra*, 111 Cal.App.2d at p. 542.) The landlord prevailed at trial, and the tenant appealed, claiming that the landlord breached his obligation by failing to put the tenant in possession of all the inventory attached to the lease. However, the parties agreed that all items of equipment were on the premises at the time of the original lease on July 20, 1946. (*Id.* at p. 543.) The evidence showed that the tenant was aware that certain items had been removed from the property by the lessees under the original lease -- one of whom was the tenant-appellant. Appellant argued, among other things, that just because the equipment in dispute was on the premises at the time of the original July 1946 lease, the March 1947 lease was an entirely new lease, and the possession by the tenant of the equipment under the old lease did not necessarily mean that the tenant was in possession of the equipment under the new lease. The *Reynolds* court disagreed, stating: "The execution of the renewal lease did not operate to interrupt the possession of . . . the lessee under both leases." (*Id.* at p. 545.)

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9 Generally, "new decisions apply retroactively to all pending cases not yet final." (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1348.) The trial court's decision to approve the 99-year lease was final in 1948, two years before the *Epstein* decision.

Reynolds did not consider the effect of a renewal lease under section 718, therefore it does not provide authority for the proposition that a second lease to the same tenant should be added to the first lease in order to determine whether a violation of section 718 has occurred.

Epstein is also distinguishable. *Epstein* involved a two-year lease of an apartment with "'option for renewal each succeeding year thereafter.'" (*Epstein, supra*, 99 Cal.App.2d at p. 738.) The Court of Appeal determined that the quoted provision of the lease amounted to the "creation of a perpetuity," putting in one party the option to renew forever. (*Ibid.*) The court distinguished a case involving an oil and gas lease, noting that the matter before it involved a city lot, which was subject to section 718. The court stated, "A lease of a city lot, with the right of perpetual renewal, to a corporation whose term of existence is without limitation as to time would manifestly be equivalent to a lease in perpetuity and contrary to the inhibition of section 718." (*Epstein*, at p. 739.) The matter before us does not involve an option for renewal in perpetuity. Instead, it involves a lease for a fixed term which, on its face, does not violate section 718.

The cases cited do not provide authority for the proposition that, on the facts of this case, the terms of the two leases should be added together and considered "illegal" under section 718.[10] In fact, we note that section 718 does not mention the length of a single tenant's possession. Instead, it focuses on the leasing or granting period as stated in the lease itself. As set forth above, the lease did not violate section 718, and the

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10 The Blairmont parties also provide a quote from *Wiener v. H. Graff & Co.* (1908) 7 Cal.App. 580, 583 (*Wiener*). However, the quote is taken out of context and does not support the Blairmont parties' position that the lease in question should be added to the prior lease for the purposes of determining a violation of section 718. In *Wiener*, the question was whether the tenants had successfully given notice of their intention to exercise an option to renew a lease. Despite the fact that the formal notice was not signed by the parties, the court determined that the lessees had successfully given notice and that "the lessees would then be entitled to hold for the additional term under the original lease and not under the notice -- the lease would then become a lease for both the original and extended terms. [Citation.]" (*Id.* at p. 583.) Section 718 was not at issue in the case, therefore it is not relevant.

Blairmont parties have pointed to no law suggesting that it should have been considered illegal at the time it was created.[11]

d. the lease is not unconscionable

Under the circumstances of this case, laches also bars the Blairmont parties' argument that the lease is unconscionable. However, as set forth below, even if we were to consider the Blairmont parties' claims of unconscionability, we would conclude that the lease should be enforced.

The Blairmont parties argue that the lease is egregiously one-sided because it attempted circumvention of section 718; did not contain a provision for rent adjustment; purported to give the tenant a right of first refusal which made the property unmarketable; and gave the tenant, but not the landlord, the right to terminate it at will.

i. the trial court's decision

The trial court found that the lease is not unconscionable. The court noted that the Blairmont parties failed to meet their burden of proving procedural and substantive unconscionability at the time the lease was executed. Procedurally, the court explained, the lease was subject to court review before execution. The court was not shocked by the length of the lease nor the terms. Further, there was no inequality of bargaining power. As to substantive unconscionability, the court noted that the lessee had to undertake costly and extensive repairs to the property. In addition, the lease contained provisions that were advantageous to the lessor, requiring the tenant to rehabilitate the building; pay all of the real estate taxes; pay all of the utilities; and pay for all of the repairs.

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11 The Blairmont parties take issue with the trial court's reliance upon *Harter, supra*, 41 Cal. 659, 667, in making its decision to shorten the lease by nine years rather than declare the lease entirely void. The Blairmont parties argue at length that because *Harter* involved a different version of the statute, the trial court in this matter should have declared the lease entirely void. Because we have determined that the lease did not violate section 718, and that Blairmont's challenges to the lease are barred by laches, we need not address the question of the appropriate remedy for a violation of section 718.

ii. applicable law and standard of review

The doctrine of unconscionability has a substantive and a procedural element. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Both elements must be present in order for a court to refuse to enforce a contract as unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) "'"Procedural unconscionability" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.]' [Citation.] The relevant factors are oppression and surprise. [Citations.]" (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656 (*Abramson*).) Substantive unconscionability focuses on the terms of the agreement and whether those terms are "overly harsh" or "one-sided." (*Armendariz, supra,* at p. 114.) To be substantively unconscionable, a contract must "shock the conscience." (*Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 480 (*Wayne*).)

Whether an agreement is unconscionable depends on the circumstances at the time it was made. (*Abramson, supra,* 115 Cal.App.4th at p. 655.)

When reviewing a claim of unconscionability, we consider the trial court's factual findings in the light most favorable to the court's determination and review those findings for substantial evidence. (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.) Where the facts are undisputed, we review the trial court's ruling de novo. (*Ibid.*)

iii. insufficient evidence that the lease was unconscionable

The Blairmont parties first argue that the lease was procedurally unconscionable because it attempted circumvention of section 718. We disagree. As set forth above, the lease did not violate section 718 on its face, and the Blairmont parties have presented no law suggesting that, at the time the lease was entered into, a second lease for a fixed period of time should be added to a previous lease for the purposes of calculating the 99-year time period.

Next, the Blairmont parties argue that the lease is egregiously one-sided because it does not contain a provision for rent adjustment for 99 years. Thus, the tenant is free to

repeatedly raise rents to its subtenants, but the landlord is relegated to $1,000 per month for 99 years. The Blairmont parties reference the testimony of their expert witness, Dr. Robert Steele (Steele), who testified that ground leases almost always contain a rent escalation provision.[12]

We find that the Blairmont parties failed to prove that the absence of a rent escalation clause constituted substantive unconscionability. First, we note that the trial court approved the terms of the lease. We must assume that the court carried out its obligation conscientiously. (*Department of California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 740.) Thus, we assume the court was familiar with the terms of the lease and did not find that those terms "shock[ed]" its "conscience." (*Wayne, supra*, 135 Cal.App.4th at p. 480.) And, as the trial court noted, the Blairmont parties failed to establish the fair rental value of the property in 1948. In addition, the lease contained provisions beneficial to the landlord, including requirements that the tenants rehabilitate the building; pay all of the real estate taxes; pay all of the utilities; and pay for all repairs.

The Blairmont parties also cite the tenant's right of first refusal as an unconscionable provision. This provision, the Blairmont parties argue, makes the property unmarketable. The Blairmont parties cite the testimony of their expert, which indicates that this provision was "a point in favor of the lessee." However, the Blairmont parties cite no evidence or law showing that such a provision should be considered unconscionable.

Finally, the Blairmont parties argue that the lease is unconscionable, and illusory, because it gives the tenant, but not the landlord, the right to terminate it at will. The

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[12] The trial court gave "little weight" to the testimony of Steele, noting that he "had little to say about standards for leases in 1948, the critical time for the purpose of analyzing unconscionability." The court also found that Steele did not know the condition of the property in 1948, nor was he familiar with the principals in this transaction. We decline to put undue emphasis on the court's misspelling of the word "principals" as "principles," as we do not review the court's decision to give little weight to Steele's testimony. The trier of fact is the sole judge of the credibility and weight of evidence. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 483.)

clause in question permits the tenant, if not in default under the lease, to terminate the lease "after the completion of the work of alteration, rehabilitation and improvement to be performed by Tenant under the provisions of Paragraph V of this Lease, but not earlier than April 1, 1958 . . . ."

The Blairmont parties cite to no evidence or law suggesting that such a term was considered unconscionable at the time the parties entered into the lease. In addition, we note that the clause does not provide the tenant with an unqualified option to pull out. The tenant was first required to spend substantial money rehabilitating the property as specified in the lease. Further, as set forth above, the trial court is presumed to have been aware of this provision when it approved the lease in 1948. The provision did not "shock the conscience" of the court at that time. (*Wayne, supra,* 135 Cal.App.4th at p. 480.) The Blairmont parties have failed to show either procedural or substantive unconscionability.

7. Conclusion: laches bars the Blairmont parties' challenges to the lease and assignments

As set forth above, the trial court's decision that the affirmative defense of laches applies under the facts of this case is supported by substantial evidence. This finding bars the Blairmont parties' challenges to "the Lease and the mesne assignments leading up to and including the Trustees." The lease, and the assignments, may not be challenged by the Blairmont parties after such prejudicial delay.[13]

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[13] The bar on the Blairmont parties' claims under the doctrine of laches includes a bar on the Blairmont parties' challenge to the validity of the December 23, 1988 transfer of a 25 percent undivided interest in the leasehold from South Bay to each of the four couples who comprised the partnership. Despite the trial court's finding that the assignment was legally ineffective because it conveyed a lesser estate than was previously held by South Bay, a challenge to this legal defect is now barred due to the trial court's findings of undue delay and serious financial prejudice. We will therefore affirm the trial court's determination that "[t]he reversionary rights in the sub-tenancy are deemed to belong to the Trustees" and that the trustees "hold a right of first refusal pursuant to Article XXIII."

This decision requires reversal of the trial court's decision to shorten the lease term by nine years. The lease shall expire after the original term of 99 years: April 30, 2047.

B. Judicial admissions, estoppel and res judicata

We have determined that the doctrine of laches bars the Blairmont parties' challenges to the lease and the assignments. Therefore, we find it unnecessary to address the trustees' arguments that the Blairmont parties' challenges are barred under the doctrines of judicial admission, judicial estoppel and res judicata.[14]

II. The trustees' cross-appeal

The trustees cross-complained against the Blairmont parties, alleging five causes of action: quiet title, breach of implied covenant of quiet enjoyment, breach of implied covenant of good faith and fair dealing, implied indemnity, and intentional interference with contractual relations. The trial court disposed of the trustees' causes of action for quiet title, breach of implied covenant of good faith and fair dealing, and implied indemnity in a motion for judgment on the pleadings. The trustees' claim for interference with contractual relations was decided against them on summary adjudication, and the trial court sustained a demurrer to their cause of action for breach of implied covenant of quiet enjoyment.

In their cross-appeal, the trustees argue that the trial court erred as a matter of law by disposing of their five cross-claims. We review the trustees' arguments below, and conclude that the trial court's decision granting summary adjudication to Blairmont on the trustees' claim of intentional interference with contractual relations was proper.

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14 In addition, we need not revisit the trial court's determination that the action is not time-barred under the statute of limitations. The trial court held that in a declaratory relief action such as this, "the statute of limitations commences to run when an actual controversy arises" (citing *Cavalli v. Macaire* (1958) 159 Cal.App.2d 714, 717). "[L]aches may bar relief in equity irrespective of whether the statute of limitations has run on the action at law. [Citations.]" (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 241.) Thus, in light of our decision that the Blairmont parties' challenges to the lease and assignments is barred by laches, it is not necessary that we address the parties' dispute over the statute of limitations.

However, we conclude that the trustees' causes of action for quiet title, breach of the implied covenant of good faith and fair dealing, implied indemnity, and breach of the implied covenant of quiet enjoyment against Fourth Church were not properly decided at the pleading stage.

A. Motion for judgment on the pleadings

The Blairmont parties' motion for judgment on the pleadings concerned the trustees' causes of action for quiet title, breach of implied covenant of good faith and fair dealing, and implied indemnity.

1. Standard of review

A motion for judgment on the pleadings is in effect a general demurrer. It is properly granted where there is an absence of an essential allegation causing a fatal defect in the causes of action alleged. (*Shabrick v. Moore* (1961) 195 Cal.App.2d 56, 60.)

We review de novo a trial court's judgment on an order granting a motion for judgment on the pleadings. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) "On appeal from a judgment on the pleadings, the court assumes the truth of, and liberally construes, all properly pleaded factual allegations in the complaint. [Citation.] The court may also consider evidence outside of the pleadings that was considered by the trial court without objection [citation], and it may consider matters subject to judicial notice. [Citation.]" (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 116.)

2. The trial court erred in granting the Blairmont parties' motion for judgment on the pleadings

A motion for judgment on the pleadings "tests whether the allegations of the pleading under attack support the pleader's cause if they are true." (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468.) It is only appropriate to grant such a motion when the "complaint does not state facts sufficient to constitute a cause of action against that defendant." (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The three causes of action which were subject to the motion for judgment

on the pleadings stated sufficient facts to support each claim. Therefore, we reverse the trial court's decision granting the motion.

a. quiet title against the Blairmont parties

In an ordinary action to quiet title, it is sufficient that the plaintiff allege that the plaintiff has an interest in real property and is in possession of the land, and that the defendant claims an interest adverse to him. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 740.) A quiet title action may be brought where the plaintiff alleges less than a fee interest in the estate, such as a leasehold. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50.)

In their cross-complaint, the trustees alleged that they "currently hold the entirety of the 'master' leasehold interest in the Property at issue." The trustees further alleged the various assignments of the lease, including the assignment from National General Theatres, Inc. to Mann Theatres on July 5, 1973; the assignment from Mann Theatres to South Bay on September 6, 1977; and the assignment from South Bay to the trustees on December 23, 1988 by way of Partnership Grant Deed. The trustees alleged that "[a]t the time the Partnership Grant Deed was executed and delivered, South Bay Properties only held a leasehold in the property, not fee title, and thus the intended and the only effect of the Partnership Grant Deed was to assign the leasehold." The trustees also alleged that by way of the Corrective Assignment of Leasehold Interest executed on November 28, 2005, the trustees clarified that they intended the Partnership Grant Deed to be an assignment by South Bay of the leasehold.

The trustees further alleged facts showing Fourth Church's affirmative acceptance of the trustees as the lessees of the 1948 lease, and expressly alleged that "[n]o owner . . . has ever questioned the legitimacy of the 1948 ground lease . . . or the subsequent assignments of leasehold rights" except for the Blairmont parties.

In their cause of action for quiet title against the Blairmont parties, the trustees sought "to confirm their leasehold rights as tenants pursuant to the lease dated April 30, 1948," and the assignments of record. They also sought a determination that Fourth Church violated its contractual obligation to offer them a right of first refusal, and that the

claims of Blairmont challenging the legitimate leasehold rights of the trustees "are without any right whatsoever."

These allegations, on their face, support a claim for quiet title.

In their motion for judgment on the pleadings, the Blairmont parties took the position that the trustees are not assignees of the leasehold. The Blairmont parties requested that the court take judicial notice of the court's statement of decision issued in the first phase of trial. The Blairmont parties pointed out that, in the statement of decision, the court found that the trustees are not legal assignees of the lease, but that the Blairmont parties' claims challenging the validity of the assignment is barred by laches. The Blairmont parties argued that while the trustees were able to assert the defense of laches to the Blairmont parties' claims against the trustees, they could not use the doctrine of laches offensively in their cross-complaint.[15] Thus, the Blairmont parties argued, because the trial court had already determined that the trustees were not assignees "under a purely legal analysis," the trustees' claims of quiet title, breach of the implied covenant of good faith and fair dealing, and implied indemnity must fail.

The trustees, however, asked the court to reconsider its decision that they were not legal assignees of the lease. In doing so, the trustees referenced certain trial exhibits, including the grant deed and the Amended and Restated Partnership Agreement of South Bay. The trustees argued that the deed from South Bay was effective; that the corrective assignment was effective; and that the doctrine of assignment by operation of law was applicable.

The trial court did not take judicial notice of its own statement of decision. It noted that "until the judgment is entered, that is more or less a tentative decision."

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[15] On January 6, 2011, the trustees filed a letter brief drawing this court's attention to a published opinion filed by Division Four of this District on December 23, 2010, *Schuman v. Ignatin* (2010) 191 Cal.App.4th 255 (*Schuman*). The trustees argue that *Schuman* suggests that laches bars any challenge to the validity of the lease, whether the challenge is affirmative or defensive. The Blairmont parties suggest in response that *Schuman* is wrongly decided. The impact of *Schuman* on the issues raised in the trustees' cross-complaint may properly be raised and considered on remand.

However, the court indicated that it was unlikely to change any of its prior decisions, therefore it granted the motion for judgment on the pleadings.

We find that the trial court erred in granting the Blairmont parties' motion for judgment on the pleadings on the trustees' action for quiet title. The trustees sufficiently alleged a leasehold interest in the property. The trial court's statement of decision was not final, nor was it's comment that "the Trustees are not assignees under a purely legal analysis" a necessary holding in the Blairmont parties' action against the trustees.[16] Under the circumstances, the question of whether the trustees had a valid claim to the leasehold for the purposes of a quiet title action was not properly decided on a motion for judgment on the pleadings.

b. breach of implied covenant of good faith and fair dealing against Fourth Church

Where a contractual relationship exists between two parties, the implied covenant of good faith and fair dealing assures compliance with the express terms of the contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.)

In their cross-complaint, the trustees alleged that Fourth Church and the trustees have been bound by the 1948 lease since at least 1993. Under article XXIII of the lease, Fourth Church was required to give the trustees a right of first refusal prior to any sale of the property. Fully aware of its obligations under that lease, Fourth Church accepted Blairmont's offer without extending the right of first refusal. This material violation of Fourth Church's duty, the trustees alleged, constituted a breach of the implied covenant of good faith and fair dealing.

These allegations, on their face, support a claim for breach of the implied covenant of good faith and fair dealing.

In their motion for judgment on the pleadings, the Blairmont parties took the position that there is no privity of contract between the trustees and the owner of the fee,

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16 As discussed at length above, the trial court determined that laches barred a declaration in the Blairmont parties' favor, despite the legal defects in assignment.

Fourth Church. The Blairmont parties again cited the trial court's statement of decision, which was tentative at that time, for the proposition that the trustees are not assignees under a purely legal analysis. Further, the Blairmont parties argued, even if the trustees were assignees, there is no privity of contract between the trustees and Fourth Church because the trustees never expressly assumed the lease.

In opposition, the trustees argued that they are assignees both by contract and by operation of law, and that the trial court erred in tentatively deciding that the conveyance from South Bay to its partners was ineffective.

Again, we find that the trial court erred in granting the Blairmont parties' motion for judgment on the pleadings on the trustees' action for breach of the implied covenant of good faith and fair dealing. The trustees sufficiently alleged a contractual relationship with Fourth Church. In addition, the trustees alleged that Fourth Church acknowledged its obligation to provide the trustees a right of first refusal. The trial court's statement of decision was not final, nor was it's comment that "the Trustees are not assignees under a purely legal analysis" a necessary holding in the Blairmont parties' action against the trustees. Under the circumstances, the question of whether the trustees have a valid contractual relationship with Fourth Church for the purposes of an action for breach of the implied covenant of good faith and fair dealing was not properly decided on a motion for judgment on the pleadings.

c. implied indemnity against Fourth Church

There are two types of equitable indemnity: "indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and . . . indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [Citations.]" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157, fn. omitted.)

In their cross-complaint, the trustees alleged that the lease and the conduct of Fourth Church imposed upon Fourth Church an implied and equitable obligation to hold the trustees harmless from all injury and expense arising from its conduct and the conduct of Blairmont in this matter. Specifically, the trustees alleged that they are entitled to

indemnification from Fourth Church for attorney fees, litigation expenses, and any other associated amounts.

The Blairmont parties' argument that this cause of action should be decided against the trustees on the pleadings again arose from the trial court's tentative decision that the assignment from South Bay to the trustees was ineffective. And again, this was apparently the reason for the trial court's decision in the Blairmont parties' favor.

For the same reasons we have articulated as to the prior two causes of action, we find that the trustee's action for implied indemnity was not properly decided on a motion for judgment on the pleadings. The trustees alleged a valid contractual relationship, and that both parties were bound by the lease. Further, the trustees alleged that Fourth Church expressly acknowledged the trustees as valid lessees and accepted rent from the trustees for many years. The trial court's statement of decision was not final, nor was its comment that "the Trustees are not assignees under a purely legal analysis" a necessary holding in the Blairmont parties' action against the trustees. Under the circumstances, the question of whether Fourth Church is liable to the trustees under the doctrine of implied indemnity was not properly decided on a motion for judgment on the pleadings.

B. Summary adjudication of claim for interference with contract against Blairmont

The elements of intentional interference with contract are: "'(1) a valid contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' [Citation.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1047.) The trustees alleged that Blairmont was fully aware of the lease and that both Fourth Church and the trustees considered the trustees' tenancy to be governed by the lease. In addition, Blairmont was aware of Fourth Church's obligation to offer the trustees a right of first refusal. Nonetheless, Blairmont made it a condition of its counter offer to Fourth Church that Fourth Church not extend the right of first refusal. As a result, the trustees alleged, they were damaged.

The trial court granted the Blairmont parties' motion for summary adjudication on this cause of action on the ground that the litigation privilege provides a complete defense to the cause of action.[17] The court reasoned:

> "As to the fifth cause of action for intentional interference with contractual relations, summary adjudication is granted on the basis of the litigation privilege, which the Court finds is a defense to the tort. The case of *Della Penna v. Toyota Motor Sales* (1995) 11 Cal.4th 376 stands for the proposition that in order to be actionable, the 'interference' must be wrongful by some measure other than the fact of the interference itself. The filing of a declaratory relief action is privileged and cannot support this tort theory. The pre-litigation correspondence between counsel for Blairmont and counsel for the Church was part of an investigation in anticipation of litigation. No wrongful conduct is in evidence. The ruling on the issue of privilege moots the other two issues asserting lack of contractual privity and an absence of damages. The court does not reach those issues as only one ground is necessary for summary adjudication."

On appeal, the trustees argue that the trial court erred in concluding that this cause of action is barred by the litigation privilege. The trustees acknowledge that litigation is part of the interference. However, citing *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 345 (*LiMandri*), the trustees contend that the privilege does not bar an interference claim where litigation is only one act in the overall course of conduct alleged.

As in *LiMandri*, the trustees argue, the litigation initiated by Blairmont was only one part of the overall course of conduct alleged. Blairmont induced Fourth Church not to extend the right of first refusal to the trustees. In addition, Blairmont agreed to indemnify Fourth Church for any liability for Fourth Church's breach of the lease. In

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[17] The litigation privilege is found in Civil Code section 47, subdivision (b), which provides that a privileged publication or broadcast is one made in any judicial proceeding. The litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The litigation privilege applies "only to communicative acts and does not privilege tortious courses of conduct. [Citation.]" (*Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1331.)

sum, the trustees argue that Blairmont's purchase contract was designed to force Fourth Church to breach the lease, and that the litigation was only a consequence of Blairmont's misconduct.

We find that, based on the acts of interference alleged, the trial court properly concluded that the litigation privilege bars the trustees' claim against Blairmont of intentional interference with contractual relations. The litigation privilege is a defense to nearly every tort cause of action, with the exception of malicious prosecution. (*Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489.)

The trustees concede that the litigation privilege is applicable to the Blairmont parties' act of filing their action for declaratory judgment. However, the law is clear that the litigation privilege also protects communications related to the filing of a lawsuit. As set forth in *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251, a communication is protected by the litigation privilege if it is "'in furtherance of the objects of the litigation.'" In other words, if the communication has "'some logical relation to'" the action, it is privileged. (*Ibid.*)

Blairmont's communications with Fourth Church leading up to the filing of the action for declaratory relief are protected by the litigation privilege. This includes any discussions regarding Blairmont's request that Fourth Church decline to extend a right of first refusal to the trustees. In the context of this case, the communication between Blairmont and Fourth Church regarding the right of first refusal was tied to Blairmont's position that the lease and/or certain assignments were invalid. Blairmont filed its declaratory action in the hopes of confirming this position. Therefore, the communication had a logical relation to the lawsuit. Blairmont's indication that it would indemnify Fourth Church also was carried out in furtherance of the objects of the litigation, and was therefore privileged under Civil Code section 47, subdivision (b).

The trial court's ruling granting summary judgment in favor of Blairmont on the trustees' action for intentional interference with contract is affirmed.

C. Dismissal of cause of action for breach of implied covenant of quiet enjoyment against Blairmont and Fourth Church

The trustees alleged a cause of action for breach of implied covenant of quiet enjoyment against all of the Blairmont parties. The implied covenant of quiet enjoyment is based in part on Civil Code section 1927, which provides: "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." This statute "guarantees the tenant against rightful assertion of a paramount title." (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 138.) The implied covenant of quiet enjoyment also requires the landlord to "refrain from action which interrupts the tenant's beneficial enjoyment." (*Ibid.*)

The trustees pleaded each element of the claim: (1) a valid lease between the parties; (2) substantial interference with the trustees' use or enjoyment of the premises; and (3) that Blairmont claimed title under Fourth Church or was authorized by Fourth Church to interfere with the trustees' rights.

Nevertheless, the trial court sustained the Blairmont parties' demurrer to the trustees' cause of action for breach of the implied covenant of quiet enjoyment on the ground that the litigation privilege provided a complete defense to the action. The court stated: "I don't believe that the institution of legal proceedings constitutes interference with use of enjoyment. I believe there's a privilege in there somewhere."

Again, the trustees argue that the litigation was only "one act in the overall course of conduct alleged." (*LiMandri, supra*, 52 Cal.App.4th at p. 345.) The trustees reiterate that the lawsuit, and Fourth Church's cross-complaint were only part of the Blairmont parties' interference with the trustees' use and enjoyment of the property. In particular, the trustees argue, it was improper for the trial court to dismiss this cause of action at the pleading stage.

Our review of the sufficiency of a cause of action is de novo. "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be

judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

We conclude that the trustees' cause of action for breach of implied covenant of quiet enjoyment stated facts sufficient to constitute a cause of action against Fourth Church. The trustees pled the existence of a valid lease, and a breach of that lease, which caused interruption of the trustees' beneficial enjoyment of the property. Further, we find that the trial court's determination that this cause of action was barred as a matter of law by the litigation privilege was premature at this stage of the proceedings.

First, we note that the litigation privilege generally precludes liability in tort, not contract. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 773.) The trustees' cause of action for breach of the implied covenant of quiet enjoyment against Fourth Church is based on a breach of the lease between the two parties. As such, it is a cause of action that is grounded in breach of contract. (See *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 588 ["In the absence of language to the contrary, *every lease* contains an implied covenant of quiet enjoyment"].)

Further, as explained above, the threshold issue in determining whether the litigation privilege applies is whether the defendant's conduct was communicative or noncommunicative. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 211.) While Blairmont's alleged actions appear to fall under the category of privileged, litigation-related communications, Fourth Church's alleged act of breaching its obligation to properly offer the trustees a right of first refusal does not fit squarely into the category of a "communication."

Under the circumstances, the trustees' cause of action for breach of implied covenant of quiet enjoyment should have proceeded beyond the pleading stage. The trial court's decision sustaining the Blairmont parties' demurrer to this cause of action is therefore reversed.

DISPOSITION

The judgment is affirmed in part and reversed in part.

The trial court's decision that the Blairmont parties' challenges to the lease and its mesne assignments are barred by the doctrine of laches is affirmed. However, we reverse the trial court's decision to shorten the lease term by nine years. The lease shall expire after the original term of 99 years: April 30, 2047.

The trial court's decision summarily adjudicating the trustees' cause of action for intentional interference with contractual relations against Blairmont, on the ground that it is barred by the litigation privilege, is affirmed. However, we reverse the trial court's decisions disposing of the trustees' causes of action for quiet title, breach of the implied covenant of good faith and fair dealing, implied indemnity, and breach of the implied covenant of quiet enjoyment against Fourth Church at the pleading stage. Those causes of action are remanded for further proceedings.

The trustees are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST