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the same work under similar conditions of employment as the employees. However, the Court stated, "The Company's decision to contract out the maintenance work did not alter the Company's basic operation.... No *capital investment* was contemplated...."[31] The Court strongly indicated that its decision should not be extended, "We are thus not expanding the scope of mandatory bargaining to hold... that the type of 'contracting out' involved in this case... is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of 'contracting out'...."[32] The concurring opinion in *Fibreboard* stated:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding... managerial decisions, which lie at the core of entrepreneurial control. *Decisions* concerning the commitment of... *capital* and the basic scope of the enterprise are not... primarily about *conditions of employment*... [within the meaning of section 8(d)].[33]

The test adopted by the court in *Transmarine* is the most equitable solution to the problem. It protects the interests of both management and labor. Management is protected since an employer's freedom to make basic managerial decisions is retained. Labor is protected against summary dismissal since management must bargain concerning the effect of the decision upon the employees.

W. GILBERT FAULK, JR.

COMPENSABILITY IN EMINENT DOMAIN OF LESSEE'S OPTION TO PURCHASE

A leasehold estate is a property right and an interest in land which is compensable when taken by eminent domain,[1] but there is considerable controversy as to whether a lessee's unexercised option to

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[31]*Id.* at 213 (emphasis added).
[32]*Id.* at 215.
[33]*Id.* at 223 (emphasis added).

[1]United States v. General Motors Corp., 323 U.S. 373 (1945); A.W. Duckett & Co. v. United States, 266 U.S. 149 (1924); Kohl v. United States, 91 U.S. 367 (1875); Illinois Power Co. v. Miller, 11 Ill. App. 2d 296, 137 N.E.2d 78 (1956); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948);Eisenring v. Kansas Turnpike Authority, 183 Kan. 774, 332 P.2d 539 (1958); Lookholder v. Ziegler, 354 Mich. 28, 91 N.W.2d 834 (1958).

purchase is compensable when there is no provision in the lease for the contingency of a taking by eminent domain.[2]

In *Sholom, Incorporated v. State Roads Commission,*[3] Sholom was a tenant under a lease which contained an option to purchase the land and options to renew the lease. Prior to the expiration of the first term of the lease, portions of the land were taken under eminent domain proceedings. Sholom notified the lessor that it intended to exercise its option to purchase, but upon realizing that the condemnation would deny direct access to its place of business, it did not exercise its option. In admitting evidence of the value of Sholom's leasehold estate,[4] the court excluded evidence of the value of the unexercised option to purchase and of the value of the unexercised options to renew.[5] On appeal Sholom sought compensation for its unexercised option to purchase the land and for its unexercised options to renew. The court held that Sholom was entitled to compensation for either its unexercised option to purchase or its unexercised options to renew.

The decision in *Sholom* is predicated upon a distinction infrequently made, that distinction being that in considering unexercised options to purchase there are two categories of option-holder's: option-holder's who have no interest in the land; and option-holder's who have an interest in the land, such as a leasehold estate. It was reasoned that because the option to purchase was contained in the lease it was part of the leasehold estate granted and, as such, compensable as a portion of the damage done to the leasehold estate. Therefore, the court held that evidence of the value of an unexercised

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[2]*E.g.*, Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952) (compensation allowed); City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961) (compensation denied); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960) (compensation denied).

[3]229 A.2d 576 (Md. 1967).

[4]Both the lessor and the lessee are parties in the condemnation litigation and may introduce evidence as to the value of their separate interests. Eagle Lake Improvement Co. v. United States, 160 F.2d 182 (5th Cir. 1947), *cert. denied,* 332 U.S. 772 (1947); United States v. 1.87 Acres of Land, 155 F.2d 113 (3d Cir. 1946). A lessee is not accorded an initial right to have his leasehold estate evaluated separately, but justice dictates that the owner of each individual interest should receive just compensation for his loss. Where evidence of the value of a leasehold estate is excluded from the proceedings, further litigation to determine the value of the leasehold estate is justified. New Jersey Highway Authority v. J.&F. Holding Co., 40 N.J. Super. 309, 123 A.2d 25 (1956).

[5]The court refused to permit Sholom's appraiser to give his opinion of the before- and after-taking values of the option to purchase and the renewal options. 229 A.2d at 579.

option to purchase was admissible as evidence relating to the damage done to the leasehold estate.

I. *The Unexercised Option to Purchase Not Contained in a Lease*

The general theory of compensation in eminent domain requires that a person have an actual estate or interest in the land to recover compensation; a mere contractual relation not creating an interest is not sufficient.[6] Options do not fit into this theory because an option is a mere contract whereby the owner of property agrees with another person that the latter shall have the right to purchase the property at a fixed price within a specified period of time.[7] The option contract differs from the typical bilateral contract in that it imposes no binding obligation upon the person holding the option; the option-giver is bound to convey, but the option-holder is not bound to buy.[8]

This differentiation was employed in *East Bay Municipal Utility District v. Kieffer*[9] to hold that the option-holder was not entitled to compensation. In that case the condemnor sought to supply water to various municipalities, and the option-holder held unexercised options to purchase the land involved. The court conceded that such an option is property but reasoned that the option does not create an interest in the land itself because it obtains only an election for the option-holder, nothing mutually binding. Such an option, not being a mutually binding contract and not having been exercised prior to the institution of condemnation proceedings, conveys no interest in the property, and consequently is a non-compensable interest.[10] However, in *State v. New Jersey Zinc Company*,[11] where

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[6]2 NICHOLS ON EMINENT DOMAIN § 5.23, at 73-74 (3d ed. rev. 1963).

[7]Graney v. United States, 258 F. Supp. 383, 386 (S.D. W. Va. 1966); Hopkins v. Barlin, 31 Wash. 2d 260, 196 P.2d 347 (1948).

[8]Suburban Improvement Co. v. Scott Lumber Co., 59 F.2d 711 (4th Cir. 1932); Warner Bros. Pictures, Inc. v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948).

[9]99 Cal. App. 240, 278 P. 476 (1929).

[10]Cravero v. Florida State Turnpike Authority, 91 So. 2d 312 (Fla. 1956); *see* People v. Ocean Shore R.R., 90 Cal. App. 2d 464, 203 P.2d 579 (1949); Carroll v. City of Louisville, 354 S.W.2d 291 (Ky. 1962); State v. New Jersey Zinc Co., 40 N.J. 560, 193 A.2d 244 (1963); Taggarts Paper Co. v. State, 187 App. Div. 843, 176 N.Y. Supp. 97 (1919). English and Canadian decisions hold that an option is an interest in land and compensable. See Oppenheimer v. Minister of Transport, 1 K.B. 242, 3 All E.R. 485 (1941); London & Southwestern Ry. v. Gomm, 20 Ch. D. 562 (1882); The King *ex rel.* Atty-Gen. of Canada v. North York Township, 2 D.L.R. 381 (Exch. 1947).

[11]40 N.J. 560, 193 A.2d 244 (1963). The option-holder by exercising his option either before or after the condemnation proceedings are begun, but before the entry of the award, becomes the equitable owner of the land. His interest is

the option-holder exercised his option after the institution of the condemnation action but prior to the entry of the award, it was held that condemnation proceedings do not void an option and that the option-holder has the right to exercise his option until the award is made and the taking is consummated.

In the novel case of *In re Petition of Governor Mifflin Joint School Authority*[12] it was determined that an unexercised option to purchase land was a right which should be compensable in eminent domain. The court concluded that the option-holder had been precluded by condemnation from exercising his right to elect to purchase and held that the option was a valuable personal right, which should be compensable.[13] "Surely, this [right] must have possessed some value—it took a $9,000 down payment to secure it!"[14] The option-holder was accordingly due compensation for his right but not due compensation for his interest in the property; he had no property interest, only the possibility of acquiring one.

II. *The Unexercised Option to Purchase Contained in a Lease*

In condemnation proceedings both the lessor and the lessee are entitled to share in the award according to their respective interests. The lessor is due compensation for the damage done to his reversionary interest, and the lessee is due compensation for the damage done to his leasehold estate.[15]

The option to purchase land, contained in a lease, is distinguished from a mere option to purchase in that in addition to being a contract, it is a covenant in the lease.[16] Such an option covenant in a lease is a convenant running with the land as it affects the land and

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compensable as a mutually binding contract of sale arises; the option when exercised becomes a contract for the sale of realty. *See also* Hennessey v. Wilson, 225 Miss. 366, 83 So. 2d 176 (1955). In *Hennessey* the option expired before initiation of eminent domain proceedings for the acquisition of a right of way. The option-holder had no interest in the property at the time the award was made and therefore was not entitled to any part of the award.

[12]401 Pa. 387, 164 A.2d 221 (1960) (this case was relied upon heavily in *Sholom*).

[13]The *Mifflin* decision is supported somewhat by *East Bay* in that *East Bay* states that an option is property, and thus tacity implies that an option has some value independnet of any relationship to the land.

[14]164 A.2d at 225.

[15]4 NICHOLS ON EMINENT DOMAIN § 12.42, at 293-96 (3d ed. rev. 1962).

[16]The option covenant in a lease is neither a sale nor an agreement to sell, but it is a binding, executed contract by which the lessor of the property agrees with the lessee that the lessee shall have the right to buy the property involved at a fixed price within a specified period of time. Keogh v. Peck, 316 Ill. 318, 147 N.E. 266, 269 (1925).

the estate granted.[17] Covenants which run with the land are assignable[18] and constitute more than an *in personam* right,[19] since they attach to the land and are transferred as part of the ownership of the land to all subsequent takers. It has been stated that an option covenant, as any other covenant in a lease, is an interest which inhers in the land from the date of the execution of the lease.[20]

Recognizing this distinction, *Sholom* held that because the optionholder was also a lessee it had an "ancillary" interest in the land, the leasehold estate. Since the option to purchase was an essential portion of that estate, evidence of the value of the unexercised option to purchase should be considered in determining the damage done to the leasehold estate, for which the lessee was due compensation.

Persuasive support for the *Sholom* theory can be found in *Cullen & Vaughn Company v. Bender Company*,[21] where the lessee had an option to purchase. The lessee's water rights and privileges were taken by eminent domain and the lessor was compensated; no damages were awarded to the lessee. Shortly thereafter, the lessee exercised his option to purchase. The lessor demanded the full purchase price for the land, and the lessee contended that the amount due the lessor was the purchase price less the damages awarded to the lessor. The lessee contended that because of the taking of the water rights, he had to install other motive power and the taking had damaged his option to purchase the land. The court stated, "It is not necessary to decide whether an option, not coupled with a lease, conveys an interest [in land] prior to the time the option is exercised. In this case a lease was executed, and one of its conditions was that the lessee might purchase the property for a fixed sum at any time during the term of the lease."[22]

In *Cullen & Vaughn* it was impossible to award damages for the leasehold estate as the option to purchase had been exercised; therefore, the court found that equitable conversion applied. It no longer being possible to convey the entire property as a result of the con-

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[17]*E.g.*, Ebensberger v. Sinclair Refining Co., 165 F.2d 803 (5th Cir. 1948).

[18]Augtauga Cooperative Leasing Ass'n v. Ward, 250 Ala. 229, 33 So. 2d 904 (1948); Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678 (1858); Rosello v. Hayden, 79 So. 2d 682 (Fla. 1955); Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925); J.F. Auderer Laboratories, Inc. v. Deas, 223 La. 923, 67 So. 2d 179 (1953).

[19]Arkansas Louisiana Gas Co. v. Evans, 338 S.W.2d 666, 668 (Ark. 1960).

[20]23 Tracts of Land v. United States, 177 F.2d 967 (6th Cir. 1949).

[21]122 Ohio St. 82, 170 N.E. 633 (1930).

[22]*Id.* at 636-37.

demnation, the fund awarded represented the part of the land condemned and was subject to the option.[23]

Sholom is the only case which allows compensation on the theory that an unexercised option to purchase, contained in a lease, is an interest in the property and compensable as part of the damage to the leasehold estate. The other decisions involving the unexercised option to purchase either deny compensation on a contract theory, as in the case of a mere option to purchase,[24] or allow compensation on a theory of equitable conversion.[25]

The early case of *Cornell-Andrews Smelting Company v. Boston & Providence Railroad Corporation*[26] involved an unexercised option to purchase held by a lessee. The court held that the unexercised option created no estate in the land, and consequently the lessee's rights were contractual only. However, the court further held that the lessee was not remediless and allowed recovery on the theory of equitable conversion. The lessee, option-holder, by exercising the option after the fund had been awarded, could buy the award at the option price. This method of compensating the option-holder has been attacked[27] on the ground that, in many instances, it would place him in a very advantageous situation. By not exercising his option until after the fund is awarded, the option-holder becomes an opportunist. If the fund is greater than the option price, the option-holder then could exercise his option—purchase the fund on a theory of equitable conversion—and realize an unjust profit.

The *Sholom* theory does not have the shortcoming that the equitable conversion theory has. In admitting evidence of the value of the unexercised option to purchase as part of the evidence of the damage done by the taking to the leasehold estate, no unjust profit is realized by any party. The lessee is merely compensated in full for the taking of his leasehold estate. The cases denying compensation on a contract theory treat an option contained in a lease as the equivalent of a bare option. This theory maintains that an unexercised option

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[23]"It no longer being possible to convey the entire property, the fund which represents the part conveyed belongs to the lessee, as purchaser." *Id.* at 637.

[24]City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961); Cornell-Andrews Smelting Co. v. Boston & P.R.R., 209 Mass. 298, 95 N.E. 887 (1911); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960); *In re* Water Front, 246 N.Y. 1, 157 N.E. 911 (1927) (a condemnation clause in the lease prevented compensation in any event).

[25]Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952); 23 Tracts of Land v. United States, 177 F.2d 967 (6th Cir. 1949).

[26]209 Mass. 298, 95 N.E. 887 (1911).

[27]*In re* Water Front, 246 N.Y. 1, 157 N.E. 911 (1927); City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961).