IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

December 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

W & F LAND COMPANY, et al.,	)	
	)	KNOX CHANCERY
Plaintiffs/Appellees	)	
v.	)	
	)	NO. 03A01-9511-CH-00395
CHEROKEE PLACE, et al.,	)	
Defendants/Appellants	)	
JOHN R. FISER,	)	
Intervening Plaintiff/Appellee	)	
v.	)	
CHEROKEE PLACE, et al.,	)	AFFIRMED AND REMANDED
Defendants/Appellants	)	

Harold P. Stone and Anna F. Hinds, Stone & Hinds, P.C., Knoxville, For the Appellant, Cherokee Place.
David Wilson Long, R. Louis Crossley, Jr., Andrew L. Colocotronis, Long, Ragsdale & Waters, P.C., Knoxville, For the Appellant, First Tennessee Bank National Association.
Keith McCord, McCord, Troutman & Irwin, P.C., Knoxville, For the Appellee, W & F Land Company.
George w. Morton, Jr., Morton & Morton, Knoxville, For the Appellee, C. Richard Bales.
Raymond E. Lacey, Lacey & Winchester, P.C., Knoxville, For the Appellee, John R. Fiser.
Wanda G. Sobieski, Sobieski, Messer & Assoc., Knoxville, For the Appellee, Haresh K. Mirani.

MEMORANDUM OPINION

INMAN, Senior Judge

I

The parties to this litigation are identified in Appendix One to this opinion. Those presenting issues for review are: W & F Land Company, Cherokee Place, First Tennessee Bank National Association, C. Richard Bales and John R. Fiser.

Many of the issues are fact-driven, requiring a determination of the credibility of the witnesses; others are questions of law. Our review is *de novo* on the record,

accompanied with a presumption of the correctness of the trial court's findings of fact unless the evidence preponderates against it. TENN. R. APP. P. 13(d). No presumption of correctness attaches to issues of law, *Hill v. Tennessee Rural Health Improvement Assn.*, 882 S.W.2d 801 (Tenn. Ct. App. 1994), but we defer to the Chancellor with respect to the credibility of witnesses. *Bowman v. Bowman*, 836 S.W.2D 563 (Tenn. Ct. App. 1991).

This litigation commenced August 4, 1992 when W & F Land Company and its trustee partners filed a complaint against Cherokee Place and its partners, the First Tennessee Bank and C. Richard Bales, a trustee for the Wise Children's Trust, who was allegedly expelled as a W & F partner. A declaratory judgment that the defendant breached a Ground Lease in various particulars was sought; the defendants filed their answers, counter-claims and cross-claims as hereafter described. Following a protracted trial spanning three months, the Chancellor filed three memorandum opinions, to which we will refer from time to time.

II

In 1983, Wise and Fiser created two entities for investment purposes, with unusual tax overtones, for the benefit of their respective children. These entities acquired an abandoned textile factory (Cherokee). One of the entities was W & F, a landlord company which took title to the land, the other entity was a tenant company, Cherokee Place, which took title to the present and future improvements. Wise and Fiser were equal partners in the tenant company, the trustees for their children were equal partners in the landlord company. The relationship between these companies was governed by a Ground Lease dated January 1, 1983.

In 1989 Wise encountered financial difficulties with other business interests and requested a distribution of some of the tenant's (Cherokee Place) assets or a personal loan, both of which Fiser refused. He thereafter sent Wise a buy-sell letter, pursuant to their partnership agreement, for Wise's interest in Cherokee Place.

Wise elected to purchase Fiser's interest in Cherokee Place for the amount--$75,000.00--specified in the letter, plus the release of Fiser from their partnership

debts. He arranged the entry of new partners into Cherokee, who, with the assistance of a loan from First Tennessee Bank, provided the necessary capital.

These new partners were Chalmers and GSM Partnership, whose partners were Haresh K. Mirani and G & S Partnership, whose partners were Jeffery R. Sharp and Gaines C. Walker. Wise signed an agreement to form a partnership with the new investors. The Bank advised Wise that it would release Fiser from the obligations to it provided the new investors assumed his obligations and provided that the landlord, W & F, agreed to transfer the Ground Lease from Cherokee Place to the “new” tenant, also called Cherokee Place.

On April 10, 1990, Fiser transferred his interest in the tenant company to Wise pursuant to the buy-sell letter. He was thus no longer involved in the tenant company (Cherokee Place) but continued to own a one-half interest in W & F, the landlord company. Fiser refused to assign his interest to the new investors, as requested, insisting that he would only assign to Wise, who then concurrently, or nearly so, assigned the 50% interest to the new investors. He also transferred a 10% interest from his original 50% interest to the new investors, who thereupon owned a 60% interest in Cherokee Place.

Parenthetically, it may be noted that at this juncture, Fiser shifted his focus to the interests of the landlord company with an eye single upon the debts of Cherokee Place and their assumption and payment by the new investors because the landlord company was required to subordinate its interest in the Ground Lease for the debts of the tenant company.

A Restated Agreement to Form a Partnership between Fiser and the new investors was effective March 8, 1990. The signatories agreed that Wise would obtain Fiser’s interest for the *new investors*, which interest would immediately pass through Wise to the new investors.

Concurrently with the drafting of the Restated Agreement, a Cherokee Place Amendment of Partnership Agreement was drafted by Wise’s attorney, which referenced the provisions of the Restated agreement and “that the original

partnership shall not be dissolved but shall continue to exist." This Amendment further provided that any liability of GSM or Chalmers would be satisfied only from partnership assets and, as against Wise, GSM and Chalmers would have no liability for any such obligation not expressly assumed. This purported amendment further provided that the new partners would assume a monthly distribution of income, contrary to the original agreement between Fiser and Wise that a distribution would be made if they agreed to do so.

Fiser did not participate in the Cherokee Place Amendment of Partnership Agreement. Wise and the new partners essentially re-wrote the original Partnership Agreement between Wise and Fiser. Keeping in mind that the flurry of paperwork on April 10 and 12, 1990 was in effect a single business transaction resulting, *inter alia*, in the voluntary divestiture of Fiser of his entire interest in the tenant company.

On October 23, 1991, the new Cherokee Place Partnership requested the landlord company to sign a subordination agreement to enable Cherokee Place to borrow construction funds. The landlord (Fiser) wanted evidence that the tenant company was financially sound before he would agree to subordination. The Ground Lease did not require such proof; Fiser and his attorney were furnished a copy of the "Cherokee Place Amendment of Partnership Agreement" of April 12, 1990, who thereupon allegedly learned that the original partnership was being continued contrary to their asserted belief that when Fiser sold his interest the partnership was *ipso facto* dissolved.

Fiser, through counsel, advised Cherokee Place of his belief and , moreover, that the new investors were assignees under the Ground Lease and therefore personally liable for all debts of Cherokee Place.

W & F signed the subordination agreement subject to a reservation of all rights to challenge the status of Cherokee Place.

In August 1992, Cherokee Place requested that the landlord company sign another subordination agreement to enable the tenant to obtain construction funds. Fiser refused to do so, claiming that Cherokee Place was a new partnership and

that the new investors were personally liable as assignees as provided for in the original Cherokee Place Partnership Agreement.

Again, parenthetically, it should be noted that if the liability of the new partners is determined under the original partners, it remains viable; if a new partnership agreement exists, the original having expired when Fiser transferred his interest, the rights of the partners must be controlled by the new agreement.

On August 13, 1992, the W & F partners met to discuss the requested subordination, which had become a critical issue with terms being of the essence. The defendant Bales, as trustee for the Wise Children's Trust, was present. He agreed that subordination by the landlord was appropriate, while the trustees for the Fiser Children's Trusts (H.R. Thornton, Jr.) and attorney McCloud opposed it. The other Fiser trustee, William A. Scruggs, was absent. He was contacted by telephone and supported his co-trustee, Thornton. Bales, representing a 50% interest in the landlord partnership, was, after he left, expelled from the partnership because of his alleged violation of section 16.1 of the Partnership Agreement in voting for subordination. After Bales was expelled, Thornton and Scruggs voted that Cherokee Place had breached the Ground Lease by attempting to assign a partnership interest to new partners without their assumption of personal liability. They instructed their attorney, McCord, to notify Cherokee Place of the alleged breach and give them the required 15 days to cure the breach under section 14 of the Ground Lease and to file this action for a declaratory judgment.

III

The complaint alleged that the Ground Lease tenant breached the lease by repudiating personal liability thereunder while concurrently demanding that the landlord execute a subordination agreement. The plaintiffs further alleged that the subordination agreement and related loan instruments were unreasonable and inequitable and that all defendants were engaged in coercive conduct calculated to enrich them and were perpetrating a fraudulent scheme. The plaintiffs sought (1) a declaratory judgment of the rights of the parties under the Ground Lease; (2) to

have the “new partnership” declared a tenant by assignment pursuant to paragraph 10 of the Ground Lease; (3) a declaration that W & F was not obligated to subordinate “except under reasonable terms and conditions”; (4) damages and attorney’s fees.

The defendant Bales answered that W & F, the landlord, had no authority to file this action because he controlled a 50% interest in W & F and did not consent to the litigation and filed a counter-claim for indemnification and accounting. He denied the right of the co-partners to expel him from the partnership.

The defendant Chalmers filed an answer, counter-claim and cross-claim essentially claiming that he and the other individual defendants became substitute partners in Cherokee Place and sought a declaration that the original partnership had not been terminated but continued to be a tenant under the Ground Lease. As additional relief, he sought a declaration that (1) the Ground Lease permitted acceleration of the debt payment by the lender in the event Cherokee defaulted with the landlord having no right to cure the default except full payment of the debt; (2) the landlord could not “cure” certain defaults; (3) terms of loans might be extended beyond the term of the Ground Lease; () the landlord be required to execute a general power of attorney authorizing the tenant to execute all future subordination agreements on behalf of the landlord.

The “new partnerships” filed an answer, counter-claim and cross-claim adopting the pleadings of Chalmers and sought damages against the landlord for failure to execute the subordination agreement in a timely manner.

First Tennessee Bank was deemed a necessary party, although no relief was sought against it. It belatedly filed an “application for a declaratory judgment” on the eve of trial alleging that the “new partnership” was a continuation of the assigned Cherokee Place partnership and sought a declaratory judgment consonant with that sought by the other defendants.

Fiser was allowed in the case as intervenor. He sought specific s of the sale of his partnership interest and recovery of attorney’s fees and expenses.

IV

The Chancellor ruled that:

(1) The lessor-landlord was required by the provisions of the Ground Lease to subordinate the fee to mortgages executed by the tenant for construction on the premises;

(2) To the extent that the tenant defaulted in its obligations to the lender resulting in an acceleration as a prelude to foreclosure, the landlord had 60 days within which to cure such default;

(3) The tenant cannot contract for a loan whose term extends beyond the term of the lease;

(4) Cherokee Place (the tenant) is a continuation of the original partnership;

(5) The new partners have no personal liability under the Ground Lease;

(6) The landlord committed no breach of contract in refusing to execute a subordination agreement in August 1992;

(7) The subordination agreement executed by the landlord in February 1993 was reasonable and appropriate;

(8) The tenant did not breach its obligations under the ground lease;

(9) that Wise is not liable for the attorney fees of Fiser;

(10) In the event First Tennessee Bank gives written notice of a default by Cherokee Place, the landlord has 60 days to cure the default by making the payments in arrears, "provided that the landlord gives the tenant 10 days after written notice is sent to cure within such 10-day period prior to landlord curing the default;"

(11) The landlord's fee is security for all existing loans owing by the tenant to First Tennessee Bank;

(12) That the purported expulsion of Bales, Trustee for the Wise Children's Trust, was ineffective;

(13) That the Wise Children's Trust may not expel the Fiser Children's Trust from the W & F Land Company;

(14) That the W & F Land Company can no longer function as a partnership and is dissolved pursuant to TENN. CODE ANN. § 61-1-131;

(15) The Wise Children's Trust is entitled to an accounting from the W & F Land Company.

V

We first consider the issues propounded by the plaintiff. These issues are, *in haec verba:*

> I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO APPLY CARDINAL RULES APPLICABLE TO THE INTERPRETATION OF UNAMBIGUOUS CONTRACTS BUT, INSTEAD, IGNORED CONTRACT PROVISIONS, CREATED NEW CONTRACTS, MISCONSTRUED CONTRACT PROVISIONS AND FAILED TO ENFORCE THE CONTRACT AS WRITTEN.
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> II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO BASE ITS FINDINGS AND CONCLUSIONS UPON THE UNDISPUTED, MATERIAL, RELEVANT AND ADMISSIBLE EVIDENCE BUT, INSTEAD, MADE FINDINGS AND CONCLUSIONS BASED UPON ARGUMENTS, OPINIONS, POSITIONS, IMPROPER INFERENCES, SUPPOSITION, CONJECTURE AND IMPRESSIONS NOT SUPPORTED BY ANY MATERIAL, RELEVANT OR ADMISSIBLE EVIDENCE.
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> III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT THE DEFENDANT, CHEROKEE PLACE PARTNERSHIP, WAS A TENANT BY ASSIGNMENT PURSUANT TO SECTIONS 10 AND 10.14 OF THE GROUND LEASE:
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>> A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT A PARTNERSHIP FORMED BY JOHN FISER AND WALTER WISE ON DECEMBER 1, 1982, WAS TERMINATED AS OF APRIL 10, 1990.
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>> B. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT DEFENDANTS WISE, CHALMERS AND GSM FORMED A NEW PARTNERSHIP NAMED CHEROKEE PLACE ON APRIL 12, 1990, AND ERRONEOUSLY CONCLUDED THAT THE NEW PARTNERSHIP WAS A CONTINUATION OF THE ORIGINAL CHEROKEE PLACE PARTNERSHIP WITH CHALMERS AND GSM BECOMING SUBSTITUTE PARTNERS.
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>> C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT WISE, THE ONLY PARTNER WITH FISER IN THE ORIGINAL CHEROKEE PLACE PARTNERSHIP, AFTER ACQUIRING FISER'S INTEREST IN THE PARTNERSHIP PURSUANT TO A BUY-SELL AGREEMENT, TRANSFERRED A PART OF HIS 100% INTEREST TO CHALMERS AND GSM, WHO THEN BECAME SUBSTITUTE PARTNERS IN THE ORIGINAL TERMINATED PARTNERSHIP.
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>> D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT THE CONTRACTUAL TERMS, PROVISIONS AND

ADMISSIONS CONTAINED IN THE DEED OF TRUST AND SUBORDINATION AGREEMENT DATED APRIL 8, 1991 (R. EX. 6) WERE NOT ENFORCEABLE AND BINDING ON THE PARTIES THERETO.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT SECTION 7 OF THE GROUND LEASE (R. EX. 12) MANDATORILY OBLIGATES THE LANDLORD TO HAVE A DEED OF TRUST LIEN PLACED ON ITS FEE INTEREST IN THE PROPERTY TO SECURE TENANT FINANCING FOR LEASEHOLD IMPROVEMENTS AND CONSTRUCTION:

A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT THE SUBORDINATION PROVISIONS IN SECTION 7 OF THE GROUND LEASE ARE UNENFORCEABLE FOR LACK OF DEFINITENESS.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONSTRUING THE CLAUSE "THIS LEASE SHALL BE SUBJECT AND SUBORDINATE TO THE LIEN OF ANY MORTGAGE . . . ." IN SECTION 7.01 OF THE GROUND LEASE TO MEAN THAT W & F WAS REQUIRED TO ENCUMBER ITS FEE INTEREST IN THE PROPERTY TO SECURE TENANT LOANS.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN INCONSISTENTLY HOLDING THAT THE 1993 SUBORDINATION AGREEMENT AND LOAN DOCUMENTS WERE REASONABLE AND ENFORCEABLE AGAINST W & F WHILE, AT THE SAME TIME, HOLDING THAT THE DOCUMENTS DID NOT COMPLY WITH THE PROVISIONS OF THE GROUND LEASE AND PARTIALLY MODIFIED THE DOCUMENTS IN AN ATTEMPT TO MAKE THEM COMPLY WITH W & F'S RIGHTS UNDER THE GROUND LEASE.

D. THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANTS AND THE BANK TO RELEASE THE APRIL 8, 1991 DEED OF TRUST (R. EX. 6) AND REPLACE IT BY THE 1993 SUBORDINATION AGREEMENT (R. EX. 148) AND RELATED LOAN DOCUMENTS.

V. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE EXPULSION OF BALES AS A PARTNER IN W & F ON AUGUST 13, 1992, PURSUANT TO EXPLICIT PROVISIONS OF THE W & f PARTNERSHIP AGREEMENT WAS INEFFECTIVE.

A. IN HOLDING THAT BALES REMAINED A PARTNER IN W & F, AND WAS NOT EXPELLED, THE TRIAL COURT ERRED AS A MATTER OF LAW BY IGNORING AND FAILING TO INTERPRET THE CONTRACT AS WRITTEN AND THE PROVISIONS OF THE UNIFORM PARTNERSHIP ACT AT TENN. CODE ANN. § 61-1-130.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW, AND INCONSISTENT WITH ITS RULING THAT THE EXPULSION OF BALES WAS INEFFECTIVE, BY DISSOLVING THE W & f PARTNERSHIP AT THE CONCLUSION OF THE TRIAL.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT UPON DISSOLUTION OF THE W & F PARTNERSHIP, THE PARTNERS OF W & F EACH OWNED AN UNDIVIDED INTEREST IN THE W & F PROPERTY AS TENANTS IN

COMMON AND WOULD BE REQUIRED TO ENCUMBER THEIR RESPECTIVE FEE INTEREST IN THE PROPERTY TO SECURE FUTURE LOANS OF THE TENANT.

VI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AWARD W & F EXPENSES AND ATTORNEY FEES PURSUANT TO SECTIONS 14.04 AND 15 OF THE GROUND LEASE.

VII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING PLAINTIFF'S CLAIM FOR FRAUD AND CONSPIRACY AGAINST THE DEFENDANTS AND BALES AND ABUSED ITS DISCRETION IN FAILING TO APPLY THE DOCTRINE OF "UNCLEAN HANDS" AS A BAR TO ANY RELIEF BY THE DEFENDANTS AND BALES UNDER THEIR RESPECTIVE COUNTERCLAIMS.

Issues one and two are exegetical.

Issues Three (A), (B), (C), (D) and Four (A), (B), (C), (D) will be discussed collectively.

Plaintiffs argue that the Cherokee Place Partnership was dissolved as a matter of law on February 8, 1990, and that the findings of the Chancellor directed to this issue are undisputed. These findings are:

> "In early 1990, Mr. Fiser decided to exercise his rights under a provision in the Cherokee Place partnership agreement [Section 7.04] which has been identified by all the parties during this litigation as a put provision. The put provision provided a means for the Cherokee Place partners to disassociate themselves, if one or the other of them decided to do so. IN exercising the put provision, Mr. Fiser gave notice by letter (R. Ex. 14) to Mr. Wise in March [sic - February] of 1990 that he (Fiser) would sell or buy one-half of the partnership for $75,000.00, plus the selling partner was to be relieved from his guaranty obligations to the Bank. The put letter having been delivered to Mr. Wise, Mr. Wise then had the choice of either selling his one-half interest in the Cherokee Place Partnership to Mr. Fiser for $75,000.00 and having Mr. Fiser arrange to have him (Mr. Wise) relieved from his obligation to the Bank, or the choice of purchasing Mr. Fiser's one-half interest for $75,000.00, and arranging to have Mr. Fiser relieved from his (Mr. Fiser's) obligation to the Bank.
>
> Mr. Wise exercised his right [R. Ex. 15] under the put to purchase Mr. Fiser's interest for $75,000.00, and arranging to have Mr. Fiser released from liability to the Bank. That exercise of rights by Mr. Wise was carried out, and completed sometime in April of 1990, when the transaction closed and Mr. Fiser signed over his interest in the partnership [R. Ex. 22]." Id. at 615.
>
> * * * *
>
> "Thus, when the purchase of Mr. Fiser's interest was completed, Mr. Fiser received $75,000.00 and was relieved from liability to the Bank, and Mr. Wise had acquired Mr. Fiser's interest." Id. at 616.
>
> * * * *

> "Before the put transaction closed, Mr. Wise asked Mr. Fiser to convey his partnership interest directly to the new partners, and Mr. Fiser refused to do so. Mr. Fiser said he would only proceed with the put transaction as provided in his put letter [R. Ex. 14]. Thus, in the closing transaction, the documents Mr. Fiser signed <u>transferred his one-half interest directly to Mr. Wise.</u>
>
> * * * *
>
> "Mr. Fiser insisted on carrying out the put as set forth in his put letter <u>and it was carried out that way."</u> <u>Id.</u> at 617.

Thus the plaintiffs conclude that since Wise became - albeit for a moment - the 100% owner of Cherokee Place Partnership, the partnership was dissolved as a matter of law under the partnership agreement and the Uniform Partnership Law. TENN. CODE ANN. § 61-1-128 defines dissolution of a partnership as follows:

> "The dissolution of a partnership is the change in the relation of the parties caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

Allied with the statute is TENN. CODE ANN. § 61-1-130, which provides that a dissolution is caused by (1) the termination of the term or particular undertaking, or (2) the express will of any partner when no term or undertaking is specified, and (3) other causes not here relevant.

We concur in the Chancellor's findings that the substitution and continuation of the partnership is contemplated by the Agreement, as reinforced by the Memorandum of Partner Withdrawal, executed by Fiser, which declares that he had withdrawn as a partner in Cherokee Place, clearly signifying as the defendants argue, that Cherokee Place continued as a viable partnership with new partners. See, *e.g., Cowan v. Maddin,* 786 S.W.2D 647 (Tenn. Ct. App. 1989). Moreover, Fiser and Wise executed another agreement when the buy-sell transaction was finalized; this agreement provided that "[It] shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns the Partnership and Partners of the Partnership."

Fiser testified, in fact, that he had assumed when he made the 'put' offer to Wise that Wise would bring in new partners. The defendants insist that Fiser cannot now complain that he was unaware of Wise's intent with regard to

substituted partners, and we agree. The defendants further insist that the "new partnership" theory, advanced three years after the fact, is only a ruse.

After the put letter was delivered to Wise, he and the new investors executed a contract whereby the original Cherokee Place Partnership was continued in lieu of the creation of a new partnership. As the Chancellor observed, the significance of this is found in the claim of W & F and Fiser that a new partnership resulted in an assignment to it of the ground lease interest of Cherokee Place, and the new partners became personally liable to the landlord for ground lease obligations.

The original Partnership Agreement provided:

> 6.02 Continuation. The Partnership shall continue as long as the partnership owns and manages the projects developed or acquired by it, and thereafter until such time as the parties agree to a termination, provided, however, that the partnership may be terminated at any time upon the agreement to do so of the parties whose aggregate partnership percentages are no less than 66-2/3%.

There is no evidence in this record that a termination or a corollary distribution of assets was ever contemplated at the time of the buy-sell agreement. We cannot square the provision that the partnership shall continue as long as the partnership owns and manages the projects developed or acquired by it, and all parties agree that this was the case. The Chancellor found that the partnership continued as contemplated in the original agreement, a finding with which we concur. While Fiser argues that he did not intend that the partnership continue - as evidenced by the fact that he refused to convey his interest to the new partners - there is no evidence that he expressed such an intent. The Chancellor found, by implication, that Fiser was surprised by Wise's decision to buy, rather than sell, and thereafter did whatever he could to avoid the facilitation of the transaction. The plaintiffs strenuously argue that the Chancellor's findings are contrary to the evidence and the documentation. We do not agree.

Since Wise had no personal liability as provided in the ground lease, it follows, as the Chancellor held, that the new partners likewise have no personal liability.

Issues 4(A), (B) and (C) will be considered together. The plaintiffs object to the ground lease requirement that their fee title must be subordinated to the lien of any mortgage the tenant tenders to a lender for construction funds. Aside from the fact that this objection partakes of obstructionism, since the tenant-lessee could not develop the project and further the interests of all concerned, including the landlord, the Ground Lease clearly provides for such subordination and we see no point in belaboring the point. We concur in the Chancellor's findings on this issue.

Issue 5 involves the attempted expulsion of Bales, Trustee for the Wise Children's Trust, from the W & F Partnership. This action was punitive in nature, and seemingly reactionary to Bales' opinion that the landlord should subordinate the fee to a mortgage.

The Partnership Agreement provides that:

> 16.01. Defaulting Events. In the event any partner . . . (vi) is responsible for any act . . . which would justify a decree of dissolution of the Partnership under the laws of the State of Tennessee (a defaulting event) . . . and in the event the Partnership is continued by the non-defaulting partners, under Section 19.01(d) . . . then the Partnership, in addition to any other remedy that it may have at law or in equity against the defaulting partner, may elect to liquidate the entire interest in the partnership of the defaulting partner. Any such election . . . shall be made by the Partnership, giving written notice of such election to the defaulting partner within such 60-day period. If the Partnership elects hereunder to liquidate the defaulting partner's entire interest in the Partnership, the liquidation price of such interest shall be determined and paid in the manner and upon the same terms and conditions provided in Section 7 hereof . . . .

The Chancellor minced no words in finding that Bales weighed his responsibilities as a Trustee and acted appropriately to protect not only the interests of the Wise children but the interests of the W & F Land Company, and his attempted expulsion was ineffective. The plaintiff argues that the Chancellor held that while W & F and the remaining partners, Scruggs and Thornton, had the right to expel Bales under the Partnership Agreement, his expulsion would result in a forfeiture. We do not so interpret the Chancellor's opinion; he held, simply stated, that Bales had acted prudently and nothing he did justified his ouster.

In connection with the issue of the purported expulsion of Bales, the plaintiffs argue that the Chancellor erred in holding that upon the dissolution of the W & F Partnership the partners thereupon owned an undivided interest in the W & F property as tenants in common and would be required to encumber such interest as security for future loans. We concur in this finding.

We are uncertain of the plaintiffs' argument directed to the judicial dissolution of the Partnership. They argue that their expulsion of Bales dissolved the partnership; they also argue that the transfer by Fiser of his interest to Wise dissolved the partnership, but are somehow critical of the judicial dissolution of it. There is little doubt that the dissolution ordered by the Chancellor was eminently correct; neither is there doubt that, pending further decisions by the former partners, they continue to own the property as tenants in common.

Issue 6 complains of the refusal of the Chancellor to award W & F its expenses and attorney fees.

The ground lease provides that:

> 14.04 <u>Lessor's Expenses.</u> If Lessee shall at any time be in default hereunder, and if Lessor shall deem it necessary to engage attorneys to enforce Lessor's rights hereunder, the determination of such necessity to be in the sole discretion of the Lessor, Lessee will reimburse Lessor for the reasonable expenses incurred thereby, including but not limited to court costs and reasonable attorney's fees. If Lessee's rights hereunder are not terminated, the amount of such expenses shall be deemed to be additional rent hereunder and shall forthwith be due and payable by Lessee to Lessor.
>
> 15. <u>Remedies.</u>
> ________________In addition to the other remedies herein, it is intended and agreed to by both parties that if a court determines there has been a breach of this Lease, the defaulting or breaching party shall be obligated to pay the other party's attorney's fees, provided this provision shall not affect the limitations of the parties' liability as set forth elsewhere herein.

The Chancellor declined to order the Lessee (Cherokee Place) to pay the Lessor's (Landlord) attorney fees and expenses, holding by implication that the Lessee was never in default, on the one hand, and questioning the right of the trustees of the Fiser Children's Trust to engage counsel for the Partnership and commence this action, on the other. From all of the circumstances presented in

this record we pronounce our concurrence with the judgment of the Chancellor on the issue of attorney fees.

Issue 7 claims error because the Chancellor failed to find fraud and conspiracy by the defendants or to apply the doctrine of unclean hands. Suffice to state that we have reviewed this record carefully and find no justiciable evidence of fraud or conspiracy on the part of the defendants.

VI

Cherokee Place presents for review two issues: (1) Whether the refusal of the landlord to subordinate its fee interest in 1992 was a breach of the ground lease, and (2) Whether the Chancellor erred in holding that Cherokee Place could not mortgage beyond the term of the ground lease.

The Chancellor found that under the Ground Lease, the landlord had the obligation to subordinate the fee to a mortgage by the tenant. One of the loan documents provides:

> c. The parties hereto stipulate and agree that the language used in Paragraph 4(b) above is consistent with the provisions of the Lease. However, Landlord and Borrower recognize that Lender interprets such language to permit Lender to accelerate the Loan indebtedness and, except with respect to exercising its right of foreclosure under the Deed of Trust, to exercise all other remedies available to Lender upon Borrower committing a default under the loan.

But as the Chancellor observed,

> "As can be seen this provides that the Landlord (W & F) and the Borrower (Cherokee Place) recognize that the lending Bank interprets the ground lease to allow acceleration upon default. The evidence disclosed that the parties understood this to mean that upon acceleration W & F could only cure and take over Cherokee Place's position by paying the entire balance due on the loan at once. W & F's position, which was held at trial to be substantially correct, was that it could cure by paying monthly payments in default, and then continue in Cherokee Place's shoes making monthly payments on the loan balance, not having to pay the entire balance at once. While paragraph 4c. did not state that the interpretation of the Bank was correct, it could be forcefully argued that inasmuch as there was no other interpretation than that of the Bank in 4c., that W & F had abandoned its position. Thus, the tendered paragraph does not reflect the fact that a serious dispute existed, and that W & F contested the interpretation in 4c. The loan document should have either reflected the dispute in some balanced way, or not addressed the matter at all. W & F did not have to accept the provision as tendered, and so W & F's failure to sign the loan documents containing paragraph 4c. was not a breach.

Paragraph 21c. of Exhibit 83A of the 1992 loan document provides:

> c. This Agreement pertains only to loans that mature no later than the term of the Lease (as extended) unless the prior written consent of Landlord to a loan with a longer term is obtained such consent not to be unreasonably withheld or delayed.

The effect of this provision would have been to obligate W & F to subordinate its fee interest to loans and their securities running beyond the term of the ground lease, perhaps far beyond. W & F felt that this would permit Cherokee Place to heavily obligate W & F's fee interest, and possibly distribute assets to its partners leaving W & F to pay for them. Such an outcome would not have been without possibility. At trial it was ruled that under the terms of the ground lease the fee interest of W & F could not be required to be to a mortgage beyond the term of the lease. Thus, W & F's failure to sign the 1992 loan documents containing provision 21c. did not constitute a breach by W & F."

We concur in this finding. We also agree with the conclusion that the landlord could not be required to subordinate its fee estate beyond the term of the lease. Cherokee Place argues that the ground lease does not explicitly prohibit the landlord from doing so, but neither does the ground lease require unlimited subordination; the landlord is only required to agree to a subordination the terms of which are reasonable. To require the fee interest to be subordinated *ad infinitum* would wreak havoc never contemplated.

VII

Fiser, the intervenor, presents for review the issues of (1) whether the original Cherokee Place Partnership could continue as the same entity after one of two partners acquired the entire partnership interest, and (2) whether Fiser is entitled to reimbursement of attorney fees from Wise.

The first issue has been addressed.

The answer to the second issue is, no. We agree with the Chancellor's findings as to each of these issues.

VIII

The appellee Richard Bales presents one issue for review. He insists that the Chancellor "should have permitted him to enforce the buy-out provisions under the partnership agreement so as to purchase the Fiser Children's Trusts on the same basis that Fiser tried unsuccessfully to 'cash out' the Wise Children's Trust. This would be for Bales, he says, poetic justice, when the predative actions of Fiser are carefully considered.

The W & F Land Company Partnership Agreement contained the same "put" provision that Fiser utilized in the Cherokee Place Partnership. Bales was fearful that if he "got a put" he could not respond on behalf of the Wise Children because the trust had no funds. Wise had none; his children had no financial resources.

Undoubtedly there were parlous times for Bales, but Fiser's interests never made a 'put' on him. Perhaps it could be said that the 'put' to Wise in the other partnership was instructive. At any rate, Bales recognizes that the Chancellor exercised his reasonable discretion in creating an equitable remedy which eliminated a forced sale of the assets of W & F.

Bales argues that pursuant to TENN. CODE ANN. § 61-1-131, which provides that it is a ground for dissolution of a partnership if a partner is excluded from participation in the conduct of business, he, as Trustee for the Wise Children, is entitled to an award of damages against the other partners. He concedes that any damages would be nominal in nature and for this reason suggests that the Wise Children Trust should be allowed to acquire the Fiser interests. This would carry 'poetic justice' too far, in one judgment, because we think the Chancellor arrived at the essential justice of the case.

IX

The First Tennessee Bank presents for review the single issue of whether the trial court properly determined that its right of acceleration of Cherokee Place's indebtedness upon default is subordinate to the landlord's right to cure the default.

The trial court's Final Judgment provides:

> ". . . in the event First Tennessee Bank gives written notice that Cherokee Place has defaulted in making a monthly payment on a

> mortgage or deed of trust loan to which Landlord is subordinated, Landlord has sixty (60) days to cure said default by making a monthly payment directly to the mortgagee, *provided* that Landlord gives Cherokee Place ten (10) days after written notice is sent to cure within such ten (10) day period prior to Landlord curing the default. If Landlord cures the default by making the monthly payment after notice to and failure by Cherokee Place to cure within ten (10) days, Landlord could then step into the shoes of Cherokee Place, as Lessee, and continue, in effect as the borrower of the bank, by making monthly payments."

The record shows that Cherokee Place Partnership has never been in default on any payment to First Tennessee Bank on any loan. Therefore, we find First Tennessee Bank has not raised a justiciable issue at trial or in this appeal. **[cite case(s)]** We hereby modify the trial court's Final Judgment insofar as it purports to render judgment on this issue. Should First Tennessee Bank allege a default on its loan(s) in the future, the parties will be free to seek a judicial determination as to the bank's acceleration rights and the cure rights of Cherokee Place and W & F at that time.

As modified, the judgment of the trial court is affirmed, with costs apportioned as follows:

W & F Land Company	50%
John Fiser	25%
Cherokee Place Partnership	15%
First Tennessee Bank	10%

The case is remanded to the trial court for appropriate disposition of the issues reserved at trial.

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William H. Inman, Senior Judge

CONCUR:

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Herschel P. Franks, Judge

Don T. McMurray, Judge