Property

Professor Grimmelmann

Final Exam - Fall 2009

This exam was moderately difficult. The multiple-choice questions ranged from easy (100% correct answers) to quite hard (12% correct answers); the essays were factually straightforward. As in the sample problems, I tried to give you fact patterns that told simple, memorable stories. This year, I put particular emphasis on sorting out multi-party disputes from the point of view of one particular party. You received few points for discussing issues not relevant to your client.

I graded each essay question using a fifty-item checklist, giving a point for each item (e.g., "Tom's use of self-help may be tortious.") you dealt with appropriately. Five points for each question were reserved for organization and writing style, another five for the quality of your practical advice to your client. I gave bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts. On average, the handwritten essays were markedly better than the typed ones, even though the typed essays were better organized and more clearly written (and graded accordingly).

Since the essays were graded on a scale of 0–50 and there were 25 multiple-choice questions, I multiplied your multiple-choice score by 2 before adding it to your essay scores to produce the exam total.

Model answers to both questions are below. They're meant to illustrate the level of analysis that would earn you an "A." They don't pin down every last detail, and it's always possible to dispute some of their conclusions.

If you would like to review your exam, they will be available starting on Tuesday, January 19, in room 706 at 40 Worth St. Please ask my faculty assistant, Naomi Allen, for your exam; she can also tell you your scores on the individual sections. I recommend that you compare your exam with the model answers. If you have further questions after reviewing your exam, or would like to discuss the course or anything else, please email me and we'll set up an appointment.

It's been a pleasure and a privilege to teach you and learn from you.

James

	Multiple Choice	Chateau	Featheracre	Total
Median	10.3	16.5	17.5	55.5
Average	10.6	17.1	17.8	56.1
Std. Dev.	3.5	5.2	4.2	12.8

Essay 1: **Chateau Pushkin**

Model Answer:

Commercial Lease

As a threshold matter, it is ambiguous whether the Vladimir-Tatiana and Tatiana-Eugene leases are residential or commercial. Eugene must argue that they are commercial, because his desired use—as a museum—is inconsistent with residential classification. (Even leaving aside the gift shop and admission fees, Eugene plans to use the house as a public accommodation, rather than simply just living there.) This argument may fail; Chateau Pushkin is a residence, Tatiana has been using it as one, and it's in a residential neighborhood.

Sublease, Not Assignment

Although Eugene's lease with Tatiana is labelled an "assignment," it appears to be a sublease in substance. Tatiana retains the right to retake possession on two months notice, giving her a reversionary interest. Moreover, Tatiana retains possession of the attached building, Eugene is to pay his rent directly to her, and she intends not to move out, indicating that their agreement intended as a temporary, partial sublease.

Vladimir Can Likely Withhold Consent

The Tatiana-Vladimir lease apparently contains a landlord-consent clause for assignments and subleases. (For this reason and others, it is important to review this lease, and Eugene should ask Tatiana for a copy.) In a commercial lease, unless the lease specifies otherwise, the landlord may only withhold consent for commercially reasonable reasons. Here, Eugene's is proposed use may be illegal under local zoning law, giving Vladimir a potentially valid reason to withhold consent. That Eugene is willing to offer more in rent than Tatiana, however, gives him a possible counterargument. If the Vladimir-Tatiana lease is classified as residential, Vladimir is almost certainly allowed to withhold his consent.

Vladimir Can Terminate Tatiana's Lease

Even if Vladimir's consent is not required for the sublease, Eugene faces the risk that Vladimir may simply terminate Tatiana's lease at the end of the year. (If Vladimir's may refuse to consent to Eugene's presence, Tatiana is already in breach, allowing even earlier termination.) Even if Connecticut has a statute or common-law rule protecting residential tenants from retaliatory eviction or eviction without cause, these rules protect tenants who need the security of a stable place to live. Eugene's commercial use is unlikely to qualify for their protections.

Olga Can Convey Occupancy, but Not Stable Occupancy

As a joint tenant, Olga can give Eugene the right to be present on the Chateau Pushkin grounds. (This, plus Tatiana's permission, explains why Eugene is not trespassing when he visits the house, regardless of the status of his lease.) Vladimir has no right to prevent Olga or her invitee,

Eugene, from being present. While Olga may be liable to Vladimir in an accounting for implicitly ousting him by giving over the house to be used as a museum, this is a matter between Olga and Vladimir that does not directly involve Eugene.

The bigger problem for Eugene is that Olga has only given him a license to be present, not a property interest. If Vladimir asks a court for partition, then Eugene faces the risk either that Vladimir will be awarded possession of the house (in a partition in kind) or that the property will be sold (in a partition by sale). Perhaps Eugene might be able to raise the money to buy it outright, but that assumes he has good financing. A partition—or even the danger of an outright transfer to Vladimir—seems especially likely given that Olga is about to file for divorce. Practically, Eugene needs a lease or some other non-revocable property interest in order to be able to operate his museum, and the oral license from Olga won't suffice. (As it stands, she herself could change her mind at any minute and revoke her permission.)

Relying on Olga's permission is also not an effective alternative to Eugene's lease with Tatiana. Having signed that lease, Eugene cannot now simply avoid it; he will be expected to continue making his own rent payments to Tatiana. And the same logic by which Eugene will point to Olga's permission to allow him to be on the land also means that Tatiana can point to Vladimir's permission to be there—and Tatiana has the earlier of these two agreements. Eugene's better course, if he chooses to stay, is to affirm his lease with Tatiana and use Olga's permission merely to try to negate Vladimir's attempts to expel him.

Eugene Has a Right to Possession

Vladimir's lock-changing was a wrongful act of self-help under Berg. It was wrongful as to Tatiana, and also to Eugene notwithstanding the lack of privity. (I have even less right to evict strangers from their apartments than I do to evict my tenants.) It also raises the possibility that Tatiana may have failed to deliver possession of the premises under Keydata; we will need to know whether Connecticut follows the rule that a landlord must deliver physical possession as well as legal possession.

The Premises Are in Unacceptable Condition

The chandelier and rugs are likely important decor for Eugene's planned museum. If his lease with Tatiana was silent on them, he could argue that they constituted fixtures. The rugs were easily removed and apparently not specially fit to the space. However, the chandelier is a closer case; it would have been harder to move and more likely to be assumed to go with the premises, especially opulent premises like the mansion. The water and gas disconnection might be breaches of the implied warranty of habitability—albeit easily repaired breaches—but Eugene cannot raise this argument without undermining his claim that his lease is commercial.

The Zoning Ordinance Is Constitutional

The zoning ordinance is likely constitutiona. As in Euclid, it restricts substantial areas of land to residential uses, concentrating commercial ones in a smaller area (a common pattern in Connecticut). This kind of separation makes residential areas quieter and more attractive.

Eugene could ask for a variance, citing the cultural benefits of the museum. However, Alexander's opposition may indicate that the neighborhood his against him, and as a tenant without his landlord's cooperation, he's not in a persuasive position.

The ordinance is also likely not a taking. It leaves residential uses intact, and indeed, Chateau Pushkin is still valuable for residential purposes. It doesn't invade the land or require a physical alteration. Eugene's investment-backed expectations are also weak; he's signed a lease, but hasn't committed to alterations or expensive construction, and his museum hasn't opened.

The Museum Is Likely Not a Nuisance, and Neither Is the Sign

The only harm Alexander will suffer from the museum is increased traffic in front of his property. True, it's a gravel road not designed for heavy use, but increased traffic during normal museum-going hours is not ordinarily a substantial interference with the use of land. Moreover, the museum hasn't even opened yet, so Alexander's suit may be premature.

Alexander's sign is unlikely to be a problem under the spite fence doctrine. For one thing, the sign doesn't actually interfere with the use of Chateau Pushkin; it's a half-mile away. For another, Alexander's purpose with the sign is expressive; any harm it causes is by persuading people not to visit the museum. That gives Alexander a substantial First Amendment interest that would be difficult for Eugene to overcome.

Advice

Eugene is unlikely to succeed in opening his museum. The zoning ordinance would make it illegal and his chances of overturning it or obtaining a variance are slim. Even if he does open, he will be there on a lease that can be cancelled on short notice, with a hostile landlord and the threat of judicial partition hanging over him. This is not a safe business climate. Eugene should cancel his plans and attempt to obtain his security deposit back. The landlord-consent clause—which Tatiana didn't apparently inform him about—provides a good justification for arguing that Tatiana breached her obligation to Eugene to deliver legal possession, allowing him to void the lease. If Eugene does decide to stay and fight it out, he's best off making allies—either both Tatiana and Olga together, or cutting a deal (at a higher rent, possibly) directly with Vladimir.

Comments

The most common exam-taking mistake on this problem was to spew large amounts of doctrine on assignment versus sublease, the rights of joint tenants, the elements of nuisance, etc. without pausing to ask whether these rules were relevant to the problem faced by your client. For the most part, they weren't. If this were real life and you were to start lecturing Eugene on the rules of survivorship, he'd start yawning.

The most common factual mistake was to jump to the conclusion that Tatiana has abandoned. Other than the fact that she's stopped paying utility bills, there's no evidence for it. It makes perfect sense that she'd stop paying these bills, since she's no longer living in the main house. Why not? Because she rented it to Eugene. Law school is no excuse to discard common sense.

Essay 2: Lake Trimalchio

Model Answer:

[East Egg and Featheracre were intended to refer to the same parcel of land.]

1972

In 1972, Daisy granted Jay an express easement (technically a "profit," even more technically a *profit à pendre*) to gather OBOE feathers. It doesn't matter what happened before then; any easement Jay had on East Egg would have been merged into the express easement.

While the *contract* between Daisy and Jay mentioned two pies a year and was limited to their lifetimes, the *deed* Daisy gave Jay contained no such limitation. While the grantor's intent controls interpretation of deeds, extrinsic evidence of that intent cannot be used to introduce a limitation or condition where none appears in the deed itself. Jay therefore had an express unconditional easement which ran with the land and bound Daisy's successors in title.

1980

Daisy's will used the language of a fee simple subject to condition subsequent in its devise to Myrtle, but attempted to create the right of entry in a third party: George. Only an executory interest can be created in a third party, which would imply that the will gave Daisy a fee simple subject to executory limitation.

The precise characterization of Myrtle's interest is irrelevant, however, because the condition—that East Egg not be mortgaged or sold—is invalid as a restraint on alienation. Striking that condition, as in White v. Brown, leaves Myrtle with a fee simple and George with nothing. Even if George held a future interest, he has not acted on it in the 24 years since Myrtle granted a mortgage on East Egg. Depending on the classification of his interest, he has either lost his fee simple through adverse possession (24 years of unchallenged possession by Myrtle and Tom) or through failure to exercise his right of entry within a reasonable period.

1985

When Myrtle granted the mortgage, East Egg was already encumbered by Jay's express easement, so the bank's security interest was subject to that easement. It is possible that the bank lacked notice of the easement, and so took clear of the easement when it recorded its mortgage, but we would need to know more about the transaction.

1995

When Tom won the foreclosure auction, he was probably a bona fide purchaser for value without notice of the easement. His winning $30,000 bid was probably sufficient to qualify him as a purchaser for value, given that there was another bidder—Jay—with a similar bid. (Jay's bid, in fact, may estop him from arguing that $30,000 was insufficient in comparison with the value of

East Egg.) He lacked record notice since Jay had not yet recorded, he lacked actual notice since Jay didn't tell him about the feather-gathering, and he lacked inquiry notice since Jay's feather-gathering was seasonal and not visible on the land at other times. As Tom also recorded his transaction before Jay did, he satisfied the conditions of the race-notice statute and took East Egg free of Jay's easement. (Daisy's will, which is in Tom's chain of title, has not been recorded, but this shouldn't matter.)

For similar reasons to those that show that Tom was a purchaser for value, the foreclosure auction probably also can't be set aside as producing a winning bid so low that it shocks the conscience. While the property's value has increased from $30,000 to $370,000 with the addition of a $100,000 house, it also did so over the course of a decade, and the increase may be attributable to the presence of the house or to general appreciation, rather than an inadequate selling price.

2008

If Jay's express easement fails, he can probably still validly claim to hold a prescriptive easement as against Tom. He has been using the land for more than the 7-year statutory period. He has been using it "continuously" as someone gathering OBOE feathers would, i.e., each fall for a few weeks. He has been gathering the feathers openly—Tom actually saw him the first year Tom stayed on the land in the appropriate season. While Tom has only been staying in the house in the summers, the test for open use focuses on the user's activities, and Jay's feather gathering would have been readily visible to others, as well as evident from the missing feathers. Jay's use was not permissive, as Tom had never granted him permission to gather them.

Jay was probably acting in good faith, as he believed he had an express easement to gather feathers. Tom might argue that Jay was acting in bad faith since he didn't tell Tom about his feather gathering, and that Jay's silence was indicative of his knowledge that he hacked the rights to do so. Jay, however could reply that he didn't want to buy the easement, but to buy the rest of the property, and had legitimate reasons to keep silent.

There is some ambiguity over the time when Jay's prescription period began. It probably doesn't matter, because the period 2001–08 satisfies the 7-year "clock" and consists solely of Jay using the land as against Tom, rendering all prior periods irrelevant. Jay's express easement prior to 1995 may have prevented him from acquiring an easement by prescription before then, as his actions in gathering feathers were completely within his rights. If, for some reason, the express easement failed prior to 1995, it appears that Jay was still holding adversely as against Myrtle, although we would need more information to determine whether her one season in the country indicated permissiveness of his activities. If Jay did reacquire an easement by prescription against Myrtle, there is an open question whether Tom's purchase without notice extinguished it. Again, Jay's use during Tom's possession probably suffices to establish the easement. Tom might also argue that Jay did previously hold an easement, but it wasn't extinguished until Tom recorded in 2008, so that Jay hasn't had a sufficiently long period of prescriptive use. I think a court would reject this argument, as it runs contrary to the policy goals of prescriptive easements: to recognize long-standing uses of others' land.

Jay did not use East Egg exclusively (he made no effort to exclude others), so he cannot claim ownership by adverse possession.

If Jay Holds an Easement

If, as I have argued, Jay holds an easement to gather feathers, then Tom cannot prevent him from gathering feathers, and *a fortiori*, cannot demand the return of previously gathered feathers. (Jay's right to gather them indicates that the feathers become his property by first possession once he picks them up.) Tom's use of a shotgun to threaten him is impermissible interference with the easement, and also tortious and criminal assault. Tom's burning of the feathers may also constitute impermissible interference with the easement, but this is a closer case.

If Jay Does Not Hold an Easement

Otherwise, Tom can prevent Jay from gathering feathers. Until this point, Jay has been trespassing each year, albeit in good faith, as he had a good reason to believe he held a valid easement. Tom can definitely burn the feathers, as Jay has no rights he must respect.

Tom cannot demand a return of feathers further back than 2004, as there is a five-year statute of limitations for conversion. (Before 1995, Tom was not the owner, but on purchasing East Egg, he may have succeeded to their accrued causes of action against Jay for trespassing.) Even within that five-year time frame, once the feathers have been stuffed into pillows, Jay may be able to argue that they've been sufficiently transformed that he can keep them (and pay Tom their value instead). And at any rate, once the pillows have been sold, the purchasers could argue that they are good-faith purchasers for value, although Tom will reply that Jay had void title as a thief.

Advice

Jay probably has sufficient rights that he can gather feathers, regardless of what Tom wants. The only question is whether it is worth the hassle and expense of litigation. Since Jay's business is involved, he may be more invested in the lawsuit than Tom would be. A negotiated agreement would be the best outcome, although Tom's actions bespeak hostility and he may want more compensation than two boysenberry pies. It may be better for Jay to avoid East Egg and gather feathers elsewhere. If (unlikely) George holds an interest, Jay could negotiate with him rather than with Tom.

Comments

Many of you tripped up on the distinction between a contract and a deed, and therefore assumed that Jay's rights on East Egg ended at Myrtle's death. Many of you also overlooked the rule against restraints on alienation, which led to long disquisitions on George's rights. But George, like Lord Hobnob, is nowhere in the picture. As between Jay and Tom, Tom is indisputably the owner of East Egg, and Jay has at most an easement. I was also surprised at the number of you who forgot that the exam specified, on page 1, that this is a race-notice state and what the statutes of limitation for adverse possession and conversion are. Most of you saw and dealt reasonably with the two main issues: the chain of title and Jay's potential easement by prescription.