2d Civil No. B314862

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FIVE

TUFELD CORPORATION,

Plaintiff, Respondent, and
Cross-Appellant,

v.

BEVERLY HILLS GATEWAY L.P.,

Defendant, Appellant, and
Cross-Respondent.

Appeal from the Los Angeles County Superior Court
Case No. BC691352
The Honorable Dennis Landin, Judge Presiding

APPELLANT'S OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Case No.: B314862

Case Name: *Tufeld Corporation v. Beverly Hills Gateway L.P.*

Please check the applicable box:

□ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Asset Two, Ltd.	Owners of greater than 10 percent interest in Beverly Hills Gateway, L.P.
2.	
3.	
4.	
5.	

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INTRODUCTION

A tenant paid its landlord $1.5 million in order to extend a ground lease from 2058 to 2123. But ten years later, the landlord had a change of heart. Despite having repeatedly affirmed the extension's validity for more than a decade, the landlord sued the tenant to invalidate not just the extension, but the entire lease.

The landlord, respondent Tufeld Corporation (Tufeld), relied on Civil Code section 718, under which "[n]o lease or grant of any town or city lot . . . which provides for a leasing or granting period in excess of 99 years, shall be valid . . . ." The trial court rejected Tufeld's more extreme arguments seeking cancellation of the entire lease. But it ruled that under section 718, the lease was absolutely void after 2102—99 years after appellant Beverly Hills Gateway, L.P. (BHG) became the ground tenant in 2003. The trial court recognized that basic principles of equity would normally foreclose Tufeld's belated turnabout regarding the lease's validity, but it believed the statute did not permit it to apply those principles.

The trial court's partial cancellation of the lease is wrong for multiple reasons. Leases violating section 718 are not absolutely void, but only *voidable*—and only at the *tenant*'s option. (§ I.B, *post*.) Section 718's history makes clear that its purpose is to protect tenants—not landlords, third parties, or the general public. A landlord therefore cannot invoke section 718 to void the lease, and a tenant can elect to forgo section 718's protection and demand enforcement of the lease's full term.

And even if section 718 could, in theory, cancel portions of some overlong leases against the tenant's wishes, the trial court still erred. (§ I.C, *post*.) The rule that "a contract made in violation of a regulatory statute is void" has "[a] wide range of exceptions." (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291 (*Asdourian*).) *Asdourian* names three factors in this analysis, all of which favor BHG: Section 718's underlying policy supports full enforcement of the lease through 2123; the lease's purported illegality is only *malum prohibitum*, and minimal at that; and the particular facts—including the trial court's well-supported findings of estoppel and laches—strongly support enforcement. (See *Asdourian*, at pp. 291-293.)

A separate error flows from the primary error. The trial court awarded BHG restitution to compensate it for the approximate value of the 21 years by which the court shortened the lease. But the court refused to award BHG interest on the restitution. This Court should not need to reach that issue, which will be mooted by enforcement of the lease extension through 2123. But if it does reach the issue, it should reverse the denial of interest. (§ II, *post*.)

One way or the other, the judgment must be reversed.

STATEMENT OF FACTS

A. The Property, The Parties, And The Problem.

Landlord Tufeld Corporation owns property at the western tip of Beverly Hills' Golden Triangle (Property). BHG is the Property's current ground tenant and the owner of the iconic 10-story office building on the Property.[1]

A 2007 amendment to the ground lease extends its term to 2123. (10AA/5473-5476.) But Civil Code section 718 says "No lease or grant of any town or city lot . . . which provides for a leasing or granting period in excess of 99 years, shall be valid."[2]

The question is whether section 718 shortens this lease.

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[1] Designed by "master architect" Sidney Eisenshtat in the post-World War II modernistic style, the building, with its unique curved façade, is one of Beverly Hills' historically and architecturally significant structures. (See Jones & Stokes, City of Beverly Hills Historic Resources Survey Report (rev. Apr. 2007), pp. 5-7; see also Appendix B, Phase III DPR 523 Forms, Friar's Club and 9777 Wilshire Boulevard, available at <https://www.laconservancy.org/sites/default/files/community_documents/City%20of%20Beverly%20Hills%20Historic%20Resources%20Survey%2C%20commercial%20properties%20update%2C%202006.pdf>.)

[2] Further undesignated statutory references are to the Civil Code.

B. In 2003, BHG Acquires The Leasehold By Assignment, Which The Trial Court Finds Was A Novation.

1. BHG acquires an existing ground lease.

In 1960, Tufeld ground-leased the Property through 2058. (10AA/5232, 5234.)

In 2003, the then ground tenant, Douglas Emmett, arranged to assign its leasehold to BHG. The assignment was accomplished in two steps over a four-day period. First, Douglas Emmett assigned the leasehold "jointly and severally" to BHG and two BHG-related entities. (10AA/5445-5446; RT/223-225.) Then, the two related entities immediately assigned their partial interests to BHG. (12AA/6028-6037.)

Two sections of the lease address assignment:

- Section 5.03 allows the tenant to assign or transfer the leasehold interest "to any other individual, corporation, partnership, or other entity." (10AA/5262.) "Such assignment shall be deemed to have been made for the unexpired portion of the term of this lease, and [for] all right, title and interest of the Tenant . . . ." (10AA/5263.) The assigning tenant must give Tufeld written notice of an assignment. (10AA/5262-5263.)
- Section 8.02 states that upon assignment, "the liabilities or other obligations under this lease of the assignor who shall have so assigned shall cease and terminate to the extent not theretofore accrued or incurred." (10AA/5339.)

2. The acquisition constitutes a novation.

A week before the assignments, Douglas Emmett sent Tufeld a letter stating that it "will be assigning its interest in the Lease to Maxxam Enterprises, LLC, Beverly Hills Gateway, L.P., or an affiliate thereof." (12AA/6285; RT/593.) On the day it signed the assignment, Douglas Emmett sent Tufeld a copy of the final, executed assignment agreement. (12AA/6286-6295.) It is undisputed that Douglas Emmett's letter satisfied the lease's notice provision. (9AA/5142; RT/472-476.)

The trial court found that the Douglas Emmett assignment effected a novation by "'the substitution of a new debtor in place of an old one, with the intent to release the latter.'" (9AA/5145 [quoting § 1531].)

C. In 2007, Tufeld And BHG Negotiate And Sign A Lease Amendment Extending The Term Through 2123.

A few years later, BHG determined that it would need "to do some upgrades to the building" but "didn't feel there was enough time left on the lease for the amount of money that they were going to invest." (RT/455.) BHG also became concerned that financing and selling the leasehold would become more difficult as the term grew shorter. (RT/254-255.)

In 2007, BHG's Joseph Daneshgar approached Tufeld's Howard "Bud" Tufeld about amending the lease or potentially buying Tufeld's fee interest. When Mr. Tufeld refused to sell (RT/344), Mr. Daneshgar expressed BHG's concerns regarding upgrade costs and the lease's limited term (RT/442). He asked

whether Tufeld would agree to a 49-year extension in return for $1 million. (RT/345.)

When Mr. Tufeld declined because of potential tax expense (RT/345), Mr. Daneshgar increased BHG's offer to $1.5 million in return for a 65-year extension, and Mr. Tufeld agreed. (RT/345-346.) At that time, neither Tufeld nor BHG realized that an extension could conflict with section 718. (RT/317, 443.)

As negotiations continued, the parties added three other terms:

- During the extension period (that is, after 2058), rent reappraisals would occur more frequently than in the original lease and BHG's ground rent would increase from 6 percent of the Property's appraised value to 6.5 percent. (10AA/5474; RT/346.)
- Tufeld granted BHG a right of first refusal if Tufeld tried to sell the Property. (10AA/5474.) BHG wanted this term to protect its investment in the leasehold from any adverse sale. (RT/363, 460.) For his part, Mr. Tufeld was "dismissive of any thought that he would ever sell," so the term "didn't matter to" him. (RT/362, 612; see also RT/502-503.)
- Tufeld granted BHG all "rights to the oil and other minerals underneath the subject property" and surface drilling rights. (10AA/5473.) These rights were worth no more than $250 per year (RT/461), and the original ground lease already granted the tenant all subsurface rights (10AA/5232-5233; RT/326). Mr. Tufeld proposed

> this term at the suggestion of an attorney friend, believing the grant of rights would allow Tufeld to report BHG's $1.5 million payment as capital gains rather than ordinary income. (RT/347, 462-465.)

Messrs. Tufeld and Daneshgar executed the ground lease amendment on May 24, 2007 (2007 Amendment). The extension clause stated:

> Landlord and Tenant hereby agree to extend the Term of the Lease for an additional period of 65 years effective January 1, 2059 [the day after the original termination date of December 31, 2058]. The new termination date of the Lease, pursuant to Section 2.01 of the Lease, will be December 31, 2123.

(10AA/5474.)

Mr. Tufeld was satisfied with the deal, and his view never changed. When asked, "Did there come a time when you became unsatisfied with the deal?" he said no. (RT/465; see also RT/512 [Tufeld director Melissa Tufeld: This lawsuit "wasn't based on the fact that it was—that we didn't feel that [the 2007 Amendment] was a good deal"].)

D. Over The Next Decade, BHG Twice Borrows Tens Of Millions Of Dollars Using The Leasehold As Security, With Supporting Estoppel Statements From Tufeld.

1. In 2007, BHG borrows $47 million; Tufeld executes an estoppel statement confirming the Lease's term and validity.

Soon after the 2007 Amendment's execution, BHG used the extended leasehold as collateral for a $47 million loan. As a condition of funding the loan, BHG's lender, Countrywide Financial, demanded that Tufeld execute an estoppel statement, and Tufeld did so. (RT/366.) In the statement, Tufeld "certifie[d] and represent[ed]" to Countrywide and "agree[d] with [Countrywide] and [BHG]" that:

- Tufeld "is the current lessor" and BHG "is the current lessee");
- The lease "terminates on December 31, 2123"; and
- The lease "is in full force and effect."

(10AA/5502.) Tufeld made all of the above statements "knowing that [Countrywide] will rely on the same in entering into" BHG's leasehold-backed loan." (10AA/5505.)

After Tufeld executed the 2007 estoppel statement, the loan closed. (11AA/5749-5750; 12AA/6073-6109, 6246-6254.) BHG used some of the loan proceeds to refinance an old loan on the property, then put "most of" the nearly $20 million left over "back

into the building" for improvements. (RT/547-550; 11AA/5749-5750, 5756-5757; 12AA/6241-6245.)

2. Tufeld and BHG disagree regarding rent adjustment.

In 2016 and 2017, the Property's bare land value was reappraised in connection with the ground lease's rent reassessment provisions. (RT/445.) The reappraisal increased BHG's monthly rent paid to Tufeld from $30,500 to $200,000. (RT/445, 498.)

But it also resulted in ill will. After the reappraisal, BHG sued Tufeld for allegedly colluding with the appraisers. (RT/231.) BHG and Tufeld eventually settled, executing a lease amendment confirming the rent increase. (12AA/6296-6300.) Although BHG "always paid its rent on time," Melissa Tufeld considered BHG's suit "a powerful reason not to trust them." (RT/499.)

During the rent dispute litigation, Tufeld was represented by the same counsel appearing in this suit. (12AA/6116-6117; RT/507.) Multiple Tufeld court filings in that litigation stated that the lease "will not terminate until December 31, 2123." (12AA/6119, 6137.)

3. BHG refinances and borrows $49 million; Tufeld again signs an estoppel statement.

In 2017, BHG sought a $49 million loan from Deutsche Bank to refinance its Countrywide loan. (RT/293.) During the approval process, Tufeld was again represented by the same counsel appearing in this suit, and Tufeld again furnished an

estoppel statement on which BHG and Deutsche Bank relied. (11AA/5737-5743.)

In the 2017 estoppel statement, Tufeld (1) "certif[ied] and represent[ed]" that "[t]he term of the Lease commenced on February 1, 1964, and terminates on December 31, 2123" and (2) confirmed that the lease is "is in full force and effect." (11AA/5738.)

After Tufeld signed the 2017 estoppel statement, the Deutsche Bank loan closed. (12AA/6149-6205, 6283-6284.)

E. Tufeld Discovers Section 718 And—Embittered By The Rent Adjustment Proceedings—Seeks To Invalidate The Entire Lease.

A few months later, BHG consulted a broker about selling its ground tenancy (RT/303-304), and the broker began marketing efforts (11AA/5760; 12AA/5854; RT/302-303). But in January 2018, a prospective assignee reported that "the title company was not able to give them the title insurance for the term of the lease." (RT/316.) This appears to be when the lease's apparent conflict with section 718 first surfaced.

Tufeld learned of the alleged lease-length issue around the same time, but it did not contact BHG (by then a 15-year ground tenant that had "always paid its rent on time"). (RT/499.) Instead, just weeks after BHG's prospective assignee/buyer raised its concerns (and just five months after executing the 2017 estoppel statement), Tufeld sued BHG, invoking section 718 and seeking to cancel the entire lease. (10AA/5277, 5281.)

Melissa Tufeld explained that Tufeld did not warn BHG about the lawsuit because "we didn't trust them" after the rent-reset dispute. (RT/490.) "[W]e would have felt happy if they were—we didn't have to deal with them anymore, to be honest with you." (RT/492.)

F. This Litigation.

1. Tufeld sues to cancel the 2007 Amendment—or the entire lease.

Tufeld's complaint alleged that because the lease's total length (measured from its initial 1960 commencement date through its 2123 termination date) exceeded 99 years, section 718 required cancellation of the entire lease—and Tufeld could therefore immediately eject BHG and take the Property free and clear. (10AA/5281; RT/494 [Melissa Tufeld: "[O]ne of the objects of the complaint was to invalidate the entire lease"].) Alternatively, Tufeld sought to cancel the 2007 Amendment and obtain declaratory relief that the lease expires at the end of 2058, as under the original ground lease. (10AA/5280-5281.) Tufeld also sought to quiet title to its claimed interests in the Property. (10AA/5281-5282.)

2. The trial court partly sustains BHG's demurrer, but rules that Tufeld has stated a valid claim for declaratory relief.

BHG demurred, arguing that Tufeld's claims were barred by the statute of limitations and laches. (1AA/65, 77-82.) The trial court partly sustained the demurrer.

As relevant to this appeal:

- The court rejected Tufeld's effort to invalidate the entire lease, noting that "leases subject to section 718 'would not be void, except as to the excess of the period' in the statute." (1AA/296, 298 [quoting *Harter v. City of San Jose* (1904) 141 Cal. 659, 667 (*Harter*)].) "Thus, it appears to the Court that this action is in fact a pure action for declaratory relief, i.e., to declare the portion of the lease that runs beyond 99 years invalid under section 718," a claim the court found unripe and thus not subject to the statute of limitations (it would ripen upon the original lease term's expiration). (1AA/298-300.)
- The court did not reach "whether defendant satisfies the laches elements." (1AA/301.) Instead, it held that laches was unavailable as a matter of law. (1AA/300-301.) According to the court, laches "'has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy.'" (1AA/300 [quoting *Colby v. Title Ins. & Trust Co.* (1911) 160 Cal. 632, 644 (*Colby*)].)

3. BHG answers and cross-complains.

BHG answered and cross-complained. In its operative second amended answer, BHG pleaded defenses of laches, waiver, and estoppel (6AA/2788, 2797); alleged that Tufeld's complaint failed to state a claim because "Section 718 does not apply" to the circumstances of this case (6AA/2795); and alleged that BHG's acquisition of the leasehold constituted a novation, so that even if

section 718 applied, its 99-year term limitation began running anew in 2003 (6AA/2798).

BHG's cross-complaint sought declaratory relief (1) confirming the lease's validity through 2123, or alternatively (2) confirming the lease's validity through 2102—99 years after the alleged 2003 novation. (4AA/1683, 1688-1689.) BHG also alleged unjust enrichment: If the lease were cancelled or shortened, then it would be unjust for Tufeld to retain the full $1.5 million that BHG paid for the 2007 Amendment. (4AA/1689.)

Tufeld answered the cross-complaint and alleged that the 2007 Amendment was unconscionable, among other defenses. (6AA/2804, 2807.)

4. The trial court denies BHG's summary judgment motion, adopting its previous reasoning regarding laches.

BHG moved for summary judgment regarding the claims in Tufeld's complaint, arguing that the full agreed lease term, through 2123, must be enforced and therefore Tufeld's sole remaining declaratory relief claim lacked merit.

In its motion, BHG acknowledged the trial court's prior ruling relying on *Colby* and its claimed limitations on contract enforcement. (2AA/633, 652.) But BHG also cited other authorities holding that the rule prohibiting enforcement of a contract that violates a statute "'is not an inflexible one to be applied in its fullest rigor under any and all circumstances,'" including where "failing to enforce a contract will lead to unjust

enrichment." (2AA/642, 652-654 [quoting *Asdourian*, *supra*, 38 Cal.3d at p. 291; citing *Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288; *California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506 (*Cal. Phys.*)]; see also RT/41, 51-53 [summary judgment argument, citing *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199 (*Tri-Q*)].)

The trial court denied the motion. (5AA/2425-2431.) The court referred to *Colby* and the demurrer ruling and stated that BHG's separate authorities were not "similar enough to the situation now before this court to warrant a result different from that previously reached." (5AA/2427.) Accordingly, the court concluded that it was "comfortable adopting the analysis and conclusions" in the demurrer ruling and rejected BHG's argument for enforcement of the lease through 2123. (*Ibid.*)

5. The trial court grants summary adjudication for BHG, finding that a novation occurred in 2003 and that the lease is valid through at least 2102.

BHG then moved for summary adjudication regarding its novation claim—that is, its claim that the 2003 leasehold assignment constituted a novation resetting section 718's 99-year limit, and therefore even if section 718 applied to the lease, the term would run until 2102. (6AA/2810, 2822-2825.)

The trial court agreed and granted the motion, finding that even if section 718 applied, the novation "entitled [BHG] to a declaration that its lease does not terminate until 99 years from October 29, 2003." (6AA/3183, 3188.)

G. The Trial And Statement Of Decision.

1. Despite summary adjudication and in limine rulings regarding novation and unconscionability, the trial court permits full evidentiary presentations on those matters.

Although the summary adjudication ruling resolved some of the parties' disputes, others remained, including: (1) BHG's claim that the lease is valid between 2102 and 2123; (2) BHG's claim for restitution of money paid to Tufeld if the lease term were partially cancelled; and (3) Tufeld's "affirmative defenses" to lease enforcement, "including alleged unconscionability." (9AA/5144.) The trial court set a bench trial regarding those issues.

Before trial, BHG moved in limine to exclude any evidence suggesting that the lease would end before 2102, arguing that the summary adjudication ruling precluded such evidence. (6AA/3191-3196.) BHG also moved in limine to exclude evidence regarding the lease's supposed unconscionability. (6AA/3199-3211.) The court granted both motions. (6AA/3309.)

Nevertheless, during trial the court allowed Tufeld to present extensive evidence on both issues, over BHG's standing objection. (9AA/5154; see, e.g., 6AA/3318, 3339-3342; RT/219, 236-237, 718-722.)

2. The trial court shortens the lease term from 2123 to 2102 and awards BHG restitution, but denies prejudgment interest.

Following an eight-day trial, the court filed a statement of decision and judgment addressing the issues above. (9AA/4660-4676, 4682-4685.) After Tufeld moved for a new trial, the court briefly reopened proceedings under Code of Civil Procedure section 662 and entered an amended statement of decision and judgment. (9AA/4698-4715; 9AA/5095-5096, 5140-5161.) The amended statement is largely identical to the initial statement, except for denying BHG prejudgment interest. (§ 2.f., *post*.)

a. Novation.

The trial court confirmed its previous ruling that the assignment to BHG was a novation resetting section 718's 99-year limit; therefore, the statute's operation would invalidate BHG's lease term only after 2102. (9AA/5145-5146.) The court rejected "Tufeld's contentions that the entire Ground Lease or the 2007 Amendment are void." (9AA/5146.)

b. Section 718.

In its trial briefing, BHG argued that, in light of section 718's purpose and text, overlong leases are merely voidable rather than absolutely void, and therefore the negotiated lease term through 2123 should be enforced. (6AA/3347, 3367-3379.) The court rejected this argument,

holding that section 718 makes leases exceeding 99 years "void as to the excess of th[at] period." (9AA/5146.)

c. Alternative findings on equitable issues.

Consistent with its demurrer ruling, the trial court once again concluded that BHG's equitable defenses, including estoppel and laches, were categorically unavailable, because the lease term violates section 718. (9AA/5147.)

But the court also made alternative findings: "Assuming *arguendo* that the equitable doctrines BHG has invoked are available," it found that each of them would apply. (9AA/5147.)

The court found:

Estoppel. "Tufeld led BHG to believe the Ground Lease extended to 2123" by reaffirming the lease's validity in the estoppel statements and during the rent dispute. (9AA/5148.) BHG and its lenders "relied on Tufeld's representations in closing tens of millions of dollars in loans secured by BHG's leasehold interest." (*Ibid.*)

As instruments, moreover, the estoppel statements were "subject to the estoppel by contract doctrine, under which the facts 'recited in a written instrument are conclusively presumed to be true as between the parties thereto'" for estoppel purposes. (9AA/5148.) "If estoppel is available, then the facts of this case compel its application, requiring full enforcement of the Ground Lease term through 2123." (9AA/5147.)

Laches. The 11-year delay between the 2007 Amendment's execution and Tufeld's suit was unreasonable. "Tufeld had the financial resources and sophistication necessary to ascertain the law" governing long leases, but failed to do so. (9AA/5148.) Tufeld's acquiescence in the long lease prejudiced BHG, because "BHG made capital improvements and borrowed millions of dollars in reliance on the extended lease term (one that Tufeld had repeatedly recognized in estoppel statements)." (*Ibid.*) "As with estoppel, if laches is available, then the facts of this case compel its application." (*Ibid.*)

Other equitable findings. Enforcing the lease through 2123 "would be consistent with [section 718's] broader policy and this case's unique circumstances." (9AA/5149.)

As to policy: Section 718 "traces its roots to abusive use of perpetual land leases during the early 19th century in rural New York—a situation immensely far removed, both physically and temporally, from these sophisticated parties executing a long-term, multi-million-dollar ground lease on commercial property in Beverly Hills, and then repeatedly reaffirming that lease's validity for years afterwards." (9AA/5149-5150.)

As to circumstances: "Both parties agreed to the 2007 Amendment. Both parties reaffirmed the validity of the lease term therein for many years. Both parties should be held to their agreement." (9AA/5150.)

On this basis, "the full lease term should be validated and enforced" if the court's conclusion regarding section 718's mandatory operation were incorrect. (9AA/5150.)

d. Unconscionability.

The trial court rejected Tufeld's unconscionability defense. Concluding that there was no procedural unconscionability, the court found that Messrs. Tufeld and Daneshgar "were experienced and sophisticated businessmen" with "access to professionals who could advise them on the wisdom of entering into the agreement." (9AA/5154-5155.) Regarding substantive unconscionability, the 2007 Amendment's primary goal of extending the lease "for a very long period does not seem unusual or unfair," given the Property's commercial use. (9AA/5155.) Mr. Tufeld himself "was satisfied with the terms of the 2007 Amendment . . . ." (*Ibid.*)

e. Unjust enrichment and restitution.

The trial court determined that BHG had paid Tufeld $1.5 million as consideration for the 2007 Amendment's full term, and "Tufeld was unjustly enriched as a result of the reduction of the lease term by 21 years." (9AA/5151.)

But despite extensive briefing and argument, the trial court could find no "reliable, undisputed projection methods" to value the lost period. (9AA/5153.) And "the parties' negotiating history could not serve as a reliable measure of the restitution amount" either. (*Ibid.*) The court lamented "the significant difficulty in precisely valuing a portion of a long-term tenancy." (*Ibid.*)

Ultimately, the trial court awarded restitution under a pro rata formula: Having invalidated 21 years of a 65-year extension, the court awarded 21/65 of the $1.5 million payment—$484,615. (9AA/5151-5153, 5156.)

f. Prejudgment interest.

With restitution calculated, the parties disputed whether prejudgment interest should accrue on the restitution award.

In its original statement of decision, the trial court awarded prejudgment interest under section 3287, subdivision (b). (9AA/4673.) But the amended statement of decision struck the prejudgment interest award based on the court's finding that sections 3287 and 3288 did not permit prejudgment interest on restitution awards. (9AA/5154.)

H. Judgment And Appeal; Statement Of Appealability.

On August 25, 2021, the trial court entered an amended judgment declaring that: (1) BHG's ground tenancy and right of first refusal run through October 30, 2102; (2) BHG's mineral rights are perpetual; and (3) BHG is entitled to $484,615 in restitution. (9AA/5158-5161.)

The judgment finally resolves all claims and is therefore appealable under Code of Civil Procedure section 904.1, subdivision (a). BHG's notice of appeal, filed the day after entry of judgment, was timely. (9AA/5163; Cal. Rules of Court, rule 8.104(a)(1).)

STANDARD OF REVIEW

This appeal presents two pure questions of law: whether section 718 limits the 2007 Amendment's term, and whether courts can award prejudgment interest on a restitution award. These are reviewed *de novo*. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 [statutory interpretation reviewed *de novo*]; *City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1477 [availability and rate of prejudgment interest reviewed *de novo*].)

ARGUMENT

I. SECTION 718 DOES NOT REQUIRE SHORTENING THE LEASE'S TERM.

A. Section 718.

1. Section 718's effect.

As relevant here, section 718 states:

> 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 . . . .

It is well established that *if* the statute applies, it does not invalidate the entire overlong lease; it only shortens the lease term to 99 years. (See *Harter*, *supra*, 141 Cal. 659, 667 ["Such lease, *if subject to* [section 718], would not be void, except as to the excess of the period," italics added]; accord, *Shaver v. Clanton* (1994) 26 Cal.App.4th 568, 576 (*Shaver*).)

But this appeal does not ask what happens to the 2007 Amendment *if* section 718 applies. It asks *whether section 718 applies at all*.

The answer is no, for the reasons we present below. (§§ I.B. & I.C.) Both reasons depend in part on section 718's purpose.

2. Section 718's purpose.

a. Legislative history.

Section 718's only discernible purpose is to protect individual tenants and thereby promote real property investment. But the history underlying the statute's enactment invites skepticism regarding whether it practically serves even that purpose.

Section 718's direct predecessor appeared in the uncodified Statutes of 1851:

> No lands within this State shall hereafter be conveyed by lease or otherwise except in fee and perpetual succession, for a longer period than ten years; nor shall any town or city lots, or other real property, be so conveyed for a longer time than twenty years.

(7AA/3760-3761 [Stats. 1851, ch. 11, § 1, p. 169]; see 6AA/3683, 3693 [note to former § 718, enacted in 1872, showing Stats. 1851 as source].)

More than twenty years later, California's first Civil Code included the original version of section 718:

> No lease or grant of any town or city lot, for a longer period than twenty years, in which shall be reserved any rent or service of any kind, shall be valid.

(6AA/3683, 3693 [former § 718, enacted 1872].) In 1903, the time limit was extended from 20 to 50 years (Stats. 1903, ch. 210, § 1, p. 247); in 1911, it was extended to 99 years (Stats. 1911, ch. 708, § 1, p. 1391).

History discloses no direct evidence of the Legislature's original purpose in limiting lease terms. But contemporaneous sources strongly suggest that section 718 is derived from this similar provision in New York's 1846 Constitution:

> No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

(N.Y. Const. of 1846, art. I, § 14, available at <https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1846-NY-Constitution.pdf>.)

Suggestively, the original 1872 version of section 718 used the New York law's legalese "in which is reserved any rent or service of any kind," and the reference to "reserv[ing] any rent or service of any kind" continues to appear in section 718 today. (See also 6AA/3683, 3685 [Cal. Law Revision Com., Revised Laws of the State of California: Civil Code (1871 ed.), Preface p. iv] ["Most of our statutes have been taken . . . from sister States, and mostly from New York"]; 6AA/3691, 3693 [original § 718, citing N.Y.C.C. § 203 as source]; 6AA/3746, 3748 [Commissioners of the Code, Civil Code of the State of New York (proposed 1865), § 203, citing "sections 14 and 15 of Article I of the Constitution"]; Kleps, *The Revision and Codification of California Statutes 1849-1953*

(1954) 42 Cal. L.Rev. 766, 767 [Statutes of 1851 were based on New York law].)

The parties and the trial court agree about section 718's origin. (6AA/3318, 3335, fn. 4; 6AA/3347, 3378; 9AA/5149-5150.) So section 718's purpose can best be gleaned by inference from the purpose of New York's similar lease-term limitations.

b. New York's tenant-focused law.

The New York constitution referred to lease term limits for "agricultural land" (N.Y. Const. of 1846, art. I, § 14), but section 718 limits leases of "town or city lot[s]." There is no obvious link between policy interests concerning agricultural leases and policy interests concerning urban leases. Moreover, the New York rule arose from circumstances unique to rural New York in the late 1700s and early 1800s.

During that period, most New York farms were held in "leases in fee": Tenants and their heirs held fee-like interests, but they were bound in perpetuity to lease-like obligations. (See McCurdy, The Anti-Rent Era in New York Law and Politics 1839-1865 (2001) pp. 11, 24 (McCurdy); Kades, *The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, and Economics* (2002) 27 L. & Soc. Inquiry 941, 942-944 (Kades); Persico, *Feudal Lords on Yankee Soil*, American Heritage (Vol. 25, Oct. 1974), available at <https://www.americanheritage.com/feudal-lords-yankee-soil#1>.) These lease-like obligations commonly included a "quarter-sale" provision—a tenant selling his interest had to pay the landlord one quarter of the proceeds. (Kades, at p. 958; Sutherland,

Tenantry on the New York Manors (1955-56) 41 Cornell L.Q. 620, 628 (Sutherland).)

This system's many tensions led to years of social, legal, and political conflict. (See Kades, *supra*, 27 L. & Soc. Inquiry at pp. 944-948.) Eventually, tenants held power at the 1846 New York constitutional convention, where they enacted the twelve-year limit on agricultural leases. (See McCurdy, *supra*, pp. 260-262.) But this provision did not advance tenant protections on its own. Rather, it operated in concert with related provisions to eliminate leases in fee. Those related provisions included one declaring all lands to be "allodial" (the opposite of "feudal") and another prohibiting quarter-sale provisions. (N.Y. Const. of 1846, art. I, §§ 12, 13, 15; see McCurdy, *supra*, at pp. 260-262; *allodial*, Black's Law Dict. (11th ed. 2019) ["Held in absolute ownership"].) Only as part of this set of rules did the twelve-year limit meaningfully protect tenants.

Although one court has claimed that New York's twelve-year limit goes beyond protecting tenants and is also "designed to enact a public policy for the benefit of the people of the State" (*Parthey v. Beyer* (N.Y. 1930) 228 A.D. 308, 313 [cited by Tufeld at 8AA/4455]), it oversimplifies history to say that the twelve-year limit was meant to promote the public good on its own. Long leases in themselves cause no identifiable harm to the public interest. Common law recognized no limit to lease durations—indeed, Blackstone reported that leases "for three hundred years or a thousand" were "certainly in use" as far back as the 1300s and for centuries thereafter. (2 Blackstone's

Commentaries (18th ed. 1929) p. 142; see also Lesar, *Landlord and Tenant Reform* (1960) 35 N.Y.U. L.Rev. 1279, 1282 (Lesar); Williams et al., Principles of the Law of Real Property (1856) p. 356 (Williams).) And American common law continues to recognize no durational limits. (Rest.2d Property, § 1.4, cmt. f [imposing "no limit on the fixed or computable period of time that the parties may specify" for lease's duration].)

We have found nothing in the history of the New York law suggesting any belief that long leases, standing alone, hindered development. (See Lesar, *supra*, 35 N.Y.U. L.Rev. at p. 1283; Casner, American Law of Property (1952) 211 & fn. 5.) And unlike some other grants, "[a] lease, no matter how long, does not offend the rule against perpetuities because it does not suspend the power of alienation. The concurrent action of lessee and lessor can always pass a clear estate and discharge any burdens or conditions created by the lease." (Jones, A Treatise on the Law of Landlord and Tenant (1906) p. 136 (Jones); accord, Annot., Lease Renewal Provision as Violating Rule Against Perpetuities or Restraints on Alienation (2014) 99 A.L.R.6th 591.)

In sum, the public harm that the New York constitution counteracted with its twelve-year rule arose not from long lease terms as such, but from the system of leases in fee. This system denied individual tenants the full value of their investments, created a disincentive for individual tenants to improve their land, and thus hindered development of rural land. (See Kades, *supra*, 27 L. & Soc. Inquiry at pp. 944, 957-958.) The twelve-year rule prevented this public harm by enacting term limits—but

only within a set of rules designed to dismantle that entire system.

c. California's derivative law.

In California, by contrast, no evidence suggests that section 718 or its predecessor were enacted as part of a set of rules aiming to end an exploitative economic system. No California case law articulates any particular purpose at all. (See also Stewart, *Ninety-Nine Year Leases* (1918) 18 Nat. Real Estate J. 157, 157-158 [noting the difficulty of determining reasons for 99-year limitations and suggesting that "ninety-nine-year leases originated in a belief in the magical power of the number nine"].)

But what evidence there is—that the statute was based on a New York law whose purpose was unquestionably tenant-protective—negates any possible purpose for section 718 other than protecting tenants.

B. Section 718 Makes The 2007 Amendment Voidable, Not Void, And Tufeld Has No Right To Avoid Its Enforcement.

Section 718's text, especially viewed in light of its only discernible purpose—protecting tenants—does not render leases subject to its operation *void*, but rather merely *voidable*, and only at the tenant's option. Therefore, landlord Tufeld may not invoke section 718 to void the 2007 Amendment here.

1. The 2007 Amendment is only voidable, not void.

a. Voidable contracts can be enforced; only void ones cannot.

"A void contract is without legal effect"; it "'has no legal entity [*sic*] for any purpose and neither action nor inaction of a party to it can validate it . . . .'" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 929, original ellipsis.) "A voidable transaction, in contrast, 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' [Citation.] It may be declared void but is not void in itself." (*Id.* at p. 930.)

b. A contract contravening a statute may be either void or voidable.

"[U]nless no other conclusion is possible from the words of a statute, it should not be held to make agreements contravening it totally void." (*Safarian v. Govgassian* (2020) 47 Cal.App.5th 1053, 1068 (*Safarian*).) Beyond this preference for voidability, whether a statute makes a contract void or voidable depends on the statute's purpose and language.

(1) Purpose.

Of these, purpose is paramount. "Every statute must be construed with reference to the objects contemplated by its provisions, so as to effectuate the intention of the Legislature. To this end, the term 'void,' found in Acts of Parliament and statutes of the different States, has been, in numerous instances,

construed to mean voidable only." (*Gee v. Moore* (1859) 14 Cal. 472, 475; see also *In re Reardon's Estate* (1966) 243 Cal.App.2d 221, 229 (*Reardon*) [citing *Gee* and stating that "the true purpose of the statute should control over a literal interpretation"].)

Statutes that protect specific parties. Generally speaking, if a statute aims to protect one or both parties to a transaction, then the protected parties are entitled to avoid enforcement. But if a statute aims to protect outsiders, then the contracts it regulates are absolutely void. "The words 'void' or 'invalid,' when appearing in statutes which are not for the benefit of the public at large, are regarded as equivalent to 'voidable' where none other than a particular person or class of persons is the object of the statutory protection." (*Reardon*, *supra*, 243 Cal.App.2d at p. 229.)

The difference between these categories of statute becomes clear by example. Consider the statute of frauds, which prohibits certain oral contracts: It aims to protect the contracting parties—and only the contracting parties—from fraud. For example, Family Code section 852 requires transmutations of community property into separate property to be in writing. Although "[a] spouse may elect to invoke the protection of the statute," "a stranger to the agreement does not have standing" to invalidate a transmutation on this basis. (*Safarian*, *supra*, 47 Cal.App.5th at p. 1068; see *id.* at pp. 1068-1070 [drawing support from other statutes of frauds].)

Laws against usury are the same. Their purpose is to protect only one side of the transaction—the borrower—from

oppressive interest. (*Zimmerman v. Boyd* (1929) 97 Cal.App. 406, 408.) Only the borrower can invoke the statutes to void a lending contract. (*Willcox v. Edwards* (1912) 162 Cal. 455, 462 (*Willcox*) ["The usurious contract, although said by the statute to be 'void,' is held to be only voidable at the election of the payor"]; cf. *Guthman v. Moss* (1984) 150 Cal.App.3d 501, 510-512 (*Guthman*) [statute governing liquidated damages clause in real estate contracts may be invoked only by buyers, not sellers, because statute is for buyers' protection].)

To be sure, these laws also promote the public good, so they have an impact beyond the transacting parties. But they do so only through the aggregation of the protection they afford to those parties. The statute of frauds protects parties to certain contracts (or purported contracts) from fraud; add up this protection and it promotes the public good by reducing fraud. Usury laws protect individual borrowers from burdensome interest; add up this protection and these laws promote the public good by reducing insolvency. The crucial point is that these laws provide no public good *outside* of the individual transactions that they affect. (Cf. *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048-1049, 1048, fn. 4 [noting that "it is difficult to conceive of a statutory right enacted *solely* for the benefit of private individuals that does not also have an incidental public benefit"].)

It is precisely because these statutes bestow their protection to the parties to a contract, not third parties, that they make the contracts they govern merely voidable. If the protected party decides that invalidating the contract does not advance its

interests, the contract can cause no harm. Voiding it would serve no purpose.

Statutes that protect the public. The party-protective statutes described above contrast with statutes that have been held to void contracts outright. For example, government contracts made by officials with a personal interest in the transaction are generally held void under statutes prohibiting such contracts. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646 & fn. 15 [noting that voidness is unaffected by good faith or absence of fraud].) These statutes do not protect the parties to the transaction; they protect the public generally from corruption and government dysfunction. To hold these contracts merely voidable at the election of a party would undermine these statutes' purpose. (*Stockton Plumbing & Supply Co. v. Wheeler* (1924) 68 Cal.App. 592, 598-599 (*Stockton*) [allowing enforcement of such contracts is "opposed to that sound and essential policy according to which all governments should be administered"].)

(2) Language.

Language matters, too. For example, in *Guthman*, the Court of Appeal held that a statute rendering subject contracts "invalid" made them merely voidable at one party's election. (150 Cal.App.3d at pp. 509-510.) Noting that a related statute "used the word 'void' to apply to clauses made in contravention of its requirements" (*id.* at p. 508), the court concluded that "[b]ecause the Legislature used 'void' in one section and 'invalid' in other sections, it can be presumed that the Legislature did so advertently and intended different meanings to attach to the

words" (*id.* at p. 509; see also *Safarian*, *supra*, 47 Cal.App.5th at pp. 1067-1068 ["'Not valid' does not necessarily mean 'void'"]).

c. Given section 718's purpose and language, leases exceeding 99 years are not void, but only voidable.

(1) Purpose.

As shown above (§ I.A.2, *ante*), if section 718 has any discernible purpose, it is to protect tenants and thereby create incentives for investment and development. Whatever broader public good it creates must flow entirely from the protection that it affords to individual tenants. No one has ever suggested any conceivable benefit that section 718 might confer on outsiders or strangers to the affected leases.

With this tenant-protective purpose in mind, the common-sense result is that section 718 must render subject leases merely voidable at the protected tenant's election, not categorically void. Like statutes of frauds and usury laws, section 718 promotes the public good only by adding up benefits to individual parties. (See *Safarian*, *supra*, 47 Cal.App.5th at p. 1068 [statute of frauds]; *Willcox*, *supra*, 162 Cal. at p. 462 [usury].) In this respect, section 718 differs fundamentally from statutes rendering subject contracts absolutely void, such as laws against government self-dealing that protect the public at large. (See *Stockton*, *supra*, 68 Cal.App. at pp. 598-599.)

(2) Language.

Section 718's language also supports the conclusion that it renders subject leases merely voidable, not entirely void.

The statute directs that no municipal lot leases with terms exceeding 99 years "shall be valid." (§ 718.) It does not say that overlong leases shall be "void," or that no one may enforce them, or that no one can waive the statute's limitations. The absence of this kind of language is significant, because "unless no other conclusion is possible from the words of a statute, it should not be held to make agreements contravening it totally void." (*Safarian*, *supra*, 47 Cal.App.5th at p. 1068.)

Section 718's language makes clear that another conclusion is possible: The direction that "no" overlong leases "shall be valid" renders such leases merely voidable.

Buttressing this conclusion is the statute's historical development. The Legislature first enacted section 718 alongside former section 716, which directed that "[e]very future interest" meeting certain disfavored conditions "is *void in its creation* . . . ." (Former § 716, enacted in 1872, repealed by Stats. 1991, ch. 156, §§ 10, 11, italics added.) By using the language "not valid" in section 718, instead of the term "void" as used in the concurrently enacted section 716, the Legislature presumptively intended a different meaning for section 718 than section 716. (See *Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1343 ["When the Legislature uses different words as part of the same statutory scheme, those words are presumed to have different meanings"]; accord, *Guthman*, *supra*, 150 Cal.App.3d at pp. 508-509 [Legislature presumed to have intended different meanings for "void" and "invalid" in same statutory scheme].)

In addition, section 718's direct predecessor in the Statutes of 1851 *had* used "void": "All leases hereafter made, contrary to the provisions of this Act, shall be *void*." (7AA/3762 [Stats. 1851, ch. 11, § 2, p. 170], italics added.) In adapting this rule into section 718, the Legislature replaced "shall be void" with "shall [not] be valid," again presumably intending a change in meaning. (6AA/3693; *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 715 ["We presume the Legislature intends to change the meaning of a law when it alters the statutory language"].)

The Legislature knew how to use the term "void" when it wanted to. It did not use the term "void" in section 718. Accordingly, the statute's phrase directing that "no" overlong municipal lot lease "shall be valid" must have a different meaning.

(3) None of Tufeld's authorities supports reading "void" into section 718.

We expect Tufeld to offer four cases to suggest that section 718 renders overlong leases void. Each is readily distinguishable.

Two cases relied on section 718 to wholly or partially void leases with potentially perpetual renewals. (*Shaver*, *supra*, 26 Cal.App.4th at pp. 575-576; *Epstein v. Zahloute* (1950) 99 Cal.App.2d 738, 739 (*Epstein*).) But leases with perpetual renewals raise policy concerns altogether different from those raised by a lease with a fixed term that happens to exceed 99 years. While common law recognized no limit to lease terms, it absolutely required leases to have *some* definite end point, "either

expressly fixed or capable of being fixed by computation." (Jones, *supra*, at p. 137; accord, Williams, *supra*, at p. 356.) The *Shaver* and *Epstein* leases violated this ancient rule. (See *Morrison v. Rossignol* (1855) 5 Cal. 64, 65 ["A covenant for a lease to be renewed indefinitely at the option of the lessee is, in effect, the creation of a perpetuity; it puts it in the power of one party to renew for ever [*sic*], and is therefore against the policy of the law"].) Indeed, it was perpetual "leases in fee" that inspired New York's rule, which section 718 emulated. But a policy against perpetual leases says nothing about leases for a long, but nevertheless fixed, term.

Harter, *supra*, 141 Cal. 659, is the only relevant decision of the Supreme Court. It concerned a 25-year lease of city-owned land to a private entity for the purpose of building a hotel, at a time when section 718's maximum term was 20 years. (*Id.* at p. 660; see pp. 38-39, *ante*.) *Harter*'s main question was whether granting the lease would violate the city's charter. (See *id.* at pp. 661-666.) The opinion does not mention section 718 at all until its final paragraph, which observes, "Such lease, if subject to [section 718], would not be void, except as to the excess of the period." (*Id.* at p. 667.) This statement merely explains the result *if* the lease was subject to section 718; it does not analyze *whether* the lease was so subject, or address at all the concept of voidability at the tenant's sole election.

Last comes *Kendall v. Southward* (1957) 149 Cal.App.2d 827. *Kendall* considered a lease made for "the term of the natural life of [the tenant]." (*Id.* at p. 827.) Because this lease was agricultural, it was subject not to section 718 but to section

717, which at the time limited agricultural leases to 15 years. (*Id.* at pp. 827-828.) The court identified no California authority applying section 717; instead, it relied on a number of decisions from other jurisdictions to hold that the lease should be construed to end either 15 years from its commencement or upon the death of the tenant, whichever came first. (*Id.* at pp. 828-830.)

Kendall is distinguishable on at least three points: It interprets section 717, not section 718; it concerns a lease for life rather than a lease of a fixed but overlong term; and, most importantly, it does not consider whether section 717 might render the subject lease merely voidable. In short, *Kendall* addresses the effect on an agricultural lease for life *if* it is subject to section 717—a question altogether different from the one here.

None of these authorities disturbs the conclusion that section 718 renders contravening leases merely voidable at the tenant's election.

2. The 2007 Amendment is fully enforceable against Tufeld.

a. Because section 718 protects only tenants, Tufeld, as landlord, may not invoke it to avoid enforcement of the 2007 Amendment.

Section 718's one-sided, tenant-empowering structure is common to many statutes. "'[W]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class" may still maintain an action "'against

a defendant within the class primarily to be deterred'"; "courts have permitted parties to enforce contracts that contravene statutes enacted for the parties' benefit [citation]." (*Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1048 (*Carter*), quoting *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 154 (*Lewis*).)

This rule applies, for example, to usury (*Willcox*, *supra*, 162 Cal. at p. 462) and to liquidated damages in real estate sales (*Guthman*, *supra*, 150 Cal.App.3d at p. 512; see also *Barrett v. Hammer Builders, Inc.* (1961) 195 Cal.App.2d 305, 309 [land purchaser, as protected party under contract that would be "void" for non-compliance with the Subdivided Lands Act "can either affirm the agreement and perform according to its terms or disaffirm the agreement and recover the sums he has paid"]; *Carter*, *supra*, 188 Cal.App.4th at pp. 1048-1050 [protected tenant could recover excess rent payments despite lease's illegality under rent-control ordinance]).

This is a court-made rule not expressed in the governing statutes. (See *Willcox*, *supra*, 162 Cal. at p. 462 ["The usurious contract, although said by the statute to be 'void,' is held to be only voidable at the election of the payor . . . ."]; *Guthman*, *supra*, 150 Cal.App.3d at p. 512 [holding that "since sellers are not members of that class sought to be protected by the statute, they are precluded from voiding the clause"].) There is accordingly no impediment to applying it here, in light of section 718's tenant-protective purpose.

Under this rule, Tufeld can't invoke section 718 to avoid the extended lease term; only BHG can. If BHG doesn't want the

"protection" of losing part of its leasehold, it should be treated just like the protected buyers, borrowers, and residential tenants in the authorities cited above: It should be allowed to enforce the deal it made with Tufeld.

b. The trial court's findings regarding estoppel and laches bar Tufeld from exercising whatever right it might otherwise have to avoid the 2007 Amendment.

(1) Governing law.

Even assuming, contrary to section 718's history and purpose, that the statute makes overlong leases voidable at the option of both landlord and tenant, that wouldn't help Tufeld. Estoppel and laches would still defeat Tufeld's attempt to invoke section 718.

Generally, if a contract is voidable and one party seeks to avoid it, the counterparty can defend the claim and obtain full contract enforcement based on estoppel or laches. (See *Reno v. American Ice Mach. Co.* (1925) 72 Cal.App. 409, 413 [highlighting equity's availability as "one of the distinctions between void and voidable contracts"]; *Wilson v. Bailey* (1937) 8 Cal.2d 416, 421 [applying estoppel to contract made voidable by statute of frauds]; *Philbrook v. Howard* (1958) 157 Cal.App.2d 210, 215 [applying laches to contract made voidable by party incapacity].)

"The existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the only one that can be

reasonably drawn from the evidence." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) Whether laches applies is also a question of fact, and "[g]enerally, a trial court's laches ruling will be sustained on appeal if there is substantial evidence to support the ruling." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67.)

Because section 718 renders overlong leases voidable—not void—estoppel and laches are available to BHG. And the trial court has already found that if those defenses are available, the circumstances "compel [their] application." (9AA/5147-5148.) That factual finding is binding and dispositive if it rests on substantial evidence. (*Johnson*, *supra*, 24 Cal.4th at p. 67.)

It does.

(2) Estoppel.

The evidence amply demonstrates that Tufeld "intentionally and deliberately led" BHG to believe that the 2007 Amendment was valid through 2123 "and to act upon such belief." (Evid. Code, § 623 ["Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it"].)

Tufeld led BHG to this belief by executing the 2007 Amendment and then reaffirming the tenancy's term over more than a decade in the 2007 and 2017 estoppel statements and its briefing in the rent-reset dispute. (10AA/5290, 5502; 12AA/6119, 6137; see also 9AA/5148.) Tufeld led BHG, along

with two different commercial lenders, to act on the belief that the lease was valid through 2123—they closed multiple rounds of financing totaling nearly $100 million. (11AA/5749-5750; 12AA/6072-6109, 6149-6205, 6241-6245, 6283-6284; see also 9AA/5148.)

There can be no doubt that such conduct supports estoppel. (See *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 533-534 [tenant presented case for estoppel in landlord's conduct "leading the lessee to believe compliance with a particular covenant will not be enforced, and reliance upon this belief by the lessee"]; cf. *Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 629 ["defendant is estopped from contradicting the (lease) termination date set forth in its estoppel certificate"]; Evid. Code, § 622 ["The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto"].)

(3) Laches.

The evidence also strongly supports the trial court's findings regarding laches. Tufeld's eleven-year pre-suit delay was unreasonable: Tufeld is a sophisticated party with the wherewithal to have retained counsel and discovered the conflict between section 718 and the 2007 Amendment much earlier. (9AA/5148-5149; RT/438-439, 451, 461-465, 590-591.)

This delay prejudiced BHG: During the decade-plus that Tufeld treated the ground tenancy as fully valid, BHG obtained loans of $47 million and $49 million in reliance on the

2007 Amendment's validity. (11AA/5749-5750; 12AA/6072-6109, 6149-6205, 6241-6245, 6283-6284.)

And Tufeld acquiesced in the extension of the lease's term to 2123 through the same conduct that estops it from voiding the 2007 Amendment: repeatedly reaffirming the Amendment's validity through 2123. (10AA/5290, 5502; 12AA/6119, 6137; see also 9AA/5148-5149.)

C. Even If Overlong Leases Are Void As To The Excess Term, The Circumstances Of This Case Require Full Enforcement Of The 2007 Amendment.

Although we believe the correct resolution of this case is for the Court to hold that section 718 renders overlong leases only voidable—and only at the tenant's option—that is not the sole path to reversal. This is because even if the Court concludes that section 718 actually does declare overlong leases "void," long-settled law requires courts to consider the specific circumstances of a case before declining to enforce an agreement that violates a statute. Here, those circumstances—particularly considered in light of the trial court's well-supported findings on equitable issues—require enforcing the 2007 Amendment in full.

1. A contract violating a regulatory statute may remain enforceable, depending on the statute's purpose, the nature of the parties' conduct, and the particular facts.

While recognizing that in general "a contract made in violation of a regulatory statute is void," courts recognize "a wide

range of exceptions" under which such a contract can and should be enforced notwithstanding the violation. (*Asdourian*, *supra*, 38 Cal.3d at p. 291.) In every such case, "the realities of the situation *must* be considered." (*Tri-Q*, *supra*, 63 Cal.2d at p. 219, italics added.) Relevant factors include "the policy of the transgressed law, the kind of illegality and the particular facts." (*Asdourian*, at p. 292.)

Policy. If enforcing the contract won't undermine the statute's policy, this factor favors enforcing the contract.

For example, *Asdourian* concerned a contractor's attempt to enforce an oral contract for property improvements exceeding $500; the defendant owners attempted to defeat enforcement by invoking a statute requiring such contracts to be in writing. (38 Cal.3d at pp. 280-281, 289-290.) The court determined that the statute aimed "to protect unsophisticated consumers" and that the defendants were "real estate investors" rather than "members of the group primarily in need of the statute's protection." (*Id.* at pp. 290, 292.) So even though the contract violated the statute, enforcing it "will not defeat the statutory policy . . . ." (*Id.* at p. 292; see also *Cal. Phys.*, *supra*, 163 Cal.App.4th at p. 1517 [court enforced contract between corporate medical research institute and health care service plan to the latter's detriment because "[t]he ban on the corporate practice of medicine is meant to protect patients, not health care service plans"]; cf. 1 Witkin, Summary of Cal. Law (11th ed. 2021) Contracts, § 442 ["In situations in which no strong objections of public policy are present, a party to the illegal contract may be permitted to enforce it"].)

The nature of the illegality. Agreements that are *malum in se*—"those of an immoral character, those which are inequities in themselves, and those opposed to sound public policy or designed to further a crime or obstruct justice"—are automatically void. (*Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593 (*Vitek*).) Examples include contracts for "murder, theft, and perjury" (*Jordan v. De George* (1951) 341 U.S. 223, 237, fn. 10 (dis. opn. of Jackson, J.)), as well as "prostitution or gambling" (*Vick v. Patterson* (1958) 158 Cal.App.2d 414, 417; see also *Russell City Energy Co. v. City of Hayward* (2017) 14 Cal.App.5th 54, 70-71).

In contrast, agreements are merely *malum prohibitum* if they concern acts that "are in themselves indifferent and become right or wrong as the municipal legislature sees proper." (*People v. Herbert* (1936) 6 Cal.2d 541, 547 (*Herbert*).) An agreement *malum prohibitum* is void "only if it falls within the area which the Legislature intended as part of deterrence necessary to protect the public interest." (*Vitek*, *supra*, 34 Cal.App.3d at p. 593.) *Asdourian*'s oral construction contract was only *malum prohibitum*, so it could be enforced "depending on the factual context and the public policies involved." (38 Cal.3d at p. 293; see also *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 991 [enforcing contract involving illegal rebate of an insurance premium in part because it involved no "serious moral turpitude"].)

The particular facts. Courts may also consider such matters as whether enforcing the nominally illegal contract might "avoid unjust enrichment to the defendant at the expense

of the plaintiff." (*Asdourian*, *supra*, 38 Cal.3d at p. 291.) When the *Asdourian* real estate investors sought to have the oral construction contract declared void, the contractor had completed the construction but had not been fully paid. (*Id.* at pp. 280-282.) Because finding the contract unenforceable would leave the investors "unjustly enriched," this factor supported enforcement. (*Id.* at pp. 293-294; see also *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 Cal.App.3d 565, 570 (*Emmons*) [rejecting law firm's attempt to avoid referral and fee-splitting contract by invoking State Bar rules prohibiting such contracts, because a "profitable piece of business came to [the firm]" through the referral service "and they should not escape their commitment to it"].)

Other relevant considerations in the analysis of "particular facts" include the parties' sophistication (see *Asdourian*, *supra*, 38 Cal.3d at pp. 292-293) and whether "the equities or any other conclusion [but enforcement] would work a distinct hardship" on the party seeking enforcement (*Vitek*, *supra*, 34 Cal.App.3d at p. 594).

2. The purpose of section 718, the nature of the parties' conduct, and the particular facts all require enforcing the 2007 Amendment through 2123.

Here, section 718's tenant-protective purpose, the 2007 Amendment's minimal illegality, and the "particular facts" (*Asdourian*, *supra*, 38 Cal.3d at p. 292) all point in just one

direction: Full enforcement of the lease term through 2123, notwithstanding any conflict with section 718.

a. Enforcing the 2007 Amendment in full would promote, rather than frustrate, the policy of section 718.

Enforcing the 2007 Amendment's lease term through 2123 would not undermine section 718's underlying policy; it would promote that policy.

As shown above (§ I.A.2, *ante*), section 718's only discernible purpose is to protect tenants. Because it forbids long leases in order to protect tenants from landlords, it is "a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another . . . ." (*Lewis*, *supra*, 48 Cal.2d at p. 153.) Given this, "a member of the protected class may maintain an action" on an illegal contract "notwithstanding the fact that he has shared in the illegal transaction," because "[t]he protective purpose of the legislation is realized" by enforcing the contract. (*Ibid.*; see also *Emmons*, *supra*, 6 Cal.App.3d at p. 570 [citing *Lewis* and enforcing referral-fee contract that violates fee-splitting rules]; cf. *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1083 [party whom the Subdivided Lands Act is not meant to protect "is estopped from asserting the invalidity of the contract," while a member of the protected class can "enforce the contract or maintain his action against a defendant within the class primarily to be deterred"].)

Here, tenant BHG wants to forgo section 718's protection and enforce the 2007 Amendment. If this Court contradicts BHG's wishes and cuts off more than 20 years of the lease, that would harm the very party the statute aims to protect.

As for section 718's possible second purpose, promoting investment and development of leased property (pp. 34-35, *ante*), fully enforcing the 2007 Amendment will promote that purpose, while shortening the term will thwart it. BHG extended the lease precisely because it wanted to finance improvements to the property, and it wanted to recoup its investment in those improvements via its own tenants' rent over the extended term. (RT/254-255, 442, 455.) BHG and its lenders relied on the leasehold's validity through 2123 when agreeing to make loans to pay for those improvements. (RT/547-550; 11AA/5749-5750, 5756-5757; 12AA/6241-6245.)

If the leasehold continues through 2123, it will remain in the best interest of the long-term ground tenant—whether BHG or a later assignee—to maintain and update the building. During the extended term, the ground tenant will have ample time to earn a return on its investments. But if the lease term is shortened, the ground tenant will have less reason—including less long-term, dependable cash flows—to maintain and update the Property. (See RT/413, 746-755, 803-805, 917-918.)

This factor distinguishes the 2007 Amendment from the agreement in *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, which we expect Tufeld to cite. *City Lincoln-Mercury* concerned a statute for the protection of buyers that required

certain disclosures in conditional auto sale contracts. (*Id.* at pp. 272-273.) The parties' contract lacked the disclosures. The seller—*not* the party protected by the statute—wanted to enforce the contract despite its violation of the statute. The Supreme Court sided with the buyer and voided the contract, protecting the buyer and serving the statute's purpose. (See *id.* at pp. 273-274.)

The opposite situation exists here. Section 718 protects tenants. But here, the tenant—the protected party—wants to enforce the contract despite the statutory violation. The tenant will benefit from enforcing the full lease term. So, too, will all its underlying commercial tenants and the members of the public who use the Property, because of BHG's increased incentive and ability to maintain and improve the Property. Invoking this tenant-protective statute to void more than two decades of the lease term, at the landlord's behest and over the tenant's objections, would thwart the statute's purpose.

b. The minimal nature of the illegality supports enforcing the 2007 Amendment on its terms.

Without question, lease terms exceeding 99 years are merely *malum prohibitum*.

Unlike acts deemed *malum in se*, the common law recognized no limit to lease terms. (Lesar, *supra*, 35 N.Y.U. L.Rev. at p. 1282; see pp. 41-42, *ante* [Blackstone refers to thousand-year leases].) Leases exceeding a certain length are not "immoral in character, inherently inequitable or designed to

further a crime or obstruct justice." (*Asdourian*, *supra*, 38 Cal.3d at p. 293.) That the Legislature has repeatedly changed permissible lease terms (see pp. 38-39, *ante*) shows beyond cavil that lease terms "become right or wrong as the municipal legislature sees proper"—the very essence of *malum prohibitum* (*Herbert*, *supra*, 6 Cal.2d at p. 547).

Beyond that, the Civil Code's lease term limitations are riddled with exceptions. State tideland leases to cities cannot exceed 66 years*, except* if "the grant from the state" expressly states a longer term, with no limit on any expressly stated term. (§ 718.) Leases of municipally owned land cannot exceed 55 years (§ 718), *except* if a general-law city grants a longer term between 55 and 99 years after holding public hearings and conducting bidding (§ 719). And leases for lots of unincorporated county land are not subject to *any* term limits. (See *Epstein*, *supra*, 99 Cal.App.2d at p. 739, discussing *Becker v. Submarine Oil Co.* (1921) 55 Cal.App. 698, 699-700.) These entirely alterable limits and exceptions compel recognition that leases exceeding 99 years fall well outside the set of morally disfavored acts deemed *malum in se*. (See *Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal.App.2d 11, 20 [regarding usury laws, stating that "[a] strong public policy, based on a settled concept of justice or morality would not be meshed with such alterable rates as the legislature might choose to impose"].)

Because it is merely *malum prohibitum*, the 2007 Amendment would be void "only if it falls within the area which the Legislature intended as part of deterrence necessary to

protect the public interest." (*Vitek*, *supra*, 34 Cal.App.3d at 593.) It does not. So it remains enforceable.

This factor distinguishes the 2007 Amendment from the agreement in *Colby*, *supra*, 160 Cal. 632, the trial court's lead authority in finding the 2007 Amendment absolutely void. There, a company threatened to have a woman prosecuted for embezzlement unless her mother agreed to repay her debts. (*Id*. at pp. 635-636.) The mother agreed and put up her house as collateral, but then sued to enjoin the house's forced sale. (*Id.* at pp. 634-635, 637.)

The court noted that the case involved as consideration "the compounding of a felony charge," that is, forbearing to prosecute a crime. (*Colby*, *supra*, 160 Cal. at p. 638.) It analogized these facts to other cases in which a contract interfered with the prosecution of a crime or the operation of a public function. (*Id.* at pp. 644-645, citing *Brown v. First Nat. Bank* (Ind. 1894) 37 N.E. 158, 162 [justice of the peace accepted contingent fee for locating and capturing accused embezzler]; *Robinson v. Patterson* (Mich. 1888) 39 N.W. 21, 24 [contract involved payment to land commissioner, "the effect of which is to influence [him] one way or the other"]; *Standard v. Sampson* (Okla. 1909) 99 P. 796, 799-800 [contract involved as consideration "the discontinuance of the criminal prosecution against" defendant]; *McCormick Harvesting Mach. Co. v. Miller* (Neb. 1898) 74 N.W. 1061, 1061-1062 ["the contract was given to compound a crime," i.e., an agreement not to prosecute the defendant for embezzlement]; and *Henry v. State Bank of Laurens* (Iowa 1906) 107 N.W. 1034, 1035 ["the note was given by reason of threats made by [defendant] to prosecute

[plaintiff's] brother"].) These contracts were "executed for an illegal consideration" and therefore "void as against public policy." (*Colby*, at p. 644.)

Agreements that further a crime, for example by hindering its prosecution, are traditionally *malum in se*. (*Vitek*, *supra*, 34 Cal.App.3d at p. 593.) They are categorically void without regard for policy or circumstances. The 2007 Amendment bears no resemblance to these categorically void agreements. *Colby* is therefore inapposite.

c. The particular facts support enforcing the 2007 Amendment.

As to the "particular facts" of this case (*Asdourian*, *supra*, 38 Cal.3d at p. 292), full enforcement of the 2007 Amendment is necessary and appropriate because of the risk of unjust enrichment to Tufeld, the parties' sophistication and lengthy negotiations, and BHG's detrimental reliance on Tufeld's repeated written affirmations of the Amendment's validity.

(1) Unjust enrichment.

BHG paid Tufeld $1.5 million for a 65-year extension of its leasehold through 2123, and the trial court has already found that shortening this period would unjustly enrich Tufeld at BHG's expense. (9AA/5151.) But enforcing the lease term through 2123, as both parties agreed, would eliminate the problem of unjust enrichment entirely. "[A]void[ing] unjust enrichment to the defendant at the expense of the plaintiff" is one of *Asdourian*'s key criteria supporting enforcement of an illegal

contract despite a statutory violation. (*Asdourian*, *supra*, 38 Cal.3d at p. 291.)

It's true that BHG's $1.5 million payment bought both an extension of the lease term and other rights, including mineral rights and a first-refusal right on any sale of Tufeld's fee interest. But these additional terms do not eliminate the unjust enrichment to Tufeld upon partial cancellation of the lease term.

- The undisputed record reflects that the mineral rights were essentially worthless and were included in the 2007 Amendment at Tufeld's request, to benefit Tufeld by eliminating or lowering its taxes. (RT/326, 347, 461-465; 10AA/5232-5233.)
- The right of first refusal tracked the lease term, so any shortening of the lease term also shortened the period during which the right of first refusal operates. And anyway, Mr. Tufeld made clear that the family did not believe it would ever want sell the property. (RT/362, 612; see also RT/502-503.)

It is no answer to *Asdourian*'s unjust enrichment concern that the trial court awarded $484,615 in restitution to counteract the unjust enrichment Tufeld would obtain upon partial cancellation. Compared to simply enforcing the 2007 Amendment in full, an award of restitution is second-best for three reasons.

First, despite considering the views of multiple experts and hearing extensive evidence, the trial court recognized "the significant difficulty in precisely valuing a portion of a long-term

tenancy." (9AA/5153.) There is no way to be sure BHG has received full compensation for the loss.

Second, even if the award could accurately value the lost two decades-plus, restitution fails to recognize the ancient principle that real property is unique—which is especially true of this strategically located property and architecturally significant building. Monetary restitution can never fully replace the loss of real property.

Third, the trial court itself recognized that "the full lease term should be validated and enforced" if possible. (9AA/5150.)

Section 718 "should not be used as a shield for the avoidance of a just obligation." (*Vitek*, *supra*, 34 Cal.App.3d at p. 595.) BHG bargained for a leasehold running through 2123; equity demands that BHG get what it bargained for.

(2) Parties and negotiations.

The trial court found that the 2007 Amendment's negotiators "were experienced and sophisticated businessmen, each of whom had access to professionals who could advise them on the wisdom of entering into the agreement." (9AA/5154-5155.) The key terms ended up at a midpoint between the parties' initial positions. (RT/345-346.)

The trial court also found that the terms did "not seem unusual or unfair," ruling that the deal involved no procedural or substantive unconscionability. (9AA/5155.) Howard Tufeld expressed no dissatisfaction with the deal terms. (RT/465.) And Tufeld's suit against BHG "wasn't based on the fact . . . that we didn't feel [the 2007 Amendment] was a good deal." (RT/512.)

All of this means that enforcing the 2007 Amendment by its terms would work no injustice on Tufeld or anyone else.

(3) Equitable issues.

Finally, voiding the 2007 Amendment "would work a distinct hardship" on BHG. (*Vitek*, *supra*, 34 Cal.App.3d at p. 594.) As the trial court noted, "[b]oth parties agreed to the 2007 Amendment. Both parties reaffirmed the validity of the lease term therein for many years." (9AA/5150.) Tufeld affirmed the lease term in signed writings three times: in two estoppel statements, and in its rent-reset dispute filings. BHG and its lenders relied on Tufeld's affirmations to support nearly $100 million in loans because they believed the lease was valid through 2123.

In these circumstances, when no policy interest favors enforcing section 718 and no injustice would result from enforcing the contract, "[b]oth parties should be held to their agreement." (9AA/5150.)

II. IF THE SHORTENED LEASE TERM IS AFFIRMED, BHG'S RESTITUTION AWARD SHOULD INCLUDE COMPENSATION FOR LOST USE OF MONEY.

We have demonstrated that the 2007 Amendment should be enforced in full. If that happens, then BHG will no longer have a claim for Tufeld's unjust enrichment, and that portion of the judgment will be vacated.

But if that does not happen, then a different error must be remedied.

Fourteen years elapsed between BHG's paying $1.5 million for the 2007 Amendment and the trial court's order that Tufeld pay BHG $484,615 in restitution for the loss of 21 years of the extended lease term. But the trial court refused to award anything for the value of Tufeld's use of this money between 2007 and 2021 or BHG's loss of its use. (9AA/5151-5153.) It ruled that prejudgment interest was not available under section 3287, subdivision (b) or under section 3288. (9AA/5153-5154.)

The effect is that BHG has given Tufeld a 14-year, no-interest loan of nearly $500,000. That's wrong. Under fundamental principles of restitution, Tufeld must repay to BHG the value of the use of BHG's money from 2007 to 2021. (See Rest.3d Restitution, §§ 52-53 [providing for prejudgment interest on awards of restitution]; *Canfield v. Security-First Nat. Bank* (1939) 13 Cal.2d 1, 30-31 [Restatements of the law are entitled to "great consideration" and generally purport to state the "better rule on any given subject" of common law].)

A. The Trial Court Has Inherent Equitable Power To Award Prejudgment Interest As Necessary To Accomplish Justice.

"In the absence of [a statutory] restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved." (*People v. Superior Court* (1973) 9 Cal.3d 283, 286-287, citing *Porter v. Warner Holding Co.* (1946) 328 U.S. 395, 398.)

The court's equitable powers include adding prejudgment interest to awards of restitution—a form of interest distinct from statutory interest under sections 3287 or 3288. (See *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 376 [affirming prejudgment interest on restitution award where trial court "made it clear it was exercising its equitable discretion to award prejudgment interest" on restitution award]; *Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1412 [remanding "for the trial court to exercise its discretion with regard to an award of prejudgment interest" pursuant to "its equitable powers"].)

The trial court did not purport to exercise discretion against awarding interest—it believed it had no power to award interest at all. Therefore, if the full lease term is not validated through 2123, then this Court should remand for the trial court

to exercise its equitable discretion and award prejudgment interest.[3]

B. Alternatively, Section 3287, Subdivision (b) Entitles BHG To A Discretionary Award Of Prejudgment Interest.

Section 3287, subdivision (b) (section 3287(b)) permits the trial court "in its discretion" to award prejudgment interest on "damages based upon a cause of action in contract" from "the date the action was filed" or later. The trial court denied interest under this section, determining that the award of restitution was neither "damages" nor "upon a cause of action in contract." (9AA/5154.) That was error.

The word "damages" in section 3287(b) does not exclude restitution. To be sure, contract damages place "the injured party in as good a position as he would have occupied *had the contract been performed*," while "restitution" restores "the injured party to as good a position as that occupied by him *before the contract was made*." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 56, italics added.) But courts applying section 3287(b) do not read "damages" so narrowly.

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[3] BHG acknowledges that it did not urge this basis for prejudgment interest below. But whether the trial court has equitable power to award prejudgment interest is "a question of law only . . . on the facts appearing in the record," so BHG may raise it for the first time on appeal for this Court to consider at its discretion. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; see also *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626, 637-638.)

For example, in *George v. Double-D Foods, Inc.* (1984) 155 Cal.App.3d 36, 39, 46-47 (*George*), the court held that section 3287(b) permitted awarding interest on a "quantum meruit" recovery that was measured by "the reasonable value of [plaintiff's] services"—not the contracted value. Though such an amount is technically restitution, not damages, this was no bar to awarding interest under section 3287(b).

As to section 3287(b)'s other qualification, stating that interest is awardable only "upon a cause of action in contract," *George* is again instructive. The *George* court allowed interest under section 3287(b) on an action for "quasi-contract," that is, a contract merely "implied in law to bring about justice without reference to the intent of the parties." (155 Cal.App.3d at pp. 46-47.) It took this view because "statutes relating to claims 'arising upon contract' have been applied to quasi-contractual obligations" and because "for most purposes, an action to recover the reasonable value of services is considered an action on the contract." (*Ibid.*)

And more recently, *Carmel Development Co. v. Anderson* (2020) 48 Cal.App.5th 492 applied *George* and allowed prejudgment interest under section 3287(b) in an action on a mechanic's lien, even though such an action "does not technically enforce a contractual provision." (48 Cal.App.5th at p. 523.) The court recognized that "the statutory scheme" for prejudgment interest awards "is closely related to contract and quasi-contract actions." (*Ibid.*)

Our case involves recovery of money rather than the reasonable value of services. (Cf. *George*, *supra*, 155 Cal.App.3d at pp. 46-47.) But BHG's claim remains squarely "quasi-contractual," falling within the category that *George* admitted into the ambit of section 3287(b) .

The Supreme Court explained quasi-contracts in *Philpott v. Superior Court* (1934) 1 Cal.2d 512 (*Philpott*). Quoting an ancient source, the court described the action of "assumpsit" as "'an action to recover back money, which ought not in justice to be kept.'" (*Id*. at p. 518.) "It lies only for money which, *ex aequo et bono*, the defendant ought to refund," including money paid "upon a consideration which happens to fail." (*Id.* at pp. 518-519.)

This description captures the present case. In days past, BHG's action for unjust enrichment might have been styled as assumpsit: "an action in which the law, in order to prevent the *unjust enrichment* of defendants from the property of plaintiff, itself *implies a promise* to repay the sum demanded." (*Philpott*, *supra*, 1 Cal.2d at p. 518, italics added.) This action's "contractual quality was always its most distinct feature." (*Id.* at p. 526; see also *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 720-725 [relying on *Philpott* to interpret an action on the unauthorized retention of the plaintiff's property as "[a]n action for breach of any *contract for sale,*" although the parties had no contract, italics added]; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388 & fn. 6 [restitution properly awarded "when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason"; "'[q]uasi-contract' is

simply another way of describing the basis for the equitable remedy of restitution when an unjust enrichment has occurred" and "'is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money'"].)

BHG's right to restitution proceeds upon the same theory. BHG paid Tufeld $1.5 million for the 2007 Amendment. Because the court partly invalidated the Amendment, some of this money was paid "upon a consideration which happen[ed] to fail." (*Philpott*, *supra*, 1 Cal.2d at pp. 518-519.) This money "ought not in justice to be kept." (*Ibid.*) To prevent Tufeld's unjust enrichment, the law therefore "implies a promise to repay the sum demanded" (*id.* at p. 518), making the action quasi-contractual. As the restitution to BHG is "based upon a cause of action in contract," prejudgment interest is allowed under section 3287(b).

Accordingly, BHG is at a minimum entitled to a discretionary award of interest under section 3287(b). Absent a reversal with directions to fully enforce the 2007 Amendment's term through 2123, this Court should instruct the trial court to conduct further proceedings regarding the amount of interest to be awarded.

CONCLUSION

Tufeld agreed to the 2007 Amendment in an arm's length negotiation. Again and again, Tufeld unequivocally affirmed the Amendment's validity through its full 2123 term, and BHG and its lenders relied on these affirmations to their detriment. Enforcing the Amendment by its plain terms causes no injustice

to Tufeld. As a matter of simple fairness, Tufeld should remain bound by those terms.

Section 718 presents no barrier to this outcome. Because it renders the 2007 Amendment merely voidable at BHG's option, the statute grants Tufeld no avoidance power. And even if section 718 did render overlong leases partly void, the circumstances of this case would still require enforcing the Amendment in full.

The Court should reverse and direct the trial court to declare the 2007 Amendment valid for its entire term. Alternatively, the Court should direct the trial court to award prejudgment interest on the restitution award.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPELLANT'S OPENING BRIEF** contains **13,511** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 14, 2022 /s/ Stefan Caris Love

Stefan Caris Love