DISREGARDING THE CORPORATE ENTITY TO ESTABLISH THE UNITARY OWNERSHIP REQUIRED FOR AN IMPLIED EASEMENT

United States v. O'Connell, 496 F.2d 1329 (2d Cir. 1974)

In order to secure Federal Housing Authority mortgage insurance[1] defendant O'Connell formed Patricia Gardens, Inc., to build and operate an apartment complex. Eight years later the apartments were purchased by the United States at a foreclosure sale. The Government subsequently discovered that it had not acquired ownership of two adjacent parking lots used by apartment tenants. These lots were still owned either by defendant or Jopat Realty Corporation in which defendant was the majority stockholder.[2] Ownership of the parking lots by the owner of the apartments was necessary in order to comply with a local ordinance.[3] The United States claimed easements by implication in these two lots, but the federal district court denied the Government's claim.[4] The court reasoned that since the title to the three parcels was not vested in the defendant at the time the apartment complex was built, the New York requirement of unitary ownership had not been met.[5] The Court of

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1. United States v. O'Connell, 496 F.2d 1329, 1331 (2d Cir. 1974), *citing* 24 C.F.R. § 232.17 (1959).

2. The confusion about who was the actual owner of the lots arose from defendant's testimony at trial:

> Q. Do you own it or does Jopat own it? A. I think Jopat owns it. I am not sure now, I am not positive. I don't know whether it was transferred over or not. Jopat owns it or I own it. It is either one of the two.
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> Q. You don't see too much difference in that though? A. No, sir.

Joint App. at 76a-77a, United States v. O'Connell, 496 F.2d 1329 (2d Cir. 1974).

3. Joint App. at 125a, United States v. O'Connell, 496 F.2d 1329 (2d Cir. 1974), *quoting* PEEKSKILL, N.Y. ZONING ORDINANCE § 3-20.7.3 (1960):

> [Parking] spaces shall be in the same ownership as the use to which they are accessory and shall be subject to deed restriction, filed with the County Clerk, binding the owner and his heirs and assigns to maintain the required number of spaces available either (a) throughout the existence of the use to which they are accessory or (b) until such spaces are provided elsewhere.

The Peekskill Planning Commission approved the site plan in October 1960, when Patricia Gardens had title only to the land on which the apartments were built. 496 F.2d at 1331.

4. United States v. O'Connell, 358 F. Supp. 925 (S.D.N.Y. 1973). The Government brought suit for a declaratory judgment, preliminary and permanent injunctions, and damages.

5. *Id.* at 927-28. *See* text accompanying notes 18-20 *infra.*

Appeals for the Second Circuit reversed[6] and *held*: Sufficient unitary ownership of land for purposes of an implied easement will exist, despite a formal division of title, if the actual control and use of the parcels indicates such unitary interest.[7]

In addition to rights in real property stemming from holding title, the common law recognized easements as accessory rights.[8] In general, easements permanently burden the land of a titleholder for the benefit of another adjacent landowner.[9] Easements may arise by express grant,[10] by prescription,[11] or by implication.[12]

When a landowner conveys a portion of his land and retains an adjacent portion, an easement in the retained portion may be implied in favor of the purchaser.[13] The law presumes that the parties contracted with reference to the condition of the property at the time of the sale,[14] and thus intended that the land be conveyed with the qualities attached by

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6. The case was remanded to the district court for a decision on the facts using the standards set by the court of appeals to determine unitary ownership.

7. United States v. O'Connell, 496 F.2d 1329 (2d Cir. 1974).

8. C. GALE, A TREATISE ON THE LAW OF EASEMENTS 1 (10th ed. 1925) [hereinafter cited as GALE]:

> In addition to the ordinary rights of property, which are determined by the boundaries of a man's own soil, the law recognizes the existence, as accessorial to these general rights, of certain other rights to be exercised over the property of a neighbour, and therefore imposing a burden upon him.

9. *Id.*; J. GODDARD, A TREATISE ON THE LAW OF EASEMENTS 1-18 (Am. ed. E. Bennett 1880) [hereinafter cited as GODDARD].

10. GALE 34-112; GODDARD 92-127, 131.

11. GALE 186-244; GODDARD 131-83. An easement by prescription arises from open, adverse possession of land for a prescribed statutory period of time. *See generally* RESTATEMENT OF PROPERTY §§ 457-64 (1944).

12. GALE 113-85; GODDARD 92-127.

13. RESTATEMENT OF PROPERTY § 474 (1944); *accord*, GALE 119 (relating "modern rule" in England as of 1911):

> Where the owner of land grants or demises part of it, retaining the remainder in his own hands, such a grant or demise will . . . impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained.

Courts, however, do not favor implied easements because they are in derogation of the rule that written instruments speak for themselves, they tend to fetter estates, and they violate the policy of the recording acts. 25 AM. JUR. 2D *Easements & Licenses* § 24 (1966).

14. *See, e.g.*, Curry v. Southwall Corp., 192 Okla. 590, 591, 138 P.2d 528, 529 (1943). RESTATEMENT OF PROPERTY §§ 476(g), (h), comment *i* (1944) (emphasis added) modifies this presumption: "The fact that [land] was used in a particular way is *some indication* that the parties contemplated its use in a similar way thereafter."

the grantor.[15] If it is found that the grantee cannot fully enjoy the conveyed property without the right to a continuation of known uses over the retained property, then an easement may be implied.[16] A grantee may thus receive not only title to one parcel, but also a right to limited use of the retained land appurtenant to the purchased land.

The common law prescribed four requirements necessary in order to burden appurtenant real property with an implied easement.[17] First, all the relevant parcels must have been in unitary ownership.[18] This re-

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15. GALE 118:

> [A landowner may have] permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, and in their nature permanent changes in the disposition of the property so that one part thereby becomes dependent upon another, that a purchaser should take the land with the qualities which the previous owner had undoubtedly the right to attach to it.

It is not necessary, however, that the parties themselves actually intended to imply an easement. "Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected." RESTATEMENT OF PROPERTY § 476, comment *j* (1944). This presumption of intention follows from the principle that "no man can derogate from his own grant." GALE 114-15; 25 AM. JUR. 2D *Easements & Licenses* § 28 (1966).

16. GODDARD 109:

> As a general rule, a grantee of land or of an easement is entitled by implied grant to any easement in the land of the grantor, which is necessary to render the land or easement granted capable of enjoyment to the full extent.

See RESTATEMENT OF PROPERTY § 476(e), comment *g* (1944).

17. The New York case often cited as authority for these requirements is Jacobson v. Luzon Lumber Co., 192 Misc. 183, 79 N.Y.S.2d 147 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 787, 92 N.Y.S.2d 537 (1949), *aff'd*, 300 N.Y. 697, 91 N.E.2d 724 (1950). *See also* GALE 113-72; GODDARD 111-27; C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 404-05 (1971) [hereinafter cited as SMITH & BOYER].

The *Restatement of Property* takes a different approach to implied easements. Section 474 defines implied easements:

> When land in one ownership is divided into separately owned parts by a conveyance, an easement may be created, within the limitations set forth in §§ 475 and 476 . . . by implication from the circumstances under which the conveyance was made, alone.

Under § 475 the conveyance upon which the easement is based must be effective to create the estate: "[T]he conveyance must satisfy the formal requisites established by local law for the creation of an estate in land of the duration of that conveyed." Section 476 then lists eight factors (not meant to be exhaustive) to determine whether the circumstances under which the conveyance was made warrant the implication of an easement. Thus, the *Restatement* requires (1) unitary ownership followed by (2) severance and legal conveyance of part of the land, but the relevance of other surrounding circumstances for the creation of an easement is left for the assessment of the court. New York law, however, has established certain factors as mandatory. *See* 57 MICH. L. REV. 724 (1959).

18. *See, e.g.*, Heyman v. Biggs, 223 N.Y. 118, 125, 119 N.E. 243, 245 (1918);

quirement assures that only uses established by one with power to subordinate one parcel for the benefit of another will accompany a conveyance. Historically, the only party with that ability was the owner of the fee.[19] Thus, unitary ownership has been interpreted to mean that title to both the conveyed and retained portions was vested in one party in fee simple.[20] Secondly, during the period of unitary ownership, a use must have been established whereby one part of the land was made subordinate to another. The holder of the dominant portion will retain use of the servient parcel.[21] Thirdly, to support an implied easement, the use must

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Times Square Properties, Inc. v. Alhabb Realty Corp., 117 N.Y.S.2d 901, 902 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 1024, 126 N.Y.S.2d 887 (1953); Jacobson v. Luzon Lumber Co., 192 Misc. 183, 79 N.Y.S.2d 147 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 787, 92 N.Y.S.2d 537 (1949), *aff'd*, 300 N.Y. 697, 91 N.E.2d 724 (1950).

19. GALE 215:

> [A]s the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement—it follows that by the common law such grant can only have been legally made by a party capable of imposing such a permanent burden upon the property—that is, the owner of an estate of inheritance.

GODDARD 93 states: "And so it is held, that the grantor of an easement must be the owner of the fee."

20. Westminster Investing Corp. v. Kass, 266 F. Supp. 597 (D.D.C. 1967) (complaint claiming implied easement dismissed when no unity of ownership of two parcels of land shown); Violet v. Martin, 62 Mont. 335, 205 P. 221 (1922) (no easement in road from property to public way when road crosses land of stranger); Green v. Collins, 86 N.Y. 246 (1881) (no easement in drain across adjoining land when grantor had no interest or title to that land); McQuinn v. Tantalo, 41 App. Div. 2d 575, 339 N.Y.S.2d 541 (1973) (no easement across land of stranger); Curry v. Southwall Corp., 192 Okla. 590, 591, 138 P.2d 528, 529 (1943) ("Such an easement derives its origin from a grant and cannot legally exist where the owner of the land over which it is claimed was never seised of both tracts of land").

The term "title" appears to refer to either the legal or equitable titleholder. In *United States v. O'Connell*, O'Connell, the mortgagor, was the legal titleholder.

Many cases state the need for unity of title before an easement may be implied and then mechanically determine the result depending on where title rests, without any discussion of reasons for the requirement. *See, e.g.*, Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960) (complaint dismissed when testimony showed two tracts of land involved rather than one, although husband owned one and wife owned other).

21. GALE 14-15. While easements may also be implied in favor of the grantor, these "implied reservations" are less favored by the courts. RESTATEMENT OF PROPERTY § 476, comment *c* (1944) states: "[C]ircumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor."

While acknowledging that conveyances historically have been construed against the grantor, Professor Powell notes a trend toward allowing implied reservations under the same circumstances as implied grants.

> This trend is desirable, since these easements are found in any case only by an inference from the circumstances that both of the parties intended the prior

be plainly and physically apparent by reasonable inspection. Finally, the particular use must affect the value of the estate benefited, the dominant estate, and must be reasonably necessary to that estate.[22]

Since the principle case involved property owned both by an individual and a corporation, the relationship between individual shareholders and the corporate entity was relevant to the determination of whether the unitary ownership requirement had been met. A corporation is considered to be a legal entity distinct from its shareholders.[23] There are, however, instances in which the corporate entity will be disregarded in order to hold shareholders personally responsible for the acts of the corporation.[24] If a court finds that disregarding the corporate entity would prevent fraud or violation of a statute, or would achieve equity,[25] it will

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quasi-easement to continue in use. . . . Adherence to the constructional rules that the terms of a grant should be construed strictly against the grantor, does not require complete disregard of the constructional factors found in the circumstances of the conveyance. The function of covenants of warranty or of covenants against incumbrances is to give assurances concerning the estate conveyed rather than to guide the construction of the conveyance as to the scope of the rights conveyed.

3 R. POWELL, THE LAW OF REAL PROPERTY, ¶ 411 at 460-61 (P. Rohan ed. 1974) [hereinafter cited as POWELL]. For a discussion of "quasi-easements," see 3 POWELL ¶ 411 at 449-52; SMITH & BOYER 404.

22. Easements by implication are also known as easements by implied grant. GALE 113. Thus, a fifth requirement, always implicit if not stated, is that of severance of the dominant from the servient parcel by a grant. 3 POWELL ¶ 411 at 450-52; SMITH & BOYER 404.

Only the first requirement was found to be at issue in *O'Connell*. The district court found that the latter two requirements had been met. 358 F. Supp. at 927. The court of appeals noted that "[p]resumably the district court found that the second element was met . . . ." 496 F.2d at 1333.

23. H. HENN, LAW OF CORPORATIONS 107-11 (1970) [hereinafter cited as HENN]; N. LATTIN, CORPORATIONS 65 (1971) [hereinafter cited as LATTIN]; *see, e.g.*, Rapid Transit Subway Constr. Co. v. City of New York, 259 N.Y. 472, 182 N.E. 145 (1932); Elenkrieg v. Siebrecht, 238 N.Y. 254, 144 N.E. 519 (1924); Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 287 N.Y.S. 62 (1936).

24. Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490 (1918); Bartle v. Home Owners Co-op., Inc., 309 N.Y. 103, 127 N.E.2d 832 (1955); Berkey v. Third Ave. Ry., 244 N.Y. 84, 155 N.E. 58 (1932); HENN 250-58; LATTIN 72-73.

25. *See, e.g.*, Zubik v. Zubik, 384 F.2d 267 (3d Cir. 1967); Automotriz del Golfo de Calif. S.A. v. Resnick, 47 Cal. 2d 792, 306 P.2d 1 (1957); Bartle v. Home Owners Co-op., Inc., 309 N.Y. 103, 127 N.E.2d 832 (1955); International Aircraft Trading Co. v. Manufacturer's Trust Co., 297 N.Y. 285, 79 N.E.2d 249 (1948); Jenkins v. Moyse, 254 N.Y. 319, 172 N.E. 521 (1930); Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 287 N.Y.S. 62 (1936). Judge Sanborn's rule in United States v. Milwaukee Refrig. Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905), is often quoted:

examine corporate operations to determine whether the corporation possesses an identity independent of its shareholders.[26] In New York, courts have disregarded the corporate entity under the "instrumentality" theory,[27] the "identity" theory,[28] and the economic "enterprise entity" theory.[29]

> If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

See also Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 517 (1912):

> When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.

26. It is often unclear what factors the courts rely upon to establish the existence of shareholder-corporate identity. For a review of various approaches, see Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. KAN. L. REV. 185 (1971) (criticizing current "scatter-gun" approach of courts and suggesting that shareholder liability be found when shareholder has control of corporation and uses that control unjustly to defeat plaintiff's claim against corporation); Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protection*, 45 N.D.L. REV. 363 (1969) (case-by-case approach to corporate entity problems must be maintained); Hamilton, *The Corporate Entity*, 49 TEXAS L. REV. 979 (1971) (reviewing theories of corporate entity and offering four principles to guide decision of whether to disregard corporate entity). For an historical review of corporate entity theories, see Farmers' Loan & Trust Co. v. Pierson, 130 Misc. 110, 222 N.Y.S. 532 (Sup. Ct. 1927).

27. Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 157, 287 N.Y.S. 62, 76 (1936) (emphasis original) defines the idea of excessive shareholder control upon which the instrumentality theory is based:

> Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had *at the time* no separate mind, will or existence of its own . . . .

28. Mull v. Colt Co., 178 F. Supp. 720 (S.D.N.Y. 1959), *appeal dismissed*, 279 F.2d 25 (2d Cir. 1962); African Metal Corp. v. Bullova, 288 N.Y. 78, 41 N.E.2d 466 (1942); Natelson v. A.B.L. Holding Co., 260 N.Y. 233, 183 N.E. 373 (1932). Basic to the identity theory are a failure to maintain formal barriers between individual and corporation (or parent and subsidiary) and a unity of beneficial interest. If it can be shown that individuals are carrying on a business as individuals and not as a corporation, they will be responsible in their personal capacities. If the corporation is merely a "dummy" for its individual stockholders, who are in reality carrying on a business in their individual capacities for personal rather than corporate ends, then treating the corporation as an agent of the stockholders is justified. Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966).

29. Mull v. Colt Co., 178 F. Supp. 720 (S.D.N.Y. 1959), *appeal dismissed*, 279 F.2d 25 (2d Cir. 1962); Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d

In *United States v. O'Connell*[30] the court of appeals, in contrast to the district court,[31] refused to limit the definition of unitary ownership to a requirement that title be in one party at the time the apartment complex was begun. The test adopted by the appellate court involved a two-fold determination. First, did the shareholder or shareholders of these corporations evince such control over the corporate operations that they could effectively do as they pleased with all the land?[32] For example, could they create a servitude on one parcel owned by Jopat or defendant (the parking lots) for the benefit of another parcel owned by Patricia Gardens (the apartment complex)? Secondly, were the three parcels used as one unit, implying that there was in fact but one party in interest?[33] If

585 (1966). The economic "enterprise entity" theory is attributed to Professor Adolf Berle. *See* Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947). While the identity theory focuses on a unity of interests between individual shareholders and a corporation, the enterprise entity theory focuses on a single economic enterprise that may be run by several different corporations.

30. 496 F.2d 1329 (2d Cir. 1974).

31. 358 F. Supp. at 927:

> [T]he Government seeks to have this Court ignore the fact that title to the properties was in different corporate entities and to pierce the corporate veil solely for the convenience of the Government. By doing so, this Court would do violence unnecessarily to the corporate and real estate law of the State of New York . . . .

The petition of the United States presented three alternative grounds for implying an easement. First, defendant could have been estopped from denying the easement because he had represented to the original mortgagee and the FHA that tenants had parking privileges on the land. Brief for Appellant at 24, United States v. O'Connell, 496 F.2d 1329 (2d Cir. 1974). The district court reasoned, however, that the Government was the party estopped because it knew or should have known all of the surrounding circumstances at the time the mortgage insurance was provided. 358 F. Supp. at 928. The court of appeals rejected the district court's position, but it did not speak to the Government's estoppel argument. 496 F.2d 1334-35. For an application of the estoppel analysis to a case involving an implied easement, see Curry v. Southwall Corp., 192 Okla. 590, 138 P.2d 528 (1923).

A second alternative was to disregard the corporate entity and vest legal title to Patricia Gardens and Jopat property in defendant. Brief for Appellant at 13, *supra*. This is the least acceptable approach given the necessity of recording title. Equity between the two immediate parties could be achieved without this drastic approach which has repercussions beyond the immediate parties. The court of appeals recognized this:

> The separation of corporate and personal entities will be ignored only for the purpose of determining whether there is sufficient unity of ownership to allow implication of an easement.

496 F.2d at 1335.

The court chose the third alternative: disregarding corporate entity and redefining unitary ownership. *Id.*

32. 496 F.2d at 1335.

33. *Id.*

both these questions could be answered affirmatively, then there was "sufficient unity of interest"[34] among the several parcels to meet the New York requirement of unitary ownership.

The establishment of an easement by implication upon the shareholder's land required that the separate legal existence of the corporation be disregarded. In order to reach a shareholder's assets for corporate obligations, there must be sufficient reason, under the doctrine of disregarding the corporate entity, to look beyond the corporate form.[35] Unlike the district court,[36] the court of appeals found sufficient cause to question the separate existence of the Patricia Gardens corporation. A local ordinance required that a certain number of parking facilities be under the same ownership as the apartment complex.[37] Disregarding the corporate entity would effect compliance with this ordinance, and thus equity would be achieved for the Government.[38] Also, the facts strongly sug-

34. *Id.* This phrase of the court of appeals sums up the new approach; "interest" has been substituted for "ownership." The court cited Cosmopolitan Nat'l Bank v. Chicago Title & Trust Co., 7 Ill. 2d 471, 131 N.E.2d 4 (1955), in support of its formulation. 496 F.2d at 1335. Although separate corporations had legal title to two lots, the Illinois court held that sufficient common ownership existed to satisfy the unitary ownership requirement because the use of the entire property had been arranged according to the wishes of the two shareholders. The corporations were mere instrumentalities of the individuals who were found to be the real parties in interest.

The *O'Connell* court distinguished New York cases brought to its attention. In Farley v. Howard, 60 App. Div. 193, 70 N.Y.S. 51 (1901), *aff'd*, 172 N.Y. 628, 65 N.E. 1116 (1902), defendant owned all of one lot and a half interest in an adjacent lot. The porch of his home encroached on the latter lot. When third parties bought the lots, it was held that there was no implied easement in the adjacent lot because there had been no unity of ownership. The *O'Connell* court distinguished the case by saying that in *O'Connell* unity did not rest on a claim of 50% ownership by defendant but on a claim of apparent complete dominance of the corporations by defendant. 496 F.2d at 1334.

In Times Square Properties, Inc. v. Alhabb Realty Corp., 117 N.Y.S.2d 901 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 1024, 126 N.Y.S.2d 887 (1953), there had been unitary ownership of two distinct parcels for a period of five years. It was not until after severance of ownership, however, that a platform encroaching on another property was constructed. The *O'Connell* court noted the *Times Square* trial court's dictum that since the pieces of land had been treated as separate, there was no unity of ownership, although legal title was at one point vested in one person. 496 F.2d at 1334.

35. As the general rule, a corporation is a separate legal entity and its shareholders have limited liability for its obligations; it is only in extraordinary situations that this entity will be disregarded. *See* sources cited notes 24-26 *supra.*

36. 358 F. Supp. at 928: "And the usual grounds for dispensing with the corporate form, *i.e.*, to prevent fraud or achieve equity, are not applicable to this case."

37. *See* note 3 *supra.*

38. A traditional interpretation of the ordinance's term "ownership" to mean legal

gested that the defendant shareholder was actually conducting the corporate business in his individual capacity.[39] Although the case was remanded for the factual determination of actual shareholder control, the court of appeals concluded that New York corporate law did not preclude the granting of an easement.[40]

Because the decision in *O'Connell* involved both an easement question and a corporate entity question, it may have an impact in both fields. First, the court listed a number of factors it considered relevant in determining whether its new test for unitary ownership had been met. These factors included whether business between Jopat, defendant, and Patricia Gardens was conducted at arm's length and whether others besides defendant participated in the management.[41] All of the factors focused on locating actual control over, and interest in, the apartment complex and parking lots, and thus were also directly related to the Government's claim.

While these factors were listed to aid the district court in applying the unitary ownership test, they were also relevant in a decision to disregard the separate corporate entity of Patricia Gardens. Under New York law, courts will disregard the corporate form when individuals fail to observe formalities in their dealings with a corporation in which they have an interest and when individuals dominate corporate activities for their personal gain.[42] Many courts, however, fail to indicate the logical relation between the plaintiff's claim and the factors relied upon to disregard the corporate entity.[43] The *O'Connell* court's analysis requires that the ele-

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title, however, would lead to the conclusion that the ordinance's requirements could not be met by disregarding the corporate entity. As the court of appeals was unwilling to transfer legal title, *see* note 31 *supra*, ownership would have to be read to mean "interest" rather than legal title. *See* note 34 *supra*.

39. 496 F.2d at 1334.

40. 495 F.2d at 1335: "We, therefore, conclude that nothing in New York's corporate law would prohibit the implication of an easement here if the conditions of our rule are met."

41. Factors listed by the court were: Whether Patricia Gardens had paid rent for the use of the two parking lots; whether there had been consideration when Patricia Gardens received land for the apartment complex from Jopat or defendant; and what control was exercised by stockholders other than defendant (if any). *Id.*

42. *See, e.g.*, Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966).

43. *See* Dobbyn, *supra* note 26, at 188:

> In an attempt to fortify their written opinions, courts have tended to use a scatter-gun approach, lacing their opinions with every available fact that might indicate unity in either the "control" or "interest" sense, regardless of its rele-

ments of dominance and lack of formalities be related to the activities complained of by the plaintiff. That is, corporate activities totally unrelated to the Government's easement claim, no matter how informally conducted or how much they were influenced by one party, would be irrelevant factors in the Government's suit. This analysis is a significant step toward establishing more precise guidelines for disregarding the corporate entity, a process now characterized by a "scatter-gun" approach.[44]

Secondly, establishing the requisite unitary ownership for an implied easement may no longer necessitate establishing title to both parcels. This definition of unitary ownership appears to be in harmony with the original purpose of that requirement, although regrettably, the court of appeals did not give an explanation of the relationship.[45] The unitary ownership requirement assures that a known use of the servient parcel will be continued only when the conveyor had the ability to burden the land permanently with such a use. That ability to manage and rearrange land does rest in the titleholder. The court of appeals has recognized that that ability may also be held by a shareholder who has complete control

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vance to the appropriate issue—has the shareholder's action affected the plaintiff's ability to collect his legitimate claim?

44. *Id.; see* sources cited note 26 *supra.*

45. The court made no attempt to tie its test to the policy behind the unitary ownership requirement. Arguably, the dominance test also serves the purpose that the legal title test has served in allowing easements only when the grantor had the power to burden land as he pleased. It is unfortunate that this was not made clear, because the test used by the *O'Connell* court has been specifically rejected in some eminent domain cases. In these cases the mechanical test of legal title has been applied, irrespective of any evidence that one party, in fact, controls the entire property, which is in fact used as one entity.

In McIntyre v. Board of County Comm'rs, 168 Kan. 115, 211 P.2d 59 (1949), a husband owned one tract of land and his wife another. Both parcels were used as one farm unit and operated primarily by the husband. The court held that "[t]racts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for a public use." *Id.* at 119, 211 P.2d at 63.

In Gossett v. State, 417 S.W.2d 730 (Tex. Civ. App. 1967), three individuals owned a corporation that in turn held a tract of land. Another tract was owned by two of the three individuals while a third tract was held by the three individuals equally. The entire area was to be used as a site for a shopping center, although construction had not yet begun. The state took and paid for portions of the tracts owned by the individuals, but it refused to compensate for the resultant decline in value of the corporation's adjacent property. The court sustained the state's action by reasoning that there was no identity of ownership in the tracts since the corporation was an entity separate from its shareholders. *Id.* at 735.

of the corporations holding title to the two parcels. To imply an easement in such a case, when the facts point to domination of the corporations by one party, does not jeopardize the rule that no easement will be implied in the land of a stranger.[46]

The question of who has the right to burden land should not be answered simply by establishing who has the title. Such a technical definition substitutes form for substance. The court of appeals has injected sensitivity to modern corporate realities into an ancient property law concept without sacrificing the purpose of the unitary ownership requirement.

46. The unitary ownership requirement is sometimes defined in terms of protecting the stranger, *i.e.* the legal titleholder who is affected by, but not a party to, a conveyance. Green v. Collins, 86 N.Y. 246 (1881).