1964
*Mar. 16
April 28

J. E. GIBSON HOLDINGS LIMITED (*Respondent*) ..... APPELLANT;

AND

PRINCIPAL INVESTMENTS LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Lease—Clause providing for renewal for successive 21-year terms in perpetuity—Validity of clause.

A motion was brought by the respondent company for a declaration that the covenant for renewal contained in its lease from the appellant company was a perpetually renewable clause and that the renewable term of 21 years, subject to the arbitration provision as to rent, was for an indefinite number of additional successive 21-year terms in perpetuity. The reversion was presently vested in the appellant company which attacked the validity of the clause. Both the judge at first instance and the Court of Appeal held that the clause was valid.

Held: The appeal should be dismissed.

There was no dispute that the lease was intended to be renewable in perpetuity and that clauses of this kind, if expressed in terms of an option to renew, do not offend the rule against perpetuities. The appellant's contention that this case was different because the renewal clause imposed an absolute obligation on the lessor to grant a new lease including the covenants for renewal (subject to arbitration as to rent) and a like obligation on the part of the lessee to accept the new lease failed. There was no logical distinction between a present contract for successive renewals in perpetuity and options to achieve the same end.

The further submission that this lease created a term which was indefinite or infinite in time and was in effect a term in perpetuity also failed. This was a lease for 21 years. When that term expired a new lease was drawn on the same terms except as to rent and that lease, in turn, had a term certain of 21 years.

Gooderham & Worts, Ltd. v. C.B.C., [1947] A.C. 66, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Fraser J. Appeal dismissed.

C. E. Woollcombe, for the appellant.

J. D. Arnup, Q.C., and *J. J. Carthy,* for the respondent.

The judgment of the Court was delivered by

[1] [1963] 2 O.R. 507, 40 D.L.R. (2d) 264.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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JUDSON J.:—The subject-matter of this appeal is a clause in a lease which provides for renewal for successive twenty-one year terms in perpetuity, subject to arbitration provisions as to rent. The reversion is now vested in the appellant company which attacks the validity of the clause. Both Fraser J., at first instance, and the Court of Appeal[1] have held that the clause is valid.

The lease was made by John Elias Gibson and Principal Investments Limited for a term of 21 years from December 15, 1949. The renewal clause is in these terms:

> And further, that the said lessor, his heirs, executors, administrators and assigns will at the end or expiration of said term hereby granted and of every subsequent term of twenty-one years granted in pursuance of these presents, and whenever the rent for said future term shall have been fixed by arbitration as aforesaid, at the cost and charges of the said Lessee, its successors, as aforesaid, make execute and deliver unto the said Lessee, its successors and assigns, and that the said Lessee, its successors and assigns, will accept a new and further lease of the hereby demised premises with the appurtenances for the same and containing the same covenants and stipulations, including covenant for renewal, as are contained in this present lease (save only that the yearly rent of the said premises be the rent ascertained or agreed upon as stipulated by arbitration, as hereinbefore mentioned.)

Principal Investments Limited moved under R. 611 for a declaration of its rights. Fraser J. made the following declaration:

> THIS COURT DOTH DECLARE that the renewal clause in the lease between John Elias Gibson and Principal Investments Limited dated the 15th day of December, 1949 is a valid renewal clause for additional successive twenty-one year terms in perpetuity subject to the arbitration provisions as to rent contained in the said lease, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

The Court of Appeal dismissed the appeal from this judgment and, in my opinion, the further appeal to this Court must also be dismissed.

There is no dispute between the parties that the lease was intended to be renewable in perpetuity and that clauses of this kind, if expressed in terms of an option to renew, do not offend the rule against perpetuities (Morris and Leach—The Rule against Perpetuities, 2d ed., p. 223). The appellant says that this case is different because the renewal clause imposes an absolute obligation on the lessor to grant a new lease including the covenants for renewal (subject to

[1] [1963] 2 O.R. 507, 40 D.L.R. (2d) 264.

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arbitration as to rent) and a like obligation on the part of the lessee to accept the new lease.

There is a thorough historical survey of the case law on this subject in the reasons of Fraser J. which I wish to adopt. He is unable to find any logical distinction between a present contract for successive renewals in perpetuity and options to achieve the same end, and I agree with his conclusion. Further, *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*[1], where the obligations of lessor and lessee concerning renewal were expressed in mutual covenants to grant and accept a lease, is against any such distinction.

The further submission that this lease creates a term which is indefinite or infinite in time and is in effect a term in perpetuity also fails. This is a lease for twenty-one years. When that term expires a new lease is drawn on the same terms except as to rent and that lease, in turn, has a term certain of twenty-one years.

The appellant also took objection that the application for a declaration of rights was premature, the lease not expiring until December 15, 1970, and that in the circumstances, the Court should not exercise its jurisdiction under R. 611. Both Fraser J. and the Court of Appeal ruled against this contention and we informed the respondent at the hearing that we did not need to hear him on this point. We agree with both Courts that the jurisdiction was properly exercised.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

[1] [1947] A.C. 66.