GUARDIAN REALTY COMPANY OF CANADA (PLAINTIFF.....) APPELLANT;

AND

JOHN STARK & COMPANY (DEFENDANTS)..... RESPONDENTS.

1922
May 30.
June 17.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Lessor and lessee—Lease for years—Covenant to renew at option of lessee—Right to renew after term expires—Continuance of possession —Sanction of lessor.

If a lease for years contains a covenant for renewal at the option of the lessee the option can be exercised at any time after the lease expires so long as the lessee remains in possession with the sanction of the lessor. Mignault J. *hesitante.*

It is not necessary that the continuance of possession shall be with the consent of the lessor evidenced by some positive act. Mere non-interference therewith on his part suffices.

Per Duff J. The interest created by a covenant to renew a lease for years at the option of the lessee is a present interest defeasible only by the election of the latter to discontinue possession. It is a vested right not one subject to fulfilment of a condition precedent.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2) in favour of the plaintiff.

The appellant company leased property to the respondents for five years with a covenant for renewal at expiration of the term for the same period at the

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 21 Ont. W. N. 373. (2) 21 Ont. W. N. 156.

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option of the lessee. The term expired at the end of December 1920. Respondents remained in possession and on Jan. 7th, 1920, appellant verbally notified the manager of the respondents that their lease and option had expired, that they were overholding tenants and possession of the premises was demanded. The respondents immediately after wrote to appellant that they had accepted the option to renew, enclosing a cheque for one month's rent at the increased rent called for by the terms for renewal. The appellant in answer reiterated its possession and returned the cheque. They they then began proceedings to recover possession under the Landlord and Tenant Act.

The trial judge held that the respondents had not remained in possession with the express consent of the lessor and that their right to renew was gone. The appellate Division reversed his decision on the ground that they were bound by the case of *Brewer* v. *Conger* (1) which decided that express consent was not necessary. The plaintiffs then appealed to the Supreme Court of Canada.

Nesbitt K.C. and *K. F. Mackenzie* for the appellant. *Prima facie* the option to renew granted by the lease must expire with it. The natural conclusion then is that it must be exercised within a reasonable time before the term ends as said by Bruce J in *Lewis* v. *Stephenson* (2).

The respondents were only tenants at sufferance and their possession was adverse and might have ripened into a title. See *Ley* v. *Peter* (3).

(1) 27 Ont. App. R. 10. (2) [1898] 78 L. T. 165.
(3) 3 H. & N. 101.

The decisions relied on by the Appellate Division are based on *Hersey* v. *Giblett* (1). That case had been misunderstood. A house was let to Hersey as a yearly tenant thereof and he was in possession under that agreement when he exercised the option given therein to take a lease. *Moss* v. *Barton* (2) and *Buckland* v. *Papillon* (3) follow *Hersey* v. *Giblett* (1) considered as deciding that the option can be exercised so long as the lessee is in possession with the lessor's consent.

R. J. McLaughlin K.C. for the respondents. An option to renew contemplates continuation of the relation of lessor and lessee and its exercise is not restricted to the duration of the term. See Halsbury vol. 18 page 393, par. 845. The only authority to the contrary which is cited is *Lewis* v. *Stephenson* (4). But that is only a dictum by a single judge which is dissented from in *Allen* v. *Murphy* (5).

Brewer v. *Conger* (6) is in line with the decisions in England and the rule there followed should be confirmed.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs.

IDINGTON J.—The appellant seeks to eject respondents as overholding tenants from office premises which had been held by them under it by virtue of a lease for the term of five years to be computed from the 1st day of January, 1916, and they, by way of defence, rely upon the following option of a renewal given in and by said lease:—

(1) [1854] 18 Beav. 174.
(2) [1866] 35 Beav. 197.
(3) [1866] L.R. 1 Eq. 477.
(4) 67 L.J.Q.B. 296.
(5) [1917] 1 Ir. R. 484 at page 487.
(6) 27 Ont. App. R. 10.

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The lessees are hereby granted the option of renewing this lease for a period of five years from the expiration of the term hereby granted at a rental of $2,575.00 per annum on the same terms and conditions as herein set out except that as to renewal.

There is nothing restricting respondents to exercise said option within any specified time as usually is in the like cases of lease, and hence what is reasonable must be the limits of the right so existent.

Nothing was expressly said by either party as to renewal until the 7th of January, 1921, when appellant's manager intimated it did not intend to renew, and respondents instantly expressed their intention to exercise the option so given and, by letter reiterating same and enclosing a cheque for the first month's rent, repeated the exercise of the option. Preceding this there had been an expenditure of nearly four hundred dollars by appellant, at the expense of the respondents, in way of changes in the office partitions during the last few months of the expiring term which must have made plain to appellant the intention to renew.

The appellant was bound by the terms of the lease to perform many daily services in way of lighting, heating, elevating, supplying water, etc., which it does not pretend by any proof adduced to have interrupted and thereby asserted its claims as it might have done against a mere wrongful overholder.

In argument its counsel stoutly asserts that there is no evidence on the point and suggests the burden of proving that rested on the respondents.

With deference, I submit that in reply to any one trying to apply the rather narrow argument, put forward, that respondents were debarred from exercising their option after the 1st of January, 1921, unless they can and do shew that the appellant actually

did something in way of assenting to their stay, it is not an unfair inference of fact in our climate, in order to meet such an argument, that if it had been possible to support it by evidence that would have been adduced.

In the court below there seems to have arisen an error as to the date of the first meeting between the manager of the appellant and one of the respondents. It is stated as having taken place on the fifth instead of the seventh, which counsel on each side are agreed is the correct date.

That shews how instantaneous the response on the part of the respondents was to the suggestion of the manager of appellant as to renewal.

It meets the situation which both the Master of the Rolls and Lord Chelmsford respectively suggested as the duty of a landlord before setting up delay as an answer to the exercise of an option.

These possibly new features of argument adduced before us are all, I think, that are not amply covered by the reasons assigned in the judgment of the Chief Justice of Ontario in dealing with the case as presented below and in which reasoning I fully concur and need not repeat here.

I think this appeal should be dismissed with costs.

DUFF J.—The operation of a covenant by a lessor to renew at the option of the lessee is a subject which has been much discussed and especially as touching the application of the rule against perpetuities. Such a covenant, even where the original lease is a lease for lives, does not come under the ban of the rule where it is wholly in the control of persons having vested interests in the lease. It has been said that this is an exception to the rule against perpetuities (Jessel,

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M. R. in *London and South Western Ry. Co.* v. *Gomm* (1) at page 579); but the so called exception has been supported upon another ground, namely, that the covenant to renew is part of the lessee's present interest. And in the case of an absolute covenant to renew a lease for years at the option of the lessee, it seems to be undeniable that the equitable interest created is not an interest to arise in future on fulfilment of a condition precedent but a present interest annexed to the land from its inception defeasible on a condition subsequent depending upon the election of the lessee to continue or to drop his possession. The vesting of a longer term does, no doubt, depend upon the happening of another event, namely, the application for renewal, but the present right, the right to have a renewal on application, is a different thing. That is a vested right, not a right to arise in future upon the happening of a condition precedent. This is the view expressed by the learned author of Gray on Perpetuities, 1915, pages 203-204, and by the learned author of Williams on Vendors and Purchasers in an elaborate discussion of the subject in 42 Solicitors Journal, at page 630. In support of it there is the statement of Jessel M. R. in *Moore* v. *Clench* (2), and of Farwell J., in *Muller* v. *Trafford* (3).

This view of the effect of such a covenant is not without its bearing upon the question raised by the present appeal. It harmonizes with the reasoning upon which the decision of Sir John Romilly, in *Moss* v. *Barton* (4), as well as that of Lord Chelmsford in *Buckland* v. *Papillon* (5), is based. Both treat the covenant to renew as vesting a right in the lessee which the lessee

(1) [1882] 20 Ch. D. 562.
(2) [1875] 1 Ch. D. 447 at page 452.
(3) [1901] 1 Ch. 54 at page 61
(4) 35 Beav. 197 at page 200.
(5) [1866] 2 Ch. App. 67 at pages 70-71.

may exercise so long as he has not lost his right by electing not to exercise it. By going out of possession at the end of the term he would obviously exercise his option against renewal. If he continue in possession the lessor is in a position to call upon him at any time to say whether he will remain or take a lease; that the lessor is entitled to do, and the corelative obligation would rest upon the lessee to exercise his right by taking a lease or to lose it. This view appears to have been acted upon by the Court of Appeal of Ontario in *Brewer* v. *Conger* (1).

It is now argued that the decisions in England in effect establish the rule that at the expiry of the term the right to exercise the option is gone if the lessee has not already exercised it unless he continue in possession with the consent of the landlord—consent meaning in this connection something more than a consent inferred from mere passivity.

I do not so interpret the decisions in question. The principle as appears sufficiently, I think, from the reasoning of Lord Chelmsford as well as that of Sir John Romilly, which, as I have intimated already, accords with the view that in other connections has been taken of the effect of such a covenant, is that the lessee's option remains open and exercisable until he has done something which concludes it. It is quite true that in both these cases the lessee who had remained in possession for some years after the expiry of the lease had been in possession with the active assent of the lessor who had accepted rent and given the lessee thereby the status of tenant from year to year. But there

(1) 27 Ont. App. R. 10 at pages 14-15.

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must have been a period in both cases in which the lessee was in occupation without the assent of the lessor. There is nothing, I think, in the language of the judgments to indicate that during this period the right of the lessee to renew was supposed to be in suspense. On the contrary, both the Lord Chancellor and the Master of the Rolls pointedly emphasize the power of the lessor over the situation by reason of the circumstance that he is entitled at any time to call upon the lessee to elect whether he will take a lease or not. That is something which could hardly have reference to a time when the lessee was in possession under a tenancy from year to year, but must refer to a time when the lessor was entitled to demand possession of the premises but for the lessee's right to have a lease. In the result this view seems to accord with the convenience of the situation because the lessor, who admittedly remains until the last day of the term in the lands of the lessee as to the matter of renewal, is entitled the moment the term is expired to require the lessee to make his election; and it is entirely consistent with the view of such covenants that excludes them from the operation of the rule against perpetuities. There is moreover weighty evidence shewing that this is the accepted view. In Fry, Specific Performance, it is laid down without qualification that where no time is limited and where the landlord has never called on the tenant to declare his option, mere lapse of time will not preclude the tenant or his assign from exercising it. To the same effect is a decision of the Irish Court of Appeal in *Allen* v. *Murphy* (1), and a long series of American decisions.

(1) [1917] I.R. 484 at page 487.

Indeed the view advocated by the respondent seems necessarily to involve the proposition that the option, unless exercised, does terminate with the lease, in the absence of something done by the lessor to extend it. For the lessee who merely remains in possession does nothing indicating an intention to abandon his right to a lease; he fails to procure the lessor's consent, that is all.

This is not enough because the basis of the cases above referred to is no more verbal formula. It rests upon this very substantial foundation that the lessee has a present interest arising from the covenant and that this interest is not conditioned by his duty to ask for a lease before the expiration of the term or within any limited period. His right to call for a lease is qualified by the condition that if he gives up possession at the end of the term he loses it because thereby he exercised his option. If he remains in possession the landlord can force him to exercise his election by setting up his right to a lease in response to the landlord's demand for possession.

It is argued by Mr. Nesbitt that the principle of the English cases is excluded in consequence of the presence of a special provision that the lessee remaining in possession with the assent of the lessor should be deemed to be held as monthly tenant on specified terms.

I am unable to agree with this conclusion. The Lord Chancellor points out in *Buckland* v. *Papillon* (2) that the right to demand a lease would not be one of the terms under which a tenant from year to year holds the premises after the determination of the orginal term. The right to demand a lease, he said,

(1) 2 Ch. App. 67.

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"had nothing whatever to do with the tenancy from year to year". The option continued to exist not because the lessee holding over had become a tenant from year to year, but because the option had not been determined by the conduct of the lessee.

The appeal should be dismissed with costs.

ANGLIN J.—Much can be said for the opinion that convenience and certainty in regard to the position of landlord and tenant on the expiry of the original term would have been promoted by holding that the right of election for the renewal of a lease, under an option in which no time therefor is fixed, must be exercised before the expiry of the term to be renewed. The weight of American authority would appear to favour this view. The law, as so stated in 29 Cyc. 999, is approved or supported by the following authorities; *Robertson* v. *Drew* (1); *Shaw* v. *Bray* (2); *Renoud* v. *Daskam* (3); *Perry* v. *Rockland Lime Co.* (4); *Thiebaud* v. *First National Bank* (5). A similar opinion was expressed *obiter* by Bruce J. in *Lewis* v. *Stephenson* (6). But that opinion has been disregarded, if not overruled; *Allen* v. *Murphy* (7); and, at least since Lord Romilly's decision in *Moss* v. *Barton* (8), it must be taken as settled that in English law the exercise of such an option is not restricted to the duration of the original term, if nothing else has occurred to determine it, but endures so long as the lessee continues in possession with the sanction of the lessor. In *Moss* v. *Barton* (8) Lord Romilly may have unwittingly

(1) 34 Cal. App. 143.
(2) 147 Ga. 567.
(3) 34 Conn. 512.
(4) 94 Me. 325.
(5) 42 Ind. 212.
(6) 67 L.J.Q.B. 296.
(7) [1917] 1 Ir. R. 484.
(8) 35 Beav. 197.

extended the effect of his own previous decision in *Hersey* v. *Giblett* (1), as Mr. Mackenzie contends in his very able factum. The yearly tenancy created by the agreement which contained the option for the lease no doubt subsisted when the tenant, Hersey, sought to exercise the option. But *Moss* v. *Barton* (2) was expressly approved in *Buckland* v. *Papillon* (3) and no dissent from it was suggested by Lord Chelmsford on the appeal in that case (4). There an assignee of the tenant, who had continued in possession as a yearly tenant after the expiry of a three year's term, under an agreement for lease, was held entitled to exercise an option to take a lease for a further term. Lord Chelmsford says:—

> He continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landord, so long he retained his option.

The law appears to have been accepted as settled in this sense by leading English text writers; Foa, Landlord and Tenant, 5th ed. page 307; Fry on Specific Performance, 6th ed., page 516; 18 Halsbury L. of E., page 393, No. 845. It was so recognized in Ontario in the case of *Brewer* v. *Conger* (5).

(1) 18 Beav. 174.
(2) 35 Beav. 197.
(3) L.R. 1 Eq. 480.
(4) 2 Ch. App. 67.
(5) 27 Ont. App. R. 10.

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Anglin J.

In so far as the case last cited, notwithstanding the special circumstances mentioned in the judgment of Maclennan J. A. at page 14, indicative of communication having been made before the expiry of the lease of the tenant's intention to renew, should be regarded as authority for the proposition that an option for renewal, containing no time limit and no condition, may be exercised after the expiry of the term although the landlord's sanction to the tenant's retaining possession has not been shewn, I find it unnecessary to express an opinion upon the accuracy of the decision. Having regard to all the circumstances in the present case, some of which are noticed in the judgment of Meredith C. J. O. (1)—I accept the view of that learned judge that when the landlord's agent, on the seventh day after the expiry of the term, notified the tenants that their lease had expired and they immediately asserted their right to a renewal and promptly sent a cheque for a month's rent at the renewal rate specified in the option, they were still in possession with the lessor's consent within the meaning of the English authorities. Their intimation of an intention to exercise their option was concurrent with the first intimation from the landlord that they could no longer hold possession with its consent and that they would be regarded as overholding tenants.

There is nothing to indicate that there had been any consent by the lessor to the creation of a monthly tenancy under the special provision therefor made in the lease. On the contrary, the notification of the 7th of January by the appellant's agent that the respondents would be regarded as overholding tenants negatives any such consent.

The appeal in my opinion fails and should be dismissed with costs.

(1) 21 Ont. W.N. 373.

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Brodeur J.

BRODEUR J.—The question to be decided is as to the right of John Stark & Company to a renewal of a lease from the Guardian Realty to them.

The lease was made for five years from the 1st of January, 1916, and it was provided that John Stark & Company, the lessees, had the option of renewing the lease for a further period of five years on the same terms.

Some time before the expiry of the lease the lessees asked for some somewhat extensive repairs which the lessor agreed to make provided their costs should be paid by the lessees. These repairs were made and paid for by the lessees, which shews the intention of the latter to remain on the premises and likely to exercise the option they had by the lease to renew it for a further period of five years.

The lessees remained in possession of the premises after the expiry of the lease on the 1st of January, 1921; and on the 7th they wrote the lessor that they had duly accepted the option of renewing the lease and sent their cheque in payment of rent for the then current month.

The lessor refused to accept the cheque and claimed that the lease and option had expired and that the lessees were liable for double rent as overholding tenants.

The question is whether the option should be accepted during the term of the lease.

The contract does not provide as to the date at which the option should be exercised. The law, as stated in Halsbury, vol. 18, page 393, is to the effect that if a lease which creates a tenancy for a term of years confers on the lessee an option to take a lease for a further term, the exercise of the option is not necessarily restricted to the duration of the general original term.

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This statement of the law is based upon the following decisions:—

Moss v. *Barton* (1); *Hersey* v. *Giblett* (2); *Buckland* v. *Papillon* (3).

In the latter case the Lord Chancellor, Lord Chelmsford, stated that the option continued after the expiration of the original term until something had been done to determine it and that it would continue so long as the tenant remained in possession with the assent of the landlord; that if the landlord wished to know upon what terms the tenant held he might call upon him to see whether he meant to have a lease or not.

Fry on Specific Performance, 5th ed. par. 1105, expresses a similar view in the following terms:—

> But where no time has been originally limited within which the tenant's option to have a lease must be exercised, and the landlord never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant or his assignee or personal representative from exercising it.

We have in Ontario the case of *Brewer* v. *Conger* (4), which is to the same effect and which holds that the option continues until something is done to terminate it.

In the case of *Lewis* v. *Stephenson* (5), there is a dictum of Bruce J. to the effect that the option should be exercised before the termination of the original lease. But this dictum has been dissented from in *Allen* v. *Murphy* (6).

In view of those authorities, I am of opinion that John Stark & Company properly exercised their option.

The appeal should be dismissed with costs.

(1) 35 Beav. 197.
(2) 18 Beav. 174.
(3) 2 Ch. App. 67.
(4) 27 Ont. App. R. 10.
(5) 67 L.J.Q.B. 296.
(6) [1917] 1 L.R. Ir. 484 at page 487.

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Mignault J.

MIGNAULT J.—With some doubt, I concur in the judgment of my brother Anglin dismissing the appeal. Independently of the authorities cited by him which, I think, conclude the matter, it would seem reasonable that an option to renew a lease should be exercised while the lease is still current, and not as in this case several days after it has come to an end. It is true that the lessees had remained in possession, but there was a clause in the lease stating that if they did so with the consent of the lessor they should be deemed monthly tenants. Now they say that having remained in possession with the consent of the lessor they can exercise their option for a renewal term and are not to be deemed monthly tenants. I bow to the authorities allowing them to do so, but I could not help feeling some doubt.

Appeal dismissed with costs.

Solicitors for the appellant: *Mackenzie, Roebuck & Sanderson.*

Solicitors for the respondent: *McLaughlin, Johnston, Moorehead & Macaulay.*