RONALD ALEXANDER GORDON (*Plaintiff*) ..... APPELLANT;

AND

ADDA WEIS CONNORS (*Defendant*) ....RESPONDENT.

1953

*May 27, 28
*Jun 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Option to lease—Minerals—Variation between lease and terms of option—Whether option binding.

The respondent signed a 30 days option to lease certain mineral rights to the appellant for a term of ten years, with a bonus payable on completion of the option. The appellant tendered the bonus payment and at the same time submitted for the signature of the respondent a form of lease containing provisions contrary to the terms of the option. The tender was refused. The trial judge found the option to be binding but the Court of Appeal for Alberta held that the tender was conditional and that the option had ceased to exist.

Held: The appeal should be dismissed. The evidence showed that the tender was not within the terms of the option.

Per: Kerwin and Fauteux JJ. The principles of *Pierce v. Empey* [1939] S.C.R. 247 apply to an option for a lease.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment at trial and dismissing an action for a declaration that the option for lease of minerals was binding.

H. W. Riley Q.C. and J. R. McColough for the appellant.

M. E. Shannon for the respondent.

*PRESENT: Kerwin, Rand, Estey, Locke and Fauteux JJ.

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

The judgment of Kerwin and Fauteux JJ. was delivered by

KERWIN J.:—This action is concerned with what is called an "option to lease", signed by Mrs. Connors, and is in these terms:—

OPTION TO LEASE

THIS INDENTURE made this 22nd day of October, A.D. 1951

BETWEEN

Adda Weis Connors of Rimbey, Province of Alberta, Canada, hereinafter called the Lessor,

and

R. A. Gordon of Lacombe, Province of Alberta, hereinafter called the Lessee.

The Lessor being the registered owner of the S.W. 23-42-3 W 5M and also being in possession of the mines and mineral rights does on this day grant an option to R. A. Gordon, the Lessee, for a period of thirty (30) days from the date of this Option, the right to lease the mines and minerals on the above mentioned land, for a period of ten (10) years at the rate of One (1) Dollars per acre per year. It is also agreed that the Lessee will pay Sixteen Hundred ($1,600.00) bonus which includes the lease fee for one year.

Now it is understood by both parties that for the sum of One Hundred ($100.00) Dollars paid by the Lessee to the Lessor, the Lessor agrees to give the Lessee Thirty (30) days to complete the payment of Sixteen Hundred ($1,600.00) Dollars agreed upon and in case the Lessee completes and takes up the option it is understood that the One Hundred ($100.00) Dollars now paid will be credited on the Sixteen Hundred ($1,600.00) payment. In case the payment of Fifteen Hundred ($1,500.00) is completed.

The Lessor and Lessee covenant and agree as follows: The Lessee shall pay to the Lessor as royalty (*a*) 12½ per cent of the current market value at the well of all petroleum oil produced, saved and marketed from the said lands. (*b*) 12½ per cent of the current market value of gas produced from the said lands and marketed or used off the said lands or in the manufacture of casinghead gasoline.

In witness whereof the Lessor and Lessee have signed their names this 22 day of October, A.D. 1951.

In *Pierce v. Empey* (1), with reference to an option for a sale of land, Sir Lyman Duff on behalf of the Court stated the law in the following terms at page 252:—

It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some

(1) [1939] S.C.R. 247.

equitable ground relieved from the strict fulfilment of them (Cushing v. Knight (1912) 46 Can. S.C.R. 555; Hughes v. Metropolitan Rly. Co. (1877) 2 App. Cas. 439; Bruner v. Moore (1904) 1 Ch. 305.

The same principles apply to an option for a lease.

In the reasons for judgment of the Appellate Division (1), delivered on behalf of that Court by Mr. Justice Clinton J. Ford, appears the following :

> The position taken by the plaintiff at the trial was that Mrs. Connors agreed to sign a lease in the form and content of what is spoken of in the case as a Landmen's lease, that was being used in the Rimbey area in the leasing of petroleum and natural gas rights.

This is made plain by the statement of counsel for the appellant at the opening of the trial:— "As I see it the main issue in the case is whether the lease should be for ten years or for ten years and longer thereafter as oil is produced." That this position was justified is shown by the evidence given on cross-examination by Mr. MacGillivray, the agent of the appellant, who in response to the following question:— "You wanted her to take the money first before you would discuss the lease with her, is that it?",—referring to the interview on November 9 or 10 between Mrs. Connors and Mr. MacGillivray,—answered by a decisive "No." It is true that the witness proceeded to state:— "I wanted her to accept the money, say she would accept it and then we would go into the lease" but that does not qualify the emphatic negative and in fact it shows that the witness was merely following the instructions he had received from the appellant who testified that he had told Mr. MacGillivray:— "Pay Mrs. Connors the $1,500.00 and have her sign the lease." The lease followed in substance the Landmen's form that was being used in the Rimbey area and instead of being a lease for ten years, it was for "ten years or so long thereafter as the leased substances were produced." It also contained other provisions contrary to the terms of the option.

It is of importance that on November 20 (before the expiration of the thirty days mentioned in the option) Mr. Braithwaite, Mrs. Connors' son-in-law, offered Mr. MacGillivray a ten year lease and repeated the offer the follow-

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Kerwin J.

ing day to the appellant. Part of the appellant's cross-examination upon this point and as to that conversation is as follows:—

Q. And do you recall Mr. Braithwaite telling you at that time that any lease they submitted to you would be for ten years certain, nothing more, nothing less, in accordance with the option?—A. I do not. But I do recall him saying that he understood that they were bound to give a lease for ten years. Yes?—A. And that they were prepared to execute a lease of that type.

Giving full effect to the trial judge's finding:— "I accept the evidence of B. M. MacGillivray throughout respecting the transactions between the parties.", it is clear that in accordance with his instructions, Mr. MacGillivray would not have paid the $1,500 to Mrs. Connors without having the latter sign the form of lease sent to him by the appellant. The Appellate Division came to the right conclusion and the appeal should be dismissed with costs.

RAND J.:—Throughout these proceedings both parties have agreed and acted on the view that, by its terms, the option was to be accepted by the unconditional tender to the respondent of the sum of $1,500. The evidence indicates clearly that no such tender was made. That of the agent representing the appellant shows beyond a doubt his intention, after demonstrating, as he did, that the money was there and available to be paid over, to proceed first to settle the terms of a lease which both parties assumed would be drawn up. The document presented at that time contained clauses that contradicted the provisions of the option, and the respondent was justified in rejecting it. But quite apart from that, at no time within the period of the option was the appellant or his agent willing to pay the money over as the act of acceptance and therefore antecedent to the formulation of terms. There was, then, no acceptance of the offer of sale, and consequently no contract, and the appeal must be dismissed with costs.

ESTEY, J.:—The appellant and Adda Weis Connors in her lifetime entered into an option agreement dated October 22, 1951, which reads as follows:

The Lessor being the registered owner of the S.W. 23-42-3 W. 5M and also being in possession of the mines and mineral rights does on this day grant an option to R. A. Gordon, the Lessee, for a period of thirty (30) days from the date of this Option, the right to lease the mines and minerals on the above mentioned land, for a period of ten (10) years at

the rate of One (1) Dollar per acre per year. It is also agreed that the Lessee will pay Sixteen Hundred ($1,600.00) bonus which includes the lease fee for one year.

Now it is understood by both parties that for the sum of One Hundred ($100.00) Dollars paid by the Lessee to the Lessor, the Lessor agrees to give the Lesse Thirty (30) days to complete the payment of Sixteen Hundred ($1,600.00) Dollars agreed upon and in case the Lessee completes and takes up the option it is undertsood that the One Hundred ($100.00) Dollars now paid will be credited on the Sixteen Hundred ($1,600.00) payment. In case the payment of Fifteen Hundred ($1,500.00) is completed the Lessor and Lessee covenant and agree as follows:

The Lessee shall pay to the Lessor as royalty (*a*) 12½ per cent of the current market value at the well of all petroleum oil produced, saved and marketed from the said lands.

(*b*) 12½ per cent of the current market value of gas produced from the said lands and marketed or used off the said lands or in the manufacture of casinghead gasoline.

The appellant contends that through his agent, MacGillivray, on the 9th or 10th day of November, 1951, he accepted the option by tendering the sum of $1,500, which Mrs. Connors refused. The respondent contends that it was but a conditional offer. The learned trial judge found in favour of the appellant and declared that the appellant was entitled to a lease in the terms of the above-quoted option, read in conjunction with the terms of the Alberta Landmen's Association form of lease, on payment by the plaintiff of $1,500.00.

The learned judges in the Court of Appeal (1) held that the Landmen's lease was not a part of the option and that the tender on the 9th or 10th of November by MacGillivray of $1,500 was conditional.

I am in agreement with the learned judges in the Court of Appeal that the Landmen's lease was not a part of the option.

The evidence justifies a conclusion that early in November the appellant had made up his mind to accept the option, provided he could obtain a lease upon the terms that he desired, which were not those of the lease contemplated by the option. He sent the $1,500 and a draft lease to his agent, MacGillivray, with instructions: "Pay Mrs. Connors the $1,500 and have her sign the lease." MacGillivray advised Mrs. Connors that he had the $1,500 and the lease. As a consequence she went to his office and, after

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Estey J.

some conversation to the effect that she preferred to be released from the option and Mr. MacGillivray's statement that he could do nothing about it, he continued: "I am instructed to tender you $1,500, and here is the money in cash." The evidence shows clearly that he did no more than show her the money. When asked: "You wanted her to take the money first before you would discuss the lease with her, is that it?" he replied: "No. I wanted her to accept the money, say she would accept it, and then we would go into the lease."

The lease prepared by the appellant and sent to MacGillivray included clauses contrary to the terms of the option. The two to which particular objections were taken provided for a right in the lessee to surrender at any time and that it should "remain in force for ten years from this date and so long thereafter as the leased substances, or any of them are produced from the said land or any operations are conducted thereon for the discovery and/or recovery of leased substances."

The learned trial judge accepted the evidence of MacGillivray "throughout respecting the transactions between the parties." MacGillivray arranged for a meeting at his office on November 21, when the appellant, MacGillivray, Mrs. Connors and Mr. and Mrs. Braithwaite were present. Notwithstanding that the appellant then had in his possession a letter written by Mrs. Connors' solicitor taking exception to certain clauses, including the two above mentioned, he brought a second draft lease to the meeting which contained both of these objectionable clauses. Braithwaite, who was acting as agent for Mrs. Connors, deposed that he, upon that occasion, offered appellant a lease for a ten-year period, which he refused in the words "It is no good to me." The appellants, while not expressly admitting Braithwaite's statement, did admit that Braithwaite had offered him a lease in the terms of the option, to which he replied: "I did tell him at the time that I did not think such a lease would be worth very much, but I should certainly like it prepared and submitted to me for my inspection." He was then asked and replied:

Q. . . . But your option is for 10 years, is it not?—A. Yes.

Q. All right. And what did you want the term to be in the lease?—A. Ten years or so long thereafter as the leased substances were produced.

Moreover, at the trial one of the main issues was whether or not the form of lease known as the Alberta Landmen's Association lease was not a part of the option agreement and, in fact, the learned trial judge directed that it be declared

> that the plaintiff is entitled to a Petroleum and Natural Gas lease of S.W. 23-42-3, W. 5th, in the terms of the agreement between the parties dated 22nd October, 1951, read in conjunction with the terms of the Alberta Landmen's Association form of lease on payment by the plaintiff of $1,500.00.

This Landmen's lease contained clauses providing for continuation and surrender to the same effect as those objected to by the respondent.

The foregoing indicates that the appellant was at all times insisting upon a lease for ten years and so long thereafter as the leased substances were produced, and, therefore, quite contrary to the terms of the option, which provided for a period of ten years certain. It was this he desired and insisted upon throughout. It was in the first lease that he sent to his agent, MacGillivray, with the instructions: "Pay Mrs. Connors the $1,500 and have her sign the lease." That MacGillivray understood and was but carrying out his principal's instructions is clear from the language "I wanted her to . . . say she would accept it, and then we would go into the lease." This leads to the conclusion that had she failed to sign the lease he would have retained the $1,500. It cannot, therefore, be construed as more than a conditional tender.

Counsel for the appellant emphasized a portion of his client's evidence as to what took place in MacGillivray's office on November 21 when all were present. This evidence reads as follows:

> I advised Mr. Braithwaite that my information was that $1,500.00 had been tendered to Mrs. Connors, and that I was prepared to go over to the bank and obtain another $1,500.00 if she desired tender to be made, and he advised that there was no necessity of making tender, because they admitted tender had been made to Mrs. Connors.

The appellant does not purport to give Braithwaite's words, but rather his own conclusion as to the effect thereof. Braithwaite was not asked as to this part of the conversation, nor was it referred to by MacGillivray. Even upon the assumption that the appellant's recollection and conclusion as to the admission is correct, it could not

1953

GORDON v. CONNORS

Estey J.

amount to more than that a tender had, in fact, been made to MacGillivray. It still remained for the Court to determine, as a matter of law, whether the tender was absolute or conditional.

The appeal should be dismissed with costs.

LOCKE, J.:—The document signed by Mrs. Connors called an "option to lease" described the land, the term of the lease, the annual rental and the royalty to be paid to the lessor in the event of oil or gas being discovered, the payment by Gordon of the sum of $100 was acknowledged and the offer to lease the mineral rights was stated to be open for acceptance for a period of thirty days from October 22, 1951. Upon acceptance and the payment of a further $1,500 before the expiration of that period without more, the transaction would have been completed. The offer thus made said nothing about any more formal lease and did not, by its terms, obligate Mrs. Connors to sign any other document.

The appellant in framing his action, after referring to the written document, said that "the lease to be granted on the exercising of the option" was for a term certain which was stated in the language of the option and, after alleging a tender, pleaded that:—

> The Defendant further refused to grant the plaintiff a lease of the said mines and minerals in direct violation of the terms and covenants in the said agreement.

By the defence it was alleged that the plaintiff had failed to tender the sum of $1,500 within the time limited by the option and, alternatively, that if any such tender was made the plaintiff had required the defendant, at the time of the tender, to sign a lease which did not comply with the terms of the option and which contained terms and covenants not provided for or contemplated in the said option.

It was upon this record that the action went to trial. The opening statement of counsel for the plaintiff, however, made it clear that the issue which the plaintiff contended was to be tried was not one which was raised by the pleadings, as he then said that the main issue in the case was whether the lease should be for ten years or for ten years and so long thereafter as oil was produced. No such question could arise under the terms of the written instrument.

The appellant, however, apparently without objection, proceeded to set up another case which was that there had been negotiations between the parties prior to the signing of the option, which obligated Mrs. Connors, if the option was accepted, to sign a written lease in a form referred to in the evidence as the Landman's lease, which, it was said, is extensively used in leasing mineral rights in the Province of Alberta. Despite the state of the record and without any amendment, evidence was directed to this issue by both parties and the learned trial Judge found that the plaintiff was:—

> entitled to a petroleum and natural gas lease of S.W. 23-42-3, W. 5th, in the terms of the agreement between the parties dated 22nd October, 1951 (Ex. 1), read in conjunction with the terms of the Alberta Landmen's Association form of lease (Ex. 3) on payment by the plaintiff of $1,500.

A blank form of the Landmen's lease had been introduced by the plaintiff into the evidence. In addition to a large number of important terms which had never been discussed between the parties, the form fixed the duration of the lease as being for a term of years to be specified,

> and so long thereafter as the substances or any of them are being produced from the said lands subject to the sooner termination of the said term as hereinafter provided.

A further provision gave to the lessee the right to surrender the lease at any time as to all or any portion of the lands, whereupon the obligations of the lessee should cease.

It was, no doubt, because the appellant had not in his statement of claim alleged that Mrs. Connors had orally agreed to lease the mineral rights for ten years upon the terms and conditions stipulated for in the Landmen's lease form that the Statute of Frauds was not raised as a defence. Clinton J. Ford, J.A. (1), in delivering the judgment of the Court of Appeal, has said that, if it were necessary, permission to amend to plead the statute should be granted but considered that the defence was open to the present respondent without this being done. On the view I take of this matter, it is unnecessary to consider the question.

The action is one for specific performance. If the issue to be disposed of is that raised by the pleadings, it is perfectly clear that Mrs. Connors did not by the terms of the option agree to sign any further written instrument and the

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Locke J.

action fails since the evidence shows that there was no unconditional tender of the sum of $1,500 during the period within which the offer was open for acceptance but that, on the contrary, the amount was offered to her on condition that she sign a lease, the terms of which differed radically from the terms of the offer. If, on the other hand, the matter be considered upon the evidence as to the negotiations between the parties, both prior to and after October 22, 1951, while it is apparent that Mrs. Connors, who had apparently very little business experience in matters of this nature, was prepared to sign a formal lease in the terms of the offer, there is no evidence that she agreed to sign such an instrument, either in the terms of the Landmen's lease or in either of the other forms which the appellant endeavoured to induce her to execute.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for the respondent: *McLaws & McLaws.*