

FREGO CONSTRUCTION INCOR- }
PORATED (*Defendant*) } APPELLANT;

AND

MARY LEE CANDIES LIMITED }
(*Plaintiff*) } RESPONDENT.

1963
*Mar. 15
Mar. 22

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

Real property—Lease of store—Prohibition to lease another store to company in same business in same shopping centre—Whether prohibition violated.

The defendant leased to the plaintiff a store in a new shopping centre. It was clearly stipulated in the lease and agreed that there would not be another store in the centre whose business would be devoted primarily towards the sale of candies and nuts. Some time later another store was leased to a company which was in that business. The plaintiff asked for the annulment of the lease on the ground that it had been violated. The trial judge dismissed the action but the Court of Appeal, in a majority judgment, annulled the lease. The defendant appealed to this Court.

Held: The appeal should be allowed.

The prohibition to lease premises to another store in the same business applied only to that portion of the land described in the agreement

*PRESENT: Tachereau, Fauteux, Abbott, Martland and Judson JJ.

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as the "centre", and, as found by the trial judge and the two dis-setting judges in the Court of Appeal, the new store leased was outside the boundaries of the centre as contemplated by the parties.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec¹, reversing a judgment of Charbonneau J. Appeal allowed.

C. A. Geoffrion, Q.C., and *M. B. Spiegel*, for the defendant, appellant.

J. F. Chisholm, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—On the 5th of November 1959, the appellant Frego Construction Inc. leased to respondent Mary Lee Candies Limited a store situated on Lafleur Avenue in the City of Lasalle, described in the lease as follows:

Those certain premises presently being built by the Lessor on Lafleur Avenue, in the City of Lasalle, Province of Quebec, and forming part of a *proposed shopping centre* to be built by the said Lessor, *between the existing building containing the Royal Bank at the corner of Jean Milot Street and Lafleur Avenue, and the existing Steinberg's Supermarket*;

The *said shopping centre* being erected on land more fully designated as follows:—

that certain block of land in the City of Lasalle, Province of Quebec, situated on the northwest side of Lafleur Avenue, being of irregular shape and composed of the whole of Lots. Nos. 958-19-1-1, 958-19-2, 958-19-3, 958-20-1, 958-20-2 and 958-20-3-1 and part of Lot No. 958-19-1-3 of the Official Cadastre of the Parish of Lachine, Registration Division of Montreal, which said block of land measures two hundred and eight and thirty-eight hundredths (280.38') feet in its southeast line along Lafleur Avenue, two hundred and five (205) feet in its Southeast line and two hundred (200) feet in its northeast line, all measurements being English measure and more or less;

The *said shopping centre* being built by the Lessor shall be referred to hereinafter as '*The Centre*';

The premises being built as part of *the Centre*, which is being leased by these presents to the Lessee herein, shall measure ten feet (10') in frontage center to center of walls along Lafleur Avenue, by a depth of sixty feet (60') more or less; i.e. center lines of partitioning walls. (S.M.W.M.F.).

It is clearly stipulated in the lease and agreed that there will not be another store in the *Centre* whose business would be devoted primarily towards the sale of candies and nuts. The *Centre* was built between The Royal Bank, at the

¹ [1963] Que. Q.B. 37.

corner of Jean Milot Street and Lafleur Avenue, and the existing Steinberg's Supermarket. Some time later, another store was leased to Laura Secord which company was in the same business. The claim of the respondent is that this had constituted a violation of the agreement and asked that the lease entered into be declared annulled and cancelled for all future purposes. Mr. Justice Charbonneau of the Superior Court dismissed the action, but the Court of Appeal¹, Hyde and Owen JJ. dissenting, came to the conclusion that the trial judge's judgment should be reversed, and annulled the lease entered into between the appellant and the respondent.

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I have reached the conclusion that the prohibition to lease premises to another store selling candies and nuts, applies only to that portion of the land described in the agreement as the "Centre".

I fully agree with the finding of the trial judge, concurred in by Hyde and Owen JJ., that the new store leased to Laura Secord was outside the boundaries of the "Centre" as contemplated by the parties.

I would allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Spiegel, Shriar & Polak, Montreal.

Solicitor for the plaintiff, respondent: T. Konbrat, Montreal.

¹ [1963] Que. Q.B. 37.