1919
*Feb. 7.
*Feb. 17.

CHARLES A. GODSON (DEFENDANT). APPELLANT;

AND

P. BURNS & COMPANY (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Landlord and tenant—Lease—Conditional renewal—Mutual agreement—Liability of lessor—Trade fixtures—Removal by lessee.

When a lease provides for a renewal thereof "upon such terms as may be mutually agreed upon" and further provides that "in the event of a renewal of this lease not being granted, * * * the lessor shall pay to the lessee * * * the actual costs * * * of alterations and additions" made by the lessee to the premises, the lessor is liable if no agreement is reached between him and the lessee, it being immaterial whether both, or either of them, were unreasonable in the discussion of terms and conditions of renewal.

It was also provided that "all improvements, alterations and fixtures constructed or made or to be constructed or made in and upon the said premises shall become the absolute property of the lessor" at the expiration of the lease.

Held, that the lessee was entitled to remove his trade fixtures.

Judgment of the Court of Appeal ([1918], 3 W.W.R. 587), affirmed.

APPEAL from the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Gregory J. (2), and maintaining the plaintiff's action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Tilley K.C. for the appellant.

A. H. Clarke K.C. for the respondent.

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

(1) [1918], 3 W.W.R. 587. (2) [1917], 3 W.W.R. 966.

THE CHIEF JUSTICE.—For the reasons given by Chief Justice Macdonald and Mr. Justice Martin in the Appeal Court, which are together quite satisfactory to me, I think this appeal must fail and should be dismissed with costs.

IDINGTON J.—The answers to the only questions raised herein depend upon the construction of the lease. I am of the opinion that the learned trial judge and the Court of Appeal have correctly construed the same.

The language used in expressing the agreement of the parties might have been more explicit, but I do not think it difficult to understand and accurately determine its meaning, if we pay attention to the business the parties had on hand.

I do not think we can help the solution of the problems presented by paying attention to the business which some other parties long ago had in hand and the language they used relevant thereto.

It is quite clear the parties postponed for nearly five years the settlement of the terms of a renewal lease and depended for the protection of their respective self-interests upon the development by work to be done within the meaning of the contract as likely to ensure a renewal upon reasonable terms. For who could imagine a lessor as being likely to pay $15,000 for the privilege of refusing a lease upon reasonable terms?

This lessor did so refuse and imagined he could by devious methods escape paying the $15,000. And he has thereby started the amusing exhibitions of dialectical skill necessary to enable him to hope to escape the consequences of so doing.

The meaning of the word "fixtures" in the clause which has been for convenience sake numbered five,

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but not so in the instrument, is *primâ facie* more fairly arguable.

Seeing, however, that the operation of the whole scheme was expressly made dependent upon the following paragraph in clause 2

> Provided, however, that the plan and specifications of any such alterations or additions shall be first submitted to and approved by the lessor;

and seeing further that he paid, as is admitted, $5,000 on account of such work and there is not pretended to have ever been any other "plans and specifications" than those adduced in evidence, I accept them as an infallible guide and especially so when coupled with the later conduct of the lessor and his language in his correspondence as to "fixtures."

These plans and specifications seem to have no relation to such fixtures as now in question, and hence any claim in respect of their removal must be founded upon something else which is *not* discoverable in the lease when read in light of the law relevant to trade fixtures owned by a tenant.

How a lessor so keenly alive to his selfish desires as appellant seems to have been failed to object to their removal, done openly under his own eyes or those of his agent, surprises me. And his solicitor's failure to recognize the possibility of claiming therefor, till over a year after the pleadings were closed, indicates how little either expected from such a claim.

And even when amended then, I incline to think as urged by respondent's counsel, he failed to rest the claim upon the right ground in law if such had ever had any foundation in fact.

The appeal should be dismissed with costs.

ANGLIN J.—For the reasons stated by Mr. Justice Martin I am satisfied that the failure to renew the

respondent's lease entitled him to recover the $15,000 in question in this action. If reasonableness of conduct were a consideration that should enter into the matter I would agree with the view of the Chief Justice of the Court of Appeal

> that the lessee (had) *bonâ fide* endeavoured to bring about an agreement on reasonable terms of renewal.

The construction placed by the learned dissenting Justice of Appeal on the provision for renewal, with respect, seems to me to be so unreasonable that it is inconceivable that it is what the parties intended. The language used certainly does not require such a construction. In my opinion it scarcely admits of it.

I also concur in the view of the Chief Justice that the learned trial judge came to the right conclusion as to the construction of what he terms the 5th clause of the lease, which immediately follows the short form covenant for quiet enjoyment, and that the respondent was entitled to remove the tenant's fixtures which it took away from the premises. They formed no part of the "alterations to the front" and

> alterations and additions to the interior of the building

for which the appellant agreed to pay a sum not exceeding $20,000 in the event of non-renewal. Applying the rule *noscitur a sociis* the word "fixtures" in the clause of the lease in question, having regard to the improvements and alterations with which it is connected, must be restricted to what are ordinarily known as landlords' fixtures.

I would dismiss the appeal with costs.

BRODEUR J.—This is an action by a lessee to recover the value of improvements made upon the property leased. The lease was for five years from the 1st April, 1909 and was concerning premises in

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Vancouver known as the Braid Building. It could be renewed at the lessee's option on terms to be agreed upon and by his giving three months' notice in writing of his desire to renew. The rent was $12,000 a year.

By the lease, the lessee, who is the respondent, agreed to make certain alterations necessary for the requirements of his business and to adapt the other portions of the premises as hotel rooms, since only a portion of the ground floor and basement was used by the respondent for his business.

It was stipulated that the alterations and plans should be submitted to and approved by the lessor, and it was further agreed that the lessor would pay the lessee during the second year of the term a sum of $5,000 in connection with those improvements.

Clause 4 of the lease, which is the one the construction of which has occasioned this litigation, reads as follows:—

> In the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of Five Thousand Dollars ($5,000). Provided, however, that such total cost shall not in any case exceed the sum of Twenty Thousand Dollars ($20,000).

Extensive alterations were made and approved by the lessor. Those alterations are estimated by the respondent as having cost a much larger sum than the $20,000 stipulated as being the amount which should be paid for those alterations in case the renewal of the lease should not be granted.

The notice required by the lease was given by the lessee, that he was willing to renew the lease. Negotiations went on and were being carried out until a few days before the lease expired, but the parties were never able to agree. The lessee then had to vacate

the premises and has instituted the present action to recover the $15,000 which was stipulated in that clause 4.

There is no doubt that the parties contemplated a renewal lease for a further period of five years if they could agree as to the terms; but in the case they would not agree as to the terms, or in the case where a new lease would not be granted, then, in such a case, what should be done with regard to the improvements?

The parties agreed that if a renewal would take place, the benefit of the alterations enjoyed by the lessee and the $5,000 already paid by the lessor would be sufficient to cover those alterations and the lessee would have no further claim as to them. But if there was no renewal, then I construe the lease as meaning that the lessor is bound to pay the balance of the sum stipulated for the value of the alterations.

Another question was raised as to some fixtures to the value of $8,000, which had been put in by the respondent on the premises and which were of the category of fixtures called tenant's fixtures.

The appellant claims that he is entitled to those fixtures.

I think, on the contrary, that the fixtures mentioned in the lease which could be retained by him are those alterations and fixtures provided by the contract itself and not the fixtures which the lessee might bring in. Clause 5, relied upon by the appellant to substantiate his contention, mentions at first in general terms

all improvements, alterations and fixtures;

but the reference in the latter part of the clause to the payments made on account of those improvements shews conclusively that what the parties intended to cover was not the tenant's fixtures but those improvements included in the formal covenant, viz., those

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which the lessee undertook to make with approval of the lessor.

For those reasons, I am of opinion that the plaintiff (respondent) was entitled to claim the $15,000, and that the judgment rendered in his favour below should be confirmed with costs.

MIGNAULT J.—The contract which has given rise to this litigation is in truth a singular one.

The appellant, on the 1st February, 1911, leased to the respondent a certain building in Vancouver for a term of five years at a rental of $1,000 per month, the lessee to have the privilege

of renewing said term for a further term of five years from the first day of April, 1916, upon such terms as may be mutually agreed upon between the parties hereto, and further upon the lessee giving to the lessor a notice in writing of the lessee's desire to renew same as aforesaid, which said notice shall be given at least three months before the expiration of the term hereby granted.

It was stipulated that the lessee should make

such alterations to the front, and such alterations and additions to the interior of the building hereby demised as in the opinion of the lessee shall be necessary for the requirements of its business, provided, however, that the plans and specifications of any such alterations and additions shall be first submitted to and approved by the lessor.

It was agreed that the lessor would pay to the lessee, during the second year of the term of the lease, the sum of $5,000,

which sum shall be accepted by the lessee in full of all claims and demands of the lessee against the lessor for any and all alterations hereafter made to the building by the lessee as aforesaid.

Notwithstanding this specific stipulation, however, the lease immediately added that

in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such a case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of $5,000. Provided, however, that such total cost shall not in any case exceed the sum of $20,000.

The parties could very well expect trouble under such a contract. The renewal clause, leaving as it did the terms and conditions of renewal to be determined

by a future agreement of the parties, really gave no right of renewal to the lessee, for a disagreement as to these terms and conditions was a more likely contingency than an agreement. But, on the other hand, it was possibly thought by the lessee that he could nevertheless go ahead and make expensive alterations and additions, in the expectation of recovering from the lessor the value of the alterations and additions up to the sum of $20,000 (including the $5,000 already paid by the lessor), should the latter not grant a renewal of the lease on terms acceptable to the lessee.

On the 28th December, 1915, the respondent gave formal written notice to the appellant of his desire to renew the lease, and that he was ready and willing to enter into negotiations with a view to the settlement of the terms of such renewal. Some correspondence followed and finally, on the 2nd March, 1916, the appellant stated as his terms of renewal of the lease for the premises as a whole (apparently the whole block), $850 per month for the balance of that year, and for the ensuing period of four years, $1,000 per month. The respondent demurred to this, and on 23rd March proposed a renewal at a rental of $500 per month, offering whatever it could get out of the upstairs and basement in addition, adding, that if this were not satisfactory, it would be willing to leave the matter to arbitration. In a subsequent letter of 27th March, the respondent repeated this offer, and stated that if it were not accepted, the respondent would expect to receive the sum of $15,000 under the provisions of the lease.

Both of the parties adhered to the position they had respectively taken until finally, on the 28th April, the appellant accepted the offer he had previously refused of a renewal at a rental of $500 per month, but this proposal was refused by the respondent which had

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previously given notice to the appellant of its intention to move out of the premises.

The present action was taken by the respondent (lessee) against the appellant (lessor) demanding, because the parties had failed to agree as to the terms of renewal of the lease and the lessor had not granted a renewal of the same, that the appellant pay him $15,000 for the balance of the cost of the alterations and additions, the total cost of which was approximately $39,000. His action was maintained by the learned trial judge, Mr. Justice Gregory, and this judgment was affirmed by the Court of Appeal, Mr. Justice McPhillips dissenting.

The right of action of the respondent depends on the construction of the lease, and notwithstanding the somewhat singular and almost conflicting provisions of this lease, it does not seem impossible to arrive at a construction which will give effect to what I take to have been the intention of the parties. The premises rented by the appellant required considerable alterations to make them suitable for the respondent's business, and the appellant had agreed to contribute at all events the sum of $5,000 to the cost of these alterations and additions, thereby indicating that they enhanced the value of his building. On the other hand, it was also considered that if the lease were not renewed for a further term of five years, the lessee should be further compensated for his improvements, and the extent to which the lessor should contribute to the payment of the same was fixed at an amount not exceeding $15,000, over and above the $5,000 he had already paid. It is true that for the renewal of the lease an agreement of the parties as to the terms and conditions on which the renewal would be granted was necessary, and the parties evidently considered that these terms and conditions could not be determined in advance, but if the

renewal was not granted by the lessor, and if he took possession of the premises with the alterations and additions made by the lessee at the expiration of the lease, it was expressly stipulated that the lessor should pay to the lessee the balance of the actual cost of the alterations and additions over and above the $5,000, not to exceed in the aggregate $20,000.

It seems to me entirely immaterial whether the lessor and the lessee, or either of them, were unreasonable in the discussion of terms and conditions of renewal. There was no agreement between them and the renewal term of five years was not granted by the lessor, and he thus came into possession of the leased premises at the expiration of the lease. I think, therefore, that the lessee is clearly entitled to the $15,000, which is no way a penalty against the lessor, but a sum payable to the lessee on a contingency provided for and which has happened. I think also that the offer of the lessor on the 28th April to accept terms of renewal which he had already refused to accept came too late to avail him in this litigation.

Mr. Tilley, on behalf of the appellant, earnestly argued that the respondent had violated the lease by removing certain improvements, alterations and fixtures, and that consequently he could not avail himself of the stipulation concerning the $15,000. In my opinion, nothing was removed by the lessee which does not fairly come under the description of tenant fixtures which the lessee could in any event remove at the expiration of the lease.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. MacNeill.*

Solicitors for the respondent: *Lennie, Clarke, Hooper & O'Neill.*