DOMINION SQUARE CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

ALUMINUM COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

1942

* Feb. 5.
* Mar. 3.

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

Lease—Notice by lessee of intention to terminate lease—Expressed condition that "no such notice shall take effect prior to" a certain date—Meaning of the words "take effect"—Intention of the parties.

The respondent leased from the appellant certain premises in Montreal for a term of ten years commencing on the 1st of May, 1939, the annual renting being $46,931 payable by monthly instalments. The notarial lease contained the following clause: "Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right: 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940)." The respondent, by letter dated 4th of January, 1940, gave the appellant twelve months' notice as from the 1st of February, 1940, of its intention to terminate the lease in full on the 31st January, 1941. The appellant refused to accept this notice on the ground that, according to the above-mentioned clause, the lease could not be terminated before the 1st November, 1941. The controversy in this case turns upon the meaning of the last phrase of that clause, the appellant contending that the meaning was that no notice could commence to operate as a notice prior to the 1st of November, 1940, with the result that the lease could not come to an end before 1st November, 1941; while the respondent contended that that phrase should be construed as meaning that "no such notice shall take effect" in terminating the lease prior to the first day of November, 1940", and that notice of cancellation could be given at any time up to 1st November, 1939, so that the lease could come to an end on or after the 1st November, 1940. The trial judge upheld the construction put forward by the appellant; but the appellate court, Barclay J. dissenting, reversed that judgment.

Held, the Chief Justice dissenting, that the construction indicated by the respondent is more in conformity with the intention of the parties as gathered from the words used by them in drawing up the clause and, therefore, the judgment appealed from should be affirmed.

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

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APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing a judgment of the Superior Court, E. M. McDougall J., which had condemned the respondent to pay to the appellant the sum of $43,997.80.

The material facts of the case and the question at issue are stated in the above head-note and in the judgments now reported. The issues between the parties were submitted to the trial judge in a stated case under the provisions of article 509 C.C.P. The respondent vacated the leased premises on the 1st July, 1940, and admitted an indebtedness of $17,599.12 in accordance with its view that the lease was to terminate on the 1st February, 1941; while the appellant claimed an additional sum of $26,398.68, in accordance with its view that the lease was to terminate only on the 1st November, 1941.

W. A. Merrill K.C. and *A. Stalker K.C.* for the appellant.

Aimé Geoffrion K.C. for the respondent.

THE CHIEF JUSTICE (dissenting)—The appellants and respondents entered into a notarial lease, dated the 13th of February, 1939, before L. Joron, N.P., whereby the respondents leased from the appellants certain premises on the tenth floor of the Dominion Square Building in Montreal. The term was for ten years commencing on the 1st of May, 1939, and ending on the 30th of April, 1949, the annual rental being $46,931, payable in equal consecutive monthly instalments in advance, on or before the tenth day of each month. The lease contains this clause:—

> Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:
>
> 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

On the 4th of January, 1940, the lessees gave notice as follows:—

> In accordance with such provisions we hereby give four months' notice of our intention to terminate, at the expiration of said four months from

this date, the lease for not to exceed twenty-five per cent of the tenth floor, and we also give you twelve months' notice, as from 1st January, 1940, of our intention to terminate the lease in full on 31st January, 1941.

The lessors accepted the four months' notice to cancel twenty-five per cent of the leased space, but disputed the right of the lessees to terminate the lease before the 1st of November, 1941.

Proceedings were taken in the Superior Court and at the trial Mr. Justice McDougall gave judgment in favour of the plaintiffs, the Dominion Square Corporation. This judgment was reversed in the Court of King's Bench, Mr. Justice Barclay dissenting.

The controversy turns upon the effect of the words

it being expressly understood that no such notice shall take effect before the first day of November, 1940.

The appellants contend that the meaning of these words is that no notice under this clause shall be effective or shall "take effect" as a notice, or that no notice under this clause shall be effected, prior to the first of November, 1940.

The respondents, on the other hand, put forward this construction: "No notice shall take effect" in terminating the lease "prior to the first day of November, 1940".

If this is what the parties meant, it is not easy to understand why, in a formal notarial document, they should not have said so in plain terms, as for instance: "No such notice shall have the effect of terminating the lease prior to the first of November, 1940".

The real point is what is the subject to which the sentence relates? Is it the constitution of the notice, or the termination of the lease? If it was the latter is it conceivable that the words as they stand would have been employed? I cannot believe it.

Mr. Geoffrion argues that if the idea to be expressed was that no such notice was to be operative as a notice prior to the first day of November, 1940, the stipulation would have read "no such notice should be given prior to that date". But the subject with which the draftsman is dealing is the constitution of the notice as notice. The omission of the words "as notice" is not, I think, such a serious departure from good habits of English speech as

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to create any real obscurity. At least I have no doubt that of the rival constructions put forward that advanced by the appellants is distinctly the more probable one.

Happily we are not obliged to rely upon verbal criticism alone. There are two considerations which appear to me to be conclusive.

First of all, the clause provides explicitly that any notice to be operative under it must be given in one of the months from the first of November to the first of May, inclusive, in any year of the term; that obviously includes the year 1939, when no notice could be given which could terminate the lease earlier than the first of November, 1940. Such being the case, the stipulation in question on the respondents' construction is without practical value, or effect. On that construction it provides for something which was already provided for in unmistakable terms, and on the other hand, the appellants' construction qualifies the language of the principal provision and has the practical effect of ensuring to the lessor the continuance of the lease until, at least, one year from the first of November, 1940.

Then it was argued by Mr. Geoffrion that the words in question were intended only to clarify. It is difficult to accept this argument. But for those words, the stipulation would be too clear for dispute. If clarification had been the conscious purpose of the draftsman, I can have no doubt that more explicit language would have been employed. The parties would have said in the plainest way that the lease was not to be terminated before the first of November, 1940. Such words would have been otiose, but there could be no possible dispute as to their meaning. If the contention is right, then the respondents, with the purpose of clarifying a stipulation that, as it stood, could have only one exclusive meaning and effect, have taken the singular course of introducing words which three judges are satisfied clearly mean the opposite of what they, the respondents, intended.

The appeal should be allowed and the judgment at the trial restored.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The sole point for determination in this appeal is the proper construction of a clause in a lease

from the appellant to the respondent, dated February 13th, 1939, which lease commenced on May 1st, 1939, and was for ten years. The clause is as follows:—

> Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:
>
> 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

The real dispute hinges upon the last few lines. McDougall J., the judge of first instance, and Barclay J. in the Court of King's Bench, agreeing with the contention of the appellant, were of opinion that the expression "take effect" had reference to the date upon which the notice would commence to operate as a notice, while the majority of the Court of King's Bench considered that it referred to the expiration of the one year's written notice provided for by the earlier part of the clause. In my view the latter construction is the correct one.

It will be noticed that when the parties referred to the time when the notice should commence to operate, they mentioned at the outset the "giving" of the notice while in the particular part under discussion they use the expression "take effect". Furthermore, when dealing with the result of the notice, they say that "one year from the date of such notice or notices this lease shall become * * * without effect". Certainly the word "effect" in that connection has reference to the termination of the notice and I can see no reason why the same meaning should not be given to the same word when used later in the clause.

It was urged that it would be unreasonable to suppose that the appellant would grant a lease for ten years and then agree to a provision whereby the respondent might put an end to it on November 1st, 1940, by giving a notice on November 1st, 1939, a little over nine months after the execution of the document. It was also pointed out that by the first part of the clause the notice could not be given earlier than November 1st, 1939, as it had to be given on the first day of any month from 1st November to

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1st May inclusive, in any year during the continuance of the lease. Granting that, without the inclusion of the latter part of the clause that would be the proper construction of the first part, it may easily have been that the clause ends as it does at the suggestion of the appellant in order to make sure that there would be no controversy on the point. As to both arguments, I can only say that the parties' intention must be gathered from the words used and that the construction indicated above is the one that appears to me to carry out the intention as expressed.

The appeal should be dismissed with costs.

HUDSON J.—A lease of premises in Montreal from the appellant to the respondent contained the following clause:

> Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:
>
> To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

The controversy between the parties arises from the concluding words of this provision:

> it being expressly understood that no such notice shall take effect prior to the 1st day of November, 1940.

The appellant contends that a notice served under this provision "takes effect" as soon as it is given and, therefore, could not be given prior to the 1st of November, 1940. On the other hand, the respondent contends that the notice would not "take effect" within the meaning of this provision until the expiry of the time provided for in the notice.

Mr. Justice McDougall who heard the matter in the first instance held that the appellant's construction was the true one, but his decision was reversed on appeal to the Court of King's Bench, appeal side.

It is clear that the notice when given had some effect. It was an election, probably an irrevocable election, to

determine the lease at the time specified. But the purpose of the notice was to determine the lease and this purpose would not be achieved until the expiry of the time specified. Until then the desired effect would not take place. Meanwhile, the relationship of landlord and tenant between the parties continued undisturbed.

It is an everyday occurrence that a person resigns an office, his resignation to "take effect" on a certain day. A government makes an order to "take effect" a month hence. An illustration of this use of the expression is found in the Scottish case of *Fullarton James* (1). In that case it was provided by a statute that a trustee entitled to resign his office might do so by signing a minute of resignation in the form of Schedule A, and that the resignation should be held to "take effect" at a specified time after the date of intimation. A trustee gave notice of his resignation in the form prescribed by the statute, which was *de presenti*. Subsequently, before the expiry of the time prescribed by the statute, he attempted to withdraw the resignation. The Court held that it was not competent for him to do so.

After much consideration, I conclude that the natural meaning of the words "take effect" in this instance is "producing the desired effect", namely, the termination of the lease. With respect, I cannot find in the surrounding circumstances anything to justify a departure from the ordinary meaning attributable to the words. Mr. Justice Galipeault in the court below states the position very fairly as follows:—

> Il est bien difficile de savoir ce que les parties ont eu en vue lorsqu'elles ont convenu, et il se peut qu'elles aient songé à des situations qui ne nous viennent pas maintenant à l'esprit, qu'elles aient cru rendre plus explicite, ou qu'elles aient même stipulé inutilement, ce qui n'est pas rare, qu'ellles aient fait redondance, mais en l'absence de toute preuve, de toute explication, encore une fois, pourquoi ne pas donner aux expressions leur sens ordinaire, leur sens propre, pourquoi déclarer ambigu ce qui est parfaitement clair?

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Merrill, Stalker & Howard.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*

(1) (1895) 23 Sess. Cas. 105.