Date: 19981112 Docket: CA 145500

NOVA SCOTIA COURT OF APPEAL
Cite as: Sobey Leased Properties Ltd. v. Gerstl, 1998 NSCA 194
Roscoe, Hart and Cromwell, JJ.A.

BETWEEN:

SOBEY LEASED PROPERTIES LIMITED, David P.S. Farrar a body corporate Appellant	)	for the Appellant
- and -	)	
EDITH GERSTL Respondent	)	Geoffrey A. Saunders for the Respondent
	)	Appeal Heard: September 15, 1998
	)	Judgment Delivered: November 12, 1998

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Hart and Roscoe, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

The main question on this appeal is whether, on November 28, 1994, Ms. Gerstl (the respondent) had the right to renew a lease affecting property owned by Sobey (the appellant). Cacchione, J., in Chambers, held that she did; this appeal is to decide if he was right.

II. Facts:

The facts, while intricate, are not in dispute. I will first set out an overview of the transactions giving rise to the dispute. I will then turn to the relevant agreement provisions, and finally, summarize the relevant actions of the parties.

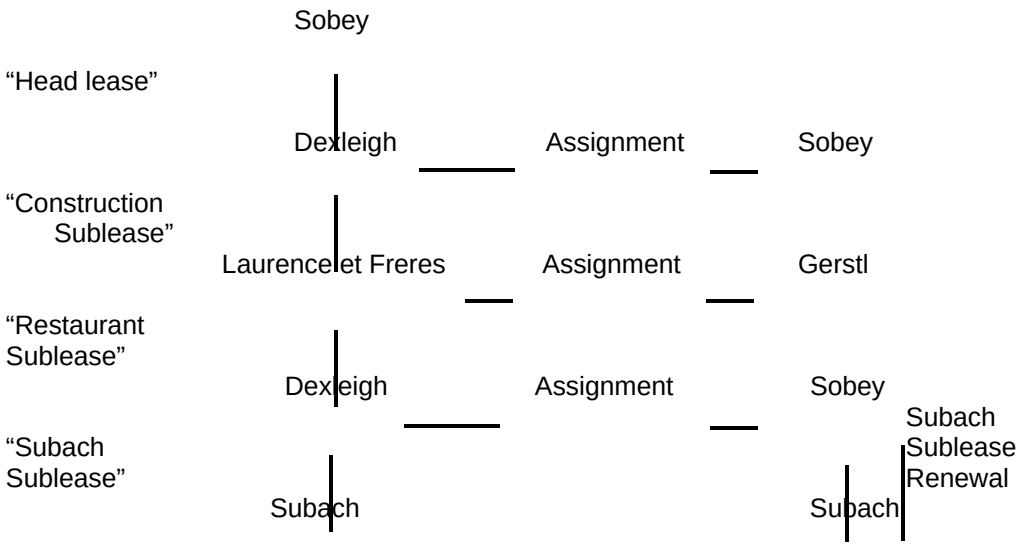
a. Overview of the Transactions

The basic transaction giving rise to the appeal occurred when Sobey, Foodex (Dexleigh) and Laurence et Freres signed a series of leases effective November 1, 1974. The transaction concerned the lease of property owned by Sobey at the Westphal Shopping Centre in Dartmouth for the construction and operation of a restaurant. (Foodex later became Dexleigh Corporation. The timing and details of this change are not important for the issues here. I will, therefore, for ease of reference refer to it throughout as Dexleigh.)

In summary, the owner (Sobey) leased the land to the operator of the restaurant (Dexleigh), the operator subleased it to the builder (Laurence et Freres)

who in turn sub-subleased it back to the operator. Later, Laurence et Freres assigned its interests to Gerstl and Dexleigh assigned its interests to Sobey.

Counsel for Gerstl captured this whole series of leases and assignments on a simple chart which I have found most helpful in considering this case. In a slightly modified form, it is as follows:



b. Details of the Transactions

It is necessary to provide some of the details of these transactions.

First, there was a lease between Sobey as owner and Dexleigh as tenant. The purpose of this lease, which I shall refer to as the "head lease", was to permit Dexleigh to build and operate a Ponderosa Steak House.

Second, and again on November 1, Dexleigh subleased the unexpired term of the ground lease, less one day, to Laurence et Freres Constructeurs Ltee. The purpose of this sublease, which I shall refer to as the "construction sublease" was to permit Laurence et Freres to construct the restaurant premises.

Third, and also on the same day, Laurence et Freres entered into a sub-sublease with Dexleigh for the same term as the head lease less 3 days. The purpose of this sub-sublease was to permit Dexleigh to operate the steak house once Laurence et Freres finished construction. I shall refer to this as the "restaurant sublease."

The Ponderosa restaurant was constructed by Laurence et Freres and operated by Dexleigh.

There were then some assignments of various interests and a further sublease.

First, on May 31, 1977, Laurence et Freres assigned all of its interests under the leases to Ms. Gerstl. This included its interest as tenant under the construction sublease and as landlord under the restaurant sublease. This appeal is concerned with the rights of renewal, if any, that Ms. Gerstl obtained by virtue of this assignment.

Next, in 1984, Dexleigh sublet the premises to Subach Limited. The purpose of this lease was to permit Subach to operate a Swiss Chalet restaurant. I shall refer to this as the “Subach sublease”.

In December of 1985, the premises were destroyed by fire. There were further agreements the object of which was to permit Subach to construct a new restaurant on a new site within the shopping centre property.

In August of 1986, Dexleigh assigned all of its interests to Sobey. This included Dexleigh’s interest as tenant under the ground lease, its interest as landlord under the construction sublease, its interest as tenant under the restaurant sublease and its interest as landlord under the Subach sublease. In November of 1986, Subach agreed to construct a new building on a new location at the Westphal Shopping Centre. At the same time, Sobey, Gerstl and Subach agreed that, except as amended by their new agreement, all of the leases respecting the premises would remain the same and in full force and effect.

In summary, as of November, 1986, Sobey was owner of the land and assignee of Dexleigh’s interests. Sobey stepped into the shoes of Dexleigh. It therefore assumed Dexleigh’s position as tenant under the head lease. Sobey also stepped into Dexleigh’s place as the tenant of Gerstl (who had succeeded to the interest of Laurence et Freres) under the restaurant sublease and as the landlord of Subach under the Subach sublease. Of particular relevance to this appeal is the

fact that Sobey, as a result of the assignment from Dexleigh, became, in effect, a tenant of itself having retained, as owner, the position of landlord under the head lease and, by virtue of the assignment, succeeded to Dexleigh's interests as tenant under the same lease.

c. Rights of Renewal

This case concerns whether Gerstl had a right to renew either the head lease or the construction sublease. It is necessary, therefore, to review the relevant provisions in the agreements.

The ground lease (between Sobey and Dexleigh) had a twenty year term to expire on October 31, 1994. It contained a renewal provision in clause 24 as follows:

> 24. In consideration of the terms, covenants, conditions and provisos herein contained and the rents payable hereunder and the sum of Two Dollars ($2.00) (the receipt and sufficiency of which is hereby acknowledged) the Lessor hereby grants to the Lessee an option to renew this lease for three (3) further terms of five (5) years; each of which additional terms shall be upon a rent based on market rent for the City of Dartmouth at the time of renewal of each term. The conditions, covenants and provisions of this Indenture of Lease shall prevail for any renewal term.

Significantly, there was no process nor any time limits stipulated for the exercise of this option to renew.

The construction sublease (between Dexleigh and Laurence et Freres and

which Laurence et Freres assigned to Gerstl) was for the same term as the ground lease, less one day. This reservation of one (1) day was, no doubt, to ensure that the agreement was a sublease and not an assignment: see A. Oosterhoff and W. B. Rayner, **Anger and Honsberger Law of Real Property** (2d, 1985) at pp. 289 - 90. It did not expressly deal with renewal, but it contains two provisions central to Gerstl's position. They are:

> 5. The Sub-lessor agrees to assign to the benefit of the Sub-lessee the enjoyment of all covenants accruing to the Sub-lessor pursuant to the Sobey lease.
>
> . . . . .
>
> 8. The parties hereto covenant and agree that the provisions in the Sobey lease shall prevail between the parties hereto as if each and every covenant, agreement, provision and condition were set forth herein and specifically subscribed and covenanted seriatim.

The next link in the chain is the assignment from Laurence et Freres to Gerstl in May, 1977. That agreement recited that Laurence et Freres had agreed to "sell, assign and transfer all its title, interest and rights as lessee under the [construction sublease] with [Dexleigh] and also its title, interest and rights as lessor under the [restaurant sublease] with [Dexleigh]." The most relevant provisions are these:

> 1. L et F [Laurence et Freres] do hereby grant and assign unto Gerstl the premises ..... together with the residue unexpired of the said term of years, of the sub-lease and the said sub-lease and all benefit and advantage to be derived therefrom. .....
>
> 2. .....Gerstl may enter into and upon and hold and enjoy the said lands for the residue of the term granted by the said sub-lease and every renewal thereof (if any) for her own use and benefit, ...
>
> And Gerstl covenants with L et F that Gerstl shall and will, from

> time to time during all the residue of the said term granted by the said sub-lease and every renewal thereof, pay the rent and perform the lessee's covenants, ...
>
> 3. L et F do hereby grant and assign unto Gerstl the aforesaid Sub-sub-lease dated the 1st day of November, 1974, ... and the rents payable thereunder or under any renewal thereof, ...

One of the issues on appeal is whether the assignment from Laurence et Freres to Gerstl, when read with clauses 5 and 8 of the construction sublease between Dexleigh and Laurence et Freres had the effect of giving Gerstl the benefit of Dexleigh's option to renew the head lease. I will say more about this later.

There are provisions dealing with renewals in the other leases subsequent to the construction sublease. These, too, are relevant to the issues in the appeal and so I will briefly describe them.

The restaurant sublease (between Laurence et Freres and Dexleigh which Laurence et Freres assigned to Gerstl) contained a renewal clause which also had conditions for its exercise. The relevant parts of the clause are:

> 24. In consideration of the terms, covenants, conditions and provisions herein contained and the rents payable hereunder and the sum of Two Dollars ($2.00) of lawful money of Canada, receipt and sufficiency of which is hereby acknowledged, Laurence et Freres hereby grants to Foodex [Dexleigh] an option to renew this sub-lease for three (3) further terms of five (5) years each at a rent to be negotiated, all other terms and conditions to remain as herein contained except a further right of renewal after the third five year renewal term. ..... In the event that Foodex [Dexleigh] exercises the said option to renew, it shall do so by written notice to Laurence et Freres six (6) months prior to the end of the Term or the immediately preceding renewal term.

Subach also had an option to renew under its lease which was for a ten year term from July 1, 1984 until October 27, 1994. Note that the expiry date was to continue the recognition of the necessity of reserving at least one (1) day. The renewal provision in this lease is as follows:

> 8. (1) So long as this lease has not previously been terminated pursuant to its terms and the Tenant gives to the Landlord written notice of its intention to renew this lease not more than 9 months and not less than 3 months prior to the expiry date of the Initial Term, or the expiry of each renewal period, as the case may be, the Tenant shall have the right to renew this lease for three further terms of five years each upon the same terms and conditions as contained in this lease except for the Minimum Rent which shall be an amount to be agreed upon by the parties and except that there shall be no further right of renewal after the third renewal period. .....

d. Actions by the Parties

The initial terms of all the leases were to expire about the end of October, 1994. In April of 1994, Sobey (as assignee of Dexleigh of its interest as tenant under the restaurant sublease) gave notice to Gerstl (as assignee of Laurence et Freres' interest as landlord under the restaurant sublease) of its intention to renew the restaurant sublease. Subach (as subtenant) in turn gave notice to Sobey (as assignee of Dexleigh's interest as landlord under the Subach sublease) of its intention to renew the Subach lease.

The ensuing dealings between Sobey and Gerstl are set out as follows in the

parties' agreed statement of facts:

> 18. On May 26, 1994, Sobey's solicitor wrote to Gerstl's solicitor inquiring whether he had received instructions from Gerstl (Tab 14).
>
> 19. On May 31, 1994, Gerstl's solicitor responded by letter advising that he had been unable to reach Gerstl or her representatives who resided in Budapest, Hungary (Tab 15).
>
> 20. In May or June of 1994, Sobey and Gerstl, through their lawyers, had discussions concerning the possible conveyance by Gerstl to Sobey or her leasehold interest.
>
> 21. On June 14, 1994, Gerstl's solicitor wrote to Sobey's solicitor to confirm that he had received directions on other matters but had not received directions with respect to the renewal of the Lease. He further inquired of Sobey's solicitor if he would forward more details of the purchase offer they had discussed (Tab 16).
>
> 22. On September 12, 1994, Gerstl's solicitor wrote to Sobey's Solicitor confirming that Gerstl would be prepared to entertain an offer for Sobey to acquire Gerstl's lease hold interest.
>
> . . . . .
>
> 25. On November 14, 1994, Sobey, by it's solicitor, gave notice to Gerstl, by way of her solicitor, that it considered that the Sublease had expired at the end of October, 1994 and that they considered that the Sublease was no longer in effect (Tab 19).
>
> 26. On November 28, 1994, Gerstl, by her solicitor, notified Sobey's solicitor of their disagreement that the Sublease had expired and of Gerstl's intention to renew the Sublease (Tab 20).

III. The Decision of the Chambers Judge:

The Chambers judge found that Ms. Gerstl had an option to renew and had properly exercised it. In his view, the assignment by Dexleigh to Gerstl gave her the benefit of clause 24 of the ground lease and, therefore, she had an option to renew. It is not clear to me whether the learned judge concluded that this was a right to

renew the ground lease or the construction sublease. Noting that there were no time limitations or conditions concerning the communication of intention to renew, the judge found that the right to renew subsisted beyond the expiry date of the lease to which the right was granted. Sobey had not called upon Gerstl to declare her position and Gerstl remained in possession through the subtenant, Subach, and had not unequivocally informed the landlord of her intention not to renew. Accordingly, the right to renew subsisted until it was exercised.

IV. Issues and Positions of the Parties:

Sobey submits that the Chambers judge erred in three respects. First, it is argued that Gerstl did not have an option to renew; second, that if she did, it was not exercised properly; and finally, that, in any event, Gerstl was not in possession of the premises through the subtenant Subach at the relevant times. The essence of the first two arguments is this. Assuming that Gerstl acquired a right to renew the construction sublease, such right could not extend beyond the term of the ground lease on which it depended. According to Sobey, the ground lease expired on October 31, 1994, and therefore any right to renew the construction sublease, which as a sublease was dependant on the ground lease, also came to an end.

Gerstl argues that she acquired the right to renew the ground lease. The result would be that the right to renew the ground lease subsisted under the principle enunciated by the Supreme Court of Canada in **Guardian Realty Company v.**

John Stark & Company (1922), 64 S.C.R. 207.

In the alternative, if Gerstl had the right to renew only the construction sublease, there are two additional arguments. First, Gerstl submits that the ground lease did not, in fact, expire on October 31, 1994 because Sobey's actions are only consistent with it being renewed. If that is so, the ground lease did not come to an end and, therefore, the right to renew the construction sublease would persist according to the **Guardian** principle. Second, upon the assignment by Sobey to Dexleigh, Sobey became both the landlord and the tenant under the ground lease. Its interests therefore merged and became subject to Gerstl's right to renew the construction sublease, which in that scenario, would persist under the **Guardian** principle.

V. Analysis:

a. Gerstl's Right to Renew

Sobey's first argument on appeal is that Gerstl had no right to renew. I cannot accept this submission. That Gerstl had some right of renewal is the only conclusion consistent with the text of the leases and the actions of the parties. If there were any doubt, which in my view there is not, it is put to rest by the fact that the solicitors for Sobey expressly acknowledged Gerstl's right to renew in a letter which is in the record.

There is no dispute that Dexleigh, as tenant under the ground lease, was granted the right to renew the ground lease. Dexleigh, as tenant under the restaurant sublease, was also explicitly granted the right to renew the restaurant sublease. Gerstl stands in the shoes of Laurence et Freres, which granted a right of renewal to Dexleigh under the restaurant sublease. This right to renewal would make no sense if Laurence et Freres had no right to renew the construction sublease. Dexleigh was both the landlord of Laurence et Freres under the construction sublease and the tenant of Laurence et Freres under the restaurant sublease. Given that these two agreements are between the same parties, it could not have been the intention of those two parties for Laurence et Freres to grant a right to renew to Dexleigh as its tenant unless Laurence et Freres also had the right to renew the sublease with Dexleigh as its landlord.

Furthermore, Sobey gave notice (in April, 1994) that it intended to renew its subtenancy under the restaurant sublease with Gerstl, a course of action that is consistent with Gerstl's right to renew the construction sublease.

For all these reasons, it is clear that Gerstl had a right to renew.

The real question then is not whether there was a right to renewal, but of what it consisted. Gerstl says it was a right to renew the head lease. Sobey says it was, at most, a right to renew the construction sublease which could not be exercised after the end of the term of the head lease on October 31, 1994.

As mentioned, there is no doubt that Dexleigh, as the tenant under the head lease with Sobey, had the right to renew it. Clause 24 of that lease, which I set out earlier, confers that right. Dexleigh also had the right to assign or sublet "this lease or any interest therein." Gerstl's principal argument is that Dexleigh's option to renew the ground lease was specifically assigned to Laurence et Freres in the construction sublease and could be exercised by it. Gerstl acquired this right upon taking the assignment from Laurence et Freres. Gerstl relies on Clause 5 of the construction sublease, which has been set out above, and provides simply that Dexleigh agrees to assign to the benefit of Laurence et Freres "... the enjoyment of covenants accruing to [Dexleigh] pursuant to " the ground lease. Gerstl also relies on Clause 8 of the construction sublease, which has been set out earlier and which states that the provisions of the ground lease "shall prevail between [Dexleigh and Laurence et Freres] as if each and every covenant, agreement, provision and condition were set forth herein and specifically subscribed and covenanted seriatim." Therefore, says Gerstl, Laurence et Freres acquired not only the rights of a subtenant but also the right to renew the head lease. This right then passed to her when she took the assignment from Laurence et Freres of "all benefit and advantage" of the construction sublease.

There seems to me to be a serious difficulty with this argument. As Gerstl pointed out, it is illogical to think that Laurence et Freres, in the restaurant sublease, would grant Dexleigh a right which had not been granted to Laurence et Freres in the construction sublease. However, the only source of a right to renew on the part

of Laurence et Freres is found in clauses 5 and 8 of the construction sublease. If, as Gerstl contends, these clauses properly construed, give Laurence et Freres the right to renew the head lease, then these same clauses cannot grant Laurence et Freres an option to renew the construction sublease. The same language was not intended to, and could not accomplish, both. Moreover, treating those clauses as an assignment of the right to renew under the head lease is inconsistent with the preservation of the subtenancy by the reservation of a day for the reversion under the construction sublease.

Although not exactly on point, the judgment of the Supreme Court of Canada in **Dental Company of Canada Limited v. Sperry Rand Canada Limited**, [1971] S.C.R. 266 provides some support for my interpretation. In that case, the sublease contained a term entitling the subtenant to "all the benefit and services and privileges used and enjoyed by [the head tenant] under the terms of the Head Lease." The head lease contained a renewal option. The Supreme Court held that the conferral of all benefit, services and privileges under the head lease on the subtenant could not be interpreted as granting the right to renew the head lease to the subtenant. To do so, said the Court, would be inconsistent with, among other things, the express reservation of one day to the head tenant. I conclude, therefore, that Laurence et Freres did not have the right to renew the head lease and, therefore, Gerstl did not acquire that right on taking the assignment.

Gerstl did, however, acquire the right to renew the construction sublease. In

my opinion, clauses 5 and 8 of the construction sublease gave Laurence et Freres the same right to renew that sublease as Dexleigh had to renew the head lease. In other words, it was as if Clause 24 of the head lease were incorporated, with necessary modifications, into the construction sublease.

This leads to consideration of the second main issue on appeal which relates to whether this right to renew the construction sublease lapsed because it was not exercised before the construction sublease expired on October 30 or the end of the term of the head lease on October 31.

b. The *Guardian* Principle

The crux of this part of the appeal is how the principle enunciated by the Supreme Court of Canada in **Guardian Realty, supra**, applies in this case. This principle applies where a tenant has an option to renew and there is no specific term governing the time or method of exercising it. In these circumstances, the tenant may exercise its rights to renew as long as the tenant has not indicated that there will be no renewal. This indication may be express or implied as, for example, from the tenant going out of possession at the end of the term. The lessor may require the tenant to say whether or not it exercises the right to renew. Absent an express or implied election not to renew or a failure to respond once put to the election by the landlord, the option to renew subsists and may be exercised. This principle has been applied on many occasions since it was enunciated by the Supreme Court in

Guardian in 1922: see, for example, **Gasner v. Bellak Bros.**, [1945] 3 D.L.R. 365 (Ont. C.A.); **Blomidon Mercury Sales Ltd. v. John Piercey's Body Shop Ltd.** (1981), 15 B.L.R. 276 (Nfld. S. Ct.); **Hensall District Coop Inc. v. Oud Boyes Inc.** (1991), 3 O.R. (3d) 455 (C.A.); **Canadian Pacific Hotels v. Van Raniga Jewelers and Designers** (1995), 50 R.P.R. (2d) 28 (B.C.S.C.).

Stated more broadly, the **Guardian** principle is based on the notion that an option to renew gives the lessee a present interest and, absent express conditions for its exercise, should not be defeated unless there are substantial reasons for doing so. Duff, J. in **Guardian** emphasized the attention to the substance of the tenant rights in these words at p. 215:

> 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 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 mere 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. (emphasis added)

It follows from this principle that the key considerations are whether the landlord has put the tenant to its option and, if not, whether the tenant has implicitly elected not to renew. While retaining possession may be strong evidence of an election to renew, it is simply that. The important question is whether the tenant has done anything to preclude the exercise of the right to renew -- whether it has lost the right to renew by virtue of its conduct of which retaining or going out of possession may be an important aspect: see **Brewer v. Conger** (1900), 27 Ont. App. Rep 10 (C.A.) at 15; **Gasner v. Bellak Bros. Ltd., supra**, at p. 369. I would conclude, therefore, that the fact that Gerstl was not physically in possession (Subach was in actual possession) is not fatal to her claim so long as she did nothing to indicate an intention not to renew. It is not suggested that she did so.

The **Guardian** principle must be adjusted when applied to an option to renew a sublease. Just as a sublease is generally dependent on the head lease, an option to renew a sublease is generally no better than the terms of the head lease. This adjustment of the **Guardian** principle is the crux of Sobey's argument on this part of the appeal. The argument, stated broadly, is that "if the head lease falls, everything under it also ceases to exist." To relate this argument more specifically to the facts here, it is that the right to renew a sublease cannot extend the term of the head lease. Accordingly, the right to renew the sublease is subject to the term of the head lease. Therefore if the head lease expires, so does the right to renew the sublease.

I think this puts the rule too broadly. I agree that the option to renew lapses if its exercise becomes impossible. The **Guardian** principle, however, demands that the substance of the situation and not simply its form must be examined. This follows from the judicial attitude towards options to renew set out in **Guardian**: the right rests on a "substantial foundation", not a "mere verbal formula".

There is also more specific support for this view in the judgment of Dickson, J. in **Ramey v. Fenety** (1973), 8 N.B.R. (2d) 679 (Q.B.).

In that case, the head lease and the sublease contained options to renew for 21 years. The head lease was renewed for a renewable five year term and the subtenant sought to renew the sublease. The tenant (i.e. the subtenant's landlord) took the position that the renewal provision in the sublease no longer applied because the head lease was not renewed for 21 years. Dickson, J. rejected this argument. He stated at 684:

> .....the plaintiff has taken an assignment of the head-lease subject to its equities - the right of the defendant to renew - and to have a renewal - of the sublease for a further period of twenty-one years provided only that a renewal of the lease from the ground landlord were obtained. A renewal has been obtained, which contains provisions for further renewals, amounting in all to a twenty year term. The fact that the immediate renewal is for only five years - in fact for only four and one half years from the expiration of the sublease - does not relieve the plaintiff as assignee from giving effect to the undertaking by which he is bound in so far as he is able. (emphasis added)

This last sentence, that an assignee bound by the option to renew should be required to give effect to it to the extent he or she is able to do so, seems to me a logical and just extension of the **Guardian** principle; where the right would otherwise subsist, it should not be extinguished unless giving effect to it has become impossible or for some other substantial reason.

Also consistent with this view is the decision of the Alberta Supreme Court, Trial Division in **Texaco Can. Ltd. v. Scougall** (1979), 30 A.R. 112. In that case, the subtenant sought to specifically enforce an option to purchase contained in a sublease. The issue was whether the sublease, and therefore the option to purchase, had terminated because of the tenant's failure to renew the head lease. The Court held that the delay in signing a new head lease did not, in fact, affect the landlord and tenant relationship between the owner and the tenant and, therefore, it should not prejudice the rights of the subtenant: see, especially at p. 122. Once again, the Court's attention is on the substance of the matter and whether the tenant is able to perform the substance of the obligation required by the option to renew.

Following the **Guardian** principle, Gerstl's right to renew did not expire with the construction sublease on October 30, 1994. There were no provisions respecting the timing or manner of exercising the renewal. Following **Guardian**, the right subsisted absent Gerstl being put to her election to renew or some explicit or implicit indication that she would not renew. There was no such indication here.

Sobey's principal argument is that any right to renewal ended, at the latest, upon the expiration of the ground lease on October 31, 1994. This follows, says Sobey, because once the head lease expires, there is nothing to renew.

While this is a correct general principle, it cannot apply to this case. Sobey's position has an air of unreality about it in light of the assignment by Dexleigh to Sobey. By virtue of that assignment, Sobey remained the landlord under the ground lease and, significantly, stepped into the shoes of the tenant under the same lease. It is one thing to say that a subtenant loses a right to renew a sublease where the tenant (the subtenant's landlord) has lost the right to renew the head lease. It is another thing to say the right to renewal is lost where, as here, the tenant (the subtenant's landlord) and the landlord are the same entity. Sobey's argument, as applied to the facts as they were in November, 1994, amounts to this: Gerstl's right to renewal expired because Sobey did not renew the ground lease with itself.

Sobey took Dexleigh's interests subject to the rights which had been conferred by Dexleigh on Laurence et Freres and which had been assigned by it to Gerstl. There is nothing in the facts as to whether the head lease was or was not renewed. Even if it was not, that did not place any practical difficulty in the way of the renewal of Gerstl's tenancy. Sobey was effectively both landlord and tenant under the head lease. It is not in accordance with the **Guardian** principle to allow the fact that, in form, Sobey occupied two different capacities to defeat the substance of Gerstl's right to renew. There was no impediment in fact or substance

to the renewal. Following **Guardian**, that right survived to the extent that Sobey, as the party bound by the right to renewal, was able to give effect to it. The right therefore would not lapse even on the expiry of the head lease . Gerstl did not otherwise indicate an intention not to renew. It is not suggested that she lost the right in any other way. On November 28, 1994, Gerstl therefore had the right to renew the construction sublease and did so.

At the request of the Court, the parties filed very helpful briefs on the question of merger. In light of my conclusion, it is not necessary for me to address that question.

VI. Conclusion

For these reasons, I would dismiss the appeal with costs. In light of the parties' agreement that $1000 would be the appropriate amount, I would fix the costs at $1000 plus disbursements.

Cromwell JA

Concurred in:

Roscoe, J.A.

Hart, J.A.

CA No.145500

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SOBEY LEASED PROPERTIES LIMITED, a body corporate	)	
	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
EDITH GERSTL	)	
	)	CROMWELL, J.A.
	)	
Respondent	)	
	)	
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