

**CASE NO.**

**VOLUME**

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**Cite as: Sobey Leased Properties Ltd. v. Gerstl, 1998 NSCA 194**

SOBEY LEASED PROPERTIES  
LIMITED, a body corporate

EDITH GERSTL

- and -

(Appellant)

(Respondent)

C.A. No. 145500

Halifax, N.S.

CROMWELL, J.A.

APPEAL HEARD:

September 15, 1998

JUDGMENT DELIVERED:

November 12, 1998

SUBJECT:

**Landlord & Tenant - Subleases - Exercise of Option to Renew - Effect of Expiry of Head Lease**

SUMMARY:

The owner of land, the operator of a restaurant and a construction company signed a series of leases. In summary, the owner (Sobey) leased the land to the operator of the proposed restaurant (Dexleigh) who in turn subleased it to the builder (Laurence et Freres) who then sub-subleased it back to the operator. Later, Laurence et Freres assigned its interests to the respondent Gerstl and Dexleigh assigned its interests to the appellant Sobey. The initial term of the head lease ended at the end of October, 1994. Gerstl purported to exercise a right to renew the lease between Dexleigh (now assigned to Sobey) and Laurence et Freres (now assigned to Gerstl) on November 28<sup>th</sup>, 1994. Sobey, as successor to Dexleigh, took the position that Gerstl had no right to renew and, in the alternative, that any right to renew expired at the end of the initial term of the head lease in October, 1994. The parties applied to a Judge of the Supreme Court of Nova Scotia in Chambers for a determination of a point of law and filed an agreed statement of facts. The Chambers judge found in favour of Gerstl and Sobey appealed.

ISSUES:

- (1) Did Gerstl have a right to renew?
- (2) Was any right to renew which Gerstl possessed properly exercised by her on November 28, 1994?

RESULT:

The appeal was dismissed. Gerstl had a right to renew the sublease originally entered into between Dexleigh and Laurence et Freres. The principle enunciated by the Supreme Court of Canada in **Guardian Realty v. John Stark & Company** (1922), 64 S.C.R. 207 required Sobey, as assignee of Dexleigh, to give effect to Gerstl's option to renew to the extent it was able to do so. 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. Sobey was, therefore, effectively both landlord and tenant under the head lease. There was no impediment in fact or substance to Sobey giving effect to Gerstl's option to renew even after the end of the initial term of the head lease. Absent an express or implied election not to renew, or failure to respond once but to the election by the landlord, the option to renew subsists and may be exercised. The right did not expire at the end of the initial term of the head lease, Gerstl did not otherwise indicate an intention not to renew and it is not suggested that she lost the right in any other way. Accordingly on November 28<sup>th</sup>, 1994, Gerstl had the right to renew and exercised it.

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