6 pages.

ROYAL COURT

23rd March, 1990 40A.

Before: P.R. Le Cras, Esq., Commissioner,
sitting as a Single Judge

The representation of Electrical
Supplies & Machinery
(Wholesale) Limited.
Clarence George Farley, Party Convened.

Dispute over the terms and
implications of an 'option
to purchase' clause contained
in a contract lease.

Advocate S.A. Meiklejohn for the representor,
Advocate R.G.S. Fielding for the party convened.

JUDGMENT

COMMISSIONER LE CRAS: The present hearing arises out of a term in a contract lease between Mr. Clarence George Farley and the Limited Liability Company Ernest Farley and Son Limited, dated 28th June, 1985. The original tenant has since assigned the lease and a change of use of the building has been agreed by the lessor.

At Folio 683 at clause 8 there is an option which reads:

"In the event of the Lessee notifying the Lessor in writing of its wish to purchase the property during the term of the Lease, the Lessor shall give notice to the Lessee in writing of the figure the Lessor deems to be a fair market price for the property (hereinafter called "the nominated fair market price")."

There is a provision at 8(ii) "that in assessing the fair market price there shall not be taken into account any improvements, variations or alterations to the property carried out by the Lessee with the consent of the Lessor pursuant to clause 3(n) hereof".

The object of this clause, the Court was told, being to avoid the tenant's paying twice for work which he had done with the assent of the landlord.

The contention of the tenants, the representors in this case, is contained in the instructions of the arbitrator, at sub-paragraph (iii) which reads now:

"By virtue of matters set out at (ii) above Mr. Langlois (as it then was) must value Farley's Building subject to the Lease and subject to ESM's occupation of Farley's Building".

The contention of the lessor was set out: "The defendant avers that this clause ought to be deleted (part of it has, as we know, but the whole of the clause you say should be deleted, I think, Mr. Fielding). Mr. Williams may adequately assess the condition of the property from inspection (subject to submissions of the parties) and it is denied that any valuation of the property for the purposes of clause 8 ought to take account of the representant's lease and occupation of the property, as both such lease and occupation will be fused with the representant's ownership thereof upon exercise of the option to purchase granted under clause 8. In the circumstances if the matters aforesaid be allowed to affect the valuation of the property then the same would be to deny the reality of the situation. As set forth in the Defendant's proposed clause (ii) it is averred that in assessing the "fair market price" Mr. Williams shall take into account the

potential of the property for improvement, alteration or sub-division so as to allow for sub-letting".

Thus, effectively the tenants claim that the price should be fixed, taking into account the balance of the lease which exists, whereas the landlord, or the lessor, says effectively that it should be valued as if it had vacant possession. There is a very large sum involved in the difference between the values and effectively this decision will decide who gets the premium.

Before I leave the lease I would refer to Folio 673 that is sub-paragraph (j). Originally the use of the premises was only let as a builders yard, workshop stores and offices. This has now been amended on the assignment of the lease to cover the use made of it by the present tenants but they are still restricted in their use.

At Folio 680 there is provision for the revision of the rental. It reads (b):

> "The expression "open market rental" means the annual rental value of the property in the open market which might reasonably be demanded by a willing landlord on a lease for a term of years certain equivalent in length to the residue unexpired at the Increase Date of the lease hereby granted with vacant possession at the commencement of such term ....."

I leave the balance of the clause out but will remark that it takes no account of certain items which are set out in sub-clauses (i) - (iv).

I am glad to say that counsel are in general agreed as to the law which is applicable to the construction of a document such as this. The main exception where they are not agreed is as to the application of the contra preferentem rule, if I may call it that, to which I will return in due course.

We were referred to extracts from Pothier Article 7, Rule 1, the first rule: "On doit, dans les conventions, rechercher quelle a été la

commune intention des parties contractantes, plus que le sens grammatical des termes". We would then refer to the second Rule: "Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui dans lequel elle peut avoir quelque effet, que dans celui dans lequel elle n'en pourrait avoir aucun". The third rule: "Lorsque, dans un contrat, des termes sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat". The sixth rule: "On doit interpréter une clause par les autres clauses contenues dans l'acte, soit qu'elles précèdent ou qu'elles suivent". The seventh rule: "Dans le doute, une clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté l'obligation". And Mr. Fielding referred us as well to the eighth rule: "Quelque généraux que soient les termes dans lesquels une convention est concue, elle ne comprend que les choses sur lesquelles il parait que les parties contractantes se sont proposé de contracter, et non pas celles auxquelles elles n'ont pas pensé".

The English canons follow to a great extent on those and the laws as to how they are to be used are perfectly clear.

Mr. Meiklejohn did refer us to the passage in Mr. Lewinson's book at p.125, reading:

> "But in Watson v. Haggitt, Lord Warrington of Clyffe, delivering the advice of the Privy Council, said:
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> > "The contention of the appellant and the judgments of the two judges who decided in his favour are based upon a supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appears .... The truth is there is no such rule of general application as is contended for by the appellant. A difficulty or ambiguity may be resolved by resorting to such a device, but it is only in such cases that it is necessary or permissible to do so"."

Mr. Meiklejohn contends that the use of the word "property" is ambiguous and that it may be either of the bricks and mortar or the

interest in the property for which a fair market price has to be assessed and that it be assessed in the state that it is - that is with the lease as it now stands.

Mr. Fielding on the other hand contends for the lessor that it in fact means bricks and mortar, and at Folio 664 they are so defined when the contract lease says: "..... les héritages suivants formant deux corps de biens-fonds (ci après désignés en la langue anglaise "the property") .....", and his point is that the word "property" in this sense is different to the word "reversion" and that if it had been merely the reversion which had been offered to the tenant, that word should have been used and in the circumstances it is unfair not to value the property with vacant possession because that is clear from the terms of the agreement what the parties intended. The tenant, he says, is in a different position to anyone else and should not have the advantage of the premium unless it is given in clear words or indeed at all.

Now I have to say that, taking the lease as a whole and using the aids to construction which counsel have placed before me, I prefer the interpretation placed on behalf of the tenant. In my view the ordinary and natural meaning as expressed in the contract lease of the word "property" as used in clause 8 dealing with the option comprises not only the buildings that is the bricks and mortar but the interest in them as well, notwithstanding the definition at the commencement of the lease. Even if I am wrong and there is ambiguity, my view is this that the lessor is in these circumstances the grantor and that there is no change in the weight of the contra proferentem rule as set out by Pothier's Rule 7 and in my view any ambiguity must be construed against him. If there is an ambiguity then I find against him on that point.

In my view clear words will be needed to establish the right to have the property valued with vacant possession. They are not contained in the lease and I find that he fails on this point also. I therefore find in favour of the representor.

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