
CANADA / JUDGMENT

Brutus Holdings Ltd. v. Quesnel Pharmacy Ltd.

2004 BCSC 292

COURT

Supreme Court of British Columbia

DECIDED

30 January 2004

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Docket:

S032103

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Rice

January 30, 2004

BETWEEN:

BRUTUS HOLDINGS LTD.

PLAINTIFF

AND:

QUESNEL PHARMACY LTD.

DEFENDANT

Counsel for Plaintiff

J.A. Krupa

R. Lord, A/S

Counsel for Defendant

D. Perry

- [1] THE COURT: This is an application pursuant to Rule 18A to resolve a commercial landlord and tenant dispute. The premise is the Quesnel Pharmacy at unit 11, 665 Front Street, Quesnel, B.C. The last lease of the premises, which was for five years, expired October 31, 1991, and was not formally renewed.
- [2] The question is whether the lease then continued on a year-to-year basis, as is the presumption in the absence of an agreement otherwise, or whether there was some other agreement. The plaintiff landlord says that they agreed to a month-to-month tenancy. The defendant tenant says that there has been a succession of renewals of the lease, one in 1991 for five years and one in 1996 for five years or 10 years.
- [3] On January 23, 2004 the parties argued this issue before me. The defendant tenant contended that the matter was not appropriate for disposition pursuant to Rule 18A principally because of the clash of evidence between each side as to the commitments allegedly made.
- [4] I ruled that the matter was appropriate for disposition pursuant to Rule 18A because I was able to evaluate the key points at issue without having to weigh credibility arising from conflicting testimony or to rely upon hearsay or other inadmissible affidavit evidence.
- [5] I ruled that the parties did not reach any agreement after expiration of the lease in 1991, either to renew it or to switch to a month-to-month tenancy or to any other tenancy, although they did agree that the tenant under the lease, Waldimar Garth Ponich, would assign his interest as tenant to his holding company, the defendant, Quesnel Pharmacy Ltd.
- [6] I then proposed to make a determination as to the notice required for the landlord or the tenant to terminate the tenancy, whether the landlord's notice to terminate, dated February 21, 2003, is effective and, whether or not it is effective, when the defendant tenant can be obliged to quit the premises. The parties agreed to submit written argument on these points, and I have received and considered those arguments.
- [7] On the points in issue, the lease provided that an assignment required prior written consent from the landlord, not to be unreasonably withheld, but that such consent would not be construed as a release of the tenant. The lease was to constitute the entire agreement between the parties and could be amended only by agreement in writing signed by the parties, and the tenant would have the option to renew if the lease was in good standing, if the tenant had not assigned the lease and if notice was not given later than six months

earlier than the expiration of the term.

- [8] The lease did not contain the common overholding clause declaring that if the tenant continued to occupy the premises after expiration of the term it would be on a month-to-month basis and at some stipulated minimum rent.
- [9] As the deadline passed on October 31, 1991, Mr. Ponich continued to negotiate. Neither then nor for the next 12 years were the parties able to agree on a renewal. Meanwhile the defendant continued as tenant paying some rent, the same rent as before under the lease.
- [10] Dr. Allan Sand, a director of the plaintiff, said in his affidavit of October 19, 2003:

Whenever it appeared that Brutus had reached a consensus and a lease agreement could be prepared, Mr. Ponich raised new issues which he advised would have to be negotiated before he would actually execute a lease document. Eventually Brutus gave up the prospect of a long-term lease. It was our conclusion, based on conversations with Mr. Ponich, that he was not prepared to enter into a written lease agreement or to have any agreement, oral or written, for an extended term. He explained to me that it was his preference to have a month-to-month lease which would allow him the flexibility of being able to vacate the premises on short notice.

- [11] It was unclear when allegedly Mr. Ponich said this and in what context, and he never admitted that he said it. The question whether the plaintiff would have accepted a month-to-month tenancy is not answered either. The landlord may well have wished to hold its tenant to a year-to-year notice requirement depending upon when the statement was sent and in what circumstances, which, as I say, is not clear.
- [12] According to Dr. Sand, after October 31, 1991, Mr. Ponich advised that he was assigning the lease to Quesnel Pharmacy Ltd., his company. The plaintiff concedes that it accepted that assignment.

- [13] On October 25, 1995, the plaintiff sent a letter to Mr. Ponich that said:

I should point out to you that as far as I am concerned you have never renewed your lease formally despite requests by Brutus Holdings Ltd. for you to do so. To the best of my knowledge, your lease ran out two years ago and we have had no documentation of it ever having been renewed despite my request to you to do so. Perhaps you could forward your documentation so I can peruse them.

The letter was only a reminder about the renewal situation. It said nothing of any switch to month-to-month tenancy. Mr. Ponich evidently did not respond to the letter.

- [14] The next year, on October 31, 1996, Dr. John Maile, another of the plaintiff's directors, wrote to Mr. Ponich about the negotiations which had resumed. Dealing with a most recent demand or counteroffer from Mr. Ponich, he said:

It does not seem that the directors are prepared to agree to a lease along these lines. You stated in the phone call that you would then proceed to move the pharmacy to another location and pay rent on a monthly basis. We would wish to continue this with one month's notice for either party. We will then endeavour to obtain a tenant for the pharmacy area ourselves.

Mr. Ponich did not answer. He dropped his earlier demands and carried on as tenant as before. He did not move away.

- [15] In 2002, the plaintiff initiated new negotiations for a lease through its solicitors. Mr. Ponich was unresponsive again.
- [16] In November 2002, the plaintiff notified the defendant of a rent increase for the premises. The defendant refused to pay the increase.
- [17] By letter dated November 18, 2002, the plaintiff then notified the defendant that it could terminate the tenancy on one month's notice.
- [18] On February 21, 2003, the plaintiff through its solicitors gave notice to the defendant of termination of the tenancy effective March 31, 2003. Further negotiations to renew ensued, but failed, and the defendant refused to accept the notice.
- [19] The plaintiff more or less concedes that it could not pin the defendant down to anything, but it maintained that Dr. Maile's letter, with the defendant's failure to respond, established an agreement for a monthly tenancy.
- [20] The defendant argued the opposite, that the letter confirmed the terms for renewal, which were in that letter and which the defendant accepted by not carrying through with its counter demand, and by staying on under those demands of the plaintiff.
- [21] Overall the defendant says that by conducting business for so long as if the lease continued in effect the parties accepted it mutually as renewed, subject to agreement on rent, which was also settled because both sides did nothing to change it. The defendant points to Dr. Maile's notes of their meeting of October 1, 1996, which set out terms of renewal, the rent and the term and the commencement date.
- [22] The plaintiff's answer to those suggestions is that, firstly, the notes were no more than notes and there was never any confirmation of acceptance of a new lease. At no time did Mr. Ponich communicate his belief that the parties were bound by any lease after the expiration in 1991. He does not allege any communications, before or after the correspondence in October 1996, asserting his version of his rights under the lease.
- [23] The evidence of Mr. Ponich's alleged statement as to his preference for a month-to-month tenancy is insufficient for the reasons that I have stated. The subsequent letters and dealings before October 31, 1991, simply do not deal with it.
- [24] Dr. Maile's letter of October 31, 1996, is insufficient, too. It is demonstrably ambiguous and each side interprets it differently.

- [25] Mr. Ponich's silence did not induce the plaintiff to believe it had a month-to-month lease. It was at least as consistent with a belief that he was entitled to a year-to-year tenancy, or with no belief in any particular right. It was not consistent with a belief that any new lease or renewal had been achieved.
- [26] The pattern of negotiation and the fact that it went on for so long without resolution rather confirms the inability of the parties to settle. Mr. Ponich could not be brought to sign any renewal contract. Evidently he preferred not to be burdened by a five-year commitment. He preferred to bargain by saying that he might give up the premises, give notice and relocate, but he did not.
- [27] Confronted with this, the plaintiff opted not for a confrontation but continued to accept his rent payments in the hope that eventually some agreement would be concluded. Latterly, the hope that he would sign changed to a hope that he would leave. The plaintiff may well have assumed that it was a month-to-month obligation as a result, perhaps believing that such was the law.
- [28] The correct position at law is this: There is a presumption that a tenancy from year to year will be created on the expiration of a lease of years in the absence of another agreement. That is quoted in the materials of both parties from, e.g. *Gasner v. Bellack Brothers Ltd.*, [1945] 3 D.L.R. 365.
- [29] This being a lease originally for five years and there being no exercise by the tenant of the right to renew, nor any overholding clause, nor other agreement to create a month-to-month tenancy, my conclusion is that the tenancy became a year-to-year tenancy, pursuant to the lease, after October 31, 1991.
- [30] Now, as to notice to terminate the tenancy, the law is clear, where no express agreement as to notice exists to terminate a year-to-year tenancy there must be six months notice to quit ending at the expiration of the lease year. A notice to quit requires no particular form. It must in substance and effect request the tenant to quit and deliver possession at the proper time. An inaccuracy in the date of termination renders the notice ineffective and the landlord must send out a new notice: *Williams & Rhodes Canadian Law of Landlord and Tenant*, 6th Edition.
- [31] Counsel referred me to *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.*, [1998] O.J. No. 4426. In its decision, the Ontario Court of Appeal stated at p. 19:

The question is, what would Canada Life have reasonably considered to be intended by the notice.

- [32] In *Goodyear*, supra, the tenant gave notice terminating his tenancy December 21, 1996, whereas the year-to-year term ran into December 31, 1996. It was found on appeal that, although the wrong date was used on the notice to quit, the owner must reasonably have known that the tenant intended to vacate the premises at the end of the current year-to-year term, and accordingly the notice to quit was valid.
- [33] Plaintiff's counsel likened the confusion in *Goodyear*, supra to his client's mistaken assumption in this case that its tenancy was month to month. He argued that, therefore, the notice given February 21, 2003 should have been effective, alternatively, as of October 31, 2003.
- [34] However, *Goodyear*, supra was not a case of mistaken assumption. The notice simply contained an error that both sides knew to be an error and the recipient knew the true date intended for expiry by the other party. Here the defendant deliberately gave one month's notice intending it to be acted upon as such. There was no intention to accept the correct date.
- [35] The test stated in *Goodyear*, supra, was what would the recipient reasonably have thought to be intended by the notice. In this case, what was intended to be the notice and what the reasonable recipient would have thought was that it was one month's notice, not six months notice.
- [36] Plaintiff's counsel argued also that failure to respond to the plaintiff's sincere efforts to clarify matters should justify upholding the April 3, 2003, notice on grounds of fairness. There may be something to that sentiment. However, unfortunately, uncooperative behaviour is not enough.
- [37] I have found that Mr. Ponich did not misrepresent facts or deceive the plaintiff, and his unresponsiveness did not constitute acquiescence.
- [38] Neither do the facts raise an estoppel. The defendant through Mr. Ponich owed no duty to convey his thoughts to the plaintiff, and, certainly, he did not act in a way to induce the plaintiffs to believe that he would accept one month's notice. The plaintiff formed independently the opinion that it was a one-month tenancy. It may well be that that view was held without knowledge of the law, which is unfortunate, but the defendant owed no duty to advise in that regard. It was for the plaintiff to determine its own rights and choose the notice that was appropriate. The defendant did not lead the plaintiff to that decision or concede anything.
- [39] It was the plaintiff's choice whether to give notice and later sue on the basis of one month's tenancy or a year-to-year tenancy, or possibly both. The defendant cannot be held responsible for the choice that the plaintiff made, and so notice given by the plaintiff February 21, 2003, is ineffective and cannot stand. A new notice must be delivered.

- [40] The lease term commenced November 1, 1986, and expired October 31, 1991. The tenancy from year to year commenced thereafter on the first of each following November. Therefore, a notice given at this time, or at anytime until six months before October 31, 2004, will have the effect of terminating the lease as of October 31, 2004.
- [41] The court does not have discretion to vary the notice period, except in circumstances where the date of expiration of the lease is unclear. It is not unclear in this case.
- [42] As to costs, it seems to me that both sides argued positions that did not accord with the ultimate result, and so I am disposed not to order costs.
- [43] I will order that each party bear its own costs.

"E. Rice, J."

The Honourable Mr. Justice E. Rice

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