

CANADA / JUDGMENT

Russo v. Field

[1973] SCR 466

COURT

Supreme Court of Canada

DECIDED

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Russo v. Field

Collection

Supreme Court Judgments

Date

1973-01-31

Report

[1973] SCR 466

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett

On appeal from

Ontario

Subjects

Lease

Decision Content

Supreme Court of Canada

Russo v. Field, [1973] S.C.R. 466

Date: 1973-01-31

Mario Russo and Aldo Russo (Plaintiffs) Appellants;

and

Henry Field, Ann Field and Menat Construction Limited (Defendants) Respondents.

1972: November 8; 1973: January 31.

Present: Martland, Judson, Ritchie, Hall and Spence JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Lease of premises in shopping centre—Tenant to carry on business of hairdresser and beauty salon—Landlord's covenant not to permit other stores to carry on such business—Notice of lease registered—Subsequent lease of adjoining premises for business of manufacturer, retailer and servicer of wigs—Whether covenant in first lease breached—Whether tenants of adjoining premises had notice of provisions of first lease—The Land Titles Act, R.S.O. 1960, c. 204, ss. 77, 109 (1), (2), (4), (6).

The defendant M Ltd., the owner of a small suburban shopping centre, leased certain premises therein to the plaintiffs, and some months later a notice of the lease was registered under the provisions of The Land Titles Act, R.S.O. 1960, c. 204, as amended. Subsequently, a lease of the adjoining premises was entered into by the defendant AF. In each case, there was a covenant by the tenant to carry on a certain business; in the case of the plaintiffs, as a hairdresser and beauty salon, and in the case of AF, as a manufacturer, retailer and servicer of wigs. The lease to the plaintiffs contained a recital of the common intention of the landlord and tenant that the stores in the shopping centre should be non-competitive and the landlord agreed that it would not permit any of the other stores in the centre to carry on the business of a hairdresser and beauty salon. In the lease to AF there was no recital of intention, but the landlord agreed not to permit other stores to carry on "the principal business of manufacturing and retailing wigs and servicing wigs".

Following the commencement of the business of AF and her husband (the defendant HF), the plaintiffs brought an action for an injunction and damages. At trial, the action succeeded as against AF and M Ltd., and was dismissed as against HF. The Court of Appeal allowed an appeal by a majority decision and from that judgment the plaintiffs, with leave, appealed to this Court.

Held: The appeal should be allowed.

The evidence showed that at the time M Ltd. leased the stores to the plaintiffs and AF, the selling and servicing of wigs was an integral part of the hairdressing and beauty salon business. Therefore, under the particular circumstances in this case, the leasing of the premises to AF and the carrying on of the business therein of a wiggery was a breach of the covenant in the lease to the plaintiffs which covenant AF had notice of by virtue of the operation of ss. 77 and 109 of The Land Titles Act.

Following the launching of the appeal to this Court, AF discontinued her business. Under such circumstances it was not necessary or proper to direct that an injunction should run against AF. The trial judge, however, gave an award of \$2,000 in damages against M Ltd. and AF. The plaintiffs were entitled to retain the judgment for such damages.

Stuart v. Diplock (1889), 43 Ch. D. 343; Stop & Shop Ltd. v. Independent Builders Ltd. and Koury, [1933] O.R. 150, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Fraser J. Appeal allowed.

G.J. Smith, for the plaintiffs, appellants.

S. Borins, for the defendants, respondents, Henry and Ann Field.

G.D. Watson, for the defendant, respondent, Menat Construction Ltd.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on May 8, 1970, whereby that Court by a majority decision allowed an appeal from the judgment of Fraser J. pronounced on March 17, 1969. The learned trial judge had granted an injunction restraining the defendant Ann Field from carrying on her business at 664 Finch Avenue East in the Municipality of Metropolitan Toronto:

from carrying on the business at 664 Finch Avenue East in the Municipality of Metropolitan Toronto, of measuring, fitting, styling, dressing or selling or servicing wigs, postiches, wiglets, or any other hairpieces or any articles or preparations used for their care.

The learned trial judge had also awarded to the plaintiffs the sum of \$2,000 damages against both the defendants Ann Field and Menat Construction Limited. The action was dismissed as against the defendant Henry Field without costs and there has been no appeal from the latter disposition.

The defendant Menat Construction Limited built at the corner of Bay view Avenue and Finch Avenue East in the Municipality of Metropolitan Toronto a shopping centre which contained one large store suitable for occupation as a supermarket and nine other stores and proceeded to develop the building as a small shopping centre known as Bay view Woods Plaza. A lease was granted on September 9, 1966, to Sunnybrook Food Markets (Keele) Limited for the larger premises to be used as a supermarket and on September 29, 1966, to the Bay wood Pharmacy Limited, one of the other stores, to be used as a drug store. The third lease granted as to the shopping centre was that to the plaintiffs Mario Russo and Aldo Russo. The lessees had submitted an offer to lease dated August 16, 1965, which offer to lease was accepted at an unspecified date by the defendant Menat Construction Limited. The offer to lease was subsequently amended by agreement of the parties made on August 16, 1966, and then a lease was executed September 30, 1966, between Menat Construction Limited as lessor and the plaintiffs as lessees. This lease, covering premises described in the schedule thereto as being the store bearing Municipal No. 660 Finch Avenue East, contained the following provisions with which we are concerned in this connection:

6. THE TENANT COVENANTS AND AGREES WITH THE LANDLORD AS FOLLOWS:

- (1) The demised premises shall not be used for any purpose other than as Hairdresser and Beauty Salon.

And without in any way limiting the generality of the provisions of this paragraph, the Tenant covenants specifically that it will not, directly or indirectly, carry on the business of a grocer or a dealer in meats, fruits, vegetables, fish, poultry or delicatessen products or any business in which articles usually sold by grocers or by meat, fruit or vegetable dealers or dealers in poultry, fish or delicatessen products are offered for sale or are given away on any part of the demised premises and that it will not carry on any of the following businesses:

- (i) A store conducted principally for the sale of secondhand goods, war surplus articles, insurance salvage stock or fire sale stock or principally as a discount house.

(ii) An auction.

(iii) A pawn shop.

(iv) Any other business which because of the merchandise methods likely to be used would tend to lower the character of the Shopping Centre.

11...

It being the intention of the Landlord and the Tenant that the stores in the Shopping Centre of which the demised premises form part shall be non-competitive, the Landlord hereby covenants and agrees that it will not at any time during the term of this lease or any renewal thereof suffer or permit any of the other stores in the Shopping Centre to carry on the business of a hairdresser and Beauty Salon.

The plaintiffs commenced the operation of their business in February of 1967 and have testified that they carried on their business in accordance with the usual course of such enterprise in Metropolitan Toronto. In or about the month of May 1967, the defendant Henry Field commenced negotiations with the officers of the defendant Menat Construction Limited leading to the rental of the store premises immediately adjacent to that occupied by the plaintiffs. The plaintiffs had previously expressed an interest in renting that store in addition to that of their own premises but had subsequently determined not to carry out such an extension. The defendant Henry Field, in his conversation with either one of the plaintiffs, and the evidence is not definite as to with which one of the two plaintiffs the conversation occurred, stated to them that he intended to rent the premises for the business of manufacturing, selling, retailing and servicing wigs. There is the usual variation in the evidence as to what was the reply by the plaintiffs but the plaintiffs allege that they stated that they also dealt in wigs and objected to this competition. I shall refer hereafter to the trial judge's finding of credibility.

The defendant Ann Field did enter into a lease of the adjoining premises; such lease was produced at trial.

The lease to the Sunnybrook Food Market and the lease to the Baywood Pharmacy both contained the exact counterpart of the clauses in the lease to the plaintiffs which I have quoted above with appropriate amendments to refer to the specific trades which the lessees intended to carry on. On the other hand, the lease to the defendant Ann Field in paragraph 6 provides:

6. THE TENANT COVENANTS AND AGREES WITH THE LANDLORD AS FOLLOWS:

- (1) The demised premises shall not be used for any purpose other than to manufacture wigs and to retail wigs and associated items.

And there had been added in ink handwriting “and service wigs”.

The balance of the clause was a repetition of that which I have already quoted. Paragraph 11 has, in place of the wording which I have cited above from the plaintiffs’ lease, the following words:

The landlord hereby covenants and agrees that it will not at any time during the term of this lease or any renewal thereof suffer or permit any of the other stores in the shopping centre to carry on the principal business of manufacturing and retailing wigs.

And here also the words: “and servicing wigs” were added in ink handwriting.

It should be noted here that the defendant Ann Field alone signed the lease although it would appear and the learned trial judge has found that the defendants Ann Field and Henry Field were in equal partnership and the evidence indicated very clearly that all business negotiations were made by the defendant Henry Field.

The difference between leases granted to the plaintiff and to the other tenants of the shopping centre, on the one part, and that to the defendant Ann Field, on the other, is quite apparent. In so far as clause 6 is concerned, in each case, the tenant’s covenant is to carry on a certain business. In the case of the plaintiff, as a hairdresser and beauty salon, and in the case of the defendant Ann Field, as a manufacturer, retailer and servicer of wigs. However, clause 11 from the plaintiffs’ and the other tenants’ lease contains a recital of the common intention of the landlord and tenant that the stores in the shopping centre should be non-competitive. That recital appears on a printed page and the words “a hairdresser and beauty salon” alone have been typed in. On the other hand, page 11 of the lease to the defendant Ann Field is typed throughout. The clause which I have quoted above contains no recital of intention and is simply a covenant by the landlord not to permit other stores to carry on “the principal business of manufacturing and retailing wigs and servicing wigs”. (The underlining is my own.) It was the evidence of the defendant Ann Field that she did not retain any solicitor in the transaction and that she had made no searches in the Land Titles Office, the property being registered under that system, nor any inquiries as to what protection other stores in the shopping centre and particularly that of their neighbour, the plaintiff, enjoyed by virtue of the provisions of their leases. This interesting variation in the form of the covenants in the lease to the plaintiffs and the previous tenants, on the one part, and to the defendant Ann Field, on the other, was made the subject of some examination in the course of the trial. In evidence given by Nathan Arback on behalf of the defendant Menat Construction Limited, of which he was the president, he was most non-

committal. When asked to explain this variation he simply said that the offer to lease was given to the solicitor with instructions and it was the solicitor's business to choose the form which was used. The evidence of the defendant Henry Field, however, was somewhat more enlightening. From it, one gathers that Henry Field realized that the Russo brothers might well be engaged in the retail selling and servicing of wigs as part of their hairdressing business. The reason why such a conclusion was inevitable I shall discuss hereafter. He, therefore, feared that the Russo brothers might develop this part of their business as being the principal part and he expressed this fear to Mr. Arback and Mr. Strul, the officers of the defendant Menat Construction Limited. He continued his testimony:

And we were assured by Mr. Arback and Mr. Strul that this could not be so, because they were leasing entirely for hairdressing, and not for selling wigs, and he would write a clause into the lease protecting us to this effect. Which he did.

And also testified:

I did not want it [Russos' business] to extend into something that would be wholly competitive, and because of that I would not have my wife sign the lease until we were assured that everything was proper and correct for us to embark on this business.

The clause which I have cited from para. 11 of the defendants' lease eventually resulted. This still leaves unexplained the omission of the declaration of intention to have the stores in the shopping centre non-competitive. As I have said, Mr. Arback, in his testimony, offered no explanation whatsoever for that omission and such lack of explanation should be considered in conjunction with the learned trial judge's finding as to credibility.

Mr. Arback, however, in answer to the direct question "Did you intend there should be any competition in the Plaza?" answered "No".

The defendants occupied the premises and commenced their business in June of 1967. Almost immediately thereafter the plaintiffs took strong exception to the rental of the next door premises to the defendant Ann Field and to the business which she and the defendant Henry Field carried on therein as being in competition with the business which they operated and that the lease was a breach of the landlord's covenants in their, the plaintiffs', lease. The plaintiffs' solicitor attempted to produce at trial a letter which he addressed to the defendants' solicitor dated April 25, 1967, which was prior to the date of the lease to the defendant Ann Field let alone prior to the occupation of the premises by the said defendant. Upon the plaintiffs' solicitor's failure to properly prove the delivery of that letter, the learned trial judge properly ruled it inadmissible and we are therefore unaware of its contents. The writ in this matter was issued on June 23, 1967, and the statement of claim set out the relief which the plaintiffs desired as follows: 14. The plaintiffs therefore claim:

- (a) An injunction restraining the defendants Ann Field and Henry Field, their servants and agents from carrying on the business of measuring, fitting, styling, dressing and the sale of wigs and hair pieces on lands and premises in the Borough of North York, and being composed of part of Block "B", Plan M-1000, in the Borough of North York, filed in the Office of Land Titles at Toronto, as described as Part 2 on a Plan of Reference filed in the Land Titles Office as R2694;
- (b) An injunction restraining the defendants Ann Field and Henry Field, their servants and agents from carrying on any business that conflicts or competes with the business being carried on by the plaintiffs in the said premises;
- (c) Damages against the defendants Ann Field and Henry Field in the sum of \$10,000.00;
- (d) Damages against the defendant, Menat Construction Limited in the sum of \$10,000.00;
- (e) Such further and other relief as to this Honourable Court seems just.

15. The plaintiffs propose that this action be held in the City of Toronto in the County of York.

It should be noted that although in the action damages are asked against both the defendants Field, on the one part, and the defendant Menat Construction Limited, on the other, the injunction is asked only against the defendants Ann Field and Henry Field and not Menat Construction Limited. So far as the latter defendant, Menat Construction Limited is concerned, the issue in the action and on this appeal is simply whether or not that defendant's act in granting the lease to the defendant Ann Field was in breach of its covenant in the lease to the plaintiffs and if so what damages flowed from such breach. The issue in the action against the defendants Henry Field and Ann Field, in addition to that question is concerned with the question of whether the said defendants had notice of the provisions of the plaintiffs' lease. The learned trial judge, in a very carefully reasoned judgment, found as to credibility and said:

As the foregoing findings and some others which will have to be made are made on conflicting testimony it is desirable that I set out specifically my view as to the credibility of the principal witnesses. I observed Arback carefully in the witness box and also have considered his testimony in the light of the other circumstances disclosed by the evidence and have also had to consider his conduct in this whole transaction. Having done so I am satisfied that he was not credible as a witness nor was he honest as a business man in so far as this transaction is concerned. Whatever might be the legal rights of the parties on the facts I am satisfied that the intentional sharp practices of Arback and his associate Strul, as representatives of Menat, have involved the other parties in their present difficulties. In so far as the Fields are concerned I am of the opinion that they are normally honest people and, under ordinary circumstances, I would be disposed to accept their evidence. However, their position will be very unhappy if they are unsuccessful in this action and, as a result, cannot continue their business. They are no longer young and Mr. Field is apparently not in good health. They were very conscious of these things and it has coloured their testimony to a considerable extent. One area in which I feel their evidence was much coloured was in their evidence as to the amount of their so-called manufacturing activity. I

am satisfied that the Fields were not manufacturers in any real sense. The plaintiffs impressed me as being honest and I believe their evidence is substantially correct and where there is any conflict I prefer to accept it rather than that of the defendants.

The learned trial judge also said:

I cannot find on the evidence that they had actual knowledge of the terms of the Russo lease. Their evidence, which I accept, is that they did not make any search before going into the transaction and they did not employ a solicitor. It is surprising that when they knew it was part of the transaction as between themselves and Menat that there be certain restrictions on the use of the premises and also on leases to other tenants in the shopping centre that they did not make any inquiry as to what, if any, rights the plaintiffs had. I am also satisfied on the evidence that as soon as the plaintiffs became aware of the proposed use of the premises adjoining them for the selling and servicing of hairpieces they protested to Menat.

In view of the evidence which I already referred to and which I shall indicate hereafter, and in view of the learned trial judge's finding as to credibility which I have quoted, and which followed immediately in his reasons the finding which I have just recited, one cannot say that this finding as to lack of actual notice was not at the least one which gave the best interpretation to the defendant Ann Field's and Henry Field's claims.

The learned trial judge did not refer to the issue of constructive notice and his finding as to actual notice is exclusive of the issue of notice by virtue of a statute which shall be dealt with immediately hereafter.

The learned authors of Megarry and Wade in the 3rd edition of the Law of Real Property dealt with constructive notice in these terms which, in my opinion, are equally applicable of constructive notice of covenants in a lease:

Equitable interests would have been entirely insecure if it had been made easy for purchasers to acquire the legal estate without notice, as by merely asking no questions. Accordingly the Court of Chancery insisted that purchasers should inquire about equitable interests with no less diligence than about legal interests, which they could ignore only at their own peril.

The authors were of the opinion that a purchaser accordingly had constructive notice of a fact if, *inter alia*, he deliberately abstained from inquiry in an attempt to avoid actual notice. In view of the evidence in the present action, were it necessary, I would have been prepared to find that the defendants Henry Field and Ann Field had constructive notice, that there existed restrictions preventing the landlord from leasing to them premises in which they could carry on a business competing with that of the plaintiffs. In view, however, of the situation which I outline hereafter, it is not necessary to come to such a conclusion.

The Bayview Woods Plaza was registered in the Land Titles Office as parcel B.2 in section M-1000 and there was produced at trial a certified abstract of title as to such parcel. That abstract bore, *inter alia*, the following entries:

A208892—Notice of a lease between Menat Construction Limited, lessor, and Sunnybrook Food Markets (Keele) Limited, as lessee.

A210093—Notice of a lease between Menat Construction Limited, as lessor, and Baywood Pharmacy Limited, as lessee.

Convenants in both of these leases have been referred to above.

A211416—Notice of a lease dated the 30th of September 1966 between Menat Construction Limited, as lessor, and Mario Russo and Aldo Russo, as lessees.

That notice which is a notice of a lease to the plaintiffs in this action was registered on the 2nd of March 1967.

As I have said, the lease to the defendant Ann Field was dated May 18, 1967. No notice of the lease to the defendant Ann Field appears on the abstract of title of the parcel. The notices of lease which were registered including that to the plaintiffs were filed under the provisions of The Land Titles Act, then R.S.O. 1960, c. 204, as amended. Section 77 of that Act provides:

77. No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry. And s. 109 of the same statute provides, in part:
109. (1) A lessee or other person entitled to or interested in a lease or agreement for a lease of registered land may apply to the proper master of titles to register notice of the lease or agreement in the prescribed manner.
- (2) Where the lease is by the registered owner of the land the proper master of titles may without notice to him enter on the register such notice thereof as he deems necessary.
- (3)...
- (4) The applicant shall deliver to the proper master of titles the original lease or agreement or a copy thereof and, if the application is granted, the proper master of titles shall make a note on the register identifying the lease or agreement, and the lease or agreement or copy so deposited shall be deemed to be the instrument of which notice is given.
- (5)...
- (6) Where notice of a lease or agreement for a lease is registered, every registered owner of the land and every person deriving title through him, excepting owners of encumbrances registered prior to the registration of such notice, shall be deemed to be affected with notice of the lease or agreement as being an encumbrance on the land in respect of which the notice is entered.

Much argument was addressed to this Court that the notice of lease appearing on the abstract of title of the parcel did not give notice by virtue of subs. (6) of s. 109 to the defendant Ann Field for two reasons. (1) The lease to the plaintiffs was not upon the property which was being leased to the defendant Ann Field. Of course, this is true, it was on the adjoining store, but the leases were of parts of the same parcel B.2, and the notice of the leases all appeared on the abstract of that parcel. It would have been impossible to have abstracted the notice of lease elsewhere than on the abstract of parcel B.2. (2) It was submitted that the notice was merely a notice of the lease and not a notice of the contents thereof and that the defendant Ann Field, had she caused the abstract to be searched, would have been quite uninterested in the fact that another part of this parcel had been leased to the plaintiffs. She, of course, already knew that. She had seen them in occupation of that other part. This surely is a most unusual interpretation of the words “shall be deemed to be affected with notice of the lease or agreement as being an encumbrance on the land in respect of which the notice is entered”.

The notice of a lease is quite vain unless it is also notice of the terms of the said lease, and before the notice could be accepted by the master of titles the applicant for registration of the notice was required to file a copy of the lease to which the notice referred. Although the copy of the lease to the plaintiffs produced at trial and filed as an exhibit is an original executed copy, the copy of the leases to both the Sunnybrook Food Market (Keele) Limited and Baywood Pharmacy were actual copies certified by the master of titles, and a similar document, that is, a copy of the lease to the plaintiffs, was equally in the possession of the master of titles open to inspection by anyone who desired to consider its terms.

Under these circumstances, the learned trial judge concluded that there had been what he termed constructive notice to the respondent Ann Field of the provisions of the lease to the Russos at the time the lease was made to her. The learned trial judge used the word “constructive” but I am of the opinion that a more accurate description would be actual notice by virtue of the statute.

MacKay J.A., in his dissenting reasons in the Court of Appeal for Ontario, said:

I am of the opinion that such registration and filing is, under the provisions of the Act, notice to all persons subsequently taking title or interest in the lands from Menat of the lease of the plaintiffs and the contents thereof. This seems to be the clear meaning of the statutory provisions and to hold otherwise would make the requirements as to filing a copy of the lease with the Master of Titles meaningless.

Dealing with the effects of such registration, Evans J.A., although he agreed with Laskin J.A. that there had been no breach, said:

To hold otherwise would mean that lessees who register their leasehold interests in the only manner provided under the Land Titles Act would be unprotected in similar situations. One might hope that the Legislature would set out in more detail the effects which flow from the registration of a notice of lease.

Laskin J.A., giving the main judgment in the Court of Appeal for Ontario; said:

In view of the determination at which I have arrived (as set out below) that there has been no breach of the restrictive covenant, I need not pursue the Land Titles question any further...

...

I emphasize again, however, that I do not decide the question whether in the case of a restrictive covenant in a lease s. 122 alone must govern with whatever limitations inhere in it, or whether such a covenant may be noted on the register otherwise than by reliance on s. 122.

Since I have come to the conclusion that there has been a breach of the restrictive covenant, I am required to determine whether or not the defendant Ann Field did have notice of such restrictive covenant by the registration of the notice of lease in the manner which I have outlined.

With respect, I have no difficulty in concurring with the view expressed by the learned trial judge and by MacKay J.A. and Evans J.A. in their reasons in the Court of Appeal.

Certainly, The Land Titles Act should be interpreted so as to carry out the very evident intention that a tenant could protect his interest by registering a notice of the lease upon the abstract and as Laskin J.A. commented practical considerations would suggest that a provision for registering a notice of a lease should be construed to embrace notice of its contents.

As MacKay J.A. pointed out, to hold otherwise would make the requirement as to filing a copy of the lease with the master of titles meaningless. In my opinion, it would defeat the whole purpose of s. 109 of The Land Titles Act. Section 122 is, in my view, quite relevant dealing as it does with conditions and restrictions running with the land.

I have therefore concluded that the defendant Ann Field had, by virtue of the registration of the notice upon the abstract of title for parcel B.2 notice of the contents of the lease to the plaintiffs.

There remains therefore, the main problem, that is, whether there was a breach of the covenant in the lease to the plaintiffs. That covenant, as I have said, is contained in the words in the lease which I have cited and which concluded with the words "...the landlord hereby covenants and agrees that it will not at any time during the terms of this lease or any renewal thereof suffer or permit any of the other stores in the shopping centre to carry on the business of hairdresser and beauty salon".

Much evidence as to the business of a hairdresser and beauty salon and also as to the business of a wig shop or wiggyery or whatever it may be called was given at trial by both the plaintiffs, by both the defendants, and by one Garry Tiebar. The latter acted as a salesman for a beauty salon supply house and in so doing called on about 150 different hairdressing and beauty salon businesses in Metropolitan Toronto. The learned trial judge accepted the evidence of the witness Tiebar and relied on it to a very considerable extent. It would seem that Laskin J.A., in the Court of Appeal, was disinclined to place any particular reliance on such evidence, saying:

Tiebar himself has no qualification as a hairdresser, and the most that can be taken from his evidence is that as a wholesale supplier to establishments calling themselves hairdressing and beauty salons, he added wigs and hairpieces to his line of goods and sold them to the same customers to whom he had formerly sold the range of articles used in the treatment of a person's hair and his or her complexion.

With all deference to that opinion, I feel that the view taken by the learned trial judge who heard this mass of evidence, and the trial took seven days, should be allowed to assess the weight which he would give to the evidence of the various witnesses in establishing facts and that he made no error when he gave weight to the evidence of a man who had dealt for 12 years with a very large number of hairdressing and beauty salon businesses in Metropolitan Toronto and had dealt with them by calling on them as a salesman. Surely, it would be difficult to imagine a person more qualified to say what was in 1966 and 1967 the ordinary business of a hairdresser and beauty salon in Metropolitan Toronto. His evidence may be summarized in one answer:

Q. From your twelve years experience in the beauty supply business, would you say that the selling and servicing of wigs, of hair goods, is a usual or not a usual, part of the hairdressing business?

A. It is a usual part of the hairdressing business.

That statement was repeated in cross-examination and in an even more graphic form. I quote that evidence: Q. Now, you mentioned that hairdressers do a variety of things, and one of the things that you suggested they do was treating wigs. Now, I would put this to you, Mr. Tiebar, that there are some hairdressers who have nothing to do with wigs at all in this area; would you agree with that?

A. The hairdressers that I have come in contact with in the last five years have to do with wigs and are familiar with wigs and are working with wigs. I am not in contact with any hairdressers today that are not.

Q. But you have not been in contact with every hairdresser?

A. That is correct.

Q. Yes; so it is quite possible that there are some that have nothing to do with treating wigs?

A. Not that I know of.

That evidence was given by a witness who each week called on 150 hairdressers in Metropolitan Toronto.

Evidence to like effect was given by both plaintiffs and as Mac Kay J.A. points out:

Perhaps the strongest support of the plaintiffs' submission that the selling and servicing of hairpieces is now recognized in the trade as a usual constituent of the business of hairdressing and beauty salon is to be found in the evidence of Henry Field...

Henry Field had been a hairdresser for forty-nine years. His training had been in England and included all aspects of hairdressing in the sense of dressing live hair and also the making and preparation of wigs for both men and women. Henry Field outlined the increasing popularity of wigs for cosmetic or, as I would prefer to designate them, fashion purposes, and his own business history since he came to Canada in 1951.

Henry Field first established a business in Toronto on Bloor Street known as Justine Beauty Salon. A short time later he moved west on Bloor Street and carried on a business known as Nicol Beauty Salon. He then moved to Windsor, Ontario, and there carried on a business as a beauty salon. From there, the defendant Henry Field moved to Charlotte, North Carolina, and again carried on a beauty salon business. He returned to Metropolitan Toronto where he once more entered the beauty salon business at the corner of Islington Avenue and Dundas Street. In each one of these enterprises, the defendant Henry Field carried on the ordinary business of a hairdresser and beauty salon and performed all the tasks ordinarily performed in such business. Because of his early training in the making and servicing of wigs, he personally in the staff of each of the businesses devoted more of his own time to the wig or hair piece part of the business and as the business progressed even to a certain extent physically divided the premises so that the hair piece end of the business was done under the same roof, under the same management but in another room or, at any rate, separated by a partition. His evidence shows first that the hair piece business which when he first commenced the beauty salon business in Toronto had been only about 10 per cent of the total business increased with the growth of the use of the head pieces by ladies for fashion purposes so that in his last place of business prior to the lease of the premises in the Bayview Woods Plaza by his wife, the defendant Ann Field, it was 50 per cent of the total business. The defendant Henry Field, therefore, determined to establish the business in the Bayview Woods Plaza and to cease carrying on all the rest of the hairdressing and beauty salon business which he had formerly carried on in the shops to which I have referred and to devote his whole time to the manufacture, sale and servicing of wigs and accessories. His own evidence demonstrates most clearly that, to use the words of the learned trial judge, It is clear that the selling and servicing of wigs and hair pieces is a completely almost universal part of the business carried on in hairdressing establishments also that in Metropolitan Toronto there are relatively few businesses engaged exclusively in selling and servicing wigs but there are many hairdressers.

One of the most significant pieces of evidence adduced at the trial was the production of ex. 17. Unfortunately, this exhibit was omitted from the appeal case evidently by the agreement of counsel as to the contents thereof. The exhibit was produced during cross-examination of the defendant Henry Field and was admitted by him as being an advertisement which he had authorized. I quote that exhibit below:

The

Wiggery

PHONE 222-5545

A Brand new service in

NORTH TORONTO

OPENING SPECIAL

YOUR WIG CLEANED

CONDITIONED

& STYLED

REGULARLY \$8.50 SPECIAL \$6.50

Extensive stock of custom

made and imported

Hair Pieces

Bayview Wood

PLAZA

Conveniently located Between Bayview Ave. and

LeslieSt. on Finch Ave.

It should be noted that the words “Opening Special” are in large type and only in slightly smaller type are the words “Your Wig Cleaned, Conditioned & Styled” and then in much smaller type beneath appear the words “Extensive stock of custom made and imported hair pieces”. The evidence of both the plaintiffs and of Tiebar showed that this very service, the cleaning, conditioning and selling of wigs, was an important and an increasingly important part of their business and yet the defendant Henry Field advertised this opening special when commencing business in the premises which immediately adjoin that of the plaintiffs.

It must therefore be determined whether under the particular circumstances in this case the leasing of the premises to the defendant Ann Field and the carrying on of the business therein of the wiggery was a breach of the covenant in the lease to the plaintiffs which covenant I have concluded above the defendant Ann Field had notice of by virtue of the operation of The Land Titles Act. I stress again that the circumstances are important. Both the premises of the plaintiffs and that of the defendant Ann Field were situated and in fact immediately adjoined in a small shopping centre containing only ten stores, nine stores plus one supermarket, and that shopping centre was situated in the northeastern part of suburban Toronto in a residential area. The landlord had expressed in the lease to the plaintiffs and in the other leases filed at trial except that to the defendant Ann Field the intention of “the landlord and tenant that the stores in the shopping centre of which the demised premises formed part shall be non-competitive”. That was part of the contents of the lease to the plaintiffs which, as I have said, the defendant Ann Field must be considered to have notice.

It has been said that covenants such as those under consideration in this action are covenants in the restraint of trade and therefore must be construed restrictively. I am quite ready to recognize that as a general proposition of law and yet I am of the opinion that it must be considered in the light of each circumstance in each individual case. The mercantile device of a small shopping centre in a residential suburban area can only be successful and is planned on the basis that the various shops therein must not be competitive. Since the shopping centre is a local one and not a regional shopping centre, the prospective purchasers at the various shops which it is planned to attract are residents in the neighbourhood. They are, of necessity, limited in number and therefore the business which they bring to the shopping centre is limited in extent. The prospective purchaser attracted to shop A in the plaza may well turn from shop A to shop B to purchase some other kind of his or her needed goods or service but if the limited number of prospective purchasers are faced in the same small shopping centre with several prospective suppliers of the same kind of goods or service then there may not be enough business to support several suppliers. They will suffer and the operator of the shopping plaza will suffer.

I am therefore of the opinion that the disposition as a matter of public policy to restrictively construe covenants which may be said to be in restraint of trade has but little importance in the consideration of the covenants in the particular case.

I am of the opinion that the evidence given by both the witness for the plaintiffs and by the defendant Henry Field himself has shown that although there always was a business in the manufacture and sale of wigs for a very long time, and I am thinking of over a century, that business was confined to the manufacture and sale of wigs for therapeutic purposes, in short, to cover bald or misshapen heads, male or female. As such, it was a very confined and specialized business with extremely few outlets. Gradually, after 1950, more rapidly after 1960, and with increasing rapidity thereafter, the manufacture, sale and servicing of head pieces used not for therapeutic purposes but as a part of female adornment became a predominant feature in the female beauty trade, if I may use those general words. So that in 1966 and 1967, the period with which we are concerned, it was an increasingly large and lucrative part of the hairdresser and beauty salon business. It could be so described in the business operated by the plaintiffs and it had been in the business operated by the defendant Henry Field in the period from 1951 on. What the defendants Henry and Ann Field have done is to take this, what I have found to be an integral part of the hairdressing and beauty salon business, and make it their specialty dropping the balance of the usual hair-dressing and beauty salon business. I emphasize that this is not the removal of a department from a multi-department business. As a wig sale and servicing operation, in the hairdressing and beauty salon business, it was carried on in all the other shops; it was not truly a separate department but just part of the services. Although the defendant Henry Field, due to his personal skill in such part of the beauty salon and hairdressing business contributed an increasing part of his time thereto, and although he speaks of a degree of physical separation in one shop, that is not the ordinary situation in hair and beauty salon places of business.

In the light of these circumstances, I am of the opinion that such cases as *Stuart v. Diplock*[2], and *Stop and Shop Ltd. v. Independent Builders Limited and Koury*[3], do not apply. In each of those cases, it is true that the covenants were, as here, against the carrying on of a certain type of business and not as against the sale of specified products but in each of the cases the alleged competitor was operating a well established separate type of business although some of the lines of goods sold in the competing business were the same as those sold in the business which the plaintiffs sought to protect. So, in *Stuart v. Diplock*, the plaintiff sought to protect the business of ladies' outfitting and the defendant operated a hosiery business in which he sold four classes of articles the sale of which was part of the business of the ladies' outfitters and in the *Stop and Shop* case the plaintiffs sought to protect the business of a grocery and meat store and the defendant operated a delicatessen. Both hosiers as in the *Stuart and Diplock* and delicatessen as in the *Stop and Shop* case had been, for many years, well established separate trades and it was held that they could not be restrained because the ladies' outfitters, in the first case, and the grocery and meat store, in the second case, sold some similar lines.

I distinguish these cases because, in my view, apart from the very limited outlets for the manufacture and sale of wigs for therapeutic use there was no established business for the manufacture, sale and servicing of fashion hair pieces for ladies until the increasing and profitable part of such operation in the ladies' hairdressing business caused a slight degree of specialization in late years.

I am therefore in agreement with the view of MacKay J.A. as expressed in his dissenting reasons in the Court of Appeal:

The question of whether the selling and servicing of wigs was an integral part of the hairdressing and beauty salon business is a question in fact to be decided on evidence. I am of the opinion that on the evidence and pleadings, the learned trial Judge was fully justified in holding that selling and servicing of wigs at the time Menat leased the stores to the plaintiffs and the defendant Field was recognized in the trade as an integral part of the hairdressing and beauty salon business, and that the defendants were operating a business that was in competition with the plaintiffs' business contrary to the covenant in the plaintiffs' lease.

It is to be noted that in these reasons I have not cited and analyzed dictionary meanings of the word "hairdresser". I am of the opinion that such exercise is futile in view of the very extensive evidence given by both plaintiffs, by the defendant Henry Field and by Garry Tiebar as to the nature of a hairdressing business in Canada in the 1960's. I have noted Laskin J.A.'s reference to the dictionary meanings as used in the *Shorter Oxford English Dictionary* and *Murray's New English Dictionary*. I am not so convinced as was Laskin J.A. that those definitions exclude the treatment of artificial hair pieces. Even if so, such definitions may well be influenced by the definition of hairdressing in the *Hairdressers (Registration) Act, 1964 (U.K.)*, c. 89, s. 15, to which Laskin J.A. refers.

In my opinion, a more convincing and relevant reference may be made to the provisions of The Apprenticeship Act of the Province of Ontario as it existed at the date this lease was executed and to the Regulations thereunder. The statute may be found in R.S.O. 1960, c. 17. There, a designated trade is said to be a trade specified in or added to Schedules A or B and in Schedule B the two trades specified are (1) barber, and (2) hairdresser. The statute contains no definition for hairdresser but Regulation 19 indicated thereunder contains a most detailed definition of hairdresser which I cite:

- (b) “hairdresser” means a person who,
 - (i) tints, bleaches or dyes hair,
 - (ii) shampoos hair and scalp, (iii) gives hair or scalp treatments, facial massages or manicures,
 - (iv) cleans or dresses artificial hair pieces,
 - (v) shapes, colours or treats eyebrows or eyelashes,
 - (vi) cuts or trims hair,
 - (vii) curls or waves hair by any means,
 - (viii) combs or brushes hair, or
 - (ix) performs any other operation with respect to dressing hair to obtain an intended effect or according to a particular style,

Section 2(2) of that Regulation provided that the course of training to be provided by the employer for an apprenticeship in the designated trade should be that outlined in the schedule and the schedule applicable to hairdressers provided for twenty different subjects of instruction and number 16 was entitled “artificial hair pieces” and the instruction was to be “cleaning and servicing; colouring and blending of hair pieces with customers’ hair; styling, safety measures”.

I am of the opinion that the definition made in the Regulation which dealt with the appellants’ business is confirmatory of my view that when the word “hairdresser” was used in the lease to the appellants it bore a meaning in conformity with the definition in that Regulation.

I therefore would allow the appeal. Paragraph 22 of the appellants’ factum contains the statement, “Following the launching of the appeal to this court, the defendant Ann Field has discontinued her business”. Under such circumstances, in my view, it is not necessary or proper to direct that an injunction should run against the defendant Ann Field and I would make no such order.

The learned trial judge, however, gave an award of \$2,000 in damages against the defendant Menat Construction Limited and Ann Field and I think the plaintiffs are entitled to retain the judgment for such damages. The plaintiffs are entitled to retain the judgment of the learned trial judge in their favour for the costs of the trial and should have judgments for the costs in the Court of Appeal and in this Court against both the defendants Ann Field and Menat Construction Limited.

Appeal allowed with costs.

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Solicitor for the defendants, respondents, Henry and Ann Field: Stephen Borins, Downsview.

Solicitor for the defendant, respondent, Menat Construction Ltd.: Murray Herman,
Toronto. Supreme Court of Canada

[1] [1970] 3 O.R. 229, 12 D.L.R. (3d) 665.

[2] (1889), 43 Ch.D. 343.

[3] [1933] O.R. 150.

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