

Date: 20230324
Dockets: CI 21-02-03954
CI 21-02-03993
(Brandon Centre)
Indexed as: Carlson Estate v. Berry;
Berry v. Carlson Estate
Cited as: 2023 MBKB 58

2023 MBKB 58 (CanLII)

COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

BETWEEN:

Docket No.: CI 21-02-03954

ESTATE OF WINNIFRED MARGARET)
CARLSON, deceased and Executors SANDRA)
JOAN FREEMAN and LANCE ERIC CARLSON)
) Glen Harasymchuk
 applicants,) for the applicants
)
- and -)
)
)
MELVYN JOHN BERRY and JEANETTE)
WELLDON BERRY,)
 respondents.) Douglas Paterson, K.C.
) for the respondents

AND BETWEEN:

Docket No.: CI 21-02-03993

MELVYN JOHN BERRY)
) Douglas Paterson, K.C.
 plaintiff,) for the plaintiff and
) defendant by counterclaim
- and -)
)
)
ESTATE OF WINNIFRED MARGARET)
CARLSON, deceased and Executors SANDRA) Glen Harasymchuk
JOAN FREEMAN and LANCE ERIC CARLSON) for the defendants and
) plaintiffs by counterclaim
 defendants,)

- and -)
)
 ESTATE OF WINNIFRED MARGARET)
 CARLSON, deceased and Executors SANDRA)
 JOAN FREEMAN and LANCE ERIC CARLSON)
)
 plaintiffs by counterclaim,)
)
 - and -)
)
 MELVYN JOHN BERRY)
)
 defendant by counterclaim.)

Judgment delivered:
 March 24, 2023

ABEL J.

INTRODUCTION

[1] This matter requires the determination of which of the leases entered into between the parties governs their respective rights and obligations, as it relates to a cabin situated on two adjacent lots.

[2] Each party seeks a declaration or determination as to the validity of the lease dated April 1, 1978 (the 99 Year Lease). Melvyn Berry (Melvyn) seeks a declaration that the 99 Year Lease is valid and does not expire until 2077. Melvyn seeks that relief on the basis that the 99 Year Lease was a legal and valid agreement.

[3] The Executors of the Estate of Winnifred Carlson seek a declaration that the 99 Year Lease is invalid, and that a lease dated November 23, 1999 was the last

valid lease between the parties. The Executors seek that relief on the basis of ***The Planning Act***, SM 1975 c.29, Cap P80 or alternatively, on the law of novation.

[4] Depending on the outcome of that determination, each party seeks further relief.

PROCEDURAL HISTORY

[5] This matter initially began by way of Notice of Application, the Applicant seeking *inter alia* declaratory relief in relation to leases entered into between the parties (the Application).

[6] The Respondent in the Application then filed a Statement of Claim, the Plaintiff also seeking, *inter alia*, declaratory relief in relation to the leases entered into between the parties (the Action). The Defendant then filed a Statement of Defence and Counterclaim. The relief sought in the Counterclaim mirrored the relief sought in the Application.

[7] At a case conference held March 2, 2022, it was determined that the matters would not be consolidated, but that both would be heard together, with affidavits being filed as the direct evidence of any witnesses, those affiants being available for cross-examination at the hearing of the matters.

LEASE HISTORY

[8] Harold Carlson (Harold) and Steve Maksymchuk (Maksymchuk) entered into the 99 Year Lease regarding the lease of two lots, being Lots 41 and 42 (the Lots) in the NW ¼ of 28-4-16 WPM, in Manitoba (the Property). Harold leased the Lots to Maksymchuk. Although the 99 Year Lease was dated 1978, it was not signed

until 1981. Neither party took issue with respect to the date of signing, each acknowledging the intention was for the 99 Year Lease to be effective as of April 1, 1978.

[9] Harold had undertaken to lease lots as cottage lots on the Property. No subdivision was ever done so as to create separate titles for the Lots. Harold had leased other lots to parties unrelated to this litigation prior to and after the effective date of the 99 Year Lease.

[10] The term of the 99 Year Lease was for 99 years. Maksymchuk was to pay to Harold the sum of \$9,000 between 1978 and 1985, and was to pay the real property taxes. There was no term included in the 99 Year Lease that Maksymchuk obtain the leave of Harold to assign or sublet the Lots.

[11] Maksymchuk assigned Lot 42 to Iona Maksymchuk (Iona) by assignment dated April 2, 1983.

[12] Maksymchuk assigned Lot 41 to Melvyn and Jeanette Berry (Jeanette) (collectively, the Berry's) by assignment dated June 27, 1989.

[13] Iona transferred her interest in Lot 42, including a Cedar Cottage (the Cottage) to the Berry's by Indenture dated sometime in June of 1989. The Cottage is currently situated on the Lots.

[14] In 1978, Harold had entered into the 99 Year Lease with Maksymchuk for the Lots. By June of 1989, the Lots had been assigned to the Berry's.

[15] Harold and the Berry's entered into a lease for the Lots on June 27, 1989, for a period of 10 years (the 10 Year Lease).

[16] The consideration for the 10 Year Lease was the payment by the Berry's of the yearly sum of \$1.00, plus the payment of property taxes.

[17] The 10 Year Lease also contained a clause preventing the Berry's from assigning or subletting the Lots without the leave of Harold.

[18] Harold and the Berry's entered into a lease for the Lots on November 23, 1999, for a period of 21 years (the 21 Year Lease).

[19] The consideration for the 21 Year Lease was the payment by the Berry's of the yearly sum of \$1.00, plus the payment of property taxes.

[20] The 21 Year Lease also contained a clause preventing the Berry's from assigning or subletting the Lots without the leave of Harold.

[21] Harold passed away in 2006, his wife Winnifred Carlson (Winnifred) being the named beneficiary of the Lots. Winnifred passed away in 2012.

[22] Sandra Freeman (Sandra) and Lance Carlson (Lance) (collectively, the Executors) are the children of Harold and Winnifred. The Executors were appointed by the Grant of Probate dated April 22, 2013 and are the named beneficiaries of the Lots from the Estate of Winnifred.

[23] Jeanette passed away on March 13, 2021.

[24] The Executors of the Estate of Winnifred commenced the Application and Counterclaim. Melvyn commenced the Action.

THE 99 YEAR LEASE

[25] The 99 Year Lease is dated April 1, 1978. It is necessary to look at the legislative history to determine whether a lease for a term of 99 years was valid as of April 1, 1978.

[26] Sections 60(1)(f), (g) and (h) of ***The Planning Act***, SM 1975 c.29, Cap P80 (the *1975 Act*), provided as follows:

No person shall...

(f) lease land;

unless

(g) the land is described in according with and is within a registered plan of subdivision; or

(h) the land referred to in thelease... comprises the entire parcel described in a certificate of title issued under The Real Property Act to the ... lessor...;

[27] The effect of that section was to prevent the leasing of land, unless the leased land was subdivided from the title, or the entire land described in the title was leased.

[28] The 1975 Act was amended in 1978 by ***An Act To Amend The Planning Act***, SM c37 (the *1978 Act*) as follows:

s.60(3)

(a) District Registrar may accept for registration without subdivision approval an instrument that has the effect or that may have the effect of subdividing a parcel, where

(b) land is leased or being leased for non-residential purposes for a period not exceeding 10 years, including any renewal thereof;

[29] The effect of that amendment was to permit the leasing of individual lots, without the need for subdividing, provided the lease term did not exceed 10 years.

[30] The *Planning Act* was amended in 1987, ss. 60(1) and 60(3)(d) (the *1987 Act*), provided as follows:

60(1)

Except as provided in subsection (3), a District Registrar shall not accept for registration any instrument, including an order or judgment of a court, that has the effect or that may have the effect of subdividing a parcel unless the subdivision has been approved by the approving authority.

60(3)

A District Registrar may accept for registration without subdivision approval an instrument that has the effect or that may have the effect of subdividing a parcel, where

(d) land is leased or being leased for non-residential purposes where the term of the lease together with the term of any renewal or substitution thereof does not exceed 10 years;

[31] The 1987 Act was amended by ***The Planning Amendment and Consequential Amendments Act***, SM 1998, c. 39 (the *1998 Act*), at s. 34 as follows:

s.34

Subsection 60(3) is amended

(c) in clause (d), by striking out "10 years" and substituting "21 years"

[32] The effect of that amendment was to permit the leasing of individual lots, without the need for subdividing, provided the lease term did not exceed 21 years.

[33] Section 121(1) of the current version of ***The Planning Act***, CCSM c. P80 (the *Current Act*) provides as follows:

121(1) A district registrar may not accept for registration any instrument that has the effect, or may have the effect, of subdividing a parcel of land, including

- (a) a plan of subdivision;
- (b) a plan of survey;
- (c) an order or judgment of a court; and
- (d) a caveat;

unless the subdivision has been approved by the approving authority.

[34] While s. 121(2) of the *Current Act* provides several exceptions for the need to obtain subdivision approval, none of the exceptions relate to a lease for a specified period of time.

[35] The *Current Act* defines “subdivision” as including an agreement granting or extending a use of or right in land, directly or indirectly or by an entitlement to renewal, for a period of 21 years or more.

[36] The legislative history of *The Planning Act*, including when the Act was amended, and the amendment to the terms of the leases, is consistent with the evidence of Sandra. Her evidence was that it was her understanding that leases for a term of 99 years entered into after January 1, 1976 were not valid, which is consistent with s.60(1) of the *1975 Act*.

[37] The evidence of Sandra was that in 1989, the leases were for a term of 10 years, which is consistent with s. 60(3)(b) of the *1978 Act* and s. 60(3)(d) of the

1987 Act. Her evidence was that in 1999, the leases were for a term of 21 years, which is consistent with s. 34 of the *1998 Act*.

LAW OF NOVATION

[38] Novation is not limited to situations where a third party assumes the obligations of an existing contract. As noted in *Bankers Mortgage Corp. v. 529754 B.C. Inc.*, 2012 BCSC 298 at para. 35:

... Novation is a generic term which signifies that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract. ...

ANALYSIS AND DECISION

[39] It is conceded and acknowledged by all of the parties that no formal subdivision took place with respect to the Lots.

[40] The 21 Year Lease does make reference to lots as shown on a plan of survey. There is no evidence as to what is that plan of survey. It may be that a survey was done to create lots for the purpose of leasing. That plan of survey was not registered against title, nor was any plan of survey filed as evidence.

[41] By operation of the *1975 Act*, no lease that has the effect of subdividing property is valid. As per *Robinson v. Guthrie*, 1984 ABCA 68, (Robinson) at para. 9, a 99 year lease for a single advance payment plus a payment in lieu of taxes, has the effect of subdividing the parcel. This transaction is intended to result in a division of the parcel for a long period of time with all of the other incidents of ownership.

[42] In this case, the 99 Year Lease required the payment of \$9,000 over a period of time, and the payment of taxes. As in Robinson, the 99 Year Lease effectively resulted in a subdivision of the Lots, in contravention of the *1975 Act*.

[43] The *1978 Act* allowed for a 10 year lease. Regardless, the effect of the 99 Year Lease was to subdivide the Lots, contrary to the *1975 Act*. Although the 99 Year Lease was not signed until 1981, when a 10 year lease was permitted by virtue of the *1978 Act*, it still purported to be for a term of 99 years.

[44] Melvyn argues that there are examples of other leases for a term of 99 years, and therefore his 99 year lease ought to be valid. Sandra has explained how for other lots in this development there might be leases for a period of 99 years.

[45] In the early 1970s, Harold was developing the Property to lease. When Sandra became more involved in the property matters in 2012, there were 52 tenants on the Property that had been developed to lease.

[46] Some of those leases predate 1976. Thomas McLean (McLean) and Dr. K.P. Binda (Binda) each swore an affidavit on behalf of Melvyn. Their evidence was despite there being a 99 year lease in place for their respective lots on the Property, when an assignment took place, there was no change to the term of the lease from 99 years to any other term.

[47] Sandra confirmed in her *viva voce* evidence that neither McLean nor Binda were approached as the original leases predated 1976, such that it was her belief that a 99 year lease could continue.

[48] Sandra further testified that the 99 Year Lease was dated in 1978, and therefore had to be changed.

[49] Cheryl Bateman also swore an affidavit in support of Melvyn. That lease began in 1977 and was for a term of 99 years, later being changed to a 21 year lease.

[50] Sandra confirmed in her *viva voce* evidence that the change of the term of that lease happened after the original tenant of the lease had died.

[51] Sandra's evidence was consistent throughout that leases entered into after 1976 that had a 99 year term, would be changed when there was a change in tenant. Leases predating 1976 need not be changed. Sandra's parents would not actively seek out to change a lease entered into after 1976 from a term of 99 years, until there was a change in the parties to such a lease.

[52] This evidence, which I accept, explains why there are some leases which continue for a term of 99 years, and why some have been changed.

[53] With respect to other leases, firstly, the existence of other 99 year leases in Manitoba does not equate to those leases being valid, nor does it equate to the 99 Year Lease being valid. Secondly, this court is not being asked to adjudicate about the validity of all leases for a term of 99 years in the province of Manitoba, just this particular lease.

[54] For example, as part of the Agreed Book of Documents, at Tab 20, an advertisement for a cottage sub-division approved by Manitoba Conservation, overlooking West Hawk Lake in Whiteshell Provincial Park was provided. The

advertisement states that the subdivision is on private land, and the leases are to be for a period of 99 years. The advertisement of such a subdivision does not make this 99 year lease valid. The approval by Manitoba Conservation, without more detail or context, does not make the 99 Year Lease valid.

[55] Counsel for Melvyn makes reference to the fact that in Brandon, Manitoba land upon which the Keystone Centre and adjoining buildings, including a hotel, are subject to a lease for a term of 99 years. There was no evidence to that effect.

[56] Ultimately, the issue is not whether other leases for a term of 99 years are valid, whether as part of the same development on the Property, or elsewhere in Manitoba. The issue this Court has to determine is whether the 99 Year Lease is valid for the Lots.

[57] The effect of the 99 Year Lease was to subdivide the Lots. The *1975 Act* precluded any lease of land, unless there was a subdivision or the entirety of the subject land was being leased. That was not the case for the 99 Year Lease. There was no subdivision of the Lots, nor was the entirety of the property leased.

[58] Accordingly, the 99 Year Lease is not valid.

[59] Whether by way of novation, or the parties understanding that the 99 Year Lease was not valid, the parties entered into the 10 Year Lease in 1989. The parties were of equal bargaining power. There was no evidence of any undue influence or coercion with respect to that lease. Melvyn was aware of the lease he was entering into, and its terms, including the fact that it was for a period of 10 years.

[60] The same can be said about the 21 Year Lease.

[61] It is only after the expiration of the 21 Year Lease, that Melvyn now says he has a valid 99 Year Lease, for the Lots which he has now assigned, without the consent of the Executors. If the 99 Year Lease was valid, Melvyn did not need the consent of the Executors to assign his interest in the Lots. Having found the 99 Year Lease to not be valid, the 21 Year Lease did require the consent of the Executors for any such assignment.

[62] Melvyn argues that the lack of his obtaining independent legal advice with respect to the 10 Year Lease and the 21 Year Lease ought to invalidate those leases. I do not agree.

[63] Again, the parties were of equal bargaining power. Melvyn had the opportunity to obtain independent legal advice, but did not do so. There was no evidence of any urgency in signing any of the leases, nor any evidence of pressure to sign, or any misrepresentation.

[64] Further, I have determined that the 99 Year Lease was invalid as of the date of signing. There was no lease effective April 1, 1978. The fact that the Berry's entered into further leases, without independent legal advice, does not address the issue with respect to the 99 Year Lease. To accept the position of Melvyn with respect to the lack of independent legal advice invalidating the 10 Year Lease and 21 Year Lease, and this Court having found that the 99 Year Lease is not valid, would result in their being no valid leases in relation to the Lots.

[65] I am therefore satisfied that the 99 Year Lease is not valid. Although the Application and Counterclaim sought a determination of the validity of the 21 Year Lease, its term expired in 2020. The result is that there is no current lease between Melvyn and the Executors.

[66] With respect to the relief sought in the Application, and Counterclaim:

- a) There will be a declaration that the 99 Year Lease is void, and is no longer of force and effect;
- b) There will be no declaration that the 21 Year Lease is terminated and no longer of force and effect, as the term of that lease has expired on its own;
- c) There will be an order that Melvyn vacate the Lots and give up physical possession of the Lots by June 30, 2023;
- d) As Melvyn has been in occupation after the expiry of the 21 Year Lease, there will be an order for damages, payable by Melvyn to the Estate of Winnifred, in the amount of \$1,500 per lot, per year;
- e) In arriving at the sum of \$1,500 per lot, per year to determine damages, I am relying on the affidavit filed by Sandra dated May 5, 2021 and filed in the Application. That affidavit of Sandra contains correspondence, attached as Exhibit "J", wherein Sandra offered to the Berry's, in 2020, to lease the Lots at the rate of \$1,500 per lot, for a total of \$3,000 per annum, or \$250 per month. This sum is reasonable in the circumstances; and

- f) As the 21 Year Lease expired on June 19, 2020, for ease of calculation, damages for unpaid rent will commence as of July 1, 2020. As of March 1, 2023, 33 months of unpaid rent is owing in the amount of \$8,250.00. Damages will continue to accrue in the amount of \$250.00 per month, until Melvyn vacates the Lots.

[67] With respect to the relief sought in the Claim:

- a) The request for a declaratory order that the 99 Year Lease is a good and valid agreement is dismissed;
- b) The request for damages for breaches of the lease agreements is dismissed;
- c) The request for damages for deceit, nuisance, bad faith and intimidation is dismissed. The evidence did not satisfy me that Harold initially, and later the Executors, engaged in conduct that could be described as deceitful or intimidating. Their negotiations with Melvyn could not be described as being in bad faith.

[68] There is the Cottage located on the Lots. The Executors take the position that the Cottage belongs to Melvyn and that he can, at his expense, remove the Cottage. Melvyn shall have until June 30, 2023 to remove the Cottage at his own expense.

[69] The Executors are also entitled to interest, at the King's Bench rate, on the damage amount set out, from July 1, 2020 until paid in full.

[70] Costs if not agreed to may be spoken to.

_____ J.