

1984 WL 249885 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 10, 1984

*1 Claude M. Scarborough, Jr., Esquire
South Carolina Research Authority
P. O. Box 12025
Columbia, South Carolina 29211-2025

Dear Mr. Scarborough:

You have asked this Office to review the Lease Agreement dated April 30, 1982, by and between the State of South Carolina (Lessor) and R. David Brown (Lessee) as well as a Lease Addendum and a Lease Amendment executed subsequent to the Lease Agreement and certain other letters and documents, the purpose of this review being to construe the documents to determine the total number of years over which the Lessee could claim a lease in the subject premises.

The facts upon which this opinion is based are as follows:

A. On April 30, 1982, the Lessor and Lessee entered into a Lease Agreement which provides in part as follows:

TO HAVE AND TO HOLD the above described premises for the full term of Five (5) years . . .

This Lease may be renewed for an additional Five (5) year term on such terms and conditions as the parties may mutually determine. Notice of intent to renew or extend this Lease shall be given by the LESSEE to the LESSOR, in writing, at least ninety (90) days prior to the expiration date of this Lease.

B. Thereafter, the parties executed a Lease Addendum dated June 21, 1983, which provides in part as follows:

This Lease may be renewed for an additional Five (5) year term on such terms and conditions as the parties may mutually determine. Notice of intent to renew or extend this Lease shall be given by the LESSEE to the LESSOR, in writing, at least ninety (90) days prior to the expiration date of this Lease. This 5-year term being in addition to the original 5-year extension as previously set out in the original Lease.

C. The Lessee has expended considerable money and effort in making a number of improvement to the property in order to utilize the property for commercial purposes. The Lessor was aware of the expenditure of this money and effort.

D. The Lease Agreement was assigned by the State of South Carolina to the South Carolina Research Authority on or about November 23, 1983.

E. The Research Authority and the Lessee had agreed tentatively to the future rental of the leased premises under the two five (5) year lease renewal provisions of the Lease Agreement and Lease Addendum.

It is the opinion of this Office that the Lessee has an initial Lease term of five years with the option to renew or extend the Lease for two additional five-year terms, a total of ten additional years.

Of some concern is the question of whether or not, by leaving open the future rental and other 'terms and conditions' for future negotiations, the renewal or extension provisions are void for uncertainty. For the reasons discussed hereinafter, we conclude, under the facts of this situation, that the lease renewal or extension provisions are not void.

In general, a provision for the renewal or extension of a lease must be certain in order to render it binding and enforceable. See, 50 Am.Jur.2d, Landlord and Tenant, § 1158. Various renewal or extension provisions that have been discussed by the courts vary in their degree of certainty and definiteness.

*2 South Carolina has not decided the question of whether or not a provision for the rental or extension of a lease with 'rental and terms' to be fixed by subsequent agreement of the parties would be void for uncertainty. The South Carolina decision which is not closely related factually is Rainwater v. Hobeika, 208 S.C. 433, 38 S.E. 2d 495 (1946). In Rainwater an addendum to a lease provided that the lessee (referred to in the addendum as the lessor because of a clerical error) was to have an option for five additional years at the expiration of the lease 'at a price agreed upon at that time.' The South Carolina Supreme Court held that the lessor would not be allowed to contend that the option provision was too vague and indefinite to be enforced, where on the faith of this renewal covenant the lessee had expended approximately \$3,000.00 for repairs and remodeling and approximately \$12,000.00 for equipment and fixtures. In the instant matter, it appears that, in Rainwater, the Lessee has expended considerable money any effort to renovate the premises. Therefore, the holding in Rainwater would seem to apply in this case so as to estop the Lessor or his assignee, the Research Authority, from claiming that the Lease Agreement 'is too vague and indefinite to enforce.' Rainwater, supra at 502.

The Court was not called upon in Rainwater to determine whether an executory lease which leaves the rent to be fixed by agreement is unenforceable and void for uncertainty and indefiniteness; however, the Court intimated in dicta that if this question had been presented, it would have held the addendum enforceable. The Court stated:

It is quite true that it is not the function of the court to make contracts between parties, but it is the court's duty so to construe their written agreements as to effectuate the intention, to the end that justice may be done. Acting upon this principle our own Supreme Court has in many cases applied the rule of reason, and has applied it in the construction of deeds and contracts relating to real estate.

Certainly, I find nothing in our own decisions invalidating the option in question on the ground that it is too indefinite and uncertain.

Rainwater, supra at 498. The Court went on to discuss the national judicial philosophy on this issue saying:

Indeed, it is said that in a majority of the states that have passed upon the question it is held that a contract for extension or renewal of a lease where the amount of the rent is to be agreed upon is unenforceable, but the courts of a number of other states have held directly to the contrary. Even if we assume that the numerical weight of authority is as indicated, I am convinced that the weight of reason is quite the reverse.

Rainwater, supra at 499.

It appears from the Lease Agreement and the various other documents that the provisions of the Lease Agreement which the parties considered essential was the term of the Lease. This was specifically provided in the Lease Agreement and Lease

Addendum. In essence, only the future rental was left open. It appears that it is the intent of the parties to allow a total potential lease term of fifteen (15) years.

*3 It is further significant that the parties have reached a tentative agreement as to how to calculate the future rent. The time for exercising the option to renew or extend the Lease has not passed; therefore, the parties (the Research Authority and the Lessee) have it within their power to eliminate any uncertainty present in the Lease Agreement simply by executing an addendum specifying the rental rate to be charged as well as any other terms if the renewal option(s) are executed by the Lessee.¹

As stated above, there is no South Carolina case which resolves the question of whether or not a provision for the renewal or extension of a lease with rent and terms to be fixed by subsequent agreement of the parties is void for uncertainty; however, a California court has held that such a provision as we have in this matter is not void.

In [Chaney v. Schneider](#), 92 Cal. App. 2d 88, 206 P2d 669 (1949), a clause in a lease providing that the lessee, upon expiration of the lease, was to have 'first refusal' for an additional term of lease, 'at rental and terms to be mutually agreed upon at that time,' was held valid and enforceable to make the lessee entitled to an additional five years upon the same terms and conditions as the original lease but at an increased rental. During the first five-year term of the lease, the lessee expended about \$10,000.00 in improvements on the property, which was used for a trailer court. When requested to agree upon the terms of the extension, the lessor refused to negotiate, indicating that she wanted the property for herself. Affirming a judgment for the lessee, the court, although noting that leases which left anything for future agreement of the parties had for a long time been generally held to be void for uncertainty, stated that the modern trend of decisions seemed to be in favor of relaxation of the strictness of that rule, particularly when only the amount of rental was left to future agreement. If there is in the writing a sufficiently definite standard or method for the determination of the rental, the court continued, and if the amount thereof is the only thing to be determined, courts of equity will hold, it was pointed out, that the parties agreed upon a reasonable rental for the extension, and will specify such a reasonable rental if the parties do not so agree. It was emphasized that the difficulty in enforcing the clause in question arose from the fact that it provided for mutual agreement as to the terms as well as to the rental for the extended period of the lease. The court declared that it seemed clear that it was the mutual intention of the parties to enter into a lease for five years, with an additional five years as part of the original agreement. Otherwise, the court explained, the lessee would never have expended \$10,000.00 on the property in improvements which both parties knew could not be removed without the lessee's loss of practically all of his investment. Pointing out that at one time in California, a lease provision for renewal at rental to be agreed upon at the time of the renewal was considered to be void for uncertainty, the court stated that like all other branches of the law, the rules as to uncertainty in interpreting contracts were developing along with changing conditions in business and human affairs. It was stated that the right of renewal in the instant case constituted a substantial element in the agreement of the lessor and lessee, and that inasmuch as the lessor failed and refused to agree upon the terms of the renewal or the rental, these terms were properly declared by the trial Court.

*4 It is the opinion of this Office that a court would probably conclude that the Lessee has a valid provision to renew or extend his present Lease Agreement for two additional five year terms.

Sincerely,

Charles W. Gambrell, Jr.
Assistant Attorney General

Footnotes

¹ The Lessee has noticed formally his intention to exercise both renewal options. The execution of a written addendum between the Lessee and the Research Authority prior to the anticipated sale of the property which includes the property on which the leased premises is situate would completely resolve any lingering doubts as to the 'options.'