THE JOURNAL PUBLISHING COMPANY LIMITED ..... } SUPPLIANT;

1930
June 23.
Aug. 8

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Contract—Rectification of contract—Lease—Eviction—Iintrest.

The Crown leased from the suppliant a certain space on two floors of a building owned by it, by a written lease duly executed by the Minister as provided for by section 18 of the Public Works Act, and under authority of an Order in Council. The measurements stated in this lease were made by officers of the Department of Public Works and the contract and plans accompanying the same were prepared by them. It was claimed by Suppliant, concurrently with the execution of the lease, that the superficial area mentioned in the lease was in error and should be greater and that the total rental based thereon should be accordingly increased. It was agreed between the parties that the area leased was improperly measured and thereupon a second

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or amending Order in Council was passed recognizing that an error had been made in stating the area in square feet leased and authorizing the amending of the first Order in Council accordingly. No new contract however was executed in conformity with this amending Order in Council.

The Crown took possession under the lease and later, before its termination, rescinded the several Orders in Council, vacated the premises and returned the keys, and repudiated its obligation to be bound under the lease. Suppliant then notified the Crown that it would hold it responsible for the rent for the balance of the term, but that it would endeavour to rent the space vacated on the Crown's account, and would give the Crown credit for any sums so received.

The present action is *inter alia* for the rectification of the contract pursuant to the second Order in Council, for rentals on the increased space, and damages by way of interest on the unpaid matured rentals.

Held that the acts of the suppliant did not constitute eviction of the Crown from the leased premises, and that the Crown was liable for the rent for the entire term of the lease. That to constitute an eviction at law the lessee must establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him evicted.

2. That notwithstanding the provisions of section 18, of the Public Works Act (R.S.C., 1927, c. 166) the suppliant is entitled to have the lease as executed rectified, so that the real intention of the parties with regard to the exact area or portion of the building demised will be effected, and is entitled under such lease as rectified to recover the rental for the increased space.

3. That in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject.

4. That the Suppliant was entitled to recover damages in the way of interest upon the unpaid matured rentals as from the several maturity dates by reason of the Crown wrongfully detaining payment in breach of the contract of lease.

PETITION OF RIGHT by the Suppliant to recover damages alleged to be due to it by reason of an alleged breach of a contract of lease by the Crown.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Ainslie Greene, K.C., for suppliant.

W. L. Scott, K.C., and *C. Scott* for respondent.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (August 8, 1930), delivered judgment.

This is an action for damages for breach of contract. The salient facts of the case are as follows. By Indenture of

Lease dated the 11th day of September, 1926, the petitioner leased to the respondent certain space on two floors of the Journal Building in Ottawa, for the term of five years from the 25th day of August, 1926, at an annual rental of $5,680.32, payable in instalments, the first instalment falling due on October 1, 1926, and thereafter in equal quarterly instalments on the first day of January, April, July and October in each year; the balance, a broken instalment, was payable on the last day of the term. The respondent, represented by the Minister of Public Works, was authorized to enter into the lease by an Order of the Governor General in Council dated the 26th day of August, 1926. The respondent entered into possession of the demised premises on August 26 and remained in occupation of the same until the following February when he vacated the premises. On September 28, 1926, His Excellency the Governor General approved of an Order in Council rescinding the Order in Council of August 26 and purporting to cancel the lease made thereunder, and rescinding also another Order in Council passed on September 21, which will be later mentioned. The Department of Public Works on September 30 advised the petitioner of the purport of this Order in Council. Just prior to the respondent vacating the demised premises, the petitioner, on January 25, 1927, wrote a letter to the Deputy Minister of Public Works, through its solicitors, stating that it considered the lease to constitute a valid and binding contract, and demanding payment of rentals which had fallen due on October 1, 1926, and January 1, 1927, and which apparently had remained unpaid though the respondent was still in occupation from the beginning of the term. The letter also stated:—

> We beg further to advise you that our clients refuse to accept the surrender of the said lease as amended, but, in view of the vacation of the premises and the repudiation under Order in Council number 1475 of September 28, 1926, they will endeavour to relet the premises on behalf of and as agent of the Crown, in order to reduce the lessor's claim under the lease, unless you advise us that you desire the leased premises to be held ready at the disposal of the lessee. They desire it to be understood, however, that they hold the Crown responsible for the rent payable, and to become payable during the whole term of the said lease as amended.

The solicitors wrote two further letters to the Department of Public Works requesting a reply to this letter, but the only response forthcoming was on March 2, 1927, and which

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was only to the effect that the matter had been referred to the Department of Justice. The petitioner thereafter made all reasonable efforts to rent the demised premises with the view of minimizing its claim for damages against the respondent, and in the petitioner's particulars of damages credit is given the respondent for any rentals thus received.

The facts leading to the passage of a second Order in Council on September 21, 1926, which is the second Order in Council just mentioned as having been rescinded, had better be explained at length. The annual rental to be paid under the lease was reached on the basis of the demised premises containing 5,917 square feet, the rate being 96 cents per square foot, and the Order in Council authorizing the lease mentions this as the area to be leased and as well this rental rate. Mr. Parkinson, Managing Director of the petitioner, stated in evidence that having previously rented space on the same two floors of the Journal Building to Departments of Government, he knew approximately what space was available for rental purposes, and in the early negotiations leading to the lease in question he states that he represented the area available as being roughly 6,600 square feet. He had in mind the renting of open floor space, not knowing how the respondent intended to divide it, if negotiations ended in a lease. Both floor spaces were then open; later they were partitioned by the petitioner in accordance with specification furnished by the respondent. A difference of opinion as to the precise superficial area to be demised soon arose. On September 8, 1926, Mr. Parkinson wrote the Deputy Minister of Public Works, that he had learned from Mr. Rogers, one of the officers of that Department, that he (Rogers) had in his calculation of the floor space area to be leased

> disallowed us the space required for a hall running from the hall adjoining our elevator to certain private offices at the south end of the building. We are not prepared to make this allowance inasmuch as the hallway in question is for the sole use of the Department of Agriculture and was created by the erection of partitions following the taking over of the floor and is not necessary except as a matter of privacy in reaching the offices in question.

This referred to the third floor and a somewhat similar question was raised as to the second floor. The measurements of the space to be rented, the lease and the plans

accompanying the same, were evidently made and prepared by the officers of the respondent without consultation with the petitioner. From correspondence put in evidence I would conclude that the question of the proper measurement of the space to be rented was again the subject of discussion between representatives of the parties at the time of the execution of the lease. Evidently an understanding was reached concurrently with the execution of the lease that the passage of another Order in Council should be requested, revising the precise area to be leased as mentioned in the Order in Council of August 29, because, on the day of the execution of the lease, Mr. Parkinson wrote the Deputy Minister of Public Works as follows:

With reference to lease executed by us this morning in accordance with the decision reached by yourself, Mr. Rogers and myself, we would request that at as early a date as possible the necessary additional Order in Council be passed providing for the discrepancy in space in relation to the area allotted to the passageway on the third floor and any further difference which may be determined on the total floor areas after discussion by Mr. Rogers and our architect, Mr. Burgess.

On the 16th day of September, the Deputy Minister of Public Works wrote Mr. Parkinson acknowledging receipt of his letters of the 8th and 11th of September, and further stating:

I have had an officer of this Department confer with your Architect and the space has been remeasured and the passageway on the third floor included in the area as occupied by the Agriculture Department. The figures as agreed upon by your Architect and our officer are as follows:

	sq. ft.
Second floor	3,195
Third floor	3,417
Total	6,612

This would mean a difference of 695 sq. ft. and at the same rate, i.e., 96 cents per square foot would be an additional amount of $667.20 per annum. The leasing of this additional space is being given attention and as soon as authorized you will be advised.

On September 24 the Assistant Chief Architect of the Department of Public Works wrote the petitioner that "an amending Order in Council has been passed providing for the increased area required, viz., 6,612 sq. ft., the annual rental in payment thereof to be $6,347.52." The Order in Council in part recites:

That the area required was incorrectly measured, and on remeasurement by an Officer of the Department it has been found that the space

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needed is as follows, as explained in the accompanying report of the Assistant Chief Architect,

	sq. ft.
Second floor	3,195
Third floor	3,417
Total	6,612

That the Assistant Chief Architect of the Department of Public Works, with the concurrence of the Deputy Minister, advises that the above mentioned Order in Council be amended so as to provide for the increased area required, viz: 6,612 sq. ft. the annual rental in payment therefor to be $6,347.52.

The Minister, therefore, recommends that authority be granted accordingly.

It was on September 28 that an Order in Council was passed rescinding this amending Order in Council as well as that of August 26.

Adverting now to the facts I have earlier stated. It is hardly open to serious contention, I think, that the petitioner was a consenting party to the vacation of the lease by the respondent, or in any way agreed to accept a surrender of the demised premises or to relieve the respondent from his covenants to be performed under the lease. The petitioner accepted the keys from the respondent after vacating the premises, but it is agreed that this of itself is not sufficient evidence of an acceptance of the surrender of the premises by the lessor; and there is ample authority to that effect. There is not a single element in the case, I think, to support the contention that in fact or in law the petitioner released, expressly or impliedly, the respondent from his covenants under the lease; nor is there anything in the way of conduct on the part of petitioner which might constitute eviction of the lessee, or waiver or recission of the contract. To constitute an eviction at law the lessee must establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him evicted. See Smith J. in *Baynton* v. *Morgan* (1). In *Walls* v. *Atcheson* (2) the Lord Chief Justice stated that the lessor ought to have given the lessee, the defendant, notice of her intention to let the apartments on account of the defendant; in *Crozier* v. *Trevarton* (3) Boyd C. stated that the plaintiff might have preserved his claim under the defendant's lease had

(1) (1888) 21 Q.B.D. 101, at p. 102.

(2) (1826) 3 Bing. 462.

(3) (1914) 32 O.L.R. 79.

he notified the defendant, the lessee, that he was reletting on the former tenant's account. In the present case the petitioner made it quite clear that it intended to hold the respondent liable upon its covenants for the full term of the lease, and that any reletting of the premises would be on behalf of the respondent " in order to reduce the lessor's claim under the lease;" that is, I think, conclusive upon this phase of the case.

If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation arises, a right of action conferred upon the party injured by the breach. Here, the respondent expressly repudiated his contractual obligations by renouncing his liabilities under it in a very formal way, that is, by rescinding the Order in Council authorizing the contract and without which the contract could not validly have been made, and then vacating the premises. Though the contract was unequivocally renounced by the respondent, that of itself did not put an end to the contract, because one party to a contract cannot alone rescind it; but the respondent by wrongfully renouncing the contract, entitled the petitioner, if it so chose, to treat the renunciation as putting an end to the contract, subject to the retention of the right to bring an action upon it for the damages sustained in consequence of the breach of it. That was what the petitioner did. The law upon breach of contract by repudiation and its consequences was carefully discussed by Collins M.R. in *Michael* v. *Hart & Co.* (1), and by Esher M.R., in *Johnstone* v. *Milling* (2). I would refer also to *Hochester* v. *De-La-Tour* (3); *Baynton* v. *Morgan* (4); *Rhymney Railway Co.* v. *Brecon and Merthyr Tydfil Railway Co.* (5); *Planche* v. *Colburn* (6); and *Fitzgerald* v. *Mandas* (7). But a man whose contract has been broken must act reasonably and if he has the opportunity of mitigating the damages which the breach of contract has caused or is likely to cause him, it is his duty to take it; it is a question of fact and not of law, in each case, if he has acted as a reasonable man might have been expected to act. See *Payzu* v. *Saunders* (8) and the author-

(1) (1902) 1 K.B.D. 482.
(2) (1886) 16 Q.B.D. 460.
(3) (1853) 2 E. & B. 678.
(4) (1888) 21 Q.B.D. 101 and 22 Q.B.D. 74.
(5) (1900) 49 W. Rept. 116.
(6) (1831) 8 Bing. 14.
(7) (1910) 21 O.L.R. 312.
(8) (1919) 2 K.B. 581.

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ities there cited. It cannot here be said that the petitioner acted in an unreasonable way; it notified the respondent that it would relet such of the premises as it could on account of the respondent in mitigation of damages, and this it did. Broadly, in my opinion, the petitioner is entitled to succeed in its claim for damages for breach of contract. There are however two other matters which require some discussion.

Counsel for the respondent contended at the trial that the petitioner could not, in any event, recover rental upon the additional area authorized by the amending Order in Council, because no formal contract or writing embodying this change in the area rented, was entered into between the parties. It is not claimed that there is no writing to satisfy the Statute of Frauds, but it is urged that section 18 of the Public Works Act, Chap. 166, R.S.C., 1927, is a bar to this portion of the petitioner's claim. That section reads:

> No deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding on His Majesty or be deemed to be the act of the Minister, unless the same is signed by him or the Deputy Minister, and countersigned by the Secretary of the Department or the person authorized to act for him.

While it must be conceded that formal compliance with the requirements of this section of the Act is necessary to entitle the petitioner to a remedy in the courts for a breach of any written contract within the purview of this section, yet, the very fact that the situation between the petitioner and the respondent is one of contract enables the Court to grant relief, which, if not granted would result in injustice to the petitioner. It is now a well established principle of law that a petition of right will lie against the Crown for the recovery of damages for breach of contract. It follows therefore that in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject. In an action between subject and subject, upon the identical facts established in this case, I apprehend there would be no hesitation by the Court in directing a rectification of the contract so as to make it conform to the agreement of the parties. Here there was a written contract, but as it stands, it does not express the agreement of the parties; it is agreed wherein

the contract should be altered so as to express the complete agreement of the parties. I am of the opinion that the suppliant is entitled to a rectification of the lease in question, so that the real intention of the parties with regard to the exact area or portion of the building demised to the respondent, will be effected. I therefore declare that the petitioner is entitled to have the indenture of lease in question rectified, that is to say, by striking out the exact number of square feet demised as stated in the lease, and substituting therefor the number of square feet mentioned in the amending Order in Council, and by making the necessary alterations in the amount of the annual rental consequent upon the change in the area demised. At the trial it was agreed that the petitioner have leave to amend its pleadings, claiming rectification of the contract, and this amendment has been made; the amended plea is not however quite correct in that it does not claim rectification of the lease in respect of the vital matter, that is to say, the area of floor space demised or intended to be demised; I shall however consider that as done and the pleadings so amended in this respect so as to meet the facts disclosed at the trial.

There remains one further point for consideration. The petitioner claims by way of damages an amount equal to interest at five per cent upon matured rentals after deducting rentals received from reletting, and upon balances estimated in the same way for the remainder of the term. If money is payable upon a fixed date and is not then paid but has been wrongfully detained, the person who has not received the same has suffered damage in that he has for the time being lost the use of that money. To that extent he is less well off than if the contract had been performed, as was stated by Riddell J., in *Fitzgerald* v. *Mandas* (1). The rule of law is, that if a person sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages, as if the contract had been performed. In the circumstances of this case it would appear to me to be oppressive if damages by way of interest should not be allowed for the wrongful detention of the rentals as they matured, subject to the

(1) (1910) 21 O.L.R. 312.

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deductions mentioned, and I can conceive of no more reasonable or just method of assessing such damages than upon the basis of an interest charge upon moneys so wrongfully detained, and at the statutory rate. In *Watkins* v. *Morgan* (1), interest was allowed by way of damages in an action upon a contract to pay money on a particular day. See also *Atkinson* v. *Jones* (2); and *Price* v. *Great Western Railway Co.* (3). In respect of this particular claim for damages, which I allow, I think, the same should be reached by deducting from the matured rentals the amounts received in the same period from reletting to other tenants, and then by calculating interest on such balances at the rate of five per cent up to the date when judgment is entered. In respect of maturing rentals, the damages should, I think, be computed upon the basis of the present worth of such maturities after deducting the estimated rentals to be received from reletting, as of the date when judgment is entered.

The petitioner, in its particulars of damages, credits the respondent with rentals received from reletting to other tenants, and for the remaining portion of the term it estimates such credits upon the basis of rentals now being received. This was not objected to by counsel for the respondent, and is, I think, eminently just and not unfavourable to the respondent.

The petitioner is entitled to a declaration that the indenture of lease in question be rectified in the manner already stated and that the same be valid and effectual between the parties as and from the date of the execution of the same. There will be judgment for the petitioner for the amount sued upon, less the amount claimed for the cost of partitioning the floor space and which claim was at the trial abandoned; and to that there will be added a further sum for damages by way of interest, to be calculated upon the basis already explained. The petitioner will have its costs of action.

Judgment accordingly.

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(1) (1834) 6 C. & P. 661. (2) (1835) 2 Ad. & El. at p. 444.
(3) (1847) 16 M. & W. 245 at p. 246.