

BETWEEN

HIS MAJESTY THE KING.....PLAINTIFF;

AND

WM. GOLDSTEIN ET AL.....DEFENDANTS.

1924
Jan. 30.

Expropriation—Lease-hold—Compensation for damages to lessee—Loss of estimated profits of business not recoverable—Diminution in good-will—Elements of damage.

Held, that while under the rule observed by the courts in assessing compensation in expropriation cases, allowance ought not to be made for loss of business or estimated profits, yet where a lessee of a store has suffered a diminution of good-will, he is entitled to compensation therefor although it is in the nature of a business loss.

2. That, in addition to an allowance for loss suffered in respect to the good-will, in assessing the compensation to a lessee of premises expropriated, allowance must be made for the reasonable cost of moving, seeking new location, loss of time, storage of furniture, depreciation in fixtures and dislocation of business occasioned by such removal.

EDITOR'S NOTE: Lord Macnaughton in *Trego v. Hunt* (1896) A.C. 7, at p. 24, observes: "Often it happens that the good-will is the very sap and life of the business, without which the business would yield little or no fruit."

INFORMATION by the Attorney General for Canada to have the court fix the compensation to be paid to a lessee of a store on premises expropriated by the Crown, for the damage done to them in respect of their tenancy.

January 8, 1924.

Case now heard before the Honourable Mr. Justice Audette at Toronto.

R. T. Harding, K.C., for the Crown.

George Kilmer, K.C., and *H. H. Davis* for defendants.

AUDETTE, J., now (this 30th day of January, 1924), delivered judgment.

This is an information by the Attorney General of Canada whereby it appears, *inter alia*, that a certain leasehold interest in the expropriated building, corner of King and Yonge streets, in the city of Toronto, was taken, from the defendants, at the time the Crown expropriated the property from the Imperial Bank for "a purpose in relation to a public work," by depositing, on the 23rd February, 1923, a plan and description of such property in the office of the Registrar of Deeds for the Registry Division of East Toronto, for the city of Toronto, Province of Ontario.

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The Crown, by the information, offers \$3,000 as compensation for the loss and damages to the defendants resulting from such expropriation.

The defendants, by their plea, aver that the sum of \$3,000 is not sufficient and just compensation and claim the sum of \$22,554.25, made up as follows:

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| (a) Profits for 8 months from 1st May to 31st December, 1923, based on average profits realized during similar period of the year for the past five years..... | \$11,974 56 |
| (b) Fixtures depreciation | 1,500 00 |
| (c) Loss of profit on 6 week's sales at a discount to reduce stock | 3,398 55 |
| (d) Capital loss on balance of stock undisposed of on 30th April, 1923, being the difference between cost value plus selling expenses and realization value..... | 3,630 76 |

\$20,503 87

together with 10 per cent for compulsory taking.

The defendants have been carrying on the business of tobacconists upon the premises in question for a period of 25 years. They occupied a small store on the ground floor of the building, with a frontage of 20 feet on Yonge street and a depth of 65 feet, for which they paid, under the last lease, an annual rent of \$11,000.00—a very high rental indeed, but I presume due to the special desirability of the commercial site of the building, which might be considered as the hub of the retail activities of the trade in the city of Toronto. Moreover, the lessor heated the premises and supplied water. See lease exhibit No. 2.

On the 4th July, 1912, the defendants entered into their last lease of these premises, running for a term of ten years, beginning on the 1st May, 1913, and ending on the 30th April, 1923. This lease is between the defendants and the Dominion Bond Company, Limited, and the ownership of the property changed hands before the expiry of the lease, when the Imperial Bank purchased the same.

The defendants ran a similar store and business at the time of the expropriation, at the King Edward Hotel, in Toronto,—a site quite close to 82 Yonge street, and on Sparks street in the city of Ottawa. Moreover, they had also opened a new store on the 1st December, 1921, at 152 Yonge street, on the same side of the street as No. 82, in question and not very far distant, as would be gathered from the municipal numbering of the street.

The plaintiff filed, as exhibit No. 3, a letter from the Imperial Bank, which both parties agreed set out the facts that did occur prior to the expiry of the lease on the 30th April, 1923, and prior to the date of the expropriation. The letter reads as follows:—

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IMPERIAL BANK OF CANADA

GENERAL MANAGER'S OFFICE

Toronto, 28th December, 1923.

R. T. Harding, Esq., K.C.,
714 Temple Building,
Toronto.

Re Northwest Corner King and Yonge Sts., Toronto

Dear Sir:—I have received your letter of 27th inst. and in reply would state as leases in the above building fell in, it was the definite policy of the bank and instructions were issued to our Bank Premises Department to endeavour to renew all leases up to, but not beyond 31st December, 1923, the date when the last lease in existence at the time we acquired the building would expire, the intention of the bank being up to the time notice of expropriation was served by the Government to obtain possession of the premises for its own purposes with a view to the erection of a new building, plans to that end having been considered, but nothing definitely settled.

In accordance with this policy, Mr. Goldstein was advised of the bank's intention and given to understand that he could remain as tenant until 31st December, 1923.

I trust this is the information you require.

Yours very truly,

Signed. W. G. MORE,
Secretary.

It appears from this letter that the defendants did obtain, by verbal arrangement, a temporary extension of their lease from the 1st of May to the 31st December, 1923. Therefore, it is well to bear in mind that the defendants while they had at one time all reason to expect to vacate their premises on the 1st May, 1923, that expectation was mitigated by this verbal extension; but they knew that without this extension they had to leave on the 1st May, 1923. However, they thereby became tenants with a right to retain possession till a fixed and definite short period, when they would have to quit.

Now we are told by the defendant, William Goldstein, that the shop at 152 Yonge street—a few hundred yards from the number 82 shop on the same street—was not opened with the object of taking over the No. 82 shop at the expiry of the lease on the 1st May, 1923, and that he has ever since endeavoured to find another store about 300

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feet from No. 82 Yonge street north of King street. I wish to observe that in making such a statement the defendant is not doing himself either justice or credit, and that contention, under the circumstances, falls short of carrying conviction. This defendant appeared to be a keen business man. Is it possible to believe that he was overlooking the expiry of his lease early in 1923—about 15 months thenceforward? Had he not become acquainted with the fact that the bank had bought the property?

The rent of \$11,000 for No. 82 appeared to me to be too heavy for a business of that class which was carried on at a loss during four months in every year—January, February, March and April. At the new shop at 152 Yonge St., the rent is only \$7,000—a good saving of \$4,000. Under the earlier leases the rental was much lower. The profits decreased materially in the last five years.

The expropriation took place on the 23rd February, 1923, and a notice to quit and deliver up possession on the 30th April, 1923, of the premises known as No. 82 Yonge St., was served upon the defendants on the 13th March, 1923, when from that day on to the 30th April they carried on a special sale. They sold part of the goods on hand. No inventory of the stock was then taken, but an estimate was made. Some of the fixtures have been sold and the balance stored in a warehouse where they are still, and the balance of the stock was very properly taken to the defendants' store at 152 Yonge St.—a few steps, so to speak, from the No. 82 premises. The staff at No. 152 was discharged and replaced by the staff of No. 82 and the business at 152 increased.

Prepared by chartered accountants—one employed by the plaintiff and the other by the defendants—we have on record a number of statements showing the nature, the volume and the evolution of the defendant's business during the previous five years.

It is well to bear in mind in approaching all of these statements prepared by the accountants that in some of them are included revenues from outside the business, such as returns from Dominion of Canada War Bonds, that have nothing to do with the trading business whatsoever.

From the statement prepared by the defendants exhibit No. 6 pp. 17 and 18, it appears that the total profits realized by that business amounted to \$331.90 for the fiscal year of 1922—a steady decrease from 1918 to 1922. That very statement had also been certified and used for their income tax returns.

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A great deal of information can be gathered from the perusal of both statements filed as exhibits numbers 6 and 7; but it would be too lengthy to analyze them here. Suffice it to state that the profits realized do not reasonably justify the extravagant claim made by the plea which is not borne out by the financial results of the past and is computed on a wrong basis. The defendants are entitled to the damages done to them in respect of their tenancy.

Now, the question submitted for determination under the circumstances of the case, is the fixing of the compensation of this unexpired lease that had but a short time to run, namely a period of eight months and subject to the abatement of the rent.

Under the provisions of section 121 of the English Land Clauses Act, 1845,—decisions under which have been regarded as authoritative in Canada—it is enacted that a tenant for a year or from year to year, required to give up possession before the expiration of the term of the lease, shall be entitled to compensation for the value of his unexpired term and to any just allowance which ought to be made to him for any loss or injury he may sustain.

With the enunciation of such a principle no one can quarrel; (1) but I have to recognize that the decisions of the courts in interpreting all of the compensation provisions of this statute very materially narrowed the literal import of the words used therein.

However, as Nichols on Eminent Domain p. 714 says, it is no simple matter to fix the market value of an unexpired term of a lease; it is almost impossible to apply the customary test of market value to a leasehold interest. It is really no test at all, because a lease rarely has any market value. It would seem that a lease in this country—contrary to custom of trade in France in that respect—might

(1) Bell, Landlord and Tenant, 437. Lewis, Eminent Domain, 3rd Ed., 1256.

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well be held to fall within the class of property not commonly bought and sold, and that consequently the intrinsic value or the value to the owner might be taken as the best and only available test of market value. The value to the owner of a lease, when he is paying the full rental value of the premises as rent—here is an abatement of rent—is the right to remain in undisturbed possession to the end of the term.

Whatever loss the tenant may be entitled to recover, expected profits during the eight months should not be the test. Yet when an allowance is made for diminution of good-will, to some extent that compensation covers loss of profit. It seems that the question of the loss of estimated profits as a mode of arriving at the compensation for the value of this unexpired term, can no more be considered, than can be considered by the expropriating party the probable loss a lessee might make, and claim a set off therefor. The question of the loss of profits *per se* is too remote. It is personal to the individual. Through the ability, skill, sagacity and wisdom of one individual large profits might be realized in a business; while another person dealing with a similar and even the same business, but wanting in those qualities would bring the business into the Bankruptcy Court.

No allowance can be made for loss of profits, *qua* estimated profits.

DeKeyser's Royal Hotel, Ltd. v. The King (1); *Gibbon v. The Queen* (2); *McPherson v. The Queen* (3); *Perram v. Town of Hanover* (4); *McMillin Printing Co. v. Pittsburg, Carnegie & Western Railway Co.* (5); *McCauley v. City of Toronto* (6); *Allison v. Chandler* (7); *White v. Her Majesty* (8); *The King v. Montgomery* (9); *The King v. Jalbert* (10); *Rickets v. Metropolitan Ry. Co.* (11), *Brown and Allen, Law of Compensation*, 2nd ed. p. 101.

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| (1) [1919] 2 Ch. D., 197 at p. 238. | (6) [1889] 18 Ont. R. 416. |
| (2) [1900] 6 Ex. C.R. 430; | (7) [1863] (7 Cooley) 11 Mich. Rep. 543. |
| (3) [1882] 1 Ex. C.R. 53. | (8) [1870] 22 L.T.R. 591. |
| (4) [1916] 31 D.L.R. 142. | (9) [1917] 40 D.L.R. 147. |
| (5) [1907] 216 Penn S.R. 504. | (10) [1916] 18 Ex. C.R. 78. |
| (11) [1865] 34 L.J.Q.B. 257; 13 W.R. 455 and annotation in 1 D.L.R. 509. | |

The defendants had the right to remain in undisturbed possession to the end of the term. Before there was any question of expropriation the defendants knew that they had to leave on the 30th April, 1923. Then that term was extended by the bank to the 31st December, 1923, and the expropriation forced them to leave at the very date of the expiry of the lease, that is in April instead of December. They, however, knew they had to leave on the 31st December, 1923, and they cannot recover loss of business or estimated profits *qua* such loss; but they are entitled to recover for any loss or injurious affection to the good-will of their business, as hereinafter set forth.

If the good-will is the probability of the continuance of a business connection, it is not taken away by the expropriation, but remains the property of the trader and the loss suffered is the diminution in its value in consequence of his compulsory ejection from the premises he is occupying for the eight months in question. Sometimes this diminution in the good-will is hardly appreciable, as the business may follow to his new premises the individual with whom a part of the public had been in the habit of dealing. Moreover when new premises can be and have been procured in the immediate neighbourhood, the loss in the good-will, if any, may be merely nominal.

The several legal elements of damages to be considered in assessing the compensation are such as will cover any loss of or diminution in the good-will, thereby letting in some loss of business or estimated profits. Then it should further cover the reasonable cost of removing, seeking a new location, loss of time, storage of part of furniture during eight months, depreciation of fixtures,—furthermore a certain amount should also be allowed for the dislocation or disturbance of the business occasioned by such removal,—all of these amounts being very difficult of estimation in detail.

And all of such elements being considered under the circumstances of the case—that is having regard to the fact that the defendants had to leave the premises on the 31st December instead of the 30th April, 1923; and further, a matter which cannot be overlooked, and that is that the defendants had already secured (when they knew their lease

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was expiring 1st May, 1923) in December, 1921, a new place of business on Yonge street, a short distance from the present one; furthermore, that they transferred the balance of their stock at those premises, dismissed their staff at 152 Yonge street, and ran the business with the staff at 82 Yonge street, since moving to the new place, with the result that the volume of business had since increased at No. 152—not overlooking the abatement of a monthly rent of \$916.67 and the salaries at No. 82,—I am of opinion, having special regard to the ascertained profits made upon these premises, No. 82, during the last five fiscal years of the defendant—and more especially the last year, in 1922, when the special accountant heard as a witness found them to be \$331 for the whole year—that the amount of \$3,000 offered by the plaintiff is an ample, fair and just compensation to the defendants under the circumstances. To this amount of \$3,000 I will, however, add ten per cent, and costs in view of the action being in the nature of a compulsory taking.

Therefore, there will be judgment declaring that the defendants are entitled to recover from the plaintiff the said sum of \$3,300 with interest thereon from the 23rd February, 1923, to the date hereof; the whole in full satisfaction for any loss or damages whatsoever arising out of the expropriation and the ejection of the defendants from the said premises eight months in advance of the expiry of their term of occupation allowed by their landlord.

The defendants will further be entitled to the costs of the action.

Judgment accordingly.