

1928
 Sept. 22.
 Dec. 27.

HIS MAJESTY THE KING.....PLAINTIFF;
 vs.
 ELITE CAFE LIMITED.....DEFENDANT.

*Expropriation—Leasehold—Civil rights—Elements of damage to lessee—
 Market value as test—Compensation*

Held, that the rights conferred by a lease being a matter of property and civil rights, within the exclusive powers of the Provincial Legislature, the Court in ascertaining the estate or interest of persons claiming compensation thereunder in an expropriation by the Dominion Crown, will have regard to the laws affecting such estate or interest in the province where the property is situated, notwithstanding sections 25 and 26 of the Expropriation Act.

2. Where a leasehold has been expropriated, the compensation to be made to the lessee for the unexpired term of his lease should cover all reasonable cost of moving, refitting and settling the new premises; loss of time in seeking new location; depreciation of valuable business fixtures and fittings and damage thereto due to moving, etc., and a certain amount for dislocation or disturbance of business, which however cannot be fixed with mathematical certainty.

3. That the customary test of market value is no test of value in arriving at the compensation to be allowed for a leasehold interest expropriated. That leaseholds rarely have any market value.

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INFORMATION exhibited by the Attorney-General of Canada to have the compensation for the leasehold interest expropriated valued and fixed by the Court.

The action was heard before the Honourable Mr. Justice Audette at Regina.

D. R. Curtin, K.C., and *D. A. Grant* for the plaintiff.

D. J. Thom, K.C., and *J. L. McDougall* for the defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (27th December, 1928), delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, among other things, that a certain leasehold interest in the expropriated building erected on lots four (4) and five (5) in block 306, in the city of Regina, in the province of Saskatchewan, was taken from the defendant, at the time the Crown expropriated the property for the purposes of a public work, by depositing, on the 10th day of October, 1927, a plan and description of such land in the Land Titles Office for the Regina Land Registration District at Regina.

The plaintiff offers, by the Information, the sum of \$25,000 as full compensation for the defendant's leasehold interest, and the defendant avers, by the statement in defence, that this sum is not sufficient and just compensation and claims the sum of \$80,000.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question.

As there seemed at the trial to exist some doubt in the mind of those representing the company as to what the expropriation did cover—and it could not cover movables—counsel for the plaintiff, after the matter or doubt had been spread upon the record, with the view of dispelling any misapprehension in that respect, declared that by the present proceedings, the Crown is only expropriating the leasehold interest, and that the defendant may remove and retain, as its own property, all the fixtures, fittings and equipment of the defendant in the said premises, including all contents of the restaurant.

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Approaching the consideration of the controversy as to fixing the compensation and the rights of the defendant thereto we are, *in limine*, met with the objection, raised at trial, that the lease under which the defendant claims was executed and signed only by the landlords, and that it is therefore null and void; a momentous question, indeed, which goes to the very root of the claim and the right of the defendant to recover.

It is quite true that the lease is not signed by the defendant company, and this error may have arisen from the facts that the landlords are also the Elite Cafe Ltd., being the only shareholders in that latter company. However, the lease is purported to be signed by both lessors and lessee—but it is only signed by the five owners of the building and not by the corporate name of the lessee.

Counsel at trial admitted the lease had been registered.

The plaintiff in attacking the lease for want of the defendant's signature relies on sec. 92 of The Land Titles, R.S.S., ch. 67. That section throws upon the owner, *the party to be charged*, the onus of executing a lease, but under Form M., therein referred to, it is both provided for the acceptance of the lease by the lessee and for his signature.

Be all this as it may, it has been held in many cases, a number of which are gathered at p. 120 of Woodfall's Law of Landlord and Tenant, 21st ed., that while a lease must be signed by the party to be charged, it need not be signed by both parties. Therefore the obligation in the present case would not be only unilateral, but would indeed be with mutuality, even if the lease is unsigned by the occupants the defendants. See also upon this question Encyclopedia of the Laws of England, verbo Fraud, Statute of, vol. VI, pp. 268-9; Fry's Special Performance of Contract, 4th ed., pp. 230-1; Leake's Law of Contract, 4th ed., p. 184.

Undoubtedly this question of lease being a matter of property and civil rights, within the exclusive powers of the Provincial Legislature, the Court in ascertaining the estate or interest of persons claiming compensation thereunder in expropriating by the Dominion Crown, will have regard to the laws affecting such estate and interest in the province where the property is situated, notwithstanding secs. 25 and 26 of The Expropriation Act.

However, the lessee has an undoubted right, as against the landlord, to the performance of the lease, and that is the right which is now expropriated. His acceptance of the lease need not be in writing and he has signified his acceptance of the lease by the overt act of occupying the premises and paying the rent. The whole dealings between the parties establish a legal right enforceable against the Crown in expropriation proceedings wherein indeed the subject has to surrender his rights by compulsion and not at his invitation. And while there is no waiver by the Crown yet, by the pleadings, it recognizes the rights of the lessee to be compensated, and the amount tendered could only have been in consideration of a five year lease—otherwise the amount would have been much less. The lessee should be compensated for such damages as it has actually sustained in respect of his leasehold interest.

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The defendant carries on a restaurant business, upon the premises in question, under the name of the Elite Cafe. It is, according to the evidence, the best cafe in the city of Regina. However, notwithstanding its equipment, the good name attached to it, the financial results of the company is far from satisfactory and that will have to be measured and weighed when considering the question of goodwill. Is it due to the fact that the rent payable under their lease is too high notwithstanding that the salaries were too low? That has certainly contributed to it. Will not the company benefit by finding and moving into a new location which they could occupy under better conditions and terms?

In 1926, the company joined in giving an option with the owners for \$150,000, covering the land, the building, the cancellation of the lease and walk out. It was then quite ready to get other premises to carry on their business. The manager, witness Girgulis, in his examination on Discovery, testified that their intention was to try and obtain new suitable premises. At trial he declared he did not expect to retire and intended to continue if he could get a location, and added that one block or one block and a half away would do for his business.

I am quite satisfied that the defendants can and will, if they look around and inquire, find in a city like Regina, new premises to continue their operation, if they see fit and

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could do so with better financial result under reduced rent. As it is the company could not carry on much longer losing money, notwithstanding the low salaries paid to the managing officers; they had gone behind in their payments of rent, salaries, etc., at the time of renewing the rent. At the end of the year 1926 the arrears of rent appeared to have been about \$16,000.

Then is not the goodwill of a business financially so unsatisfactory almost left with the mere hope and probability that old customers will resort to the old Elite Cafe? And in such a case it would mean the name of the cafe and the popularity and the good name attaching to the personality of the persons operating the restaurant, all of which will pass over to the new premises the company will occupy within a reasonable compass and zone of the present premises. The expropriation does not take away from the lessee its commercial qualities, its initiative, nor the goodwill of his clients.

Now the negotiations for the purchase of this property and the leasehold interest were started in April, 1927, and yet the lease in question was signed on the 11th May, 1927, when the defendant was quite aware, as admitted by their manager, that the Crown was expropriating for the purpose of enlarging the Post Office building at Regina. See *Ex parte Edwards* (1).

As I had occasion to say in previous cases and as stated by Nichol, on Eminent Domain, p. 714, 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 no test at all, because a lease rarely has any market value and that especially applies to the present lease under the financial circumstances mentioned above. It would seem that a lease in this country,—contrary to the custom of trade in France—might be held to fall within the class of property not commonly bought and sold and that therefore the intrinsic value or the value to the owners 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, is the right to remain in un-

disturbed possession to the end of the term. But in this case it is to the advantage of the defendant to put an end to their business under such onerous tenancy and to improve its position by going somewhere else, *the abatement of rent necessarily* following since the building has also been expropriated and that the landlord cannot exact his rent.

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The amount of compensation to be awarded cannot be fixed with mathematical certainty, but must largely be a matter of conjecture, after taking all the circumstances into consideration.

Bearing in mind the declaration made at the opening of the trial by counsel for the plaintiff, as above recited, that the expropriation is of the leasehold and that the defendant may remove and retain as its own property all the fixtures, fittings and equipment in the premises, including all the contents of the restaurant,—which is only repeating the legal effect of the expropriation under the present circumstances,—I will now proceed to fix the compensation.

The compensation must be such as to cover all reasonable cost of moving, refitting and settling the new premises, the loss of time in seeking new location, and more especially the depreciation of these valuable business fixtures and fittings, including plumbing which is its full value, additional depreciation of fixtures and equipment from moving, etc., all what was mentioned at trial in such classes; furthermore a certain allowance should be made for the dislocation or disturbance of business occasioned by the removal and all incidental legal elements of compensation for all damages done to his tenancy arising out of the expropriation—all of these allowances being very difficult of estimating in detail. The defendant is entitled to recover all such damages and losses as are the natural result of the expropriation and he should not be any poorer or richer than before the expropriation.

Adverting duly to what must enter into the compensation I am of opinion, having regard to the several considerations above mentioned that the total sum of \$35,877.05, including 10 per cent for compulsory taking, will be an ample, fair and just compensation to the defendant under the circumstances.

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Now the compensation allowed is greater than the amount tendered and offered by the Crown and it therefore primarily carries interest from the date of the expropriation to the date hereof. However, the defendant company was still in occupation of the premises and operating their business at the date of the trial, and at the date the Court was viewing the premises, and the defendant cannot recover both the interest and occupy the premises. I will therefore hereby reserve leave to either party to apply to the Court for further direction in respect of the question of interest and occupation under the circumstances. Indeed, if the defendant were to stay in occupation during the whole life of the lease, it would have no claim to compensation. *Syers v. Metropolitan Board of Works* (1). Will the defendant be allowed to remain in possession of the premises for the whole life of the lease, paying rent to the plaintiff? The defendant has paid rent up to January, 1928.

Therefore there will be judgment as follows, to wit:

1. That the leasehold interest of the defendant in the premises in question is vested in the Crown as of the 10th October, 1927.

2. That the compensation for the said leasehold interest is hereby fixed at the sum of \$35,877.05, in full satisfaction for any loss or damages whatsoever arising out of the expropriation and the termination of the defendant's tenancy of the said premises in advance of the expiry of its term of occupation under its lease, the whole with interest thereon from the 10th October, 1927, to the date hereof.

3. That the defendant is entitled to be paid the said sum of \$35,877.05, the question of interest being held in abeyance until the parties, or either of them, move for further direction, upon material showing if the defendant is still in occupation and will further occupy, and any fact relating thereto, in respect of the question of interest and occupation.

4. The defendant will further be entitled to the costs of the action.

Judgment accordingly.