1932
Oct. 21, 22, 25 & 26
1933
Feb. 6.

THE KING, on the Information of the Attorney-General of Canada ..... PLAINTIFF;

AND

NORTHEASTERN LUNCH COMPANY, LIMITED ..... DEFENDANT.

Expropriation—Leasehold—Option by lessee to purchase the freehold—Elements of compensation

The Information herein was filed to have the compensation to which the defendant was entitled, fixed by the Court. The defendant was lessee of the property expropriated and by the terms of his lease was given an option to purchase the freehold.

Held, that as a lessee is entitled to compensation for the loss of his lease and as the option to purchase was one of the covenants of the lease, the right to purchase the freehold is an element to be considered in computing the compensation to be allowed the defendant.

INFORMATION by the Crown to have the compensation for the leasehold of the defendant herein fixed by the Court.

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

Paul Lacoste, K.C., and *Gregor Barclay, K.C.*, for the plaintiff.

L. A. Forsyth, K.C., and *C. Sinclair, K.C.*, for the defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (February 6, 1933), delivered the following judgment:

The precise matter for determination here is the amount of compensation that should be paid to the defendant in consequence of the expropriation, by the plaintiff, of certain lands in which the defendant had a leasehold interest together with an option to purchase the freehold. The facts give rise to several problems which are not easy of solution.

In September, 1927, the plaintiff expropriated, under the provisions of The Expropriation Act, certain lands, with two buildings thereon, belonging to the Estate of Phillip Meehan, and situate at the northwest corner of St. Antoine street and St. Monique street in Montreal. The property was expropriated for the purpose of providing terminal facilities for the Canadian National Railway Company, at Montreal, and in the Information the railway is referred to as " the Government Railway."

In 1923 the defendant leased the lands taken for the period of twenty years, and the term would expire on April 30, 1943. The annual rental was $3,900. The lessee was to make all repairs, whether the landlord's or the tenant's. One of the buildings, at the time of the expropriation, was sub-let by the lessee to tenants. The lease provided that the lessor would not during the term of the lease sell or otherwise dispose of the property, and the right was given the lessee to purchase the same at the expiration of the term for the sum of $60,000. In order that the lessee might avail itself of this right, it was required to give the lessor notice in writing to that effect at any time before February 1, 1942. The defendant did in fact give such notice, in June, 1929, but subsequent to the date of the expropriation.

The defendant at the date of the expropriation carried on quite an extensive restaurant business, and operated twelve restaurants located at different points throughout

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the city of Montreal; the gross turnover of its business amounted annually to about $1,000,000; that is about the time of the expropriation. The building which the defendant itself occupied was situate entirely on St. Monique street and was used as the head office of the defendant company, and as a depot or warehouse for the various supplies required by the different restaurants, and from which place such supplies were distributed as and when required. The defendant also operated a laundry in the same building, but only for the purposes of its own business. The building occupied by the defendant comprised four stories and a basement, and the combined floor area was 9,020 square feet. The building, originally constructed as a shoe factory, was a plain brick structure with wooden beams, and might properly be described as a factory building with four floors and a basement. One floor was occupied by the defendant for office purposes. Apparently the building was convenient and suitable for the business there carried on by the defendant. St. Monique street, apart from the corner of St. Antoine street, was not an important business thoroughfare, and while I do not recall any evidence on the point, I should say it was more of a factory and warehouse street than anything else, but in this I may be mistaken. Thus being about to be deprived of its leased property the defendant searched for new premises, and it claims that it was unable to obtain suitable premises comparable in size, location and general utility, with the St. Monique premises, and at something approximating the same rental and taxation charges. Apparently considerable effort was made to find such premises, but without success, it is claimed. The plaintiff tendered evidence to the effect that suitable premises might have been procured at a rate of rental somewhat corresponding to that paid for the whole of the expropriated property. While it is difficult to draw any satisfactory conclusion from the evidence on this point, yet it is difficult to avoid the impression that there must have been other equally suitable premises available in the city of Montreal, though perhaps not upon such favourable rental terms, at that date. This point is of importance because it is claimed that the defendant in the end leased premises that were unnecessarily expensive for the nature of the business it had carried on at St. Monique street.

In the end the defendant leased premises on St. Catherine street west, from the Guaranteed Pure Milk Company, and, as is well known, this street is in a very important and busy retail district. The building is a comparatively modern brick and steel structure, the front exterior is quite attractive and portions of the interior are appropriately finished. The leased premises, in reality only a part of a building, comprise four stories, the total floor area being 22,981 square feet inclusive of the basement floor. The annual taxes levied against the premises is about $3,000 and the annual rental is $6,000, altogether about $9,000. The defendant installed in the new premises a bakery, a line of business not carried on in the vacated premises. Very substantial expenditures were made by the defendant on account of repairs and alterations to the building, before entering into occupation, and a claim is made by the defendant on account of such expenditures, and to which I shall be obliged to return later.

The plaintiff tendered the defendant $20,000 in full satisfaction of any loss or damage resulting to it in consequence of the taking of the property in question; this the defendant declined to accept, and in its statement of defence claimed $86,063.44, but at the trial it sought to establish a claim for compensation in the sum of $58,000. The defendant's claim for compensation falls generally under the following heads: loss of the unexpired term of the lease and its right to purchase the property under the option clause; excess rent and taxes paid for the new premises over the old; cost of removing plant, machinery, furniture and restaurant supplies from the old to the new premises; depreciation and injury to property, furniture and goods, while being moved to St. Catherine street; damages suffered by delays in its business operations resulting from the railway terminal work which caused the blocking of traffic on St. Monique street; expenses incurred in washing and cleaning the interior of the premises and goods owing to dust and dirt entering the premises and arising from the railway terminal work in front of the defendant's premises; loss of tenants and rentals in the sub-let premises attributable to the railway terminal construction work; and the cost of necessary repairs, alterations and additions made in the St. Catherine street premises.

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Turning first to the claim for damages made in respect of the loss of the unexpired term of the lease and the option to purchase the fee-simple of the lands taken. The defendant claims under this head the sum of $17,765.50 as the present value of the increased rent it will be obliged to pay during the residue of the term of the lease; $13,988.05, the present value of the increased taxes payable upon the new premises during the same period; and $14,289.51 for being deprived of the option to purchase the fee-simple of the lands taken. The defendant paid a rental of $3,900 annually, for the whole of the expropriated property. In order to estimate the rental paid for the building which it occupied, the defendant makes a deduction, calculated on a basis that was not questioned, on account of rentals received from sub-tenants occupying the other building, amounting to $2,040, and which leaves the net rental of the building which the defendant occupied, at $2,285.90 per annum. The annual rental of the St. Catherine street property is $6,000 and after making a deduction of 28 per cent for the floor area occupied by the bakery, a new branch in the defendant's business, the net annual rental is calculated at $4,278, being a net annual increase of $1,992.10, or about $166 per month, for the new premises over the old premises, from October 1, 1931, to the end of the term of the lease. Mr. Ogilvie, an expert witness for the Crown, was of the opinion that the defendant should have been able to rent suitable premises for $4,300 a year. The gross rent and taxes paid by the defendant for the whole of the property taken was $4,929.05, and if from that is deducted the renewals paid by sub-tenants, the net amount paid for rent and taxes would be $2,889.05. Assuming that premises might have been rented at $4,300, this would amount to $1,410 more annually than the rental and taxes for the whole of the property taken, and the present worth of that difference for the balance of the term of the lease was stated to be $12,312. It must always be remembered that the expropriated property had two buildings thereon, one of which the defendant occupied, while the other was rented as I have explained, with the result that the actual net annual rent to the defendant for the building it occupied was approximately the amount I have mentioned. So if the rental of $6,000 for the new premises

is disregarded altogether, and we assume that the defendant might have rented suitable premises elsewhere for $4,300 annually, inclusive of taxes, even then the rent and taxes would be $1,410 more annually, than was paid for the vacated premises. I think it is quite fair to treat the rental position of the defendant at the old premises in this way. I see no fallacy or error in it. The defendant was in an advantageous position under the old lease, and it was the result of leasing a larger property than it needed for its own purposes. The premises occupied by the defendant on St. Monique street was apparently suitable and convenient for its purposes, the terms of rental were favourable, and I do not think that equally suitable premises were available to the defendant upon the same terms, and accordingly I think it has suffered damages. I think, however, that the defendant's calculations are subject to some qualification. No deductions seem to have been made for depreciation, cost of upkeep, insurance, etc., and there was always the possibility of lack of tenants for the building that was sublet, and reduction in rentals, and all this must be considered. I have no doubt the defendant being obliged to secure new business premises wished for a better type of building, particularly as to office appointments. The enforced change of quarters probably suggested the inclusion of other activities at the head office premises. The St. Catherine street premises cannot safely be used to measure the defendant's damages or compensation. The street, the size and general character of the premises, the rent, the taxes, precludes a comparison of the St. Catherine street premises with that vacated by the defendant. I do not think it can fairly be said that the defendant's present premises are a reasonable substitute for the old premises, and the defendant is only to be placed back into premises comparable to where he was, so far as that can reasonably be done, that is, so far as the expropriating party is concerned. I should refer perhaps, with more particularity, to the taxes on the old premises, and that on the St. Catherine street premises. The annual realty tax on the expropriated property was $1,209.05, and apportioning $425.90 to the sub-let premises for taxes, the net annual taxes on the building occupied by the defendant was $603.15. The annual realty tax on the St. Catherine street property is

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$3,039.26. The net annual realty tax upon the new premises would therefore be $1,564.11 in excess of that on the old premises. These figures are embodied in one of the defendant's exhibits and their accuracy was not questioned.

The defendant also claims compensation, as already mentioned, because it was deprived of the covenant of the lessor not to sell the freehold during the term and of the option to the lessee to purchase the freehold. The plaintiff was bound to have known, I think, the terms of the lease because he was bound to ascertain and demand from any one in occupation of the lands taken, the nature of the estate or interest therein claimed by the occupant, and the situation would have been much less complicated if the interest of the freeholder and lessee respectively in the lands taken had been determined by the Court, or by agreement, before the compensation money which was to stand in lieu of the lands taken, had been distributed. The exact words of the option clause in the lease is as follows:

> The Lessor agrees and undertakes that he will not during the term of the present lease sell or otherwise dispose of the said property but the right is hereby given by the Lessor to the Lessee to purchase said property at the expiration of the term hereof for the sum of sixty thousand dollars ($60,000) upon such conditions as may be agreed upon between the parties.
>
> In order to avail itself of this right the Lessee will give to the Lessor notice in writing to that effect at any time before the first day of February, nineteen hundred and forty-two (1942).

The plaintiff paid the Estate of Meehan $75,000 as compensation for the fee-simple of the lands taken, $15,000 more than the option price to the defendant, and according to the evidence of one of the plaintiff's own witnesses, the market value of the lands taken at the date of expropriation, was $75,000. It seems that a deed of conveyance passed from the legal representative of the late Philip Meehan, on November 11, 1930, to the Canadian National Railway Company, the reason alleged for this being that while the statutory plan and description was deposited of record at the Registry Office in Montreal, yet it was not in fact registered as against the lands taken, and therefore the passing of a deed of conveyance from the Meehan Estate to the railway company was deemed desirable, if not necessary. If that is really the correct position of affairs then clearly the Expropriation Act should be amended. But that

does not alter the fact that $75,000 was paid as compensation for the fee-simple of the property taken. It does not appear that the leasehold interest of the defendant, or its option to purchase, was taken into consideration in determining the value of the interest of the Meehan Estate in the lands taken. The defendant now claims that the lessor's covenant not to sell the property during the term of the lease, and the option to the defendant to purchase the same was a valuable term or covenant of the lease binding on the legal representatives of Philip Meehan, and that the value of such right is represented by the apparent increase in the value of the property at the time of taking, over the option price fixed in the lease, when it was made in 1923. The defendant gave notice in writing of its intention to exercise the option, but this was after the date of the expropriation, though prior to the date of the deed to the Canadian National Railway Company, when, I assume, the consideration passed to the Meehan Estate. Now, the defendant is entitled to some compensation for the loss of its lease, and as the option to purchase is one of the covenants of the lease, that must be considered in reaching the amount of the compensation to be allowed the defendant. I must say that when this claim was first advanced by Mr. Forsyth, I was not disposed to attach weight to it, but upon further consideration I think the claim is one of substance. A simple option to purchase given after the lease was made, would be, I think, another matter, but with that we are not for the moment concerned. It is to be assumed, I think, that there was consideration for the covenant not to sell, and for the option to purchase, and that that consideration is reflected in the terms of the lease.

A case, almost identical in the facts with the one under consideration is the New Zealand case of *Compton* v. *Hawthorn and Crump* (1). The facts of this case are as follows: Compton was the owner of the fee-simple of certain lands which she leased to Hawthorn and Crump for twenty-one years, and the lease contained a clause by which the lessor agreed with the lessees that they or either of them might purchase the land upon three months' notice in writing, upon terms which need not be stated except to say that the purchase price advanced as the time for the exercise

(1) (1903) 22 N.Z.L.R. 709.

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of the option was postponed, but if notice was given during the first seven years of the term the purchase money was to be £800. In November, 1901, the Wellington City Corporation, under the Public Works Act, published a notice of its intention to take the land for street widening purposes, and when all conditions had been performed and all times having elapsed entitled it to do so, it caused a Proclamation to be issued in May, 1902, taking the land and vesting it in the Corporation. On June 9, 1902, Compton, as owner in fee-simple made a claim against the Corporation for £1,800 as compensation for the taking of the land, but stated that the land was subject to the lease to Hawthorn & Crump. A Compensation Court was constituted under the Public Works Act for the hearing of Compton's claim, consisting of Stout C.J., as President, and of certain assessors. On August 6, 1902, Hawthorn and Crump gave formal notice to Compton of their desire to purchase the fee-simple of the land, and on September 19, 1902, Hawthorn and Crump made a claim against the Corporation for compensation payable to them. They claimed the sum of £2,000 for their leasehold interest with the right to purchase the fee-simple at £800 and they claimed that the sum of £800 only was payable to Compton, and that the whole value of the fee-simple less the £800 was payable to them; it was agreed that the value of the fee-simple exceeded the £800. Compton, on the other hand claimed that the right to purchase was at an end by the taking of the land before the giving of the notice by the lessees, and that she was entitled to the whole value of the fee-simple subject only to the leasehold term. A case was then stated for the decision of the Supreme Court and was argued before Stout C.J. I may usefully quote his decision in full, and it is short. He said:—

I do not agree with the contentions made on behalf of either the claimant or the tenants.

First, as to the claimant: It is true the lease has merged and was put an end to by the Proclamation, and with it went the option to purchase; but the tenant is entitled to obtain compensation for the lease, including one of its terms, the option to purchase. This option cannot be dissociated from the lease for non constat that such a rent as is provided therein would have been paid if there had been no such purchasing clause. The claimant is not, therefore, entitled to claim the full value of the freehold as if there was no such lease including the purchasing clauses.

2. As to the tenants: They have not an equitable estate in the land as purchasers, for they gave no notice, though they might have given

notice when the intention to take the land was advertised. They neglected to do so, and in my opinion it must be left to the Assessment Court to say what compensation they are entitled to. I cannot lay it down as a proposition of law that the exact sum the freeholder is entitled to is the amount at which they might have purchased, and that they are entitled to the balance if the value exceeds this sum. Many things have to be considered—the chances of property falling, of the lease being forfeited, etc. I do not express any opinion as to whether the freeholder should get any excess of the sum which she has agreed to take if the option of purchase were exercised. All I decide is that no exact rule can in this case be laid down, and the Assessment Court should consider all the circumstances in making the award.

The solicitors of Compton then filed a statement of claim and notice of motion in the Supreme Court claiming that Hawthorn and Crump, the defendants, might be restrained by injunction from further prosecuting their claim for compensation so far as it extended to the alleged interest in the demised land under the right of purchase given in the lease, and that it might be adjudged that the Compensation Court was not entitled, in considering the claim of the plaintiff Compton, to take into consideration the said option in order in any way to affect the amount of compensation to be awarded to Compton as the fee-simple owner of the land, and might be restrained by injunction from doing so. The motion for an injunction was removed into the Court of Appeal, consisting of three Judges, and there was complete agreement by the Court that the motion should be denied, because it was an attempt to regulate the proceedings of the Compensation Court. Williams J., after stating that the plaintiff should fail in her motion, referred to the merits of the case and he said:—

But the question of the merits has been discussed, and I must say that I entirely coincide in the opinion which the Chief Justice has already expressed. The plaintiff is entitled to compensation for the estate or interest which she had in the land at the time that the land was taken. She makes her claim as tenant in fee-simple subject to a lease. The value of her interest in the land is the total value of the land itself less the value of the leasehold interest. The lease contained an option to purchase. That option could have been exercised at any time during the twenty-one years of the lease. The effect of the taking of the land was not only to destroy the option of purchase, but to put an end to the lease altogether. The leaseholder, therefore, by the taking of the land has been deprived of the balance of the term, and also he has been deprived of his option, during the balance of the term, to purchase the fee-simple. The plaintiff has been deprived of her interest subject to the lease—that is to say, she has been deprived of an interest which was subject during the balance of the term, to the right of purchase of the lessee. It is quite true that, after the land has been taken, the covenant by the lessor that she will sell to the lessee if the lessee requires has been put an end to.

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But so have all the other covenants been put an end to. The lease itself has been put an end to. And it is because the covenants have been put an end to and the lease has been put an end to that the lessee is entitled to compensation. As I understand it, the meaning of the Chief Justice is that each person is entitled to the market value of his real interest in the land at the time it was taken. So far as the lessees are concerned, they are entitled to the market value of the residue of the term with the right of purchasing the fee-simple during the term at the price named in the lease. So far as the lessor is concerned, she is entitled to the market value of the fee-simple subject to a right of purchase by the lessees at that price exercisable during the term. I entirely concur in that view.

The reasoning of Stout C.J., and Williams J., seems to me to be sound. In the case under consideration the right to purchase the freehold is an element to be considered in computing the compensation to be allowed the defendant.

Now, taking together the claim for compensation based upon increased rental, increased taxes, and the loss of the option to purchase, arising from the termination of the lease, what compensation is to be allowed the defendant? That is a most difficult thing to determine. The defendant is entitled to compensation for having been deprived of the balance of the term of its lease, and the option to purchase the fee-simple was a term of the lease. The annual rental worth of the old premises may be tested by what it would cost the defendant to obtain similar premises elsewhere, at the date of the expropriation. Upon the evidence, I think, I am bound to hold that the defendant was unable to lease premises suitable for its business, except at an increase of rent and taxes. This appears clear even if we take the rate of rental at which the plaintiff suggests premises might have been secured, viz., $4,300, although that is not a fact definitely established. This would indicate that the defendant had premises leased upon favourable terms, and that the residue of the term was therefore of substantial annual value to it; and the defendant must so far as is possible be restored to its former position in regard to premises wherein to carry on its usual business, during the balance of the term of the lease. Then other considerations must not be overlooked, some of which I have mentioned, that is to say, the maintenance of the leased property during the balance of the term, the possible loss of tenants, a fall in rents, and other matters. Then again the option to purchase would seem to have been of some value, along with the other terms of the lease, because the market value of the freehold had

increased some $15,000 above the price at which Meehan agreed to sell it to the defendant, and this would, I think, have had the effect of enhancing the market value of the leasehold at the time of the expropriation, but I do not say that this enhancement is necessarily represented by the $15,000. It is possible that at the end of the term the value of the leasehold including the option to purchase would not have the same value which it appeared to have at the date of the expropriation. As I have already stated, to determine the amount of compensation properly payable to the defendant because of the expropriation of the unexpired term of the lease, is extremely difficult. After anxious consideration, I have decided to allow the defendant the sum of $20,000.

[The learned judge here discusses numerous miscellaneous claims, and then concludes by allowing $34,540 as the total compensation.]

Judgment accordingly.