1920
July 5

HIS MAJESTY THE KING.....PLAINTIFF;

AND

GEORGE W. BROWN AND JAMES W. BROWN, BOTH OF REGINA, IN THE PROVINCE OF SASKATCHEWAN.. } DEFENDANTS.

AND

BY ORDER OF REVIVOR,

BETWEEN

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE SAID JAMES W. BROWN AND THE NATIONAL TRUST COMPANY, LIMITED, EXECUTORS OF THE LATE GEORGE W. BROWN, WHO DEPARTED THIS LIFE SINCE THE INSTITUTION OF THE PRESENT SUIT. } DEFENDANTS.

Expropriation—Leasehold—Damages due to abandonment—Mitigation of damages—Burden of Proof.

On the 14th of October, 1918, the Crown expropriated a certain leasehold term of 18 months for the purpose of temporary military barracks in Regina, and offered to pay $1,200 a month, plus taxes, insurance, light and heat for the same. Subsequently, on the 31st of October, 1919, it filed an abandonment of the leasehold in question in the Land Titles office.

Held: That the offer of the Crown, $1,200 per month for the time up to date of abandonment was sufficient; but in as much as by the abandonment the Crown practically took the position of one repudiating a contract, the lessors would also be entitled to damages resulting from the loss of rent from date of cancellation to end of term, either by reason of such repudiation of contract, or under the provisions of sub-sec. 4 of sec. 23 of the Exchequer Court Act.

2. That the burden of proof, in respect of the mitigation of the damages flowing from the abandonment by the Crown in expropriation proceedings, is upon the Crown.

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INFORMATION by the Attorney General of Canada to have certain leasehold interest in land described expropriated and valued.

Mr. F. W. Turnbull, counsel for plaintiff.

Mr. G. H. Barr, K.C., and C. J. Johnston, counsel for defendants.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 5th July, 1920) delivered judgment.

This is an Information exhibited by the Attorney General of Canada, whereby a certain leasehold interest in the lands hereinafter described and belonging to the defendants were taken and expropriated, by the Crown, for the purposes of a temporary military barracks, at Regina, province of Saskatchewan, by depositing a plan and description of such leasehold term in the Land Titles Office for the Assiniboia Land Registration District, in the province of Saskatchewan. This leasehold interest is described as follows: "A leasehold term of eighteen months, commencing on the *14th day of October, 1918*, of, in and to the following lands, namely:—Lots numbered five (5) to ten (10) inclusive, in block three hundred and seventy-two (372) in the city of Regina, in the province of Saskatchewan, according to a plan of record in the Land Titles Office for Assiniboia Land Registration District as Old No. 33, as *well as of all buildings situate thereon.*"

The Crown, by the Information, offers for said leasehold interest in the said land and buildings, the sum of $1,200 per month net, paying taxes, insurance, light and heat, and the defendants by their statement of defence claim the sum of $2,500 per month net to them, in addition to taxes, insurance, light and heat.

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Now, counsel at bar on behalf of the plaintiff, at the opening of the case, filed an undertaking to abandon, under the provisions of section 23 of the Expropriation Act, the expropriation of the leasehold in question in this case, and in compliance thereto, such an abandonment was filed in the Land and Titles Office for the Assiniboia Land Registration on the 31st October, 1919.

The controversy therefore becomes twofold. First, in respect to the fixing of the monthly rent payable by the Crown from the date of the expropriation to the 31st October, 1919, and secondly, the fixing of the compensation for the damages resulting from the abandonment under the provisions of sub-sec. 4 of sec. 23, of the Expropriation Act.

In respect of the rent that should be paid for the time that the Crown occupied the premises, a deal of evidence has been adduced on both sides, with the usual conflicting character as is met with in expropriation cases.

The evidence on behalf of the owners may be summarized in the following manner: Witness *Linton* values the property at $300,000, and the monthly rental at $2,800. Witness *McCarthy* values the property, in the fall of 1918, at $240,000 to $250,000, and contends he should get 8 per cent. net on that amount for rent. He is of opinion that the parties who built the Sherwood block were not justified in building it; it is too expensive a building for that locality, and it was a mistake. Witness *Lecky*, values the property at $350,000, and says the owners should get 8 per cent. net per month; but that there was no market for that price in October. 1918, and that in October, 1918, the property should command a rent of

$2,200 to $2,300 per month. Witness *Darke* values the property at $250,000 in October, 1918, and the rent at $1,700 per month—with respect to the abandonment, the plaintiff should pay half the rent since the cancellation of the lease, and take care of the carrying charges. Witness *Delai* fixes the rental at $2,810 monthly.

On behalf of the Crown, witness *McAra* places the value of the rent at $1,200 net, monthly, in the fall of 1918. Witness *Gibsone* considers that a fair rental in the fall of 1918 would be $1,000 to $1,200, and values the property at $225,000, which at 6 per cent. would give $1,350 net. Witness *Carmichael*, an architect in the employ of the plaintiff as Clerk of Works since June, 1919, and before that date assistant for a while, says that he was asked to report on the Sherwood Building in September, 1918. The Government was offering $1,200. Mr. Brown did come down and was asking $1,500. Mr. Mollard was at the head of the Department when defendant Brown was asking $1,500. He stated the Government would pay taxes from the 1st January to the 31st October, 1919.

The parties admitted that Mr. Mollard at one time in the course of the negotiations, recommended a rent of $1,475, but that was not accepted by the Department at Ottawa.

However, the most cogent evidence and the most helping evidence in the circumstances is the fact that this property was previously occupied by the Crown under a lease for a term of four months and eight days, ending on the 30th April, 1918, and this lease, although signed only by the owners of the Sherwood Stores, contained the following provision: "That the lessor will, on the request of the Minister, before the expira-

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tion of the term hereby created, grant to His Majesty a lease of the demised premises for the further term of .....years from the expiration of the said term at the same rent, and containing the like covenants, provisos and condition." The monthly rent payable under that lease was the sum of $1,346. The amount now offered by the Crown is the sum of $1,200 per month *net* to the lessors, the Crown paying taxes, insurance, light and heat. If it is considered, as established by the evidence, that the taxes for the year 1919 amount to the sum of $4,374.65, and the insurance without the sprinklers being kept in operation at $2,000, these two amounts added together alone represent the sum of $6,374.65, which added to the $14,400 represented by the monthly rent for 12 months at $1,200, that will give a yearly rent of $20,774.65, as compared with $16,152 for 12 months' rent at $1,346, under the lease above referred to.

It therefore results that the rent of $1,200 net per month offered by the Crown, is a most fair and reasonable one, under the circumstances. The owners of the Sherwood Building having already during the same year (1918), between the same parties, accepted a rent of $1,346, looking after the carrying charges, with the undertaking to continue the renting at the same price for an unlimited number of years, I therefore, without any hesitation think that the amount offered by the Crown of $1,200 per month *net* is most reasonable, yielding to the owners of the building placed at a value of $240,000, a *net* income of 6 per cent.

It appears from the evidence that the erection of the building in the locality in question was a financial mistake.

Moreover, as appears by the affidavit of W. G. Styles, the manager of the company, notwithstanding his numerous and earnest efforts to rent the building since the Crown has abandoned, he has been unable to secure a tenant, as shown by the affidavit filed herein on the 14th day of May, 1920.

Coming now to the question of compensation arising under the abandonment, the Crown practically takes the position of one repudiating a contract and therefore entitling the lessors to damages resulting from the loss of such rent from the date of cancellation, or under the provisions of sub-sec. 4 of sec. 23 of the Expropriation Act, which reads as follows:

"The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken."

Upon this branch of the case, the evidence is very meagre, if any on the record that could satisfy one to arrive at any just conclusion and none in that respect was adduced on behalf of the Crown.

Is not the lessor, under the circumstances, entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have had the effect of mitigating the loss?

The *onus probandi*, in respect of mitigation of the damages flowing from the abandonment, is upon the Crown and not upon the defendants. Moreover, under sub. sec. (c) of sec. 26, of the Expropriation Act, the plaintiff is bound by the Information to set forth:

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"(c). The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance," and the Crown has made no offer in connection with the abandonment.

With respect to the damages resulting from the abandonment, the Court at trial was unable to say whether the defendants would be able to rent their premises before the expiration of the life of the lease. It could not then comply with the provisions of sub-sec. 4 of sec. 23 of the Expropriation Act which says that: "The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compenation for the land taken" and give judgment fixing such compensation without proper evidence, without being seized with all the facts and "all the, circumstances of the case." By doing otherwise a most egregious piece of justice would be done.

If such damages could be mitigated by circumstances that would happen between the time of the trial and the expiration of the 18 months, they would be taken into consideration before fixing the damages and the Court would be justified in staying its hand.

The damages must be fixed once for all [1]. Furthermore, there is authority for the proposition that in fixing damages for loss of profits arising out of a breach of contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which one is entitled to compensation [2].

[1] Dominion Coal Co., Limited, *v.* Dominion Iron and Steel Company, Limited, (1919) A.C. 293.

[2] Finlay *v.* Howard, 58, S.C.R., 516.

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Therefore, before proceeding to render judgment, I called the parties before me and asked them whether it would not be proper, under the circumstances, for the Crown to undertake to pay to the defendant the amount of the rent offered by the Information at $1,200 per month *net*, up to the 31st October, 1919, the date of the abandonment, and ask the Court to stay its hand until the expiration of the 18 months, when evidence by affidavit or *viva voce* might be adduced showing what has really taken place since the 31st October, 1919, the defendants, in the meantime, showing diligence in their endeavour to rent or use the premises in question.

This course having been accepted and an application having been made, I refrained from giving judgment at the time, allowing the matter to rest until the expiration of the lease, and proceeding now to render judgment upon all the questions involved herein:

I hereby fix the compensation for the rent, up to the 31st October, 1919, at the sum of $1,200 per month, the Crown paying the carrying charges of taxes and insurance.

With respect to the unexpired portion of the rent and the abandonment,—Counsel for the defendants having at bar declared his readiness to accept half of the rent,—the Crown paying the carrying charges,—stating that this course would be satisfactory, I shall therefore direct that judgment be entered accordingly, the defendant having in the meantime been paid and accepted the sum of $3,000 in full settlement of all repairs to the building during the time it was occupied by the Crown.

Therefore there will be judgment in favour of the defendants declaring them entitled to recover from the

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plaintiff the rental of $1,200 a month, together with all charges mentioned in the Information such as taxes, insurance and heat, between the 14th October, 1918, and the 31st October, 1919,—and from the 31st October, 1919, to the end of the lease the sum of $600 a month together with all cost of taxes and insurance. The defendants being entitled to their full costs, after taxation thereof.

Solicitor for plaintiff: *F. W. Turnbull.*

Solicitors for defendants: *Barr & Stewart.*