

1962
*Feb. 22
June 11

IN THE BANKRUPTCY OF GINGRAS AUTO-
MOBILE LTEE.

LES PRODUITS DE CAOUTCHOUC }
MARQUIS INC. (*Petitioner*) } APPELLANT;

AND

ANDRE TROTTIER (*Trustee*) RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

Bankruptcy—Landlord and tenant—Claim for arrears of rent and for costs of repairs—Whether landlord a secured creditor—Whether both claims preferred—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 95, 100, 105—Civil Code, arts. 1619, 1624, 1628, 1994, 2005.

The petitioner, as landlord of the premises occupied by the bankrupt, filed with the trustee a preferred claim in respect of three months arrears of rent due by the bankrupt and also in respect of costs of certain repairs for which the bankrupt was liable under the terms of the lease. The trustee allowed the amount claimed for arrears of rent as a preferred claim, but refused to consider the claim for repairs as a preferred claim. The trial judge held that the petitioner was entitled to rank by preference for both claims. That judgment was reversed

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

by the Court of Queen's Bench and the decision of the trustee was restored. The petitioner obtained leave to appeal to this Court. The petitioner contended that s. 95 of *The Bankruptcy Act* dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference under the provincial law was preserved by s. 105.

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Held: Only the claim for arrears of rent was entitled to priority.

Subject to priority of ranking under s. 95 of *The Bankruptcy Act*, by virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated. However, in the event of bankruptcy, the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. That preference ranks sixth in order of priority and is limited as provided for by s. 95. Furthermore, by the combined effect of ss. 95, 100 and 105, the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec¹, reversing a judgment of Mitchell J. Appeal dismissed.

A. Denis, Q.C., for the petitioner, appellant.

J. P. Bergeron, Q.C., and *P. E. Blain*, for the trustee, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant is a creditor of Gingras Automobile Ltée, a bankrupt, and respondent is the trustee of the estate of the said bankrupt. At the date of the receiving order a valid lease existed between the debtor and appellant covering premises occupied by the debtor and with respect to which three months' arrears of rent amounting to \$1,800 were outstanding. In addition, appellant was entitled to claim from the debtor a sum of \$1,398.22 representing the cost of certain repairs for which the debtor was liable under the terms of its lease. Appellant's total claim against the debtor amounted therefore to \$3,198.22, for which it filed a claim with respondent, alleging that it was entitled to be paid its entire claim by preference.

It is conceded that at the date of the receiving order sufficient moveable property was located upon the leased premises to secure payment of the full amount claimed.

The trustee allowed the amount claimed for arrears of rent as a preferred claim but disallowed the balance. On appeal to the Superior Court that decision was reversed and

¹[1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55

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appellant held entitled to rank by preference for the whole amount of its claim. On appeal to the Court of Queen's Bench¹, that judgment was reversed and the decision of the trustee restored. The present appeal, by leave, is from that judgment.

The facts are not in dispute and the sole questions in issue on this appeal are ones of law. Under the provincial law, appellant was entitled to be paid a sum of \$3,198.22 and payment of that claim was secured by privilege on the moveable property located on the leased premises: arts. 1619 *et seq.* and 2005 of the *Civil Code*. That privilege consisted in the right to seize and sell such moveable property and to be paid by preference out of the proceeds: Faribault, *Traité de Droit civil*, t. 2, p. 112. In the event of competing claims, under the law of Quebec the landlord's privilege ranks eighth in order of preference: art. 1994 of the *Civil Code*.

The legal question in issue here is, to what extent if any the provincial law has been abrogated by the provisions of the *Bankruptcy Act*, R.S.C. 1952, c. 14.

In 1949 all existing bankruptcy legislation was repealed and a new *Bankruptcy Act* enacted, 13 Geo. VI, c. 7, now R.S.C. 1952, c. 14. The previously existing statute was completely re-cast and many important changes made including changes in the preferential right of the landlord.

The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid *pari passu*. To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s. 91(21) of the *British North America Act* to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: *Royal Bank v. Larue*². To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail. In his argument before us Mr. Denis did not of course challenge that proposition. He contended, however, that s. 95 of the Act dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference

¹[1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55.

²[1928] A.C. 187, 8 C.B.R. 579, 1 W.W.R. 534.

under the provincial law was preserved by s. 105. With deference I am unable to agree with that submission. The relevant portions of s. 95 and s. 105 are as follows:

95. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: . . .

(f) the landlord for arrears of rent for a period of three months next preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent: . . .

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due to him.

105. Except as to priority of ranking as provided by section ninety-five, and subject to the provisions of subsection four of section forty-two, the rights of landlords shall be determined according to the laws of the province in which the leased premises are situate.

"Secured creditor" is defined by s. 2(r) as follows:

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable; . . .

The interpretation and effect of these sections were considered by the Court of Appeal of Saskatchewan in *Canadian Credit Men's Trust Association Ltd. v. Carman Block Ltd.*¹.

In my respectful opinion, Gordon J.A. accurately stated the law when he said at p. 162:

With every deference I do not think a landlord with a claim for arrears of rent falls within the definition of a "secured creditor". He has no lien on the property seized but must give it up to the trustee and file his claim in the usual way. He has no security to value within the provisions of ss. 87-92 of *The Bankruptcy Act*. Further, I do not think that any such inference should be drawn in the face of the explicit directions contained in s. 95 of the Act. So far as I can see the Act deprives the landlord of his right of lien and merely uses the value of the property seized as a gauge to fix the amount for which he is allowed a preferred claim but does not make him a "secured creditor".

¹ (1957), 36 C.B.R. 158, 8 D.L.R. (2d) 647, 22 W.W.R. 180.

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Subject to priority of ranking under s. 95 (and to s. 42(4) which has no relevance here) in virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated.

In my opinion however, in the event of bankruptcy, the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. Shortly stated, such preference ranks sixth in order of priority. It is limited to three months' arrears of rent prior to the bankruptcy and to accelerated rent for a period not exceeding three months following the bankruptcy. Any amount payable by preference is limited to the amount realized from property on the lease premises, and any payment on account of accelerated rent must be credited against any amount due by the Trustee for occupation rent.

I am further of opinion that by the combined effect of ss. 95, 100 and 105 of the Act the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorney for the petitioner, appellant: A. Denis, Sherbrooke.

Attorneys for the trustee, respondent: Blain, Piché, Bergeron, Godbout & Emery, Montreal.