CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

GEORGE E. WINTER, THE AUTHORIZED TRUSTEE OF THE PROPERTY OF COAST SHINGLE COMPANY LIMITED (PLAINTIFF) .... APPELLANT;

1927
*May 4, 5.
*May 31.

AND

CAPILANO TIMBER COMPANY LIMITED AND J. A. DEWAR COMPANY LIMITED (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Landlord and tenant—Forfeiture of lease and re-entry—Exercise by lessor, at trial, of option to avoid lease on ground other than that previously claimed—Sufficiency of re-entry.

D. Co. had leased lands to C.S. Co., and, on June 4, 1925, served on it notice of forfeiture for non-payment of rent. C.S. Co. being in financial difficulties, a committee of its creditors was formed to look after its affairs, and this committee negotiated with C.T. Co. for the latter to take a sub-lease, and it was alleged that a sub-lease was agreed upon for three months at a net rental of $2,400. C.S. Co. signed a lease, which C.T. Co. refused to accept. C.T. Co. went into possession on July 9, 1925. On September 28, 1925, C.S. Co. was adjudged bankrupt. On October 1, 1925, C.T. Co. took possession under a lease from D. Co. of that date. An action was brought in the name of the trustee in bankruptcy of C.S. Co. against D. Co. and C.T. Co. for possession. The lease from D. Co. to C.S. Co. contained a proviso for re-entry by the lessor on non-payment of rent, but the question arose whether D. Co.'s. notice of forfeiture was sufficient to terminate the lease and allow it to re-enter without a demand for rent according to the formalities of the common law (which demand was not made), this question depending on whether the lease should be construed as being subject to the *Short Forms of Leases Act,* R.S. B.C., 1924, c. 234.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Held, without deciding the question last mentioned, the defendants were entitled to have the lease from D. Co. to C.S. Co. treated as void, under a covenant in the lease that the lease would cease and become void, at the option of the lessor, if the lessee became insolvent or made an assignment for the benefit of creditors, D. Co. having, at the end of the trial, exercised its option to avoid the lease on this ground. The taking of possession by C.T. Co. on October 1 as tenant of D. Co. was a sufficient re-entry by D. Co. in so far as requisite.

Held, further, that plaintiff could not recover from C.T. Co. the $2,400 above mentioned, either as for rent or by way of compensation for use and occupation, for the following reasons: that C.S. Co. did not profess to be in possession of the foreshore (part of the lands in question) when, at its instance, C.T. Co. entered on July 9; on the contrary, C.S. Co. was then denying the title of its landlord, D. Co., and endeavouring to obtain a lease of the foreshore from the Crown; there was no demise, and possession was never effectively given to C.T. Co. by C.S. Co.; furthermore, C.T. Co. was obliged to pay to D. Co. for its occupation compensation amounting to the said sum of $2,400.

Judgment of the Court of Appeal for British Columbia (38 B.C. Rep. 401) reversed in part.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) in so far as it held (sustaining in this respect the judgment of D. A. McDonald J.) that a certain lease from the defendant J. A. Dewar Company Limited to the Coast Shingle Company Limited was no longer a valid and subsisting lease, but had been effectually terminated through forfeiture and re-entry; and cross-appeal by the defendant Capilano Timber Company Limited from the said judgment in so far as it held (reversing in this respect the judgment of D. A. McDonald J.) that the plaintiff should recover from it the sum of $2,400 for rent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, and the cross-appeal allowed with costs.

Alfred Bull for the appellant.

A. Geoffrion K.C. and *E. F. Newcombe* for the respondents.

(1) 38 B.C. Rep. 401; [1927] 1 W.W.R. 811.

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The judgment of the court was delivered by

MIGNAULT J.—This is an action which one Frank King, who had large interests in the Coast Shingle Company, Limited, was authorized to bring in the name of the trustee in bankruptcy of that company under s. 35 of *The Bankruptcy Act*. The facts which gave rise to the litigation are as follows:

At all material times referred to hereinafter, the J. A. Dewar Co., Limited, was lessee under a lease granted by the Canadian Pacific Railway Company, called the head lease, of certain lands and of a portion of the foreshore on the north side of False Creek in the city of Vancouver, on which a shingle mill and other buildings had been erected by different parties holding under sub-leases granted by the Dewar Company. These parties having failed and their leases having become forfeited, the Dewar Company, on the 21st of June, 1922, leased the premises to the False Creek Shingle Company, Limited.

On the 6th of December, 1923, the False Creek Shingle Company having become insolvent and its lease having been forfeited for non-payment of rent, the Dewar Company leased the lands, and the foreshore so far as it had the right to do so, to the Coast Shingle Company, Limited, which I will call the Coast Company.

In view of the controversy that has arisen, the material provisions of this lease—which was virtually a copy of the lease to the False Creek Shingle Company—should be briefly noted.

This sub-lease covered the full term of the lessor's lease from the Canadian Pacific, and of an extension thereto subsequently made. It recited the lease to the False Creek Shingle Company and the termination of the latter's tenancy for non-payment of rent. It also stated that the lessor had applied to the Department of Lands of British Columbia for leasehold or other title to the foreshore and lands covered by water. The rent was to be $200 per month, payable in advance, and in consideration of this rent the lessor gave the lessee the use and possession of the lands and foreshore in so far as it could do so. The lessor also transferred to the lessee any interest which it had or might have in the buildings, machinery, plant, tools, equip-

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ment and fixtures. It was covenanted that the lessor would use its best endeavours to obtain title to the foreshore or lands covered by water and would lease them to the lessee. The lease contained several covenants, among others the following:—

> Proviso for re-entry by the Lessor on non-payment of rent or non-performance of covenants and this proviso shall extend to and apply to all covenants whether positive or negative.

It was expressly stated that there was no covenant by the lessor for quiet enjoyment, and it was also agreed that in case the lessee should become insolvent, or make an assignment for the benefit of creditors, the lease would, at the option of the lessor, cease and be void and the term would expire.

The Coast Company entered into possession under this lease but soon fell behind in the payment of the rental, several months of which were in arrears when, on June 4, 1925, the Dewar Company caused to be served on the Coast Company a notice of forfeiture of the interest and right of possession of the latter company for non-payment of rent.

About the same time the Coast Company found itself in financial difficulties and called a meeting of its creditors who formed a committee for the purpose of looking after the involved affairs of the company. This committee, of course, had no legal status, but it was expected that the Coast Company would give effect to any measures the committee decided upon. The president of the committee was Mr. Albert Twining. Before the notice of forfeiture of the lease, the Coast Company had ceased to operate the shingle mill, and Mr. Twining and his committee, who were aware of the notice of forfeiture, sought to have the company's lease reinstated by the Dewar Company so that it might grant a sub-lease of the premises.

The chief obstacle to this reinstatement, besides the large amount of rent in arrears, was that the Coast Company, in breach, it is alleged, of its legal obligations under the lease, had itself applied to the provincial government for a lease of the foreshore, without which the property would have but little value. It had been at first assumed

that the Canadian Pacific Rly. Co. had acquired valid title to the foreshore from the Dominion Government, but at the time to which I refer it appears to have been common ground that the title was in the province, and the Dewar Company, as stated in its lease, had applied to the Provincial Government for a lease of this foreshore. In the negotiations entered into with the view of having the lease reinstated, Mr. Dewar on behalf of his company insisted on the withdrawal of the Coast Company's application for the foreshore. This condition was never fulfilled, Mr. King and his associates apparently thinking that their application had a better chance of being granted than that of the Dewar Company.

In the meantime, the creditors' committee endeavoured to sub-lease the property. For that purpose, Mr. Twining entered into negotiations with Mr. Johnson, the general manager of the Capilano Timber Company, which I will call the Capilano Company. It is alleged that the latter agreed to take the property for three months at a rental of $1,000 per month, subject to certain deductions so that the net rental for the three months amounted to $2,400. The Committee of the creditors had, of course, no authority to make such a lease, but apparently it was assumed that the Coast Company would ratify what had been done, and its solicitor prepared a lease signed by it for the three months, which, however, the solicitor of the Capilano Company refused to accept. The latter company entered into possession on the 9th of July, 1925.

Short of taking legal proceedings, Mr. Dewar tried to force the Capilano Company to leave the premises. At his request, the water supply for the mill was shut off and a threat was made, but not carried out, of blocking the road that gave access to the property. Finally the parties got together. It was agreed between their solicitors that the Dewar Company would lease the property to the Capilano Company at the same rental as that charged to the Coast Company, $200 per month, that a demand of assignment for the benefit of creditors would be made to the latter company, that the Capilano Company would pay a premium for the lease of $2,400, which was equal to the

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arrears of rent due by the Coast Company, that the lease and the premium paid would be placed in escrow until the Coast Company had been put in bankruptcy. All this was carried out, and on October 1, 1925, the Capilano Company took possession under a lease from the Dewar Company of that date, a receiving order against the Coast Company which was adjudged bankrupt having been made on the 28th of September. The appellant, Geo. Winter, an authorized trustee in bankruptcy, was named receiver of the estate of the Coast Company.

As I explained in the beginning, this action is taken in the name of the trustee but for the benefit of Frank King. The Dewar Company and the Capilano Company are defendants. The plaintiff asked for a declaration that the Coast Company's lease is a valid and subsisting lease, that the notice of forfeiture of the 4th of June, 1925, is void and of no effect, that the plaintiff is entitled to possession of the premises, that the Capilano Company be ordered to give up possession to the plaintiff and to pay to the latter rent at the rate of $1,000 per month until such possession is given him, or, in the alternative, that the Capilano Company pay damages for wrongfully withholding possession from the plaintiff for the three months' period provided by the *Landlord and Tenant Act.*

The learned trial judge rejected the plaintiff's demand *in toto.* The Court of Appeal granted the plaintiff $2,400 for rental during three months under the arrangement made by the creditors' committee with the Capilano Company, but otherwise dismissed his action. The plaintiff appeals and seeks to obtain a declaration that the Coast Company's lease is valid and subsisting, and has not been legally forfeited, and that its trustee is entitled to possession under that lease. The Capilano Company cross-appeals and prays for relief from the judgment against it in favour of the plaintiff for $2,400 as balance due on rent under the three months' lease.

Many interesting questions are raised by the appeal, the most important being the question whether the Coast Company's lease from the Dewar Company is subject to the *Short Form of Leases Act,* R.S.B.C., 1924, ch. 234. On

this latter question the learned judges of the Court of Appeal were equally divided.

The point, in short, is whether there is in the lease in question a sufficient reference to the Act. If so, the proviso for re-entry, which I have quoted, would be construed according to the second schedule of the Act, and the notice of forfeiture of June 4, 1925, would be sufficient to terminate the lease and allow the lessor to re-enter without a demand of rent according to the formalities of the common law, which demand was not made.

Notwithstanding the interest and importance which attaches to this question, and although Mr. Dewar persisted in saying that he claimed forfeiture only for non-payment of rent, I think the respondents are entitled to have the Coast Company's lease treated as void under the covenant that the lease would cease and become void, at the option of the lessor, if the lessee became insolvent or made an assignment for the benefit of creditors. The Dewar Company, at the end of the trial, exercised its option to avoid the lease on this ground. The taking of possession by the Capilano Company on October 1 as tenant of the Dewar Company is a sufficient re-entry by the latter in so far as requisite. Under these circumstances, it seems unnecessary to express any opinion on the question concerning the *Short Form of Leases Act,* and the main appeal should be dismissed with costs.

As to the cross-appeal, the Coast Company did not profess to be in possession of the foreshore when, at its instance, the Capilano Company entered on the 9th of July, 1925. On the contrary, the Coast Company was then denying the title of its landlord, the Dewar Company, and endeavouring to obtain a lease of the foreshore from the Crown. There was no demise, and possession of the premises was never effectively given to the Capilano Company by the Coast Company. Furthermore, the Capilano Company was obliged to pay to the Dewar Company for its occupation compensation amounting to the sum claimed by the Coast Company. In these circumstances, we think, with great respect, that the claim of the Coast Company, whether as for rent or by way of compensation

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for use and occupation, cannot be maintained and that the cross-appeal must, consequently, succeed.

Appeal dismissed with costs; cross-appeal allowed with costs.

Solicitors for the appellant: *Tupper, Bull & Tupper.*

Solicitor for the respondent Capilano Timber Company Limited: *J. H. Lawson.*

Solicitor for the respondent J. A. Dewar Company Limited: *W. J. Baird.*