Supreme Court of Canada
Bénard v. Hingston, (1917) 55 S.C.R. 17
Date: 1917-10-09

Joseph Elie Bénard (Plaintiff) Appellant;

and

Lady Margaret Hingston (Defendant) Respondent.

1917: May 31; 1917: October 9.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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

Landlord and tenant—Lease—Liability of landlord—Repairs—Damages—Flood—Vis major—Art. 1614 C.C.

The appellant was about to go into occupation of premises leased by him from respondent, when water inundated the basement, and a former law-suit was in part decided in the appellant's favour. The respondent executed some extensive repairs to the building, according to advice from experts, in order to prevent similar troubles and appellant took possession of the premises. In the spring following, a second flood occurred, causing considerable damage, for which appellant took action against respondent, on the grounds that the respondent's contrivances for keeping away the water were defective and that the respondent was under obligation to protect him from river flooding.

The judgment appealed from (Q.R. 25 K.B. 512), reversing the judgment of the Superior Court and dismissing the appellant's action, was affirmed.

Per Davies J.—It is not necessary, to bring an event within the scope and meaning of the words *vis major* or the Act of God, that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected.

Per Anglin J.—Upon the evidence, appellant's action did not fall within art. 1614 C.C., as he is presumed to have been willing to take the premises in the condition in which they were after the repairs had been made with the risk of further trouble from inundation of which he was or should have been aware; or if the flood was so extraordinary that it could not have been anticipated, the defence of *vis major* should prevail.

APPEAL from the judgment of the Court of King's Bench, appeal side[1], reversing the judgment of the

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Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The circumstances of the case are fully stated in the above head-note and in the judgments now reported.

[1] Q.R. 25 K.B. 512.

Arthur Brossard K.C. and Ed. Fabre-Surveyer K.C. for the appellant.

P. B. Mignault K.C. and L. P. Crépeau K.C. for the respondent.

THE CHIEF JUSTICE.—I am to dismiss the appeal with costs. The cross-appeal was abandoned.

DAVIES J.—I agree that this appeal should be dismissed.

I do not think that art. 1614 of the Civil Code covers the case of damages arising solely from *vis major* and the case before us is such a one.

Mr. Surveyer's contention was that the landlord's liability to the tenant under art. 1614 extends to "all defects and faults in the thing leased" that skill and science could provide against.

But that contention should only be accepted subject to the limitation that it does not extend to damages arising solely from *vis major* or the act of God.

As a matter of fact there was no defect or fault in the premises leased within the meaning of those words of the art 1614.

The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and meaning of the words *vis major* or the act of God, that such an event should never have happened before; it is sufficient

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that its happening could not have been reasonably expected. That is the true test under the English authorities and on principle. *Nitro Phosphate Chemical Co.* v. *London & St. Katharine Docks Co.*[2].

The only additional precaution which it is suggested the landlord should have taken against such an unexpected flood as that which occurred in 1913, I agree with Mr. Justice Cross, even if practicable would certainly have been inefficient as against such a flood.

[2] 9 Ch. D. 503.

IDINGTON J.—This appeal should be dismissed for the reasons assigned in the judgment appealed from and in the notes of the Honourable Justices Cross and Carroll in support thereof.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—Since the defendant (respondent) has acquiesced in the judgment allowing a diminution in the plaintiff's rental, the only question now before us is as to the right of the latter to recover damages for injuries sustained from the flooding of the leased premises in the spring of 1913. The evidence, in my opinion, establishes that with full knowledge and appreciation of the danger of flooding, to which the situation of the property unavoidably exposed it, and of the means which the defendant had taken to prevent, as far as possible, the consequences of inundation due to the waters of the St. Lawrence overflowing its banks, the plaintiff accepted the premises as having been put in the best possible condition and as meeting all requirements on which he was entitled to insist as a tenant. He had himself obtained

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the report of an engineer as to what could and should be done to protect the basement of the building, as far as possible, from being flooded, yet he neither asked for nor suggested any precautionary measures greater or other than those which the defendant had taken. She had employed an architect, an engineer and a contractor, all of the highest reputation, and had faithfully carried out their recommendations

I agree with Mr. Justice Cross that the only additional precaution suggested at the trial was probably impracticable and that, however serviceable it might have been had the rise of the river been less, it would not have availed to save the premises from being flooded in the inundation of 1913. The plaintiff's claim so far as it is based on defects in the construction of the building or in the contrivances adopted for keeping out and taking care of the water, is unfounded. Under the circumstances stated I also agree with Mr. Justice Carroll that the case does not fall within art. 1614 C.C., the lessee being presumed to have been willing to take the premises in the condition in which they were after the repairs of 1912 had been made, with the risk of further trouble from inundation, of which he was or should have been aware. The authorities cited fully warrant this conclusion. Dalloz, Receuil periodique 1900, 1, 507; Dalloz 1849, 5, 272; Guillouard, Louage, pp. 137 & seq;

Agne, Code et Manuel des Propriétaires, (2éd.) 295; Planiol, 2, p. 559, No. 1688; Pothier, Louage No. 113; 25 Laurent, No.117.

If on the other hand the flood of 1913 was so extraordinary that it would not be reasonable to hold that the plaintiff, notwithstanding his undoubted knowledge of local conditions, should have anticipated it and should therefore be deemed to have assumed its

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attendant risks, it would seem impossible to escape the alternative conclusion that the defence of *vis major* should prevail.

Appeal dismissed with costs.

Solicitors for the appellant: Brossard & Pepin.

Solicitors for the respondent: Elliott, David & Malhiot.