GEORGE MODDE ..... APPELLANT;

AND

DOMINION GLASS COMPANY LIMITED and RALPH W. TAYLOR, JR. ..... RESPONDENTS.

1967

*May 18
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Oil and gas—Lease—Delay rental provision—Failure to pay rental on time —Subsequent acceptance of rental payment—Application for order declaring void and vacating registration of lease dismissed—Waiver of default—The Gas and Oil Leases Act, 1962-63 (Ont.), c. 49.

By an agreement of lease dated August 5, 1955, the appellant leased certain lands to the respondent company for the purpose of carrying on operations regarding crude oil and natural gas and other related hydrocarbons. Paragraph 1 of the agreement of lease contained a provision for the termination of the lease in the event that the lessee did not exercise his privilege of either commencing operations within one year or paying delay rentals in lieu thereof on the 5th of August of each year, in which case the time within which operations could be commenced was extended for a further year. The lessee company paid the rental in lieu of drilling until the end of the rental year 1961-62.

The lessee assigned the lease to one T by an assignment made on May 31, 1961. No drilling took place in the rental year 1962-63 and no rental was paid in lieu of drilling until some day in October or November of 1962 when T paid to the lessor the sum of $100, the payment being made in the form of a cheque with an attached counterfoil. The lessor cashed the cheque and signed and returned the counterfoil. In the subsequent rental year, no drilling was commenced and no rental in lieu of drilling was tendered until September 23, 1963, when a cheque for $100 was forwarded to the lessor. This cheque was cashed by the lessor although he did not sign or return the rental receipt acknowledgment attached thereto.

Subsequently, the lessor applied to a County Court Judge for an order under the provisions of *The Gas and Oil Leases Act,* 1962-63 (Ont.), c. 49, declaring void and vacating the registration of the oil and gas lease dated August 5, 1955. The County Court Judge dismissed the application and on appeal to the Court of Appeal his judgment was upheld. With leave, an appeal was then brought to this Court.

Held: The appeal should be dismissed.

The County Court Judge was exercising a statutory jurisdiction only, and apart from the provisions of *The Gas and Oil Leases Act* he had no jurisdiction to make the declaration requested. Under the provisions of s. 2(1)(*a*) of the Act the lessor's right to make an application is

* PRESENT: Cartwright, Martland, Judson, Hall and Spence JJ.

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confined to the situation where the lessee has (1) made default under the terms of an oil or gas lease in that he has failed to commence to drill a well, and (2) failed to pay rentals in lieu thereof. In the present case, the lessee, *i.e.*, the assignee T had failed to commence to drill a well but on March 12, 1964, when the appellant applied for the order, the lessee had not failed to pay the rent in lieu of drilling. In fact, he had paid on September 23, 1963, and it had been accepted. This circumstance was sufficient to require the County Court Judge to dismiss the application declaring the lease void.

As held by the Court below, if a judge under s. 6 of the Act is entitled to take into account a payment made and accepted after the making of the application, *a fortiori* he is entitled to take into account one made before. Section 6 gives the clearest indication that a failure to pay rent in lieu of drilling is, under the statute, considered to be a default and, therefore, is one which may be relieved against even after the application has been filed.

Canadian Superior Oil of California, Ltd. v. Kanstrup et al., [1965] S.C.R. 92; *East Crest Oil Co. v. Strohschein*, [1952] 2 D.L.R. 432, considered.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from an order of Beardall Co.Ct.J., whereby a lessor's application made under the provisions of *The Gas and Oil Leases Act*, 1962-63 (Ont.), c. 49, was dismissed. Appeal dismissed.

C. M. V. Pensa, for the appellant.

C. E. Woolcombe, for the respondent, R. W. Taylor, Jr.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on March 2, 1965. By that judgment the Court of Appeal dismissed an appeal from the order of His Honour Judge W. B. Beardall made on June 19, 1964, whereby His Honour had dismissed an application made by the lessor under the provisions of *The Gas and Oil Leases Act*, 1962-63 (Ont.), c. 49.

The appellant George Modde had granted to the Dominion Glass Company Limited an interest in the lands in question by a document dated August 5, 1955, and entitled "Agreement of Lease". This document is in a well-recognized form for an oil and gas lease. The habendum read, in part:

TO HAVE AND TO HOLD the said lands for and during the term of 20 years from the date hereof and as long thereafter as crude oil and natural gas and related hydrocarbons (all of which are hereinafter called "the said substances") or any of them are produced from the said lands or as the Lessee conducts operations on the said land or any part thereof for the recovery of the same, with the exclusive right (subject to a reasonable compensation to be paid to the Lessor as hereinafter provided) to make geological surveys and otherwise to prospect and explore and to drill for, recover, remove and/or sell all the said substances . . . .

Clause 1 of the lease read, in part:

1. The Lessee agrees that if operations for drilling a well for the said substances or any of them shall not be commenced on the said land within one year from the date hereof, this lease shall terminate unless within such year the Lessee shall pay or tender to the Lessor or shall pay in accordance with this lease a sum equivalent to $1.00 per acre for the said land, which shall operate as rental and which shall extend for one year the time within which such operations may be commenced. In like manner the duration of this lease may be extended from year to year by commencement of operations or by payment or tender of rentals as follows: for the third and fourth years sum equivalent to $1.00 per acre of the said land per annum, for the fifth and sixth years equivalent to $1.00 per acre of the said land per annum and thereafter sum equivalent to $1.00 per acre of the said land per annum . . . .

The lessee Dominion Glass Company Limited paid the rental in lieu of drilling until the end of the rental year 1961-62. The rental year commenced on the 5th of August annually.

The lessee assigned the lease to Ralph W. Taylor, Jr., by an assignment made on May 31, 1961. No drilling took place in the rental year 1962-63 and no rental was paid in lieu of drilling until some day in October or November of 1962 when the assignee Taylor paid to the lessor the sum of $100 being at the rate of $1 per acre, the payment being made in the form of a cheque with a counterfoil attached bearing the instructions "Please detach, sign and return to Brady, Findlay and Quillian Ltd., P.O. Box 367, Chatham, Ontario". The lessee cashed that cheque, signed the said counterfoil and returned the same.

In the subsequent rental year, no drilling was commenced and no rental in lieu of drilling was tendered until September 23, 1963, when the same firm on behalf of the assignee issued its cheque in favour of the lessor for $100 and forwarded it to the lessor with a similar counterfoil attached.

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The lessor took the cheque and cashed the same but he did not sign and return the rental receipt acknowledgment attached thereto.

By application verified by an affidavit sworn on March 12, 1964, the appellant applied to the County Court Judge of the County of Kent for an order under the provisions of the said statute declaring void and vacating the registration of the said oil and gas lease dated August 5, 1955.

It must be noted that this statute is one in special and rather unusual form and that counsel for the appellant was not able to indicate that its counterpart existed elsewhere in Canada. The learned County Court Judge was exercising a statutory jurisdiction only, and apart from the provisions of *The Gas and Oil Leases Act* he had no jurisdiction to make the declaration requested. The appellant would have been left to his right to proceed by action in the Supreme Court of Ontario, the jurisdiction of the County Court Judge being limited, by the provisions of *The County Courts Act*, R.S.O. 1960, c. 76, to cases where the value of the real property does not exceed $1,000.

The jurisdiction of the County Court Judge to consider the application is set out in s. 2(1) of *The Gas and Oil Leases Act*, which provides:

> 2. (1) Where the lessor of any land alleges,
>
> (*a*) that a lessee has made default under the terms of a gas or oil lease affecting the land in that he has failed to commence to drill a well for natural gas or oil and has failed to pay rentals in lieu thereof; or
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> (*b*) that a lessee has made default under the terms of a gas or oil lease affecting the land, other than a default specified in clause (*a*), and
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> (i) that the default has continued for a period of two years, or
>
> (ii) that, the default having continued for a period of less than two years, the lessor has given notice in writing to the lessee specifying the default alleged and requiring the lessee to cure the default within thirty days of the giving of the notice, and that the lessee has not cured the default within such thirty days, the lessor may apply, upon affidavit, to a judge for an order declaring the lease void and, if the lease or any assignment or transfer thereof is registered, vacating every such registration.

Therefore, under the provisions of the said s. 2(1)(*a*) the lessor's right to make an application is confined to the situa-

tion where the lessee has (1) made default under the terms of an oil or gas lease in that he has failed to commence to drill a well, and (2) failed to pay rentals in lieu thereof.

In the present case, the lessee, *i.e.*, the assignee Taylor, had certainly failed to commence to drill a well but on March 12, 1964, when the appellant applied for the order of the County Court Judge, the lessee had not failed to pay the rent in lieu of drilling. In fact, he had paid on September 23, 1963, and it had been accepted. In my view, this circumstance was sufficient to require the County Court Judge to dismiss the application declaring the lease void. This is sufficient to dispose of this appeal.

Roach J.A. giving the judgment for the Court of Appeal, said:

> We are of the opinion that the learned trial judge was right in dismissing that application for the reasons stated by him, *viz.*, that the payment, though late, having been accepted and retained by the lessor, that amounted to a consent by him to waive strict compliance with the lease as far as the delayed rental provision for that year was concerned.

That conclusion brings up the question dealt with in many cases in this Court, in the Courts in the western provinces, and the United States as to whether the doctrine of waiver applies in the case of these oil and gas leases. Such decisions hold that there being no duty upon the lessee to either drill or pay rental unless he elects to do so, there was no breach by the lessee of any obligation arising under the lease and therefore there was no breach which the lessor could waive by the acceptance of the rental after its due period: *Canadian Superior Oil of California, Ltd. v. Kanstrup et al.*[1], where, however, the default took place after the end of a fixed term while here it took place during the course of the fixed term; *East Crest Oil Co. v. Strohschein*[2], adopted by this Court *per* Martland J. in the aforesaid *Canadian Superior Oil* case at p. 105.

The appellant submits that under such a view there was in the present case no default and therefore there could be no waiver of default, despite the fact that the failure to pay the rent in lieu of drilling occurred here during the currency of the fixed term of the lease.

[1] [1965] S.C.R. 92. [2] [1952] 2 D.L.R. 432, 4 W.W.R. (N.S.) 553.

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I repeat again, however, that the jurisdiction of the learned County Court Judge herein was solely statutory. The statute, *i.e., The Gas and Oil Leases Act,* specifically refers to the failure to drill or to pay rent in lieu thereof as a default and it was in respect of such an alleged default that the appellant's application was made under that Act. If it is a default then, of course, it may be waived and, in my opinion, the learned County Court Judge was correct in his view that it had been waived. I am confirmed in that view, as were both the learned County Court Judge and the Court of Appeal, by s. 6, of *The Gas and Oil Leases Act* which provides, in part, as follows:

> 6. The judge, upon the hearing of the application, shall not take into account, [among other things]
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> . . .
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> (*b*) any rentals or other remuneration tendered after the making of the application;
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> unless [the same] is agreed to or accepted by the applicant.

I adopt herein the words of Roach J.A., giving judgment of the Court of Appeal, when he said:

> If a judge under that section is entitled to take into account a payment made and accepted after the making of the application, *a fortiori* he is entitled to take into account one made before.

I add that certainly s. 6 gives the clearest indication that a failure to pay rent in lieu of drilling is, under the statute, considered to be a default and, therefore, is one which may be relieved against even after the application had been filed.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Giffen & Pensa, London.

Solicitors for the respondent, R. W. Taylor, Jr.: Burgess & Irwin, Wallaceburg.