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FREDERICK GEORGE HAACK AND FRANK BERNARD HAACK BY HIS NEXT FRIEND JOHN HAACK (PLAINTIFFS) } APPELLANTS; *Feb. 10, 11. *April 20.

AND

EDWARD A. MARTIN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Damages—Quantum—Wrongful eviction of lessees of farm—Liability of lessor—Measure of damages—Loss of unexpired term—Matters to be considered in assessing damages.

There is no special rule in regard to damages recoverable by a wrongfully evicted lessee; the case is governed by the general rule applicable to all breaches of contract, namely, that the party wronged is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. Compensation to the lessee will not be confined to the value of the unexpired term, but will include all loss naturally resulting from the eviction.

The impossibility of assessing with mathematical accuracy the damages to a wrongfully evicted lessee for the loss of the unexpired term of a farm lease does not relieve the lessor from liability for such damages; and the court may award an amount though it may be to some extent speculative. The actual results from working the land between the date of the eviction and the time of the trial should be taken into account. Estimates of damages as to future years should be based on the assumption, not of unusual, but of normal, conditions as they have existed in the past.

Lessees of farm property sued for damages for wrongful eviction. They were awarded at trial, ([1925] 3 W.W.R. 769), $1,217 for summer-fallowing done by them, and $22,500 for loss of the unexpired term (about five years). The Court of Appeal, Sask. (21 Sask. L.R. 19; ([1926] 3 W.W.R. 11) reduced the $22,500 to $2,500.

Held, on the evidence, and having regard to the actual results from working the land between the date of eviction and time of trial, the average yield for preceding years, the conditions in the district, and the nature of the land (and taking into account the cost of operating, marketing, etc., and other circumstances), that the allowance by the Court of Appeal was insufficient; but that the allowance by the trial judge, who had not given due regard to the uncertainty of the price of wheat or the possibility of the lessees earning on another farm, was excessive; and that the damages should be $15,000, covering both the summer-fallowing and the loss of the unexpired term.

APPEAL by the plaintiffs from the judgment of the Court of Appeal of Saskatchewan (1) reducing the amount of damages awarded to the plaintiffs by the trial judge, Bigelow J. (2), from $23,717 to $3,717.

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

(1) 21 Sask. L.R. 19; [1926] 3 W.W.R. 11.

(2) [1925] 3 W.W.R. 769.

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The plaintiffs were lessees from the defendant of certain farm lands, and the action was brought to recover damages for alleged wrongful dispossession, in breach of the covenant in the lease for quiet enjoyment. There were a number of issues raised in the courts below, but the only question before this Court was as to the quantum of damages.

The trial judge allowed the plaintiffs $1,217 in respect of certain summer-fallowing that they had done on the land, and $22,500 for loss of the unexpired term. The Court of Appeal did not disturb the allowance for summer-fallowing, but reduced the amount allowed for loss of the unexpired term to $2,500. The plaintiffs appealed against this reduction. The material facts bearing on the question are sufficiently stated in the judgment now reported.

P. M. Anderson K.C. for the appellants.

J. F. Bryant for the respondent.

The judgment of the court was delivered by

RINFRET J.—This case comes to us from the Court of Appeal for Saskatchewan. It arises out of the breach by the respondent Martin of a covenant for quiet enjoyment, in a lease of a certain tract of land in the Milestone district of the province of Saskatchewan to the appellants, Haack Brothers. The lease was dated the 26th February, 1924, and was made for six years on the basis of a yearly rental of a share of the crop.

In October, 1924, the Canada Trust Company, claiming through or under the respondent, interrupted and disturbed the appellants in their possession and evicted them from the land. There was no justification whatever for the eviction. The respondent contended that the appellants had not farmed or summer-fallowed the lands properly and, in fact, filed a counter-claim based upon these complaints; but they were held groundless by the trial judge, who found that the appellants had farmed and summer-fallowed the lands in a reasonably good and husband-like manner. These findings were concurred in by the Court of Appeal.

Both courts were of opinion that the plaintiffs were entitled to damages for the disturbance in their possession; but they differed on the quantum of damages to be awarded.

The trial judge held that the appellants should recover $2,717 for the summer-fallow done by them on the property. As they had already been paid $1,500, they were allowed the balance of $1,217. The Court of Appeal confirmed this allowance.

But the trial judge assessed the damages of the appellants through the loss by them of the unexpired term of their lease at $22,500. The Court of Appeal reduced that amount to $2,500.

The appeal is only as to this quantum of damages, and there is no cross-appeal. The learned trial judge thought that the plaintiffs were entitled to the value of the unexpired term and that such value was to be arrived at in this way:

> The rental value to the plaintiffs was two-thirds of the crop, and to estimate that we have to consider the cost of working the farm, and the probable profits. The average crop for the last ten years was twenty bushels to the acre; two-thirds of the land would be put in crop each year; 1,280 acres at 20 bushels to the acre would be 25,600 bushels of wheat that would be grown on that land in an average year; at a dollar a bushel that would be worth $25,600; two-thirds of that would be $16,167. Deduct $8,000, the outside cost of operating, would represent a profit of $8,167. The general evidence that a reasonable value of the unexpired term would be $1,500 a section, or $4,500 for the land in question per year, would seem well within the mark. That amount for five years would be $22,500.

Mr. Justice McKay, speaking for the Court of Appeal, said that he could not agree with this valuation. According to him,

> this method of arriving at the value of the unexpired term to the plaintiffs depends upon too many contingencies, upon which the success of raising a crop rests. There is always the risk of drought, hail, and frost and other things, which cause crop failures. * * * There is also the uncertainty of the price of wheat to be considered. * * * It also assumes that plaintiffs cannot do any other work during the unexpired term of the lease.

Because, however, these damages could not be assessed with certainty was no reason, in his opinion, why the appellants should not be entitled to substantial damages. Under all the circumstances of the case, he did "not think it unreasonable to allow plaintiffs $2,500 damages for the unexpired term, in addition to the $1,217, altogether amounting to $3,717."

Against this variation of the judgment of the trial court, the plaintiffs now appeal to the Supreme Court of Canada,

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asking the restoration of the amount awarded by the trial judge, or such other amount as the Supreme Court will deem proper.

There is no special rule in regard to damages recoverable by a wrongfully evicted lessee. The case is governed by the general rule applicable to all breaches of contract, and laid down as follows by Parke B. in *Robinson* v. *Harman* (1).

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This was quoted with approval as being "a rule of good sense" in *Lock* v. *Furze* (2), where the plaintiffs sued upon the covenant for quiet enjoyment contained in a void lease. There, Channell B. (p. 452) said:

> I take the indisputable rule of law to be, that, where a man enters into a contract, and fails to perform it, he must make compensation to the extent of the injury sustained by the person with whom he has contracted.

In the case of a lease, the compensation will not be confined to the value of the term, but will include all loss naturally resulting from the eviction. Such is the effect of the judgment in *Grosvenor Hotel Company* v. *Hamilton* (3), where the lessee claimed damages as the consequence of a nuisance caused by his lessor. Vibration resulting from the working of engines on land adjacent to the demised premises had damaged the house rented to the lessee to such an extent that the premises became useless to him and he was obliged to remove his business to another house. The lessor was held liable in damages on the ground that the landlord could not defeat his own grant contained in the lease, and Lindley L.J. said (p. 840):

> There being a good cause of action, the question of damages arises. It is contended for the plaintiffs that the damages consist solely in the loss of the term. If the term were of value, the defendant could recover its value by way of damages; but to say that the damages are confined to the value of the term is erroneous in point of law. The damages are whatever loss results to the injured party as a natural consequence of the wrongful act of the defendant.

The difficulty, however, lies in ascertaining the true extent of the pecuniary loss naturally flowing from the breach.

(1) (1848) 1 Ex. 850, at p. 855.

(2) (1866) L.R. 1 C.P. 441, at p. 451.

(3) [1894] 2 Q.B. 836.

With regard to the first year after the eviction, there are in the record, as will appear presently, sufficient elements to estimate the loss with a reasonable degree of certainty. It is not so for the subsequent years, as to which the exact data are of course lacking and the evidence is somewhat conjectural. The average yield since 1910 of the lands rented, and the normal cost of production and of marketing are known. It is established that the land "is away better," and would ordinarily produce per acre five bushels more, than the "average land." Experience has shown that failures are unusual in that district and that none have occurred for the last fifteen years. Such evidence—which is uncontradicted—goes towards extenuating some of the possibilities and of the contingencies dreaded by the Court of Appeal. It is not unreasonable to assume that the same land, year in and year out, will produce the same results. Estimates must be based on the assumption, not of unusual, but of normal, conditions as they have existed in the past. Otherwise the ordinary conduct of business would be a practical impossibility.

When the respondent and the appellants in this case got together on the 26th day of February, 1924, and made the agreement whereby the respondent leased his lands and the appellants promised to pay the yearly rental of one-third of the crop, no doubt the crop each party anticipated was the average crop grown on these lands during the previous years; and the value to each of them of such average crop may reasonably be considered as representing the damages within the contemplation of the parties, if for some reason they happened to be deprived of their share or portion of the yearly rental. Such therefore, in this case, is the measure whereby the damages must be computed, in addition to any actual loss or expense that may be established.

The learned trial judge did take into consideration the average crop for the last ten years, the total absence of failures during a still longer period of years, the cost of operating the farm and of marketing the grain, and he estimated thereby the yearly profit which that would represent for the five years to run of the unexpired lease. He did not however allow any offset for the uncertainty of the

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price of wheat, a very material element in the computation of damages of this character. Neither did he consider the possibility of the appellants earning on another farm. Although, during the interval between the eviction and the trial, they were "unable to get a similar lease of as good land in the Milestone district," it cannot be expected that such a condition would be likely to persist during the remaining four years. They had been set free and they could work elsewhere. They may possibly have secured a lease yielding benefits equal to—if not higher than—those which they could have derived from the cancelled lease. In either case, their loss after the first year would be negligible, if not wholly eliminated.

It must not be forgotten also that any amount awarded to the appellants is to be paid at once and can be put to profitable use immediately, while the money earned on the farm would be available only by fractions and from year to year.

We agree therefore with the Court of Appeal that the award made by the trial judge was excessive and could not be maintained. But the appellants have also satisfied us that the allowance of $2,500 made by the Court of Appeal for the whole of the unexpired term is utterly insufficient.

The eviction of the appellants occurred in October, 1924. The trial took place in November and December, 1925. Evidence was given of what actually happened in 1925. We know what the crop was and that the profit derived from the lands by those who replaced the appellants was close to $12,000.

In *Findlay* v. *Howard* (1), this Court held that

> in an action for damages for loss of future profits arising out of a wrongful breach of partnership 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 the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.

We see no reason why this rule should not apply here. If the appellants had not been dispossessed, they would have had the benefit of the profits of 1925. It may be that they would not have done just as well as their successors. They may not have had all the equipment required for a

(1) (1919) 58 S.C.R. 516.

two thousand acre farm. But all allegations of improper farming made against them were disbelieved by both courts. They were held to have shown themselves competent farmers. Nevertheless, in the computation of the damages allowed by either court, the actual results for the year 1925 appear to have been altogether disregarded. There was nothing speculative about them. The appellants were entitled to ask that these results be taken into account in ascertaining their damages, for the holding was that during that time they were unable to earn anything elsewhere, although they used all reasonable efforts to get other land and, in the words of the trial judge, they "did everything possible to minimize the loss." For this reason the judgment of the Court of Appeal must be modified. Of course, the year 1925 was admittedly an exceptional year and could not be set up as a standard. But it shows conclusively to our mind that the amount allowed by the Court of Appeal must be materially increased. It is obviously impossible to assess the damages "with mathematical accuracy," but that is not necessary, and such impossibility "does not relieve the wrongdoer of the necessity of paying for his breach of contract" (*Chaplin* v. *Hicks* (1)).

Any amount awarded must be to some extent speculative. We must proceed "largely as a jury." We have, however, the benefit of the calculations made by the learned trial judge and by the Court of Appeal. If we apply to their figures the corrections which, in our view, are made necessary for the reasons which we have given, we think that an amount of $15,000, covering both the summer-fallowing and the loss of the unexpired term is justified upon the evidence in the record. This is, of course, without prejudice to the amount allowed on the counter-claim with which we are not concerned. It also leaves untouched the order as to costs and as to the right to set-off made by the Court of Appeal.

The appeal should be allowed to the extent indicated, and the appellants should have their costs before this Court. *Appeal allowed, to extent indicated, with costs.*

Solicitors for the appellants: *Anderson, Bayne & Bigelow.*
Solicitors for the respondent: *Bryant & Burrows.*

(1) [1911] 2 K.B. 786.