2010 ONSC 1998
Ontario Superior Court of Justice

London (City) v. Ordinal

2010 CarswellOnt 1972, 2010 ONSC 1998, 100 L.C.R. 113, 187 A.C.W.S. (3d) 446, 71 M.P.L.R. (4th) 82, 93 R.P.R. (4th) 301

The Corporation of the City of London, Applicant and Robert Ordinal, Respondent

T.A. Heeney J.

Heard: March 31, 2010
Judgment: April 6, 2010
Docket: 448-10

Counsel: G. Belch, D. Cribbs, for Applicant
J. Hoffer, L. Lake, for Respondent

Subject: Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Real property --- Expropriation — Power to expropriate — Statutory power of municipality — Miscellaneous

Residential tenant — Landlord's property was expropriated pursuant to Expropriations Act (EA), effective November 27, 2009, for construction of $12 million overpass — On December 11, 2009, tenant was served notice that city required possession by March 13, 2010 — Tenant refused to vacate before expiry of his fixed-term lease, which expired on November 30, 2010 — City brought application for warrant under s. 40 of EA to evict tenant — Application granted — Warrant issued directing sheriff to put down tenant's opposition to city taking possession, but warrant was not to be exercised for 15 days — Lease was deemed to be frustrated, pursuant to s. 34(2) of EA, as of date of expropriation, November 27, 2009 — Since both lease and landlord and tenant relationship were extinguished, there was no need for city to resort to Residential Tenancies Act, 2006 (RTA) to terminate tenancy — Since tenant's lease was frustrated by operation of law, and since his leasehold interest was, in effect, expropriated by city, tenant no longer had any interest in land — Tenant had claim against compensation and nothing more — Therefore, it was not necessary for city to seek

termination of his tenancy pursuant to RTA, as tenancy no longer existed — EA and RTA were not in conflict.

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Frustration

Expropriation of premises — Landlord's property was expropriated pursuant to Expropriations Act (EA), effective November 27, 2009, for construction of $12 million overpass — On December 11, 2009, tenant was served notice that city required possession by March 13, 2010 — Tenant refused to vacate before expiry of his fixed-term lease, which expired on November 30, 2010 — City brought application for warrant under s. 40 of EA to evict tenant — Application granted — Warrant issued directing sheriff to put down tenant's opposition to city taking possession, but warrant was not to be exercised for 15 days — Lease was deemed to be frustrated, pursuant to s. 34(2) of EA, as of date of expropriation, November 27, 2009 — Since both lease and landlord and tenant relationship were extinguished, there was no need for city to resort to Residential Tenancies Act, 2006 (RTA) to terminate tenancy — Since tenant's lease was frustrated by operation of law, and since his leasehold interest was, in effect, expropriated by city, tenant no longer had any interest in land — Tenant had claim against compensation and nothing more — Therefore, it was not necessary for city to seek termination of his tenancy pursuant to RTA, as tenancy no longer existed — EA and RTA were not in conflict.

Real property --- Landlord and tenant — Residential tenancies — Relationship of landlord and tenant

Expropriation of premises — Landlord's property was expropriated pursuant to Expropriations Act (EA), effective November 27, 2009, for construction of $12 million overpass — On December 11, 2009, tenant was served notice that city required possession by March 13, 2010 — Tenant refused to vacate before expiry of his fixed-term lease, which expired on November 30, 2010 — Pursuant to instructions from city, tenant paid December rent and January rent to city treasurer, which were both cashed — City issued cheque refunding two months' rent and returned two other post-dated cheques — Tenant refused to accept refund, and returned cheques to city — City brought application for warrant under s. 40 of EA to evict tenant — Application granted — Warrant issued directing sheriff to put down tenant's opposition to city taking possession, but warrant was not to be exercised for 15 days — Judge rejected tenant's assertion that payment of rent, and city's acceptance of that rent, gave rise to oral month-to-month tenancy agreement between city and tenant which could only be terminated pursuant to Residential Tenancies Act, 2006 (RTA) — Whereas definition of "landlord" in s. 2(1) of RTA includes person "who permits occupancy of a rental unit", city did not "permit" tenant to remain in possession, rather it had no choice because under terms of EA, it could not obtain possession until city gave at least three months notice, thus city had no right to either permit or prohibit possession until March 13, 2010 — "Tenancy

agreement" is defined in s. 2(1) of RTA as "a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit", but here there was no written, oral or implied agreement to rent on month to month basis, rather, rent was paid and received within expropriation process, pursuant to which premises were to be vacated and demolished — There was nothing unreasonable about city receiving rent following expropriation but before possession date — Receipt of rent did not imply creation of new tenancy — Tenant's leasehold interest in land was extinguished as of date of expropriation, November 27, 2009 — Since tenant remained in possession thereafter, tenancy at will came into being, which was subject to termination at will of city, which occurred as of March 13, 2010, when city was entitled to possession pursuant to EA.

Table of Authorities

Cases considered by *T.A. Heeney J.*:

Hubbard v. Hamburgh (1993), 16 O.R. (3d) 368, 1993 CarswellOnt 1094 (Ont. Gen. Div.) — referred to

Rosenblood v. Plastic & Allied Building Products Ltd. (1969), 9 D.L.R. (3d) 123, [1970] 1 O.R. 611, 1969 CarswellOnt 303 (Ont. C.A.) — followed

Toronto (City) v. Bernardo (2004), 1 M.P.L.R. (4th) 29, 9 C.E.L.R. (3d) 146, 84 L.C.R. 98, 2004 CarswellOnt 3205 (Ont. S.C.J.) — referred to

Statutes considered:

Expropriations Act, R.S.O. 1990, c. E.26
Generally — referred to

s. 34(2) — considered

s. 35 — considered

s. 39 — referred to

s. 39(2) — considered

s. 40 — referred to

Residential Tenancies Act, 2006, S.O. 2006, c. 17
Generally — referred to

s. 2(1) "landlord" (a) — considered

s. 2(1) "tenancy agreement" — considered

s. 19 — considered

s. 37(1) — considered

APPLICATION by city for warrant pursuant s. 40 of *Expropriations Act* to evict tenant.

***T.A. Heeney J.*:**

1 The level railway crossing at the intersection of Hale and Trafalgar Streets in London has been a major traffic bottleneck for many years, but the cost of rectifying it has been financially prohibitive. However, with the availability of infrastructure funding from the federal and provincial governments, the Applicant ("the City") has been able to put together a package whereby the problem can be rectified through the construction of a large overpass at a cost of about $12 million, of which the City will only have to pay about 1/6th. The project must be completed by March, 2011 in order for full infrastructure funding to be available.

2 Given the size of the project, and the need for the construction of approaches to the overpass, a number of residential properties had to be purchased or expropriated, and all of that has been done. However, the Respondent, by his own admission, stands in the way of the project. Despite the expropriation of the rented house in which he lives, he refuses to vacate, and insists that the City cannot get possession of his property except pursuant to the provisions of the *Residential Tenancies Act, 2006* ("the RTA"). He claims the right to remain in possession of the property until the end of his fixed-term lease, which expires November 30, 2010.

3 Mr. Hoffer, for the Respondent, concedes that the rented property, located at 1377 Trafalger St., has been validly expropriated by the City from its owner, Margaret McLeod, pursuant to the provisions of the *Expropriations Act*, R.S.O. 1990, c. E.26 ("the Act"). The effective date of the expropriation was November 27, 2009. Proper notice has been given under s. 39 of the Act that the City requires possession of the property by March 13, 2010. This was served, on December 11, 2009, on both the registered owner and the Respondent, although the Act does not require service on a tenant.

4 Mr. Hoffer also concedes that the Respondent is resisting and opposing the taking of possession of the expropriated property by the City. Thus, the preconditions for a warrant to be issued under s. 40 of the Act have been met. This warrant would authorize the sheriff "to put down the resistance or opposition". In plain terms, this amounts to a warrant to evict the Respondent from the property. It is precisely such a warrant that Mr. Belch, for the City, seeks in this application.

5 Two arguments are raised on behalf of the Respondent in opposition to this application. First, despite the fact that the Act expressly provides that a lease is "deemed to be frustrated" by an expropriation, and that the RTA expressly states that the doctrine of frustration of contract applies with respect to tenancy agreements, Mr. Hoffer submits that only leases that are frustrated at common law can be terminated in this way. Deemed statutory frustration, he submits, is not applicable to a lease under the RTA. Thus, he submits that the provisions of the RTA continue to apply. Since the two acts are inconsistent with each other, and since both acts contain provisions which state that their terms prevail over all other legislation, he asks me to find that his client's rights under the RTA are paramount. Thus, he submits that the Respondent cannot be evicted unless some ground for eviction can be established under the RTA.

6 If that argument fails, Mr. Hoffer submits that a new tenancy was created in December, 2009 and January, 2010, between the City, as landlord, and the Respondent, as tenant, by virtue of the City's acceptance of rent for those two months (rent which has since been refunded to the Respondent, although he refused to accept the refund and sent the cheque back to the City). Thus, it is argued that the City can only terminate this new tenancy and evict the Respondent pursuant to the provisions of the RTA.

7 In considering the first argument, the starting point is s. 34(2) of the Act. The relevant part provides as follows:

> (2) Where all the interest of a lessee in land is expropriated ... the lease shall be deemed to be frustrated from the date of the expropriation.

8 This is followed by s. 35, which reads in full as follows:

> 35. Where land has been expropriated, the compensation stands in the stead of the land, and any claim to or encumbrance on the land is, as respects the expropriating authority, converted into a claim to or upon the compensation and no longer affects the land.

9 The Respondent, as a tenant, has a right to claim compensation from the City, just as the registered owner does. If the matter of compensation cannot be resolved, it can be determined in an application to the Ontario Municipal Board. The Respondent has stated his intention to seek such compensation. The statute is clear, however, that the tenant's claims can only be against the compensation, and not against the land. In this proceeding, the Respondent is advancing a possessory claim against the land.

10 The effect of the frustration of the lease was commented upon by Laskin J.A. in *Rosenblood v. Plastic & Allied Building Products Ltd.*, [1969] O.J. No. 1508 (Ont. C.A.). Although that proceeding was governed by the predecessor to the current legislation, Laskin J.A. commented on the Act in para. 9:

> In my opinion, s. 35 of the new Act, so far at least as concerns the taking of the whole of land which is subject to a tenancy, states expressly what is implicit in expropriation under the Act of 1962-63. Where title is by virtue of the expropriation vested in the taker, the landlord no longer has the estate in respect of which he has made a demise; and, indeed, the theory of rent as issuing out of the land (apart from the covenant to pay) becomes untenable. What the landlord had by way of estate in fee simple has been converted into a right to compensation; this is expressly stated in s. 15(1) of the Act of 1962-63. Moreover, by the expropriation of the land in respect of both the landlord's reversion and the leasehold, there is a merger in the expropriating authority, and the lease and the relationship of landlord and tenant founded upon it are extinguished.

11 Since both the lease and the relationship of landlord and tenant have been extinguished, there is no need for the City to resort to the RTA to terminate the tenancy. The leasehold interest of the Respondent has, in effect, been expropriated by the City, along with the registered owner's title in fee simple. All that remains is the Respondent's right to claim compensation.

12 Mr. Hoffer relies on s. 37(1) of the RTA, which provides as follows:

> 37. (1) A tenancy may be terminated only in accordance with this Act.

13 He therefore submits that there is a conflict between the two acts, such that it is necessary to decide which act should prevail. However, s. 19 of the RTA states the following:

> 19. The doctrine of frustration of contract and the *Frustrated Contracts Act* apply with respect to tenancy agreements.

14 Mr. Hoffer submits that this section applies only so as to render applicable the common law of frustration of contract, which provides that a contract will be frustrated where performance has been rendered legally impossible. He submits that the section does not embrace the situation where a contract has been deemed to be frustrated pursuant to statute.

15 No authority has been offered to support this submission, and I find no basis in logic to make the distinction sought. In my view, the relevant provisions of both statutes are clear and unambiguous. Under the RTA, a lease may cease to exist because the contract has been frustrated, and it does not matter whether that frustration has been brought about because the common law criteria for frustration have occurred, or through the operation of statute.

16 Accordingly, I do not find the two statutes to be in conflict. Since the Respondent's lease has been frustrated by operation of law, and since his leasehold interest has, in effect, been expropriated by the City, he no longer has any interest in the land — leasehold, possessory or otherwise. He

has a claim against the compensation and nothing more. It is not, therefore, necessary for the City to seek termination of his tenancy pursuant to the RTA. His tenancy no longer exists.

17 The second argument relates to the assertion that a new tenancy has arisen between the City and the Respondent, which now must be terminated pursuant to the RTA.

18 The Respondent was well aware of the expropriation proceedings as they were ongoing, and of the fact that he would have to move to make way for the coming construction of the overpass. Indeed, he met with a representative of the City on November 11, 2009, in order to inspect another nearby property owned by the City, with a view to moving there. However, he found that property to be unacceptable.

19 On November 27, 2009, the same day that expropriation was finalized, counsel for the Respondent sent an email to Mr. Belch enquiring who the Respondent should make his December rent payment to. Tentative instructions were given to make it payable to the Treasurer, City of London. Rent for December was accordingly paid by cheque and cashed, as was rent for January, 2010. However, shortly thereafter, the City issued a cheque refunding the two month's rent, and returned the two other post-dated cheques. While the Respondent refused to accept the refund, and returned the cheques to the City, they remain available to him to retrieve and cash at any time.

20 Mr. Hoffer argues that the payment of rent by the Respondent and the acceptance of that rent by the City have given rise to an oral month-to-month tenancy agreement between the City and the Respondent, which can only be terminated by the City pursuant to the terms of the RTA. He submits that the definitions of "rent", "landlord", "tenant" and "tenancy agreement" in the RTA all fit the present situation, and lead inevitably to that conclusion.

21 I disagree. First, the definition of "landlord" in s. 2(1) of the RTA includes a person "who permits occupancy of a rental unit". In this case, it cannot be said that the City "permitted" the Respondent to remain in possession. The fact is that they had no choice in the matter. Under the terms of the Act, they could not obtain possession of the premises until they have given at least three months notice of their intention to take possession. Thus, they had no right to either permit or prohibit possession of the property until March 13, 2010.

22 The definition of "tenancy agreement" means "a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit". Here, the evidence is clear that there was no written, oral or implied agreement whereby the Respondent would rent the premises on a month to month basis. To the knowledge of both parties, rent was paid and received within the ongoing process of an expropriation, pursuant to which the premises were to be vacated and demolished.

23 There is nothing unreasonable in the City receiving rent following the expropriation but before the possession date. There is no logical reason why the tenant should be entitled to live in

the premises for free. The receipt of rent does not, in my view, imply the creation of a new tenancy in the circumstances of this case.

24 Indeed, *Rosenblood* (*supra*) recognized that the obligation to pay rent continues despite the expropriation. At para. 11, the court stated that "where there is no eviction a tenant cannot rightly withhold rent while remaining in possession".

25 Laskin J.A. went on, in para. 15 of *Rosenblood*, to describe the nature of the relationship between the tenant and the expropriating authority that exists after the expropriation but before the date of possession:

> Since the Expropriation Procedures Act, 1962-63 does not give entitlement to possession immediately upon an expropriation, there must be an interval during which a tenancy at will exists.

26 Those same comments apply here, since under the Act the expropriating authority equally has no right to immediate possession. Section 39(2) provides that the date for possession "shall be at least three months after the date of the serving of the notice of possession".

27 *Rosenblood* was applied in *Hubbard v. Hamburgh*, [1993] O.J. No. 2972 (Ont. Gen. Div.). This was not an expropriation case, but does serve to confirm the continued existence of the concept of "tenancy at will". At para. 24, Rapson J. adopted the following definition from Black's Law Dictionary, 5th ed.:

> Tenant at Will: One who holds possession of premises by permission of owner or landlord but without a fixed term. Where land or tenements are let by one man to another, to have and to hold at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called "tenant at will" because he has no certain nor sure estate, for the lessor may put him out at what time it pleases him.

28 On the authority of *Rosenblood*, I conclude that the Respondent's leasehold interest in the land was extinguished as of the date of expropriation, November 27, 2009. Since he remained in possession of the property thereafter, a tenancy at will came into being, which was subject to termination at the will of the City. Termination occurred as of March 13, 2010, being the date that the City was entitled to possession pursuant to the terms of the Act.

29 I conclude that no residential tenancy came into being during this period, and therefore it is not necessary for the City to seek to terminate any such tenancy under the terms of the RTA.

30 As I have already noted, the conditions for the issuance of a warrant under s. 40 have been met. The issuance of a warrant is, however, a matter within the discretion of the court: *Toronto (City) v. Bernardo*, [2004] O.J. No. 3258 (Ont. S.C.J.). Mr. Belch seeks the issuance of a warrant

immediately, with the proviso that it will not be exercised for two weeks. Mr. Hoffer asks that it be deferred until the end of April in order to give the Respondent time to find a place to live.

31 The fact is that Mr. Hoffer has had since early December to find a place to live, when he was notified of the date that the City required possession of the property. There is a pressing public interest in proceeding with construction as soon as possible, in order to meet the completion date for full funding. Once possession is obtained by the City, an assessment must be made of the property to determine if any hazardous materials are present before demolition can proceed. A great deal of work remains to be done, as detailed in the affidavit of Henry Huotari, the Senior Project Manager, sworn February 19, 2010. In the exercise of my discretion, I conclude that possession should not be delayed for more than 15 days.

32 For these reasons, the application is allowed. An order will go as follows:

1. Declaring that the Respondent's lease with Andrew Lesko dated October 12, 2007 is deemed to be frustrated, pursuant to s. 34(2) of the Act, as of the date of expropriation, November 27, 2009;

2. Declaring that the RTA has no application to the said lease, nor to the continued occupation of the premises by the Respondent;

3. That a warrant shall issue forthwith directing the sheriff to put down the resistance or opposition of the Respondent to the taking of possession of 1377 Trafalgar St., London, ON by the City. This warrant shall not be exercised for a period of 15 days from the date hereof.

33 If the parties cannot agree on costs, I will accept brief written submissions from counsel within 30 days.

Application granted.

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