

IN THE COURT OF APPEAL OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

AT THE LAW COURTS BUILDING, EDMONTON, ALBERTA, ON THE 5TH DAY  
OF MARCH A.D. 1986, BEFORE A COURT COMPOSED OF:

THE HONOURABLE CHIEF JUSTICE J.H. LAYCRAFT  
THE HONOURABLE MR. JUSTICE A.F. MOIR  
THE HONOURABLE MR. JUSTICE R.P. KERANS

BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT

- and -

TOUCHE ROSS LIMITED and  
PROPERTY STEWARDS WESTERN LTD.,


APPELLANT

FORMAL JUDGMENT OF THE COURT

UPON HEARING the within appeal against a Judgment made pursuant  
to Section 771 of the Criminal Code, presented by Counsel for the Appellant,  
Counsel for the Respondent, replying as required:

IT IS HEREBY ORDERED AND ADJUDGED:

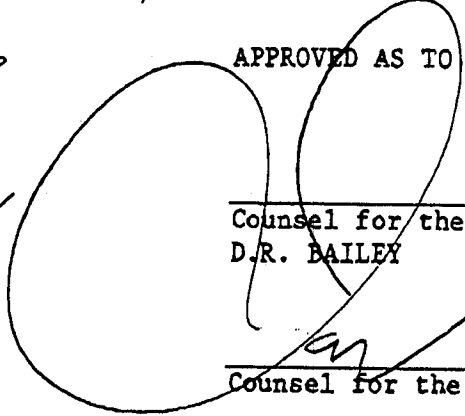
1. The appeal against judgment of the Court of Queen's Bench is dismissed.

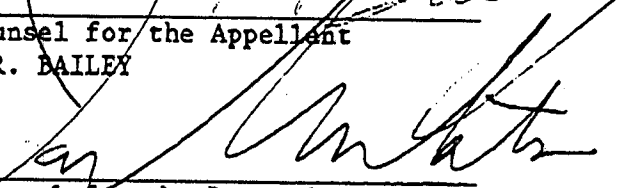
  
Registrar of the Court of Appeal

ENTERED this 2nd day of  
April, A.D. 1986  
at Edmonton, Alberta.

  
Clerk of the Court

APPROVED AS TO FORM AND CONTENT:

  
Counsel for the Appellant  
D.R. BAILEY

  
Counsel for the Respondent

S. RUTWIND

APPEAL NUMBER: 8503-9236-A ✓

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IN THE COURT OF APPEAL OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

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BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT

- and -

TOUCHE ROSS LIMITED and  
PROPERTY STEWARDS WESTERN LTD.,

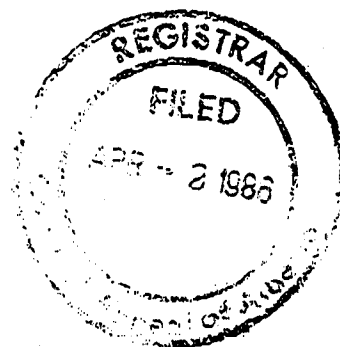
APPELLANT

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FORMAL JUDGMENT

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APPEALS, RESEARCH AND SPECIAL PROJECTS BRANCH  
CRIMINAL JUSTICE  
3RD FLOOR, BOWKER BUILDING  
9833 - 109TH STREET  
EDMONTON, ALBERTA  
T5K 2E8

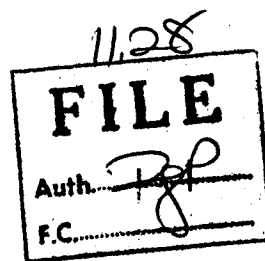


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IN THE COURT OF APPEAL OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

TOUCHE ROSS LIMITED and  
PROPERTY STEWARDS WESTERN LTD.



Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

NOTICE OF APPEAL

PARTICULARS

1. The Appeal is by way of further Appeal from the Court of Queen's Bench of Alberta in respect of a Summary Conviction Offence.
2. The place of Appeal in front of the Court of Queen's Bench of Alberta was in the Judicial District of Edmonton and the Appeal Action Number was 8503-0034-S6.
3. The name of the Judge was the Honourable Mr. Justice Miller, A.C.J.
4. The name of the Court was the Court of Queen's Bench of Alberta, Judicial District of Edmonton.
5. The name of the Crown Prosecutor was S.H. Rutwind, Esq.
6. The name of the Defence Counsel was D.R. Bailey, Esq.
7. Offences of which the Appellants were convicted were:
  - (a) on or about the 10th day of December, A.D. 1982, at or near the City of Edmonton, in the Province of

Alberta, Touche Ross Limited and Property Stewards Western Ltd., being landlords in receipt of a security deposit did fail to deliver the security deposit or any portion thereof together with an accounting, to Lori Decker, their tenant, within ten (10) days of the day that the tenant gave up possession of the premises, being #10, 13144 - 114 Avenue, City of Edmonton, Province of Alberta, thereby contravening Section 50(a) of the Landlord and Tenant Act of Alberta.

- (b) on or about the 11th day of February, 1983, at or near the City of Edmonton, in the Province of Alberta, Touche Ross Limited and Property Stewards Western Ltd., being landlords in receipt of a security deposit did fail to deliver the security deposit or any portion thereof together with an accounting, to Carl Cornwell, their tenant, within ten (10) days of the day that the tenant gave up possession of the premises, being #4, 11574 St. Albert Trail, City of Edmonton, Province of Alberta, thereby contravening Section 50(a) of the Landlord and Tenant Act of Alberta.

8. The section which was interpreted in order for the Appellants to be convicted was Section 40 of the Landlord and Tenant Act.

9. The plea at trial was not guilty.

10. The sentence imposed was a fine of \$1.00 in regard to each count and each party resulting in fines of \$2.00 for Touche Ross Limited and \$2.00 for Property Stewards Western Ltd., time having been granted for payment, and payment having now been made.

11. The date of sentence resulting from the Summary Conviction Appeal before the Court of Queen's Bench of Alberta was June 28, 1985.

TAKE NOTICE that the Appellants apply for leave to appeal against their conviction on grounds involving a question of law alone.

The grounds of appeal are that the Honourable Appeal Justice erred in law in his construction or interpretation of Section 40 of the Landlord and Tenant Act, R.S.A. 1980, c.L-6 (and in reversing the first instance decision of His Honour Guy Beaudry) by determining that a Court appointed receiver and manager is liable to refund damage deposits to tenants which were paid prior to its appointment and which were never received by it, as a result of the determination that that it did "acquire the interest of a landlord" pursuant to the said section 40.

The relief sought is the dismissal of the said charges and the acquittal of the Appellants, a direction that their fines be returned to the Appellants, and an Order setting aside the Order of Restitution granted by the Court of Queen's Bench of Alberta.

The Appellants' address for service is c/o Milner & Steer, Barristers & Solicitors, 2900 Manulife Place, 10180 - 101 Street, Edmonton, Alberta, T5J 3V5.

DATED at the City of Edmonton, in the Province of Alberta, this 17 day of July, 1985.

MILNER & STEER

PER: 

D.R. Bailey

Counsel for the Appellants

APPEAL

8503-9236-A

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IN THE COURT OF APPEAL OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

---

BETWEEN:

TOUCHE ROSS LIMITED and  
PROPERTY STEWARDS WESTERN LTD.

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

---

NOTICE OF APPEAL

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MILNER & STEER  
BARRISTERS & SOLICITORS  
2900 MANULIFE PLACE  
10180 - 101 STREET  
EDMONTON, ALBERTA  
T5J 3V5

FILE: 125665-26/DRB

No. 8503-0034-S6

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

HER MAJESTY THE QUEEN

- and -

TOUCHE ROSS LIMITED and PROPERTY STEWARDS  
WESTERN LTD.

-----  
No. 8503-0035-SO

HER MAJESTY THE QUEEN

- and -

COOPERS LYBRAND LIMITED

-----  
REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE MILLER, ACJ  
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THE COURT:

This is an appeal from a decision of Provincial Court Judge Beaudry issued on the 18th day of December, 1984. What was actually before the Learned Provincial Judge was a quasi-criminal charge against Touche Ross Limited and Property Stewards Western Limited for failing to return to one Decker the \$300 security deposit given by her to Gold Property Management Limited when she rented a suite in the Bel Air Apartments in the City of Edmonton.

Touche Ross became involved when it was appointed Receiver-Manager of the Bel Air Apartments after Gold Property Limited had defaulted under a mortgage to the CCB Mortgage Corporation. Touche Ross, as it was allowed to do under the Court Order, appointed Property Stewards Western Limited as their rental and

1 management agent. It is clear that Touche Ross never collected  
2 the \$300 deposit initially and never received it from Gold  
3 Property Management Limited when Touche Ross took over the  
4 properties.

5 While the matter before the Court is clothed in a quasi-  
6 criminal charge under the Landlord and Tenant Act, what is  
7 really at issue in this whole scenario is the question of who  
8 is responsible civilly for the return of damage deposits  
9 collected by owners, landlords or property managers from  
10 tenants. The issue is neatly highlighted by the fact situation  
11 on this case where the tenant, Decker, gave the deposit to the  
12 then property manager. The property is then defaulted by the  
13 mortgagor under the mortgage. The mortgagee comes forward to  
14 the Court, asks the Court to appoint a Receiver-Manager to  
15 preserve the cash flow and the asset while the foreclosure  
16 proceeding is going through the Court system. The tenant stays  
17 on while the Receiver-Manager is operating and continues to pay  
18 rent to the Receiver-Manager. Then the tenant gives notice  
19 to vacate and seeks the return of the security deposit. At  
20 that point in time, and in this case, the original firm that  
21 the security deposit was paid to is no longer financially able  
22 to return the money or is unwilling to do so, whatever the case  
23 may be, and the only person or firm left around that the tenant  
24 can look to for recourse is the Receiver-Manager who is now in  
25 charge of the property.

26 As I have indicated, Touche Ross was appointed Receiver-  
27 Manager by the Court at the request of the mortgagee, CCB

1 Mortgage Corporation, for the main purpose of collecting the  
2 rents and preserving the assets of the Bel Air Apartments.  
3 This was for the benefit of the mortgagee in attempting to  
4 realize as much as it could under its mortgage security.

5 In my view, although Touche Ross is acting under the Court  
6 Order it, in reality, stands in the shoes of CCB Mortgage  
7 Corporation and is there primarily to protect the mortgagee's  
8 interest. All sides agree that Touche Ross or its agents,  
9 Property Stewards Western Limited, fall within the legal  
10 concept of a landlord in performing its function under the  
11 Court Order appointing it Receiver-Manager. Touche Ross,  
12 through its counsel, maintains that it is only a stakeholder  
13 and should not be required to account for the former owner's  
14 obligations namely, in this case, the return of the damage  
15 deposit collected by the former owner or its agent. It is  
16 pointed out that there are some very practical problems, if  
17 the situation were held to be otherwise. In the case of the  
18 Bel Air Apartments, this could mean several thousands of  
19 dollars of obligation on the part of the Receiver-Manager,  
20 should the tenants who were in possession prior to the appoint-  
21 ment of Touche Ross and who gave their deposits to the former  
22 owner manager, now come along and want them to be refunded.

23 Much of the issue turns around the interpretation of  
24 Section 40 of the Landlord and Tenant Act, RSA 80, Chapter  
25 L-6 which reads as follows:

26 "A person who acquires the interest of a landlord  
27 in residential premises has the right and is  
subject to the obligations of the previous

1 "landlord in respect to a security deposit paid  
2 to the previous landlord in respect of the  
residential premises."

3 It is my view that the intent of this section is to place  
4 an obligation upon succeeding landlords to honour the legal  
5 obligations of the landlord who received the deposit initially,  
6 as spelled out in the Act. I can see no reason why the  
7 Receiver-Manager acting in the interests of the mortgagee, even  
8 under a Court Order, should be treated any differently under  
9 this section than the mortgagee who may eventually receive the  
10 title to the property subject to certain rights and obligations.

11 Counsel have brought to my attention that there are two  
12 recent decisions of Courts in this province which must be  
13 considered. One is, of course, the written decision of  
14 Provincial Judge Beaudry from which this appeal arises, and the  
15 other is the decision of my brother Lutz J. in a case called  
16 Waverley Management Limited versus Linda Sobie and Francine  
17 Dunn which was released only a few days ago on June 18th, 1985.  
18 This latter judgment became available after both sides had  
19 filed their Memorandum of Argument. These two decisions go in  
20 diametrically opposed directions in my opinion and, indeed,  
21 Lutz J. either specifically or in strong obiter dicta  
22 disapproves of Provincial Judge Beaudry's decision.

23 During the noon break I have had the opportunity to read  
24 both decisions very carefully and I have come to the conclusion  
25 that I agree with the reasoning of Mr. Justice Lutz. I also  
26 would make the additional observation, as I did earlier, that  
27 the Court appointed the Receiver-Manager, namely Touche Ross,

1 as primarily the agent for the mortgagee, and it is the  
2 mortgagee in my view who takes the ultimate risk if the  
3 judgment of Lutz, J. is correct and not the Receiver-Manager  
4 appointed by the Court.

5 Having come to this conclusion, I am of the opinion that  
6 the reasoning set out by Lutz, J. is the correct view of the  
7 interpretation of Section 40. The statute itself, and  
8 particularly Section 40, in my view is remedial in nature and  
9 is a legislative attempt to force upon landlords and their  
10 successors the obligation of protecting tenants acting in  
11 good faith without any negligence on their part, from being  
12 deprived of the right set out in the Landlord and Tenant  
13 Act to recover the deposit, providing they have not damaged  
14 the premises during the time of their occupation. By imposing  
15 a quasi-criminal aspect to the failure to produce or to  
16 return the deposit, it is a clear indication to me that the  
17 Legislature of this province is urging that those involved in  
18 the rental business in this province on a commercial basis,  
19 make the necessary arrangements, both in the first instance,  
20 and if someone takes over either voluntarily or through  
21 litigation processes, to be aware that there is a residual  
22 responsibility imposed by Statute upon such persons who become  
23 landlords under the Landlord and Tenant Act to protect the  
24 interests of tenants vis-a-vis the damage deposits which have  
25 been collected from the tenant.

26 It is my opinion that the approach adopted by my brother  
27 Lutz more accurately reflects the intention of the legislators

1 in enacting Section 40 of the Landlord and Tenant Act and  
2 making it a part of the law in this province.

3 Having come to this conclusion, I am of the view that the  
4 learned trial judge has erred in his interpretation of the  
5 law contained in his judgment and that his dismissal of the  
6 charges against Touche Ross Limited must be reversed. Let me  
7 say quite clearly, that I am satisfied Touche Ross Limited has  
8 found themselves in the middle of an interpretative dispute  
9 relating to the Landlord and Tenant Act and that even though  
10 the proceedings against them are of a quasi-criminal nature, I  
11 understand their position. They perhaps had no choice but to  
12 bring the matter before the Court in this fashion and to resist  
13 the proceedings taken against them under the Landlord and  
14 Tenant Act in order to obtain some sort of clarification and  
15 interpretation from the Courts as to the obligation of a  
16 Receiver-Manager caught in this kind of a situation.

17 Accordingly, I would hope now that with the decision from  
18 my brother Lutz J. and my confirmation of his approach to the  
19 matter, the situation may be somewhat clarified, at least  
20 until it goes to the Court of Appeal and they have a chance to  
21 take a run at it.

22 In the result, the appeal of the Crown will be allowed.

23  
24 PROCEEDINGS CONCLUDED

25 Delivered orally at the Law Courts, Edmonton, Alberta, on the 28th  
day of June, A.D. 1985.

26 S. H. Rutwind, Esq.  
27 For the Crown

D. R. Bailey, Esq.  
(Milner & Steer)  
For the Defence

ps/4 Ruth Johnson  
Official Court Reporter

No. 8503-0034-S6

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

HER MAJESTY THE QUEEN

- and -

TOUCHE ROSS LIMITED and PROPERTY  
STEWARDS WESTERN LTD.

---

No. 8503-0035-S0

HER MAJESTY THE QUEEN

- and -

COOPERS LYBRAND LIMITED

---

REASONS FOR JUDGMENT OF THE HONOURABLE  
MR. JUSTICE MILLER, ACJ

---

IN THE PROVINCIAL COURT OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

TOUCHE ROSS LIMITED and  
PROPERTY STEWARDS WESTERN LTD.

J U D G M E N T

The sole question to be decided in this case is whether or not the accused companies acquired "the interest of a landlord in residential premises", within the meaning of section 40 of the Landlord and Tenant Act, being chapter L-6 of the Statutes of Alberta.

If in fact a receiver or a receiver-manager appointed by the Court under the circumstances which will be described hereunder "acquires the interest of a landlord", under section 40 of the above named Act, then, the Crown argues, the accused must be found guilty of a breach of the Act, since they failed to return a damage deposit to one Lori Decker within the prescribed time limit provided by the said Act.

The facts as set out in the agreed statement of facts are as follows:

1. Touche Ross Limited is a corporation duly incorporated under the laws of the Province of Ontario and was duly registered under the laws of the Province of Alberta, on September 17, 1975, and was and is at all relevant

times, a valid and subsisting corporation. (Exhibits 1 and 2).

2. Property Stewards Western Ltd. is a corporation duly incorporated under the laws of the Province of Alberta on August 30th, 1976, and was and is at all relevant times, a valid and subsisting corporation. (Exhibits 3 and 4).

3. Gold Properties Ltd. was the owner of the property known as the Bel-Air Apartments which complex included 775 apartment units, situate at the City of Edmonton and Province of Alberta (Exhibit 5). Gold Property Management Ltd. was a property management company of the Gold companies which did manage the aforesaid lands and was the landlord of the Bel-Air Apartments.

4. Gold Properties Ltd. as mortgagor, mortgaged the said lands known as the Bel-Air Apartments, to CCB Mortgage Investment Corporation, for the sum of \$13,700,000.00, which mortgage was dated the 8th day of December, 1980, and was registered at the Land Titles Office on the 10th day of December, 1980, as Instrument No. 802297367 (Exhibit 6).

5. Gold Properties Ltd. allowed the mortgage to go into default and as a consequence CCB Mortgage Investment Corporation commenced an action against Gold Properties Ltd. by Statement of Claim filed in the Court of Queen's Bench of Alberta (Exhibit 7).

6. On October 7th, 1982, Master M. Funduk of the Court of Queen's Bench of Alberta granted an Order Nisi/Order For Sale, which provided inter alia that Touche Ross Limited (herein after referred to as Touche), was appointed Receiver of the rents and profits of the lands in question. (Exhibit 8). Upon or subsequent to appointment of Touche as Receiver, Gold Properties Ltd. and Gold Property Management Ltd. effectively walked away from the Bel-Air Apartments.
7. On October 12, 1982, Michael J. E. Venner (Manager of Touche) was granted possession of all those lands and was appointed Receiver and Manager of all rents and profits of all those lands described in the aforesaid Statement of Claim. It was ordered that Michael J. E. Venner was at liberty to appoint Property Stewards Ltd. (herein after referred to as Property Stewards) to manage the said property to better carry on his duties as Receiver and Manager of the said lands. (Exhibit 9).
8. On October 13th, 1982, Touche was validly appointed Receiver and Manager of all those lands described in the Statement of Claim aforesaid, the apartment business thereon (Bel-Air Apartments) and was granted possession of the said lands by Order of Master M. Funduk of the Court of Queen's Bench of Alberta, pursuant to the laws of Alberta including Section 45 of the Law of Property Act, R.S.A. 1980, c.L-8 (Exhibit 10).
9. The Order of October 13th, 1982, provided that Touche was at liberty to appoint Property Stewards as an agent for Touche as Manager of the said property.

At all relevant times, Property Stewards was acting as the agent of Touche and was carrying out the managership of Bel-Air Apartments. Activities of Property Stewards as agents for Touche included showing the premises to prospective tenants, granting leases to tenants, generally renting the apartments, taking in the rents and damage deposits and maintaining and repairing the properties, from the date of the appointment of Touche as Receiver and Manager. From the date of appointment, Touche did carry out the duties of a Receiver and Manager and Property Stewards did carry out the duties as a Manager and Agent for Touche.

10. For those tenants who moved in prior to the date of the appointment of the Receiver and Manager and who moved out prior to the date of the appointment of the Receiver and Manager, Gold Property Management Ltd. or Gold Properties Ltd. paid back the damage deposits that were owed to the tenants.

11. For those tenants who moved in after the date of the appointment of the Receiver and Manager and who moved out after the date of the appointment of the Receiver and Manager, Touche paid back the damage deposits that were owed to the tenants.

12. Lori Decker and Cheryle Brown entered into a lease as tenants with Gold Property Management Ltd. for unit 19-A-10, being Apartment 10 - 13144 - 114 Avenue, one of the Bel-Air Apartments, the term of the lease being for six months commencing on June 1st, 1982, following which the tenancy would continue

as a month-to-month tenancy until terminated. (Exhibit 11). Lori Decker paid to Gold a damage deposit of \$300.00 on May 10, 1982, for which a receipt was issued by Ms. Chang of Gold Property Management Ltd. (Exhibit 12).

13. Lori Decker and Cheryle Brown gave written notice of termination of tenancy to an agent of Property Stewards as agent for Touche on October 31, 1982, which was to be effective on November 30, 1982. Possession of the said unit was given up on November 30, 1982 by the said Lori Decker and Cheryle Brown. On November 30, 1982, an agent for Property Stewards or Touche inspected the said premises. From the date of inspection until December 21, 1982, no written or verbal communication was received from Touche or Property Stewards.

14. A Statement of Account of Property Stewards was received by Lori Decker for Lori Decker and Cheryle Brown, which Statement of Account was dated November 30, 1982, indicating that a refund of \$318.05 was owing to them for the damage deposit being \$300.00 for return of the damage deposit and \$18.05 interest thereon. (Exhibit 13). Attached to the termination statement was a letter from Casey Moroschan of Property Stewards dated December 21, 1982, indicating inter alia that the damage deposit would not be returned "at this juncture" (sic.). (Exhibit 14). Appended thereto was a letter from Touche to Property Stewards indicating that tenants should pursue Gold Properties Ltd. or Gold Property Management Ltd. for their damage deposits not repaid to the tenants (Exhibit 15).

15. To this date, Lori Decker and Cheryle Brown have not received the damage

deposit nor the interest from anyone, and in particular, have not received it from Touche or Property Stewards.

The facts in paragraphs 1 - 15 supra are alleged by the Crown in proof of Count #1. of an information sworn by Rose Coté, dated 22 April, 1983, against Touche Ross Limited and Property Stewards Western Ltd.

I am indebted to both counsel for their help and assistance in this matter. Indeed the arguments presented to me by Mr. Bailey and by Mr. Rutwind were extensive and thorough, covering some 114 pages of transcript, and it is not my intention to repeat their arguments here as they are a matter of record. Suffice it to say that they have enabled the Court to reach a conclusion as to the proper interpretation to be placed on Section 40 of the Landlord and Tenant Act, as it applies to receivers or Receiver-Managers.

There is no dispute of the fact that Touche Ross Limited and Property Stewards Western Ltd. were properly appointed by an order of the Court as Receiver-Managers of all the apartment complex involved, namely the complex known as Bel-Air Apartments in the City of Edmonton. There can be no question that from the moment of their appointment, they became Landlords as such of that apartment complex, within the meaning of the Landlord and Tenant Act (though that term is not defined in the Act). That they were Landlords with respect to their daily operations of the complex, there can be no doubt. But, in my view it does not mean that because they became landlords they necessarily acquired the interest of the previous landlord in the residential premises,

within the meaning of section 40 of the Act. The appointment of the accused as Receiver-Managers, by virtue of the Court order, whether made under the authority of section 45 of the Law of Property Act of Alberta, or under section 13 of the Judicature Act of Alberta, or under the inherent powers of the Court, or from all three sources combined, which had the effect of making them landlords of the apartment complex, did not and would not result in my view in the accused acquiring the interest of the previous landlord. The only logical interpretation that can be given to the designation "interest" in section 40 of the Landlord and Tenant Act is that it means "propriety<sup>or</sup>" interest, in my view. If this interpretation is correct, and I believe it to be so, then the Court Order made appointing them as Receiver-Managers could not possibly give them a proprietary interest, as the Court itself at that stage did not possess the power to do so. They could only acquire a proprietary interest by foreclosure proceedings, whereas the only acquisition which the Court gives them at the time, and did in fact give them was possession of the lands in question, but certainly no proprietary interest or title to the lands. This also eliminates any concept that the accused could have acquired the interest of the previous landlord whether by attornment, or by simply acting as or holding themselves up or representing themselves as landlords.

Not having acquired the interest of the previous landlords, but being merely Managers and Landlords pro tem of the premises in question, the Receiver-Managers were under no legal obligation to re-imburse Lori Decker her deposit, given to the previous landlords.

The interpretation to be given to the word "interest" as contained in section 40 of the Landlord and Tenant Act is commented upon by Master Funduk in a case cited by counsel, namely CCB Mortgage Investment Corporation and Gold Properties Ltd., and the case of Beverley Trenholm and Ronald Duguay and Gold Property Management Ltd. Both cases involve judgments of Master Funduk of the Court of Queen's Bench of Alberta.

On the former case, Master Funduk states at page 4, second paragraph, as follows:

"Whether the Plaintiff may become liable for the deposits, if it obtains an order for foreclosure, pursuant to section 40 of the Landlord and Tenant Act is not an issue before me". This is clearly an indication, in Master Funduk's opinion, that liability for deposits may arise should title to the property pass.

But by far the most persuasive argument as to the interpretation to be placed on the word "interest" in section 40 of the Landlord and Tenant Act is to be found in the later judgment of Master Funduk when he says at page 5: "In my view, a receiver, even one who has possession of the land, is not a 'person who acquires an interest of a landlord', within the context of sections 40 of that Act".

I agree with Master Funduk's interpretation.

But that is not all. In a recent decision of my brother Judge Tompkins of Calgary in the unreported decision of the National Bank and Helen Cruse we have further support to the interpretation that the word "interest" in section 40

of the Landlord and Tenant Act, means proprietary interest.

As the Judgment is short and most relevant here, I will incorporate it in its entirety as part of the decision:

Docket No. LTA 84/125

IN THE PROVINCIAL COURT OF ALBERTA  
SMALL CLAIMS DIVISION

BETWEEN:

THE NATIONAL BANK

Plaintiff

- and -

HELEN CRUSE

Defendant

---

REASONS FOR JUDGEMENT OF HIS HONOUR  
JUDGE D. J. TOMPKINS

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The plaintiff claims against the defendant the sum of \$600.00 for rent for the months of December, 1983 and January, 1984 for the premises municipally known as Apt. 214, 7107 Elbow Dr. S. W., Calgary, Alberta. The defendant paid a security deposit of \$495.00 to the previous owner, the plaintiff having acquired ownership of the premises in August of 1983 by way of foreclosure proceedings. The issue is whether the plaintiff is responsible

as the new owner for the defendant's security deposit.

Section 19(1) of The Landlord and Tenant Act provides:

"19(1) Subject to the Land Titles Act and the Law Property Act, a person who acquires the reversionary interest of the landlord or the leasehold interest of the tenant has all the rights and is subject to all the obligations based on the real covenants relating to the tenancy, during the time that he holds the interest."

and section 40 provides:

"40 A person who acquires the interest of a landlord in residential premises has the rights and is subject to the obligations of the previous landlord with respect to a security deposit paid to the previous landlord in respect of the residential premises."

It is significant to note that section 40, dealing specifically with security deposit, is not prefaced as is section 19(1) by the words "subject to the Land Titles Act and the Law of Property Act". I refer now to case of The Owners: Condominium Plan CDE 13442 v. Alder, Furman & Associates Ltd., an unreported case which, while dealing with the Condominium Property Act, R.S.A., 1980, C-22, is nevertheless applicable in the present case. In the Alder case, Bowen, J., states:

"In essence it (the Act) contemplates a change of ownership and a charging of the new owner for fees owing."

and further:

"This right (under the Condominium Property Act) did not come into being until the vesting order was filed."

Similarly in the present case, section 40 of The Landlord and Tenant Act clearly contemplates a change of ownership and imposing the responsibility for the security deposit on the new owner, a right which accrued to the defendant only on the change of ownership to the plaintiff and therefore it is irrelevant whether the change of ownership came about on a purchase and sale or by way of foreclosure proceeding.

Consequently the defendant is entitled to set off the amount of her damage deposit in the sum of \$495.00 against the plaintiff and claim for rent in the sum of \$600.00 and the plaintiff will therefore have judgment in the sum of \$105.00, plus \$10.00 court costs and \$5.00 counsel fee.

"D. J. TOMPKINS"

J. P. C. A.

Dated at Calgary, Alberta

this 22nd day of August, 1984.

As he says, section 40 clearly contemplates a change of ownership.

Finally, to return again to the Judgment of Master Funduk in Trenholm and Duguay, I would again express agreement when he says at page 4:

"If a receiver is liable for the other liabilities incurred by the landlord it indirectly means the mortgagee or vendor is liable for the landlords debts because the rent proceeds go to the mortgagee. Why should a mortgagee or vendor, who is a creditor of the landlord, be required to indirectly pick up the unsecured debts of the landlord? There is no basis in law for that."

Counsel for the accused argued a further point which I believe has some validity here, and that is the rule with respect to statutory interpretation of a penal statute. The party must be brought strictly within it. Should I be in error in my interpretation of section 40, the accused are entitled to a dismissal of the charge in the present case, should there be uncertainty in the proper interpretation of section 40 of the Act.

It is unfortunate that the tenant here and many others in like situations cannot recover their deposits. That the Court sympathizes with these tenants who are deprived of their property goes without saying. In many cases the tenants cannot afford the loss which has caused them great hardship. But as long as security deposits are required to be paid to landlords, this problem will likely continue to exist unless the law requires that security deposits with landlords be held in trust. If it is intended that receivers and Receiver-Managers should be liable for the security

deposits left previous landlords, then it should be positively stated in the Act. As it is, the tenants are now left without protection when the landlord goes into receivership.

The accused are found not guilty, and the charge is dismissed.

DATED at the City of Edmonton, in the Province of Alberta, this 18th day of December, A.D. 1984.

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Guy Beaudry  
Provincial Judge