RE MacNEILL AND NORTH AMERICAN LEASEHOLDS LTD.

Alberta Court of Queen's Bench, Stevenson J. November 8, 1980.

Landlord and tenant — Residential tenancies — Damage deposit — Landlord having carpets and drapes professionally cleaned — Objects not dirty — Foreign material removed through professional cleaning accumulated through normal wear and tear — Cost may not be deducted from security deposit — Landlord and Tenant Act, 1979 (Alta.), c. 17, s. 39(4).

[*Haskell et al. v. Marlow et al.*, [1928] 2 K.B. 45; *Regis Property Co. Ltd. v. Dudley*, [1959] A.C. 370, apld]

APPEAL from a judgment holding that the appellant landlord could not retain cleaning costs out of the respondent's damage deposit.

Janet G. Zurcher, for appellant.

STEVENSON J.:—This is an appeal from a decision denying the appellant landlord's claim to retain out of the respondent tenant's damage deposit certain cleaning costs. The sole issue before me is whether or not this is a deduction for "normal wear and tear" and thus prohibited by s. 39(4) of the *Landlord and Tenant Act*, 1979 (Alta.), c. 17.

The respondent did not appear and the appellant sought to rely on the evidence taken below raising only the single point to which I have referred. The learned trial Judge applied that section, although he referred, in terms, to s. 30(4) of the 1978 Act (repealed [1979, c. 17, s. 62], unproclaimed).

The tenant entered into a written lease. One provision of that lease is that the tenant will have carpeting and drapes professionally cleaned upon vacating the premises. He did not do this. The landlord had those operations carried out and seeks to deduct

the costs from the damage deposit. No question as to the enforceability of the clause, or as to the measure of damages for its breach is before me.

At trial, the tenant argued that the carpeting and drapes did not need cleaning. The learned trial Judge found they were clean, and therefore, anything that might have accumulated and would be removed by professional cleaning accumulated as a result of normal wear and tear.

Section 39(4) reads:

> (4) No deduction may be made from a tenant's security deposit for normal wear and tear to the residential premises during the period of his tenancy.

The learned trial Judge concluded that the cleaning resulted in the removal of any foreign material that had accumulated as result of normal wear and tear. On appeal, the appellant's position was that cleaning was something distinct from the restoration of wear and tear, a phrase which counsel contends implies physical deterioration. There was no suggestion that there was any accumulation of foreign material other than through normal usage. Does, then, the cost of work designed to remove the accumulation of foreign material caused through normal usage constitute a deduction for normal wear and tear? Is that term to be restricted to cases where some part of the fabric is damaged or destroyed?

Laws relating to landlord and tenants are not directed towards any class of citizens conversant with special meanings, and the term is used in a popular sense: *Craies on Statute Law*, 7th ed. (1971), at p. 162. The Shorter Oxford English Dictionary defines the phrase as "wearing or damage due to ordinary usage; deterioration in the condition of a thing through constant use or service". Webster's Third International Dictionary defines it as "the loss or injury to which something is subjected by or in the course of use; *esp.* normal depreciation". Gage's Senior Dictionary defines it as "a loss or damage caused by use". The condition is clearly caused by normal use, the only concern is whether or not the work done, and deduction claimed, is a reparation of normal wear and tear. I am of the view that it is. In the leading case of *Haskell et al. v. Marlow et al.*, [1928] 2 K.B. 45, Talbot J. says [at p. 59]: "Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces." His discussion was approved by the House of Lords in *Regis Property Co. Ltd. v. Dudley*, [1959] A.C. 370. Indeed in the latter case, at p. 410, Lord Denning says usually the clause excepts a tenant from leasehold repairs that are "decorative". The appellant claims cleanliness is something separate and distinct from "wear and

tear". I think it arguable — and not in issue here — that normal wear and tear does not exclude an obligation on a tenant to do usual and ordinary cleaning and to be responsible for cleaning the results of abnormal use. But that is not this case. The Legislature has decided that the security deposit is not to be subjected to deductions for the remedying of normal wear and tear.

In the ordinary case, the question to be asked is: "Is the landlord seeking to deduct the costs of repair or restoration, and was the real cause of the condition which is to be repaired normal wear and tear?" I am in agreement with the learned Provincial Court Judge that this question is to be answered affirmatively and the deduction cannot be made.

The appeal has been argued on the narrow point to which I have referred, and on the facts as found as to the condition that was remedied, it fails.

Appeal dismissed.

MORMAC INVESTMENTS LTD. et al. v. ANDRES WINES LTD. et al.

Nova Scotia Supreme Court, Appeal Division, Coffin, Hart and Jones JJ.A. December 8, 1980.

Corporations — Shareholders — Compulsory acquisition of shares — Offer to be accepted by 90% of shareholders within four months — Offer originally open for one month extended for further three months — Notice of extension not reaching shareholders until after expiry of original offer — Whether offer validly extended — Companies Act, R.S.N.S. 1967, c. 42, s. 119(1).

Section 119(1) of the *Companies Act*, R.S.N.S. 1967, c. 42, permitting compulsory acquisition of shares on approval by nine-tenths of the shareholders within four months of making the offer is to be strictly construed. The offer of acquisition must be open for a single uninterrupted period of four months; the requirement cannot be satisfied by an offer initially open for a shorter period and subsequently renewed.

[*Rathie v. Montreal Trust Co. and British Columbia Pulp & Paper Co. Ltd.*, [1953] 4 D.L.R. 289, [1953] 2 S.C.R. 204; *R. v. Clarke* (1927), 40 C.L.R. 227; *Re Waterous and Koehring-Waterous Ltd.*, [1954] 4 D.L.R. 839, [1954] O.W.N. 445; affd D.L.R. *loc. cit.*, [1954] O.W.N. 580; *Re International Petroleum Co. Ltd.* (1962), 33 D.L.R. (2d) 658, [1962] O.R. 705; affd *sub nom. Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc. et al.* (1963), 37 D.L.R. (2d) 598, [1963] S.C.R. 144; *Re Gregory et al. and Canadian Allied Property Investments Ltd. et al.* (1979), 98 D.L.R. (3d) 358, 11 B.C.L.R. 253, [1979] 3 W.W.R. 609; *Re Hoare & Co. Ltd.*, [1933] All E.R. Rep. 105, refd to]

APPEAL from a judgment of Morrison J., 113 D.L.R. (3d) 45, 40 N.S.R. (2d) 90, dismissing an application for an order to prevent the compulsory acquisition of the plaintiff's shares.

IN THE PROVINCIAL COURT OF ALBERTA
SMALL CLAIMS

BETWEEN:

LARRY McNEILL

-and-

NORTH AMERICAN LEASEHOLDS LTD.

REASONS FOR JUDGMENT

His Honour Judge D. E. Patterson	Provincial Judge
Larry McNeill	Plaintiff
Larry D. Smith	For the Defendant Company
Lise Thibault	Monitor/Transcriber

Grande Prairie, Alberta
February 25, 1980

1 Proceedings taken at Small Claims Court, at the Provincial Court of Alberta,
2 Court House, Grande Prairie, Alberta.
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4 FEBRUARY 15,1980

5	His Honour Judge D E. Patterson	Provincial Judge
6	Larry McNeill	Plaintiff
7	Larry D. Smith	For the Defendant Company
8	Lise Thibault	Recorder

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10 THE COURT: The Plaintiff, Larry McNeill, has brought
11 an action as a tenant against his landlord for the return of a portion of
12 a damage deposit which he paid to the landlord. His original action was
13 brought against one Paul J. Evashkevich and at theoutset the pleadings were
14 amended to show the Defendant to be North American Leaseholds Ltd. It is
15 patently clear from the examination of Exhibit "1" the lease in this matter,
16 that the landlord is indeed North American Leaseholds Ltd. The claim is
17 for the sum of $95.00 the details of which are: $52.00 which were deducted
18 for cleaning the carpet and $43.00 which were deducted for cleaning the
19 drapes. The facts of the case are that the Plaintiff became a tenant
20 of the Defendant on the 1st of August, 1979, he ceased to be a tenant on
21 the 30th day of November, 1979, due to the fact that a co-tenant left and
22 he was no longer in a position to retaint the apartment. Prior to leaving
23 the made certain inquiries concerning the carpet and drapes. The Plaintiff
24 was aware of a term of the contract which specifically provided that the
25 carpeting and drapes were to be professionally dry-cleaned upon vacating
26 the premises. The only evidence before me as to the condition of the carpeting
27 and the condition of the drapes, is that they were clean and did not in fact

1 require professional cleaning, in the sense that there was anything particu-
2 larly dirty about them. And I accept that that was in fact the condition of
3 these two articles. The Plaintiff has urged upon me that since it was un-
4 necessary to clean these carpets and drapes the Defendant ought not to have
5 done so and he certainly ought not to have been charged for them. The
6 Defendant points out that this is a policy of the landlord and in particular
7 each case the landlord sees to it that the new tenants have professionally
8 cleaned carpets and drapes when the new tenants move in, that this is done,
9 as far as is known by the witness for the Defendant virtually and variably
10 and for that reason. With respect to the urging of the Plaintiff that
11 what was done was unreasonable I am bound, I think, to consider the terms
12 of Exhibit '1' which is the lease between the parties which of course if
13 a contract with very specific terms. It is true that earlier in the contract
14 there is reference to the tenant being responsibly and promptly paying to
15 the landlord on demand the costs of cleaning, repairing, and replacing all
16 carpets and broadlooms soiled, damaged, water stained, or destroyed, due to
17 the fault or neglect of the tenant, his family or guests, reasonable wear
18 and tear accepted. There is however also the clause dealing with the time
19 when the tenant vacates, number 2.20 which reads:

20 > 'the tenant shall, at the expiration or sooner termination of this lease without notice from the Landlord peaceably
21 > surrender and yield up possession of the premises, fixtures and appliances, if any , to the Landlord in as good
22 > condition as when the same were entered upon by the Tenant, reasonable wear and tear, damage by fire, lightning
23 > and tempest only excepted. The Tenant fruther agrees:
24 > (a) To have all carpeting professionally cleaned upon vacating.
25 > (b) To have all drapes professionally dry cleaned upon vacating.

26 I am of a view that the clause requiring the tenant to pay for damaged
27 carpets and broadlooms and the clause requiring the tenant to have the

1 carpeting professionally cleaned upon vacating are consistent one with
2 the other presumably section 205 - C would come into effect only in the
3 event that in fact the tenant was still occupying the premises and the
4 Landlord determined that the carpets were soiled, damaged etc. whereas
5 clause 220-A & B come into play when the tenant vacates the premises.
6 With respect to the question as to whether or not the actions of the
7 Landlord were reasonable or unreasonable I think I am bound to advise
8 as to the general law of contract. I note the firm which the Plaintiff
9 advised, perhaps not in evidence but at the outset of the proceedings,
10 that he was employed by, which indicates to me that perhaps he is a
11 chartered accountant student. Some day , if he has not already done so
12 he will be required in the course of his training to take a course in
13 commercial law, one of the more important parts of which is the law of
14 contract. I propose to read from Cote, an Alberta author on the law of
15 contract, page 189 deals with performance and breach of contract and
16 the first sub-heading is strict liability.

17 'The first and most important rule of contractual liability is the on most often overlooked. Liability in contract is
18 strict. Those used to the law of torts or even criminal law may fall into the habit of thinking in terms of fault or
19 negligence, and from that into the assumption that there could be no liability for breach of contract on the part of one who
20 had taken reasonable steps to perform the contract. Indeed, some recent English dicta having to do with a duty to see that
21 care is taken, might reinforce this impression. But the impression is entirely false. Reasonable care or efforts to
22 perform the contract,are notenough. Indeed, even superhuman efforts, orevery possible effort to perform, will not suffice.
23 Nothing will do but successful performance; the duty to perform is absolute. Thus a contract to sell and deliver four Shakespeare
24 folios intact by ten tomorrow morning would bind one even if there should notbe four intact folios in this hemisphere,or
25 even in the world. This rule applies not only to liability for non-performance, but also to non-performance excusing performance
26 by the other party. Nor is it even an excuse that though the contract was easy to perform when made, it later became very
27 expensive or difficult to perform.'

1 That is the common law, the common law of course subject to the inter-
2 vention of the legislator, binds alandlord and tenancy agreement. I
3 mention the revisal, however, but this is subject to the intervention
4 of the legislator. And in 1978 anew Landlord and Tenant Act was passed
5 and proclaim by the legislature of the Province of Alberta parts of
6 which have not yet been promulgated in force and parts of which have.
7 As I understand it, part 3 has in fact been promulgated by the legislature.
8 Section 30 deals with the security deposits which are given to a landlord
9 and Section 30 (4) reads as follows:
10 'No deduction may be made from a tenant's security
deposit for normal wear and tear to residential
11 premises during the period of his tenancy.'
12 As I have indicated at the outset the only evidence before me is that of
13 the Plaintiff that in fact the carpeting and the drapes were clean. But
14 of course, whatever may have accumulated upon them in those circumstances
15 would be something which accumulated by way of normal wear and tear. It
16 is of course the policy of Defendant Company, and in my view a good policy,
17 to ensure that new tenants have the benefit of professionally cleaned
18 carpets and drapes. But the question is whether or not if those carpets
19 and drapes have been dirtied only as aresult of wear and tear, should the
20 responsibility for cleaning them rest with the Defendant, that is to say
21 the landlord, or the Plaintiff. In my view the legislator, under the
22 provisions of the Landlord and Tenant Act is intervened in circumstances
23 such as this is. It is held that it shall be the Landlord's responsibility
24 in circumstances where the Landlord conducts the policy that I refered to,
25 which I approve, to pay the cost of it. If in fact, of course, the carpets
26 or drapes are dirty then in the normalcourse of events cleaning must be
27 paid for by the Tenant. But the legislator which does have the power to

1 modify the law of contracts and of course it has done so greatly and
2 particularly in Landlord and Tenant law, have seen fit to intervene in
3 this particular set of circumstances and in my view I am bound in the
4 circumstances, having regard to this provision in the Act, give
5 Judgment to the Plaintiff in the amount claimed. That is $95.00 and
6 $4.00 costs.
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