

IN THE CIVIL DIVISION OF THE PROVINCIAL COURT OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

SABETAI GRUNBERG PROFESSION CORPORATION

v.

**JOHN RICHARD
CHAD VEINDT
CORY ANDOLSEK**

REASONS FOR JUDGMENT OF THE HONOURABLE B.E. SCOTT

[1] On September 29, 1997 the Plaintiff and the Defendants entered into an written lease agreement ("Lease") for the premises known as 5612 20th St S.W. for a period of twelve months as and from October 1, 1997 at a monthly rental of \$1,800.00 per month, the Lease also providing for a security deposit of \$1,800.00. The Defendants took possession of the premises on September 29, 1997 paying to the Plaintiff the sum of \$2,000.00 representing the security deposit of \$1,800.00, plus \$200.00 toward the October rent as the Defendants did not have additional funds to pay the full month's rent. In addition, the Defendants provided the Plaintiff with post dated cheques dated October 16, 1997, for \$1,600.00 being the balance of October rent, and November 1, 1997 representing the November rent.

[2] An inspection report was made out on September 29, 1997 and signed by the Defendants. The premises had just been newly renovated and the inspection report was marked as "Clean/OK" throughout, denoting also, a new stove and new dishwasher. There was new carpet throughout the premises and a new kitchen parquet floor had been installed.

[3] The intent of the Defendants was to have one or two other individuals live in the house to share the rent but this never materialized.

[4] On or about October 3, 1997 one of the bathrooms in the home backed up and, being unable to contact the Plaintiff, the Defendants hired a plumber to unplug same. On being advised of such by the Defendants, the Plaintiff immediately reimbursed the defendants the \$100.00 they had paid to the plumber.

[5] The Defendants state that they also were not getting hot water and the plumber checked the hot water tank when he was at the premises. The plumber apparently found the pilot light out and re-lit it. Despite that, the Defendants allege they never had sufficient hot water and were required to shower at a friends' premises which were located nearby.

[6] Shortly after the kitchen sink allegedly began leaking causing the parquet flooring near the sink to lift. On being advised the Plaintiff sent out Mr. Jesus Mora, a maintenance worker for the Plaintiff, who repaired the floor but could find no leak. The Defendants state that they had turned the water off prior to Mr. Mora's attendance on the premise to prevent further leaking. On turning the water back on, the Defendants allege the leak again recurred causing the parquet flooring to lift again and also causing water to leak into that portion of the basement immediately below the kitchen. However, no water leaked in that portion of the basement which was used for "jam sessions", the Defendants apparently being part-time musicians. The Defendants allege that the leak was apparently a pin hole in the drain pipe.

[7] On October 16, 1997 the Plaintiff deposited the \$1,600.00 cheque drawn on Canada Trust for the balance of the October rent which was dishonoured. The Defendants allege they did not deposit the necessary funds to cover the cheque because of the problems that they were experiencing.

[8] The Plaintiff gave the Defendants more time to honour the cheque but the Defendants did not or would not do so. Nor was their sufficient funds in Canada Trust to honour the rent cheque dated November 1, 1997, although never deposited.

[9] As a result, the Plaintiff, on November 4, delivered to the Defendants an eviction notice requiring possession to be given up by November 19. The Defendants gave up possession but not until November 21 without having cleaned the premises and leaving certain pieces of furniture which ultimately had to be removed by the Plaintiff.

[10] A move out inspection report was done by the Plaintiff without notice to the Defendants.

[11] The Plaintiff now brings this action for arrears of rent and damages to the premises. The Defendants counterclaim for their security deposit.

[12] In answer to the Plaintiff's claim for rental arrears, the Defendants allege that as they never received a copy of the lease as required by Section 15.1(2) of the *Residential Tenancies Act*, RSA 1980 Chapt. 15.3 ("Act") they were entitled and continue to be entitled to withhold payment of rent. The fact is that the Defendants, from the outset, did not withhold rent paying \$1,800.00 on account of the security deposit and \$200.00 towards the October rent. They also tendered a cheque for the balance of the October rent dated October 16, as well as a cheque dated November 1

for the November rent. Having done so this section if of no help to the Defendants. As to the eviction notice, the Defendants were entitled under Section 23 of the Act, upon receipt of the eviction notice, to pay all arrears of rent which would have rendered the eviction notice ineffective. This they failed to do preferring to move out of the premises.

[13] The Defendants further argue that the deplorable state of repairs amounted to a breach of the Plaintiff's covenance under Section 14 of the Act and that the Defendants are therefore entitled to a full abatement of rent, despite the provisions of Article 4.1 of the Lease which required that rent be paid "without deduction abatement or set-off".

[14] Section 14 of the Act states:

"14 The following covenants of the landlord form part of every residential tenancy agreement:

- (a) that the premises will be available for occupation by the tenant at the beginning of the tenancy;
- (b) that, subject to section 17, neither the landlord nor a person having a claim to the premises under the landlord will in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises;
- (c) that the premises will be habitable by the tenant at the beginning of the tenancy."

[15] The evidence of the Defendants is that the interior of the property looked like new and they did not really wish to vacate the premises. The alleged failure of the Plaintiff to repair, are in my view, exaggerated, at best. The plugged toilet was cleared by the plumber called by the Defendants and upon being notified by the Defendants the Plaintiff immediately reimbursed the Defendants for the cost. When advised of a leak from the kitchen sink causing the parquet floor to lift, the Defendants utilized the services of Mr. Mora to check for the leak and reinstall the parquet flooring that had lifted. Mr. Mora found no evidence of a leak.

[16] The Defendants also allege they either never had hot water or what hot water they had was luke warm and not enough for all of them them to have showers after work. If that was the case, the plumber they retained had found the pilot light on the hot water tank was out and re-lit it. It may well have gone out again, but they did not check it. In any event, I accept the evidence of the Plaintiff that the first he heard there was a problem with the hot water tank was at the trial.

[17] As to the complaint that one of the garage doors did not close, it should be noted that the Defendants had signed the inspection report on September 29, 1997 that indicated that the garage was "Clean/OK".

[18] The major complaint of non repair relates to the alleged continue leaking from the kitchen sink subsequent to repairs to the kitchen flooring carried out on October 23, 1997 causing seepage into the basement. However, at this point in time the cheque dated October 16, 1997 had been dishonoured and despite being given a few more days to deposit sufficient funds to clear same, such had not occurred. The Plaintiff refused to carry out further repairs to the kitchen until the outstanding October rent was paid. However, I accept the Plaintiff's evidence that on move out the floor was again repaired and he has had no further problems in that respect despite apparently not having to carry out any plumbing repairs after the Defendants' departure.

[19] Even if I were to accept the Defendants' evidence that the sink was leaking, the amount of water that may have seeped into the basement was far from a flood, as described by the Defendants, making the premises uninhabitable. In *Provencal v. J. M. Investments* (1989), 93 A.R. 211 Judge Ayotte of this Court found that the flooding and resultant damage of the premises in that case was of such a scope (3-4 inches of water throughout an apartment) required to tenant to move out which in his view amounted to an interference with the tenant's enjoyment of the premises deserving of an abatement of rent, although it should be noted that the tenant was found liable for unpaid rent. I would distinguish that case on the facts. In the present case the amount of seepage, in my opinion, was minimal and did not constitute a breach of "peaceful enjoyment" of the premises that in any significant manner disturbed the Defendants' possession of the premises.

(20) I would distinguish, as well, the cases of *Haun et al and Kramer* (1979) 26 O.R. (2d) 558 and *Caithness Caledonia Ltd. v. Goss* (1973) 2 O.R. 592 on the same grounds.

(21) In response to the case of *Temlas Apartments Inc. v. Desloges et al* (1980) 29 O.R. (2d) 30 relied on by the defendants, Mr. Justice Maloney of the Divisional Court of the Ontario High Court of Justice held that the provision of a hot water system in an apartment containing rust, sand and iron filings which made it impossible for the tenants to bathe their four year old daughter did not violate the contract, but as a result of the seriousness of the situation he allowed an abatement of rent approximating some 25% of the rent paid. The present case is far less serious. If the Defendants had a serious concern in this respect, they should have notified the Plaintiff, which I have found, they did not.

(22) In answer to the whole of the Defendants' case, I again accept the evidence of the Plaintiff that the complaints he received relative to the leaking of the kitchen sink and the garage door all started after mid October 1997 when their cheque of October 16, 1997 was dishonoured. I am satisfied from the whole of the evidence that the Defendants had entered into a lease agreement at a rental that was beyond what they could afford, particularly when one or two additional persons who they were relying on to occupy the premises and share the rent did not materialize. In my view the

[28] In addition, the Plaintiff shall be entitled to recover the costs against the Defendants of \$200.00 plus allowable disbursements unless application to vary same is made to this Court within 15 days of today's date.

The Honourable B. E. Scott

Keith MacLean, Blue Moon - Agent for Plaintiff
Andrea Neufeld, Bennett Jones Verchere - Counsel for Defendants