

THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

KURT REMPEL and DEBBIE REMPEL

Plaintiffs
(Applicants)

- and -

DWAYNE FETTIG and DWAYNE FETTIG carrying on business as
FETTIG REAL ESTATE INVESTMENTS and
FETTIG REAL ESTATE INVESTMENTS

Defendants
(Respondents)

JUDGMENT OF THE HONOURABLE JUDGE J.N. LeGRANDEUR

Nature of the Proceedings

[1] This proceeding began as an application by the Plaintiff pursuant to the Residential Tenancies Act of Alberta, RSA 2000 Chap.R-17 for relief specified as abatement of rent, damages for breach of lease by the landlord, an order requiring the landlord to fulfill the obligations imposed pursuant to the terms of the lease and the Residential Tenancies Act and for damages specified as moving expense costs. The Respondents opposed the Applicants' claim and seek judgment for arrears of rent.

[2] This application, through a process of appearances before the Court was fixed for a trial of the issues raised by the Applicants and the Respondents and the trial proceeded on the basis that the Applicants' claim as specified and the Respondent landlord's claim for arrears of rent, would both be addressed as issues at hearing.

Procedure

[3] Before moving to a discussion of the substance of the respective claims, there are two matters of procedure that need to be addressed. First, it is acknowledged by counsel for the Defendants that the landlord is Dwayne Fettig and Dwayne Fettig carrying on business as Fettig Real Estate Investments and Fettig Real Estate Investments and the style of cause should be amended accordingly.

[4] Secondly, for future reference, if a trial of an issue is directed by the Court with respect to one or more issues raised on an application filed pursuant to the Residential Tenancies Act, a court order should be issued specifying the issues to be tried, or the parties should be required to file pleadings with respect to their individual claims. In this case, neither was done, and although the Court proceeded to try this matter as described aforesaid without order or pleadings, such will not be the case in the future.

Issues

[5] Generally speaking, the issues before this Court may be summarized as follows:

- a. Did the landlord breach any of the covenants or duties owed the tenants under the leasehold contract or by statute?

and if so,
- b. What covenants or duties were breached?
- c. What remedy or remedies are the tenants entitled to, damages, abatement of rent or both?
- d. Are the tenants in arrears of rent, and if so, how much?

Facts and Analysis

[6] Kurt and Debbie Rempel, (hereinafter referred to as the Plaintiffs or the Rempels) executed a Residential Tenancy Agreement with respect to Apartment #3 located at 6 Chinook Drive S.W., Medicine Hat, Alberta on the 30th day of April, 2000 and moved in on that same day. Adolf Seiler, the property manager and agent of the landlord Dwayne Fettig (hereinafter referred to as the Defendant or Fettig) signed the lease on behalf of the Defendant. The Plaintiffs had been given a quick showing of the apartment earlier that same week. No formal walk through or inspection was done, nor was an inspection report as contemplated by s.15.2 of The Residential Tenancies Act completed.

[7] The Plaintiffs paid to Mr. Seiler, at that time, the sum of \$900.00, representing the May rent and \$305.00 towards the security deposit of \$595.00. The leasehold agreement entered into by the parties (Exhibit #3) contemplated the balance of the security deposit being paid on May 15th, 2001.

[8] Mrs. Rempel testified that the balance of the security deposit was being held back until Mr. Seiler effected certain repairs to the premises that had been brought to his attention by the Plaintiffs at the time of their signing the lease and taking possession of the premises. Mr. Seiler denies any such discussions or any undertaking on his part to make any specific repairs to the premises. The repairs contemplated by the Plaintiffs at this time related only to things like loose arborite on the counter top, the fact that the kitchen floor was pocked and pitted, primarily matters relating to the kitchen.

[9] Mrs. Rempel testified that Mr. Seiler told her that, "As long as she paid, he would make the repairs."

[10] Over the next two weeks following the taking of possession, the Rempels noticed other problems such as leaks in the bathroom and the kitchen sink, rotten baseboards and other damage as well. No repairs were ever done by the landlord.

[11] Mrs. Rempel called Mr. Fettig and left him a message about the problems and the next day he came to the residence and she says offered to show them another place to live. That place was, according to Mrs. Rempel, worse than the apartment they were in and they rejected it as a possible replacement residence.

[12] In June that year, the sewer backed up and it did so again in September. On the second backup, the sewage flowed out of the bathroom onto carpet and into their son's bedroom.

[13] Mrs. Rempel testified to regularly complaining about the condition of the premises. Mr. Seiler denied receiving any complaints from her, save with respect to the wet carpet after the second overflow occurred on September 9th, 2001.

[14] On September 10th after the second flooding, Mrs. Rempel called Mr. Larry Butts, the Public Health Inspector for the Palliser Health Authority complaining about the sewer problem and other items of disrepair in the subject apartment. Mr. Butts inspected the premises on September 12th and then called Mr. Seiler. Mr. Seiler did not return his call. On September 13th he called again; again his call was not returned. On September 16th, Mrs. Rempel called Mr. Butts again complaining of the sewage smell.

[15] On September 17th, Mr. Butts got through to Mr. Seiler who told him that he wanted the tenants out and to put his concerns in writing. A letter was posted and sent to Mr. Seiler on September 20th; by October 10th, Mr. Seiler had not gotten back to him, so he sent a follow up registered letter. On October 15th, Mrs. Rempel called to tell Mr. Butts that they had no heat in the apartment.

[16] On October 15th, Mr. Butts got through to Mr. Seiler who said it was the owner's

problem, not his. Mr. Butts finally heard from Mr. Fettig four days later on October 19th and Mr. Fettig said that since the tenants had not paid all their rent, he did not have to fix the problems. Mr. Butts told him that these were health issues and he had an obligation to make repairs. Mr. Fettig said he would get back to him by October 22nd. Mr. Fettig did not do so and despite other messages left by Mr. Butts, Mr. Fettig never contacted him. On October 25th, Mr. Butts did another inspection of the apartment and issued an order of condemnation (Exhibits #2) requiring the tenants to vacate the premises by October 31st, 2001.

[17] During the course of his testimony, Mr. Butts commented on the fact that the premises, in terms of day to day cleanliness appeared to be well kept by the Plaintiffs, given the condition they were in.

[18] In issuing the order, (Exhibit #2) references were made to the following deficiencies:

- a. Mould under the carpet in the back basement bedroom
- b. Wall behind shower stall has rotted and broken due to water damage
- c. Kitchen sink is loosely attached and not sealed to the kitchen counter
- d. Carpet floor in the basement bedrooms has not been properly cleaned after the sewer back up
- e. There is a hold in the kitchen screen
- f. No hand rails on the stairs to the basement
- g. Smoke detectors upstairs and downstairs are not working
- h. The wood baseboard trim at the basement entrance in the basement has rotted and broken
- i. Arborite on the kitchen cupboards is separated, loose and broken
- j. Patio screen door is missing
- k. Oven does not maintain indicated temperature
- l. Bathtub leaks water on the bathroom floor
- m. Toilet leaks water on the floor when flushed

[19] It is clear on the evidence of Mrs. Rempel that she complained early on after taking possession as to the condition of the residence which resulted in Mr. Fettig actually showing them another potential tenement. This is consistent with her testimony that she made complaints throughout the period of their occupancy about the condition of the premises.

[20] I am also satisfied, given the nature of the deficiencies as outlined by Mr. Butts in the Executive Officers Order (Exhibit #2), that these items of disrepair existed, for the most part throughout the whole period of occupancy of the subject premises by the Plaintiffs. Although the sewer backup occurred only twice, the condition of disrepair, in the sense that it was susceptible to backup, existed at the time this tenancy was entered into and continued to exist throughout it. Mr. Orge testified that he attended the premises for sewage backup problems usually once a year.

Although the Defendant Fettig had only owned the property for about one and one half years, he ought to have known of the problem and ought to have had in place a program of regular preventative maintenance, such that backup would not occur; as opposed to just addressing the sewage problem as it arose, from time to time.

[21] Mr. Seiler and Mr. Fettig's response to Mr. Butts' inspection, demonstrates complete disregard for the welfare of the tenants and little regard for the duties and obligations owed by Mr. Fettig as landlord and Mr. Seiler as property manager on behalf of the landlord.

[22] The Plaintiffs had been searching for a new residence for some time prior to October 31st and fortunately found a residence that became available to them on the 4th day of November, 2001. Given the Executive Officer's order (Exhibit #2), they had to take a hotel for four days, for that period after they vacated the premises on the 31st day of October until they could get into the new residence on the 4th day of November. The cost of the hotel for the four day period was \$246.40 (Exhibit #9).

[23] With respect to rental arrears, save for the sum of \$200.00 paid in September, the tenants did not pay rent for the months of August, September or October, 2001.

Analysis

Habitable Condition

[24] Section 15 of The Residential Tenancies Act, RSA 2000 Chap.R-17, provides:

- 15 The following covenants of the landlord form part of every Residential Tenancy Agreement:
 - a. That the premises will be available for occupancy by the tenant at the beginning of the tenancy;
 - b. That, subject to s.22, 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.

[25] The facts in this case raise the issue as to whether or not the premises were habitable by the tenant at the beginning of the tenancy.

[26] At common law, in the case of a furnished residential premises, there is an implied covenant in the tenancy agreement that, at the commencement of the term, the subject premises will be reasonably fit for habitation. In the case, Summers v. Salford Corporation, [1943] A.C. 283, the House of Lords considered the meaning of the phrase “keep in all respects reasonably fit for human habitation”, as set out in the British Housing Act of 1936. The Court adopted the statement of Lord Atkin given in the earlier case of Morgan v. Liverpool Corporation, [1927] 2 KB 131, wherein addressing this issue he stated:

I will only cite one passage from my own judgment in Morgan's case (1), because I know no better way of expressing my present opinion after a lapse of fifteen years (2): “If the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.”

[27] Lord Atkin in his speech in Summers, also stated in this regard:

I wish to add that, since the argument, I have looked at the decision in Proudfoot v. Hart (3), a leading case on repairing covenants, and there I find a reference in Lord Esher's judgment to a definition by Alderson B. in Belcher v. M'Intosh (4) of “habitable repair”. “It was difficult to suggest any material difference between the term ‘habitable repair’ used in this agreement, and the more common expression ‘tenantable repair’: they must both import such a state, as to repair, that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied.” “That is the whole definition,” says Lord Esher, “and, so far as it goes, it is a good one.” I agree, and I am bound to say that I find it difficult to draw a distinction between an obligation to put premises into habitable repair and so deliver them up, and to keep premises “in all respects reasonably fit for human habitation.” Too much emphasis should not be laid on “comfort”, but, taking a reasonable view of the meaning of “comfort” in the definition, it affords a useful test of liability.

[28] I see no reason why the meaning of the word “habitable” as referred to in s.15.1(c) should be interpreted any differently in the context of residential tenancies than as discussed in the Summers case referred to aforesaid.

[29] Lord Atkin in his speech makes further comments apropos to this particular claim, he states:

My Lords, the case raised what is an important question to owners and tenants of houses to which the Housing Act, 1936, applies, namely, the meaning and extent

of the phrase "keep in all respects reasonably "fit for human habitation". The test of the obligation cannot simply be whether, with the disrepair complained of, the tenant can live in the house. The present war has shown how ineffectual such a test may be. It must not be measured by the magnitude of the repairs required.

[30] I agree with this view as expressed. The fact that the tenant has actually lived in the premises does not determine whether they were habitable. (See also: re Claydon and Quann Agencies Ltd., (1972) 2 OR 485)

[31] In the case at hand, although the premises were not condemned until some time into the six month of occupancy, I am satisfied that the condition of the premises was for the most part, the same throughout the entire occupation as was observed by the health inspector on September, 2001, which condition ultimately led to an Executive Officers Order requiring the premises to be vacated by the tenants. This house was a health hazard for the reasons cited by the health inspector and the fact that it would not have taken much to put it into a state of habitability, is not the test as to whether or not it was habitable at the time the Plaintiffs took possession thereof. I adopt the words of Riddell, J. from the case of Gordon v. Goodwin, 20 OLR 327, when in considering the issue of whether a home was recently fit for habitation, he stated at p.330 of the report:

Supposing, however, all the defects to be slight, the case for the plaintiff is not bettered. For, in the first place, it is not the extent of the defect which is material, but the result of such defect in producing an unsanitary condition;

Much was made of the fact that it was not proved that the sickness resulted from the condition of the house. It is quite likely, in accordance with Beal v. Michigan Central R.R.Co. And the cases there cited, that the defendant would have failed had he claimed damages from the plaintiff for causing the sickness; but it is not necessary to go that far - it is not necessary to provide that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this case, that it might have such effect, that is (to repeat) that the house was unsanitary.

[32] The subject premises in this case were not habitable at the time the tenants took possession, nor did that change during the currency of their possession. These premises could not be dwelled in safely, in the sense of the health of the occupants, nor did the condition of the premises allow the occupants to live in reasonable comfort, having regard to the intended use of the premises. I am satisfied that the conditions noted by the health inspector which led to the Executive Officers Order (Exhibit #2) were in existence at the time the tenants took occupation. The fact that the tenants resided in the residence for some six months does not change that fact, nor may it be seen as some sort of a waiver by the Plaintiffs.

[33] I am satisfied that the Plaintiffs would have moved if they could have found other accommodation and I believe they made reasonable attempts to do so.

[34] I conclude that the landlord was in breach of the covenant implied by s.15(1)(c) of the Residential Tenancies Act to provide the tenants with habitable premises. At no time was that breach remedied by the landlord, although he was given the opportunity to do so by the Plaintiffs and indeed requested to do so, likewise he was instructed by the health inspector to do so. The landlord disregarded all of those requests.

Plaintiffs' Remedies for Landlord's Breach of Covenant

[35] Section 34 of The Residential Tenancies Act, supra, provides:

- 34 If a landlord commits a breach of residential tenancy agreement or contravenes this Act, the tenant may apply to a court for one or more of the following remedies:
- a. Recovery of damages resulting from the breach or contravention;
 - b. Abatement of rent to the extent that the breach or contravention deprives the tenant of the benefit of the tenancy agreement;
 - c. Compensation for the cost to perform the landlord's obligations;
 - d. Termination of the tenancy by reason of the breach or contravention if in the opinion of the court or contravention is of such significance that the tenancy should be terminated.

Damages

Hotel Costs

[36] The Plaintiffs incurred an expense of \$246.40 for a hotel which they occupied for a period of four days from October 31st, 2001 when they vacated the subject premises until November 4th when they took occupation of new premises that they had obtained. Had they not been removed from the Defendant's premises by the Executive Officers order (Exhibit #2), they would not have incurred this expense. The hotel was a necessary expense incurred for living purposes as a result of the breach of the landlord's covenant as described aforesaid. This is a loss which flows directly from the landlord's failure to provide a habitable residence and the Plaintiffs are entitled to judgment for the said sum of \$246.40.

Moving Expenses

[37] The Plaintiffs incurred moving expenses in the amount of \$254.62 being the cost of renting a U-haul trailer in which they hauled and stored their goods during the four day period from October 31st until they occupied their new residence on November 4th. (Exhibit #4) Had the tenants been aware that the residence was not habitable, they would not have moved in, in the first place. They moved in because they didn't know and had no where else to go. They moved out because of the uninhabitableness of the premises. The move was necessitated by the Defendant's breach of s.15(1)(c) of The Residential Tenancies Act as described aforesaid. This item of damage is allowed as well, in the sum of \$254.62. (see re Hahn v.Kramer, (1980) 26 OR (2d) 558)

Damages for Illness Caused by Condition of Premises

[38] The Plaintiffs' claim for damages to the health of Mrs. Rempel allegedly caused by the condition of the premises and the alleged abuse of conduct of Mr. Seiler, the agent of the Defendant Fettig. I am unable to conclude on the evidence that Mrs. Rempel's condition as described in her evidence was caused by the facts she alleged and therefore no compensation may be ordered in this regard.

[39] With respect to the Plaintiffs' complaints concerning their son's health deteriorating while in the premises, again, the evidence does not demonstrate by a preponderance that the unhealthy conditions prevalent in the residence as described by the health inspector caused his difficulties. Certainly those conditions might have had that effect. Although that may be enough to find a residence uninhabitable (see Gordon v.Goodwin, supra) is not enough upon which the Court may award damages for personal injury.

Abatement of Rent

[40] The remedy of abatement of rent may be given when the Court concludes that the tenant did not receive the benefit of the tenancy. (Section 15(1)(c) of the Residential Tenancies Act, supra.)

[41] Although the premises were not habitable, during the course of the Plaintiffs occupation as I have described aforesaid, neither can it be said that the Plaintiffs did not derive some benefit from the occupation of the same. Although they suffered inconvenience and discomfort and had to live in conditions that were unhealthy, they did, nonetheless, have shelter, heat, water and other amenities, albeit in circumstances that were unacceptable for any tenants.

[42] Full abatement of the rent would not, accordingly, be appropriate given the fact as described aforesaid, that they did derive some benefit from their tenancy. (Temlas Apartments

Inc. v. Desloges, (1980) 29 O.R. (2d) 30) They did not however, derive the full benefit of the tenancy to which they were entitled under their tenancy agreement and pursuant to the provisions of The Residential Tenancies Act. The value of the rental abatement should be the difference in value of the premises if they had been habitable and the fair market value of the premise during the occupancy of the tenant, while the landlord was in breach of the subject covenant, (See: re Quann and Pajelle Investments Ltd. (1975) 7 OR (2d) 769 at 789). I have no evidence before me that allows me to make the assessment on the aforementioned basis so I am placed in the position of doing the best that I can, in the circumstances, to assess what an appropriate abatement would be.

[43] Given all the evidence, the nature of the premises, the condition of the residence, also considering how easy it would have been to remedy these problems and the attitude displayed by the landlord and his agent as to remedying of the same, I would conclude that it is fair to abate rent for each and every month of occupation in the sum of \$295.00, thereby making the Plaintiff liable only for the sum of \$300.00 per month for that period May 2001 through October 2001.

Summary of Judgment in Favour of Plaintiffs

[44] The Plaintiffs shall have judgment against the Defendant as described in the style of cause as follows:

a.	Judgment for abated rent for the months of May, June and July - \$295.00 x 3	\$885.00
b.	Judgment for return of the security deposit paid to the landlord	\$305.00
c.	Judgment for moving costs	\$254.62
d.	Judgment for hotel expense	<u>\$246.40</u>
	Total judgment in favour of Plaintiffs:	<u>\$1691.02</u>

Defendant's Counterclaim for Rent

[45] The Defendant is entitled to receive rent after abatement as described aforesaid in the amount of \$300.00 per month for each of the months May through October, 2001. The

Defendant has been paid the unabated portion of rent for the months of May, June and July and part of the rent of \$200.00 for September.

[46] The Defendant is therefore entitled to judgment against the Plaintiffs for unpaid rent as follows:

May	\$0.00	(\$300.00 paid)
June	\$0.00	(\$300.00 paid)
July	\$0.00	(\$300.00 paid)
August	\$300.00	
September	\$100.00	(\$200.00 paid)
October	<u>\$300.00</u>	
Total:	<u>\$700.00</u>	

Total judgment in favour of the Defendant against the Plaintiffs, \$700.00.

Summary of Judgment

[47] The judgment in favour of the Defendants in the sum of \$700.00 shall be set off against the judgment owing the Plaintiffs by the Defendant being the sum of \$1,691.02, leaving a net judgment in favour of the Plaintiffs in the sum of \$991.02.

Costs

[48] The Defendant shall pay to the Plaintiffs costs in the sum of \$200.00 inclusive of all disbursements.

[49] The Clerk shall accordingly issue judgment in favour of the Plaintiffs against the Defendant as described in the style of cause for the sum of \$1,191.02, inclusive of costs.

Dated at the City of Lethbridge, in the Province of Alberta, this 14th day of May, 2002.

Jerry N. LeGrandeur
Judge of the Provincial
Court of Alberta