April 18, 2017

Punitive Damages and the *Residential Tenancies Act*

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Case Commented On: *Wilderdijk-Streutker v Zhao*, 2017 ABPC 24 (CanLII)

Punitive damages are rarely awarded in residential tenancy disputes, but *Wilderdijk-Streutker v Zhao* is one of those rare cases. And although an award of punitive damages is very fact-dependent, there are some principles and rules of law which residential landlords and tenants who are contemplating claiming punitive damages should be aware of. They should also be aware that there are a few unsettled issues concerning the awarding of punitive damages in this context. Those unsettled issues are the focus of this post.

Provincial Court Jurisdiction to Award Punitive Damages

The ability of a Provincial Court judge to order punitive damages is not discussed in this case or others where punitive damages were claimed. Nevertheless, as Justice P.R. Jeffrey recently reminded us in *Director (EAP) v Alberta (Provincial Court)*, 2017 ABQB 3 (CanLII) at paras 40-41, the Provincial Court of Alberta possesses no inherent power; the only powers it has are those conferred upon it by statute (see also "Jurisdictional Matters Concerning Environmental Protection Orders Under the Environmental Protection and Enhancement Act" commenting on that decision).

The *Provincial Court Act*, RSA 2000, c P-31, section 9.6(1)(c) lists three types of orders that a Provincial Court judge can make under the *Residential Tenancies Act*, but none of those three include any type of damages. The most likely source for the power to award punitive damages claimed by a tenant is section 37(1) of the *Residential Tenancies Act* which provides, with respect to damages, as follows:

> 37(1) If a landlord commits a breach of a 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 … (emphasis added)

That subsection specifies that the damages must be the result of a breach of a residential tenancy agreement or a contravention of the *Residential Tenancies Act*. That specification may be a problem for the award of punitive damages which, as we shall see, requires an actionable wrong. If there is an independent actionable wrong that allows punitive damages to be awarded, are those damages the result of a breach of a residential tenancy agreement or a contravention of the act? Or is it only compensatory damages that arise from such breaches? If the actionable wrong is "independent", can punitive damages be awarded under section 37(1)(a)?

The equivalent *Residential Tenancies Act* section in a case where the landlord claims punitive damages is section 26(1)(d) providing for the "recovery of damages resulting from the breach" of a residential tenancy agreement. The same questions therefore seem relevant. See also section 32

regarding damages when the tenant fails to vacate the rented premises at the end of the tenancy, where the court's power seems even more restricted.

The Test for the Award of Punitive Damages

The leading cases on the award of punitive damages are two Supreme Court of Canada cases, both cited by Judge Yake in *Wilderdijk-Streutker v Zhao* (at paras 88-89).

The more recent of the two Supreme Court of Canada decisions is *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595, 2002 SCC 18 (CanLII). Judge Yake relies upon *Whiten* for three matters (at para 89):

- "The conduct for which the punitive damages are awarded must be an actionable wrong against the party seeking punitive damages."
- "In addition to punishment, the purpose of an award of punitive damages is to deter others from similar misconduct."
- "Punitive damages must be proportionate to such factors as the harm caused, the degree of misconduct, the vulnerability of the tenant and any advantage or profit gained by the landlord[.]" (emphasis added)

The older decision is *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 1989 CanLII 93 (SCC). Judge Yake relied on *Vorvis* for the principle that "[p]unitive damages are available for deliberate wrongful acts which are so harsh, vindictive, reprehensible and malicious that they deserve punishment" (at para 88).

In applying the law from those two cases, Judge Yake summarizes the landlord's actions that he found to be "malicious, highly reprehensible and … a marked departure from the ordinary standards of decent behaviour" (at para 90), dishonest (at para 91), reprehensible, harsh and vindictive (at para 92) and "highly reprehensible" (at para 94) — all of which apply the principle he cited from *Vorvis*. He also explicitly refers to the third point he cites from *Whiten*, noting proportionality (at para 92) and the tenant's vulnerability to professional discipline due to the landlord's interference with the tenant's confidential patient records (at para 93).

Notably absent, however, is any discussion by Judge Yake about whether or not the landlord's conduct was an actionable wrong. He perhaps hints at this requirement when he discusses the landlord's "dishonest act" in attempting to cash a replacement rent cheque when the landlord retained the original rent cheque (at para 93), but it is no more than a hint.

The Requirement for an Independent Actionable Wrong

The requirement for an actionable wrong has been problematic for two other Provincial Court cases which briefly discussed punitive damages.

The first of those two cases is *Nordal v McFeeters*, 2008 ABPC 352 (CanLII). The tenants relied on the *Whiten* case and claimed punitive damages as a result of what they called a systematic campaign to force them from the rented premises. However, Judge J. Shriar distinguished *Whiten* on the basis that, under the insurance contract sued upon, the insurance company owed the tenants as policyholders a duty of good faith (at para 82). She noted that "The breach of that duty was itself an actionable wrong and that was an important precondition for the

award of punitive damages" (at para 82, emphasis added). However, Judge Shriar found that the landlord did not owe the tenant a duty of good faith.

There is no indication in Judge Shriar's brief decision whether or not she thought there was no duty of good faith owed on the facts before her, or whether she thought there was no duty of good faith owed by any landlord to any tenant in the residential tenancies context.

The second of the two cases is a decision by Judge J.N. LeGrandeur in *Singh v RJB Developments Inc*., 2016 ABPC 305 (CanLII). Judge LeGrandeur relied upon Ronald M. Snyder and Harvin D. Pitch, *Damages for Breach of Contract*, 2nd ed, at page 4-3 for the requirements for awarding punitive damages:

> (a) There is an independent actionable wrong, separate from the ground upon which the Applicant is suing;
> (b) The conduct of the Respondent is sufficiently high-handed, outrageous or egregious;
> (c) Compensatory damages (i.e. aggravated damages, costs etc.) are not sufficient to fully express the Court's repugnance regarding the Respondent's conduct (at para 70, emphasis added).

Because Judge LeGrandeur found that the conduct of the landlord was not high-handed, outrageous or egregious enough to justify an award of punitive damages (at para 72), he did not say much about the requirement for an independent actionable wrong. What he did say, however, was almost the opposite of what Judge Shriar said in *Nordal*:

> There is undoubtedly an element of good faith required by the Landlord in exercising any of the powers granted the Landlord under a residential tenancy agreement and so there is likely a breach of that good faith requirement in this case such as to satisfy the independent actionable wrong requirement (at para 71, emphasis added).

Judge LeGrandeur suggests that all landlords exercising any power under a residential tenancy agreement owe a duty of good faith.

One big change in the law between the *Nordal* decision in 2008 and the *Singh* decision in 2016 is the intervening Supreme Court of Canada decision in *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 (CanLII). The issue in *Bhasin* was whether the Canadian common law imposes a duty on parties to perform their contractual obligations honestly and the answer was yes. (at para 1) In the unanimous decision written by Justice Cromwell, the Court took "two incremental steps" in the development of the common law:

> 1) An "organizing principle" of good faith: "The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance" (at para 33).
> 2) A duty of honest performance: "The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations" (at para 33).

Justice Cromwell made it clear that he was talking about contracts. For example, he did not rule out the ability of the parties to reach an agreement that influences the scope of honest performance in a particular context (at para 77).

Is a Residential Tenancy Agreement a Contract to Which the Organizing Principle of Good Faith Applies?

In *Wilderdijk-Streutker v Zhao*, Judge Yake called the *Residential Tenancy Act* "a comprehensive statute" (at para 58). He cited *Krause v Bonin*, 2011 ABPC 171 (CanLII), for that characterization. In *Krause*, Judge J.D. Holmes stated:

> The *Residential Tenancies Act* SA 2004 ("the Act") is a comprehensive statute outlining the rights as between landlords and tenants. A tenancy can only be terminated in accordance with the act. Any waiver or release by the tenant of the rights, benefits or protections of the Act is void (s. 3(1)) (at para 13).

The *Residential Tenancies Act* is not entirely comprehensive. It does not, for example, include a landlord's right to distrain the goods of the tenant in any of its provisions setting out the rights of landlords. And as another example, it says nothing about the need for registration of a residential tenancy agreement with a term of more than three years in order to bind third parties.

Nevertheless, the *Residential Tenancies Act* is a fairly comprehensive statute, albeit not a complete code. It regulates the landlord-tenant relationship in great detail and offers protections to the tenant that the tenant cannot vary or waive. Is a residential tenancy agreement — highly regulated by the *Residential Tenancies Act* as it is — a "contract" that attracts the two principles set out by Justice Cromwell in *Bhasin*? Does it matter that the governing statute says nothing about good faith (whereas some provincial landlord and tenant legislation does with respect to very specific aspects of the relationship)?

Because Judge LeGrandeur did not state why he found that there is "undoubtedly an element of good faith required by the Landlord in exercising any of the powers granted the Landlord under a residential tenancy agreement" (at para 71, emphasis added), we do not know if he was applying the Supreme Court of Canada decision in *Bhasin*.

Conclusion

The uncertainties about the possibility of the Provincial Court awarding punitive damages in the right case could easily be resolved with an amendment to sections 26 and 37 the *Residential Tenancies Act*.

This post may be cited as: Jonnette Watson Hamilton "Punitive Damages and the *Residential Tenancies Act* " (18 April, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/04/Blog_JWH_Wilderdjik_v_Zhao.pdf

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