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Abatement of Rent for Landlord's Breach of the Minimum Housing and Health Standards

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Case Commented On: *C.V. Benefits Inc. v Angus*, 2017 ABPC 118 (CanLII)

This decision is important for two reasons. First, Assistant Chief Judge Jerry LeGrandeur awarded the tenant an abatement of her rent based on her landlord's breach of section 16(c) of the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*). Section 16(c) requires landlords to ensure that rented premises "meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations." Usually abatement of rent is granted for a landlord's breach of section 16(b) of the *RTA*, which is the landlord's promise that it will not "in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises." Relying on section 16(b) suggests that a tenant must be unable to use or possess all or a part of the rented premises. Indeed, the landlord in this case argued that there needed to be an actual loss of physical use of all or part of the premises before a court could grant an abatement of rent. Tying the abatement of rent remedy to tenants' inability to physically occupy the premises might seem appropriate if a tenant is forced out of possession by flooding or a bedbug infestation. However, tenants need to be able to be awarded an abatement of their rent when the problems are persistent but less serious breaches of minimum housing standards that do not drive them out of possession or entitle them to terminate their lease. Judge LeGrandeur's decision made it clear that tenants can rely on section 16(c) when seeking abatement of their rent. Second, rather than calculating the amount of the abatement based on what percentage of the square footage of the rented premises the tenant could not use, Judge LeGrandeur adopted a more contextualized approach that seems much more appropriate.

I wrote about the abatement of rent remedy two years ago, in "The Abatement of Rent Remedy under Alberta's *Residential Tenancies Act*," when commenting on *Perpelitz v Manor Management Ltd.*, 2014 ABPC 63. That was a case in which Judge Gordon Yake relied on section 16(b) of the *RTA* to grant the tenants an abatement of rent. It involved a leaking dishwasher and leaking plumbing that eventually flooded the basement and necessitated the replacement of kitchen and bathroom floors and subfloors, kitchen countertops and cupboards, plumbing fixtures, and drywall in the basement. Judge Yake found that the tenants lost the entire use of their basement for five months and the use of a large portion of their main floor for two months. He appeared to assess the amount to be awarded as an abatement of the rent based on the percentage of the rented premises that the tenants could not use. I had complained at the time about the reliance on section 16(b), the exclusion of any consideration of section 16(c), and the lack of correlation between compensation based on square footage instead of the benefits actually lost by tenants who were without heat, a kitchen, two bathrooms, and a basement for a considerable period of time. Judge LeGrandeur's use of section 16(c) and his more holistic approach to determining the amount of rent to abate is preferable.

Facts

The landlord, C.V. Benefits Inc., initiated this action, seeking termination of the tenancy, possession of the premises and a judgment for arrears of rent. The tenant, Lyra Angus, applied for damages and abatement of rent.

The tenant had rented a small, older house in Lethbridge for herself and her two small children for six months, beginning December 1, 2015. The lease was extended for a further three months to August 31, 2016 on the same terms and conditions. The tenant vacated the premises on September 1, 2016.

Her rent was $1,300 per month. She was in arrears for the months of July and August and she did not dispute that she owed the landlord rent of $2,600. She had also paid a security deposit of $1,050 which had not been returned by the date of the trial on September 12, 2016.

Because the tenant did not dispute that she owed the landlord $2600, the sole issue was whether the tenant was entitled to an abatement of rent (at para 4). She based her claim for an abatement on the following defects:

1. exterior doors not maintained,
2. interior doors not maintained,
3. cracked windows,
4. no window screens,
5. no proper emergency window egress in some bedrooms,
6. no handrails on the stairway between the first and second floor,
7. a leak in the plumbing system, and
8. porch overhang not maintained.

Law

The relevant provisions of the *RTA* are sections 16(b) and (c) and section 37(1):

> 16 The following covenants of the landlord form part of every residential tenancy agreement:
> …
> (b) that, subject to section 23, 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 meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations.
>
> 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;
> (b) abatement of rent to the extent that the breach or contravention deprives the tenant of the benefit of the residential tenancy agreement;
> . . .

> (d) termination of the tenancy by reason of the breach or contravention if in the opinion of the court the breach or contravention is of such significance that the tenancy should be terminated.

The relevant *Public Health Act* regulation is the *Housing Regulation*, Alta Reg 173/1999, which requires, among other things, that the owner ensure that housing premises are "(i) structurally sound, (ii) in a safe condition, (iii) in good repair, and (iv) maintained in a waterproof, windproof and weatherproof condition" (section 3(1)(a)). That regulation also provides, in section 4, that an owner "maintain the housing premises in compliance with the Minimum Housing and Health Standards, as approved and published by the Minister and as amended by the Minister from time to time."

Application of Law to Facts

Judge LeGrandeur quoted the relevant provisions of the *Minimum Housing and Health Standards* at some length (at para 9) and, when he discussed each of the tenant's complaints in turn (at paras 10-27), noted which provision of those standards was not met and why. Judge LeGrandeur found that seven of the tenant's eight complaints disclosed conditions which were a breach of the *Minimum Housing and Health Standards* and therefore of section 16(c) *RTA* (at para 30). For example, he found that neither of the exterior doors closed properly and therefore neither was reasonably secure, contrary to the requirement in section 2(b)(i) of the *Minimum Housing and Health Standards* that exterior doors be maintained in good repair (at para 17).

Judge LeGrandeur held that none of the breaches of the *Minimum Housing and Health Standards*, even if considered cumulatively, amounted to a substantial breach that would allow the tenant to terminate the tenancy early (at para 32). However, they did support a claim for damages or abatement of rent because the landlord failed to provide the tenant with premises that met the minimum housing standards.

In calculating how much to award as an abatement of rent, Judge LeGrandeur began by noting how many months out of the nine months of the tenancy the tenant had to endure each condition she complained about. Most of the problems persisted for the entire nine months, but the lack of window screens he held to be a problem for only four months (at paras 33-37).

Noting the proportion of the tenancy's term that each condition persisted might seem similar to Judge Yake's approach of using square footage in *Perpelitz v Manor Management Ltd.* However, Judge LeGrandeur did not stop there.

After setting out section 37(1)(b) *RTA*, which describes the abatement of rent remedy as available "to the extent that the breach or contravention *deprives the tenant of the benefit* of the residential tenancy agreement," Judge LeGrandeur quoted (at para 40) from Richard A. Feldman, *Residential Tenancies*, 10th edition at 432:

> An abatement of rent is a monetary award expressed in terms of past or future rent. It may be a lump sum payment the landlord is ordered to pay the tenant (which effectively orders the landlord to refund a part of the rent paid) or it may be an order to allow the tenant to pay less rent by a certain amount or percentage (or even to pay no rent) for a specified period, or a combination of these.

Feldman's point is important because it means that tenants can be awarded an abatement of rent even if the rent was already paid or was past due. The tenant does not have to seek a court order for abatement of rent before the rent is due.

Judge LeGrandeur next considered the landlord's argument that the tenant must be deprived of the benefit of the residential tenancy agreement because of the wording of section 37(1)(b). As I noted at the beginning of this post, the landlord suggested that "an actual loss of physical use or occupation of all or a part or an aspect of the residential premises was required" (at para 41). However, Judge LeGrandeur held that the deprivation of the benefit of the tenancy agreement required by section 37(1)(b) meant that the tenant had to be "deprived partially or completely of the bundle of rights to which the tenant was entitled under the tenancy agreement and the *Residential Tenancies Act*" (at para 42):

> If the landlord had failed to fulfil to the minimum standard his covenants under the agreement *the tenant has been deprived of that benefit for which he or she has paid* resulting in the consequential interference with the tenant's reasonable enjoyment of the premises. The bundle of rights includes adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and maintenance and the quiet enjoyment of the property…. (emphasis added)

It is regrettable that Judge LeGrandeur tied the deprivation of benefit to "the tenant's reasonable enjoyment of the premises" and "the quiet enjoyment of the property," both of which speak of breaches to section 16(b) *RTA*, rather than a breach of 16(c) arising from the failure of the landlord to meet minimum standards. The introduction of the landlord's covenant of peaceful enjoyment in this passage may cause unnecessary confusion. Nonetheless, Judge LeGrandeur immediately follows up with the conclusion that "when these things, or any one of them, are not provided to the minimum standards required by the law, then the landlord is in breach and the tenant has been deprived in relation to the tenancy" (at para 43) — a clear reference to section 16(c).

The landlord also argued that the tenant "knew what she was getting into" when she rented the small, older house and that she therefore waived any concerns about problems with the house or, in the alternative, her concerns should be taken less seriously when calculating the amount to be abated (at para 44). Justice LeGrandeur was willing to take into account the age of the house and its general condition when setting the amount of the abatement. However, the rule is not *caveat emptor* (or *lessee emptor*). Instead, as Judge LeGrandeur noted, the rules are in the *RTA* and section 3(1) provides that tenants cannot waive any of the benefits and protections of the *RTA*.

As for the calculation of the amount of the abatement, Judge LeGrandeur quoted (at para 46) the factors to be considered, as set out in an earlier judgment of his, *Rempel v Fettig*, 2002 ABPC 81 at para 43: "all the evidence, the nature of the premises, the condition of the residence, … how easy it would be to remedy these problems, and the attitude displayed by the landlord and his agent as to remedy the same." He also quoted the similarly contextualized approach used in *Biltmore Terrace Apartments v Nazareth* (1997), 197 Carswell Ont 1667 (Ont Gen Div):

> What is appropriate in each case will depend on the circumstances, including amount of rent, the age and general condition of the premises, the nature and degree of the non-repair and its duration, the efforts of the landlord to inspect, the cooperation or otherwise of the tenant and the efforts made by the landlord to rectify the defect.

The general condition of the premises in this case were assessed as "pretty sad" (at para 48), even if the tenant was paying $1,300 per month including utilities. Despite the age of the house and its general condition, Judge LeGrandeur found that an appropriate abatement of rent for December 1, 2015 to May 1, 2016 was $175 per month; for May 1 to July 15, 2016, when the lack of window screens was relevant, $225 per month; and for July 15 to August 31, 2016, after some but not all window screens had been installed, $200 per month. He also allowed $10 per month for the entire nine months for the cracked or broken windows (as well as $75 for the lack of a washer for one week, which was a breach of the tenancy agreement but not of the *RTA*). The total award for abatement was therefore $1,902.50 (at para 53).

Judge LeGrandeur also awarded the tenant costs in the amount of $500 inclusive of disbursements for her relative success (at para 54). He awarded the landlord only its $100 filing fee for success on its claim for arrears of rent because that claim was not disputed. Setting off the tenant's judgment against the landlord's judgment, the tenant in the end owed the landlord a total of $297.50.

Concluding Comments

This case illustrates, once again, that a tenant's covenant to pay rent is an independent promise. It is not tied to or conditional upon the landlord performing its promises, such as its covenant to make sure the rented premises meet minimum housing standards. A tenant has to pay rent regardless. He or she has no self-help remedy. We are not told why the tenant in this case did not pay her rent for the last two months of the term, but it may be that she was trying for an abatement of her rent as a self-help remedy. However, the only thing a tenant can do if their landlord breaches one or more of its covenants is apply to the court or the Residential Tenancies Dispute Resolution Service (RTDRS) seeking an abatement of their rent, damages, or, if the breach is serious enough, early termination of their tenancy.

This case also illustrates that we are fortunate that the landlord's counsel chose to begin this action in the Provincial Court instead of using the services of the RTDRS. The RTDRS does not give written reasons so there is no development of the law when it is the decision-maker.

We are also fortunate that Judge LeGrandeur issued a written decision which sets out his reasoning in considerable detail. As I have mentioned in other posts, residential tenants need written decisions that explain how provisions of the *RTA* will be interpreted and applied. However, I note that the trial in this action took place on September 12, 2016 and Judge LeGrandeur's judgment was not released until May 29, 2017, some eight-and-one-half months later. That is a very long wait for the parties.

This post may be cited as: Jonnette Watson Hamilton "Abatement of Rent for Landlord's Breach of the Minimum Housing and Health Standards" (5 July, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/07/Blog_JWH_CV_Benefits_v_Angus.pdf