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Wear and Tear, Cleanliness, Repair, Replacement and Betterment: A Landlord's Claims for Compensation at the End of a Residential Tenancy

By: Jonnette Watson Hamilton

Case Commented On: *Barry v Navratil*, 2019 ABPC 229 (CanLII)

This decision by Judge Jerry LeGrandeur deals with several claims by a landlord for compensation for damages allegedly done to residential premises by former tenants. The landlord claimed for the cost of replacing the carpet in the living room, master bedroom and a closet, based on what the landlord said was damage due to pet urine and, in one specific spot, due to cigarette burns. She also claimed for the cost of replacing the kitchen countertops and backsplash due to a burn from a hot cooking pot. These two claims for replacement rather than repair raised the issue of "betterment," because the landlord ended up in a better position than she would have been in had the carpet and countertop not been damaged. The landlord also claimed for the cost of materials to sand and paint the garage floor which had been stained by the tenant. That claim raised the issue of wear and tear, although it was resolved as a cleaning issue. Judge LeGrandeur's written decision provides some helpful clarity for both landlords and tenants on the issues of repairing versus replacing, betterment, wear and tear, and cleaning, as well as the burden of proof, standard of proof, and the need for evidence. It also reinforces the rule that a landlord cannot demand more of a tenant than do the statutory obligations in the *Residential Tenancies Act*, SA 2004, s R-17 (*RTA*).

Burden and Standard of Proof

The landlord who sued had the burden of proving on the balance of probabilities that the tenant was in breach of his promises (at paras 11-12). "Balance of probabilities" means "more likely than not" or "51% probability" or "proof on a preponderance of evidence": *Braile v Calgary (Police Service)*, 2017 ABCA 144 (CanLII) at para 37. In small claims cases, as in other civil proceedings, if the evidence leaves the judge uncertain, then the burden of proof decides who wins: *Braile* at para 21.

Tenant's Promises

There was a question about which promises the tenant was required to keep. The *RTA* sets out the tenant's statutory covenants in section 21. These are mandatory promises, implied into every

residential tenancy agreement. In this case, the relevant statutory covenants were in section 21(e) and (f):

> 21. The following covenants of the tenant form part of every residential tenancy agreement:
> ...
> (e) that the tenant will not do or permit significant damage to the premises, the common area or the property of which they form a part;
> (f) that the tenant will maintain the premises and any property rented with it in a reasonably clean condition; (emphasis added)

The lease between the landlord and tenant also dealt with both cleanliness and damage:

> 6. Cleaning Fee:
> Tenants hereby agree to accept the property in its present state of cleanliness. They agree to return the property to the same condition or pay them $250.00 minimum fee if the Landlord has to have the property professionally cleaned. The cleaning fee will be deducted from the security deposit refund.
>
> 15. Tenant responsibility:
> - Good housekeeping is expected of everyone. The tenants agree to keep quarters clean and in a sanitary condition. The tenants agree to not permit any deterioration or destruction to occur while they are occupying the property. (emphasis added)

In both of the clauses in the lease, the obligations imposed on the tenant were more onerous than those imposed by the *RTA*. Did the tenant have to keep the premises in a "reasonably clean" condition or in a "sanitary condition"? Was the tenant responsible for "significant damage" or for "any deterioration"?

Section 4(3) of the *RTA* provides that "[a]ny waiver or release by a tenant of the rights, benefits or protections provided the tenant under this Act is void". This means that if a tenant has made a promise in a written lease with the landlord that is more demanding about the same thing than the tenant's statutory covenant in section 21 of the *RTA*, it is only the covenant in section 21 that the tenant is bound by. The promises in the lease cannot expand or contradict a section 21 statutory covenant (at paras 9-10).

Judge LeGrandeur held that the promise not to allow any deterioration had to be read "subject to reasonable wear and tear" for two reasons: first, that otherwise the tenant could be held responsible for deterioration that was not caused or permitted by the tenant;

and, second, that otherwise the lease would be imposing a more demanding obligation on the tenant than the statutory condition, which is not allowed (at para 10).

The requirement in clause 6 of the lease that the tenant return the property in the same state of cleanliness or pay at least $250 for a professional cleaning was not seen as imposing a more onerous condition than did the *RTA* (at para 43).

Almost all leases used by Alberta landlords that I have seen do try to impose more onerous obligations on their tenants than the *RTA* allows. Not enough tenants seem to be aware that the *RTA* governs if their lease contradicts or attempts to extend the RTA's statutory covenants. Not enough landlords seem to care enough to bring their leases into compliance with the law.

Carpet

The landlord sued the tenant for the cost of replacing the carpet in the living room, master bedroom and one closet, alleging that the carpet smelled and was stained by pet urine and had a number of cigarette burns in one specific area.

This claim came down to the evidence. The landlord testified that on June 30, after the tenant vacated, the smell of urine was so strong when she opened the door that she had to step back, close the door and leave. She also produced photographs showing staining on the floor under the carpet along the edges next to the walls and in the corners. However, she did not produce evidence that the stains were not already there when the tenant moved in. And, when she testified that she had showed the house to prospective new renters on June 27, the landlord did not mention any urine smell or reaction by the prospective renters. The tenant and family members testified the dog was well trained and never urinated in the house. The tenant's father, a plumber, testified that the stains could have been caused by a faulty pipe that ran below the walls. The tenant testified that many of the place along the walls where the stains appeared were under furniture. In the face of this contradictory evidence, the landlord, who had the burden of proof, failed to prove the stains were caused by urine (at para 20).

As for the four or five small cigarette burns in the carpet, the tenant admitted to causing them. In the case of the burns, the issue was the amount of damages the tenant would have to pay for these burns. The answer was none, because of the betterment problem (at paras 23-31).

Judge LeGrandeur accepted that the cigarette burns could not be repaired. The carpet in the small area could not be replaced by matching carpet. If not repairable, then

replacement was appropriate. However, the purpose of damages is to restore the landlord's loss fully and replacing the carpet puts the landlord in a better position than she would have been in had there been no cigarette burns. And whenever you are dealing with property that is the type that must be periodically replaced, the tenant has to be given credit for bettering the landlord's position if the carpet is replaced (at para 26).

There are three ways to give the tenant credit for the landlord's betterment. As Judge LeGrandeur explains, one way is "to calculate the accelerated expense of having to replace the carpet sooner than would normally be required," a second way is to calculate "the cost of borrowing the money to replace the carpet or the lost interest on money used to purchase the new carpet, sooner than what would normally be the case," and the third way is to award the depreciated value of the carpet (at paras 27-28).

In this case, however, the carpet was already being replaced because of a smell and staining that was not proven to be the tenant's fault. As a result, the landlord was not awarded any damages (at para 31).

Countertop and Backsplash

Betterment was the issue with the replacement of the countertops and backsplash. The tenant admitted to leaving a hot cooking pot on the laminate kitchen countertop and causing burn marks. The landlord also provided photographic proof of the damage and its extent.

The landlord replaced the countertop in the burned area, and also the rest of the kitchen countertops to match. The new laminate was placed on top of new countertop boards which did not fit under the old backsplash, and so the landlord also replaced the kitchen backsplash.

Judge LeGrandeur held that repairing the burn damage by replacing all of the countertops and the backsplash was an example of a situation where the landlord could not be returned to her pre-burn position without improving her position (at para 34). He determined that the new backsplash and countertops were of better quality than the old and improved the look of the kitchen (at para 33). The general rule of damages in this context is that "benefits occurring from making good a loss, if they could not otherwise have been gained by the [landlord,] are to be taken into account to reduce damages" (at para 35, quoting Waddams, *The Law of Damages*, at para 1.2780).

The parties had not provided the court with any evidence about the life expectancy of laminate countertops, the increase in value due to the betterment, or the decrease in value due to the damage. The only evidence provided was the cost of the backsplash and countertop materials and their installation. Taking into account that the countertops and backsplash were replaced early

and were of better quality, Judge LeGrandeur did the best he could with the information he had and reduced the landlord's claim by 25% to reflect the betterment to her position (at para 36).

Garage Floor

The landlord claimed that the garage floor had to be sanded, cleaned with special chemicals, and then re-painted due to staining, the cause of which she was unable to prove. She claimed only for the cost of the sanding and painting materials, worth just over $100, and the $250 cleaning fee set out in the lease's clause 6.

The first issue was whether the garage floor stains were more than "reasonable wear and tear." If they were only reasonable wear and tear, the stains would not be damage to the premises, as discussed above. If they were more than reasonable wear and tear, then the issue became whether the stains were "significant damage" under section 21(e) *RTA* (at para 39). Judge LeGrandeur relied upon a recent Ontario case for an understanding of "reasonable wear and tear":

> Reasonable wear and tear is generally defined as unavoidable deterioration in the dwelling and its fixtures *resulting from normal use*. For example, carpet wear due to normal traffic is wear and tear, while a cigarette burn is avoidable and constitutes damages. Wear and tear can be defined to different degrees according to the state of residence. There tends to be a great deal of ambiguity and subjectivity in this area. "Normal" for one individual, can and will be vastly different from another individual's perception of what is "normal" (at para 41, emphasis added, quoting *Kamoo v Brampton Caledon Housing Corp*, [2005] OJ No 3911 (SC)).

However, Judge LeGrandeu held that the garage floor stains were not about wear and tear, but instead about cleaning (at para 42). Under section 21(f) *RTA*, the tenant had to maintain the premises in a "reasonably clean condition." Clause 6 of the lease also required the tenant to return the premises at the end of the lease in the same state of cleanliness that they received them in at the beginning of the lease, reasonable wear and tear excepted.

Cleaning the garage floor had required more than a power wash or other normal garage floor cleaning efforts (at para 43). The landlord's claim for the $250 fee agreed to in clause 6 of the lease was held to be a reasonable claim for the work the landlord put into cleaning the garage floor, even if it was not professionally done (at para 45).

Conclusion

There was an additional claim by the landlord for the cost of materials to repair the holes in the walls of two bedrooms and repaint them, but that claim did not raise any legal issues (and neither did the landlord's claim for unpaid rent and utilities). Instead, the landlord's modest claim of $87.99 for paint, rollers and liners was just one of several examples of the apparent reasonableness of the self-represented landlord (at paras 45, 48). According to Judge LeGrandeur's account, the self-represented tenant was equally reasonable, accepting responsibility for the cigarette burns to the carpet and acknowledging responsibility for the damage to the countertop (at paras 22, 32). Both the landlord and tenant appeared to be well prepared, providing evidence beyond their own testimony, including the testimony of witnesses, photographs, invoices, receipts and their written lease. Success was divided. The tenant succeeded on the $2,386.97 carpet replacement claim. The landlord succeeded on 75% of the countertop and backsplash replacement claim, recovering damages of $1,947.12, plus materials used to clean the garage floor and the cleaning fee specified in the written lease – another $351.84 – as well as the $87.99 for bedroom painting.

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