SUPREME COURT OF NOVA SCOTIA

Citation: *White v. Burt*, 2014 NSSC 272

Date: 2014-07-14
Docket: PtH. No. 425712
Registry: Port Hawkesbury

Between:

Tara White and Jonathan Osmond

Appellants

v.

Richard Burt and Eileen Burt

Respondents

Judge:	The Honourable Justice Robin C. Gogan
Heard:	June 13, 2014, in Port Hawkesbury, Nova Scotia
Written Decision:	July 14, 2014
Counsel:	Tara White and Jonathan Osmond, in person Richard Burt and Eileen Burt, in person

By the Court:

Introduction

[1] This is the appeal of Richard and Eileen Burt (the "**Burts**"). They appeal the decision of Small Claims Court Adjudicator, Ray E. O'Blenis dated February 26, 2014. In his decision, the Adjudicator ordered the Burts to pay Tara White ("**White**") and Jonathan Osmond ("**Osmond**") the sum of $337.50, by way of return of the security deposit.

[2] I heard the appeal on June 13, 2004. For the reasons that follow, I dismiss the appeal.

Background

[3] The parties to this dispute were in a landlord and tenant relationship for only a brief period. The Burts were the landlord. White and Osmond were tenants. The rental unit was a single family home. The parties entered into a written lease on or about October 8, 2013.

[4] White and Osmond discovered mold in the unit and made plans to leave the unit in November of 2013. They vacated the unit on or before November 28, 2013.

The Burts were able to rent the unit for January 1, 2014. White and Osmond sought return of their security deposit in the amount of $337.50.

[5] The matter came before a Residential Tenancies Officer on January 22, 2014. An Order of the Director was granted the same day dismissing White and Osmond's application for the return of the security deposit. White and Osmond appealed.

[6] The appeal was heard by the Small Claims Court Adjudicator who made the following findings:

> UPON FINDING the Appellants were entitled to the return of a security deposit of $337.50 paid to the Respondent landlord at the time of the written lease, October 8, 2013, was entered into by the parties.
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> AND UPON FINDING the premises leased by the Appellants had mold present and the Appellants health had suffered significantly as a result thereof.
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> AND UPON FINDING the Respondent acknowledged the premises contained mold which was both visible and confirmed by his own report conducted by Winmar.
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> AND UPON FINDING the Respondent landlord was in breach of Statutory Condition 9 (1) (1) of the Residential Tenancies Act.
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> AND UPON FINDING the Appellants notified the Respondent in early November, 2013, they were compelled to quit the residential premises because of significant deterioration of their health and informed the Respondent they were relying on section 10C(1) of the Act to terminate the lease.
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> AND UPON FINDING the Appellants were not required to give the Respondent one month notice when relying on the breach of Statutory Condition 9(1)(1) of the

> Act as a consequence of the mold in the premises which made the premises unsafe.
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> AND UPON FINDING the Respondent took over possession of the premises on December 1, 2013, and had informed the Appellants the security deposit would be returned to them within 10 days.
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> AND UPON FINDING the Respondents were not entitled to damages for the costs of heating the premises and power to the premises in the month of December 2013, as both heat and power were the tenants responsibility and were in addition to the monthly rent, and as the Respondent's took over possession on November 28, 2013, and had informed the Appellant the security deposit would be returned within 10 days.

[7] In the end, the Adjudicator ordered the Order of the Director dated January 22, 2014 be varied and required the security deposit be returned to White and Osmond.

[8] On March 25, 2014, the Burts appealed the Adjudicator's decision. The Notice of Appeal indicates 2 grounds of appeal; jurisdictional error and a failure to follow the requirements of natural justice.

[9] The particulars supporting the grounds of appeal are found at Schedule "A" of the Notice. These particulars are not true particulars. Rather, Schedule "A" contains a review of the history of the matter and the evidence before the adjudicator, mixed with various arguments as to why the adjudicator should have

made a different decision. There are no particulars which support a jurisdictional error or a failure to follow the requirements of natural justice.

[10] In response, the Adjudicator issued his Summary Report of Findings dated May 16, 2014. In his report, the Adjudicator notes that the parties agreed to submit the documents that had been before the Residential Tenancy Board and allow findings of fact based on this evidence. Neither party submitted any new evidence and neither party gave oral evidence. The Adjudicator further noted:

> At the commencement of the hearing, both parties were asked if there was any dispute of facts regarding the signed Lease Agreement; the Notice to Quit, with Form G and Form H (Section 10 (c) of the Act); Dr. Lawrence MacNeil's certificate; confirmation of mold presence in the apartment; and the report by Winmar disclosing mold presence in the building. Both parties agree there was no dispute on the evidence as set out in these documents.

[11] During the hearing of the appeal, it was clear that the Appellants did not understand the limited nature of the appeal. There were repeated attempts to reargue the case and only limited attempts to frame their submissions in the context of the grounds of appeal. There were no arguments, written or oral, to support a jurisdictional error and I dismiss this ground of appeal outright.

[12] In keeping with the decision of Rosinski J. in ***Takacs v. Elegant Horizon Suites***, 2013 NSSC 285, I am mindful that the Burts are without counsel and are

not legally trained. Accordingly, I have taken a more expansive approach to this appeal and tried to ascertain if any of the submissions made by the Burts, either orally or in writing, support an error in law or a failure to follow the requirements of natural justice.

Issues

[13] Given my review of this appeal, I would frame the issues as follows:

(a) Did the Adjudicator misapprehend the evidence or make unreasonable findings of fact?

(b) Did the Adjudicator err in law in finding that the Burts were not entitled to one month's notice when relying on a breach of Statutory Condition 9 (1)(1)?

(c) Did the Adjudicator fail to allow Mr. Burt to speak in a manner that denied his right to be heard and follow the requirements of natural justice?

Position of the Parties

The Burts

[14] The Burts submit that the appeal should be allowed because the Adjudicator did not give Mr. Burt a fair opportunity to speak during the hearing.

[15] They further submit that the Adjudicator must not have appreciated the evidence before him if he found that the premises was unhealthy or unsafe. They were particularly insistent that the Adjudicator failed to consider evidence that White and Osmond were planning to leave the premises even before they had been to the doctor, the suggestion being that White and Osmond had fabricated a medical issue to get out of the lease and move to another unit.

[16] Although the Burts did not specifically raise the legal interpretation of the ***Residential Tenancies Act***, RSNS 1989, c 401, it was implicit in their position that they were entitled to one month's notice under the ***Act***.

White and Osmond

[17] White and Osmond submit that the Adjudicator was correct and that the appeal should be dismissed. They maintain that the Adjudicator properly assessed the evidence and found that they were entitled to leave the premises for medical reasons. They say that the Burts had a fair hearing but that the Adjudicator did not agree with them.

Analysis

Standard of Review

[18] In residential tenancies matters the appeal to this Court is pursuant to section 17E of the ***Residential Tenancy Act*** which mirrors section 32 of the ***Small Claims Court Act*** R.S.N.S. 1989 c. 430 and provides:

> 17E (1) Subject to subsection (2), a party to an appeal to the Small Claims Court pursuant to this Act may, if that person took part in the hearing, appeal the order of the Small Claims Court to the Supreme Court of Nova Scotia in the manner set out in the Small Claims Court Act.
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> (2) An appeal pursuant to subsection (1) may only be taken on the ground of
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> (a) jurisdictional error;
> (b) error of law; or
> (c) failure to follow the requirements of natural justice.

[19] Several cases have articulated the standard of review applicable to an appeal of a decision from the Small Claims Court. In **Takas, supra**, Justice Rosinski provided the following review of the standard:

> [7] In *Paradigm Investments Ltd v. Bremner's Plumbing and Heating Ltd*., 2010 NSSC 263, Robertson, J. observed at para. 6:

There are inherent limitations of the *Small Claims Court Act* appeal process. The leading case often quoted is *Brett Motors Leasing Ltd. v. Welsford*, [1999] N.S.J. No. 466 (N.S.S.C.), where Saunders, J. (as he was then) stated at para. 14:

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the Adjudicator. I do not have the authority to go outside the facts as found by the Adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the Adjudicator in the interpretation of documents or other evidence; or where the Adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the Adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the Adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[8] As noted above, this Court is only entitled to consider the "materials" from the Small Claims Court hearing. These "materials" usually consist of all the exhibits filed in the hearing, as well as the Adjudicator's Decision and Summary report of the findings of law and fact that they have made in a case on appeal, including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by the Adjudicator -- see sections 32(3) and (4) of the Act. Notably, this Court does not have the benefit of the transcribed testimony of witnesses at the Small Claims Court trial.

[9] This puts an appeal court at a substantial disadvantage in relation to the Adjudicator who had the benefit of seeing the testimony of the witnesses (in particular the testimony of witnesses in relation to the exhibits in the case) and who made findings of credibility that may be determinative of the outcome of the case.

[10] A high level of deference must be accorded to the Adjudicator's findings of fact. Nevertheless, any material finding of fact that is based on palpable and overriding error constitutes an error of law.

[11] As Robertson, J. observed at para. 18 in *Paradigm Investments supra*.:

> I have also considered the law on what constitutes palpable and overriding error. I refer to *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, at paras. 31, 32 and 33:
>
> > 31 A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene ...
> >
> > 32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial ... Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
> >
> > 33 On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error.

[12] The term "the requirements of natural justice" is broadly interpreted to include "procedural fairness". The acceptable level of minimum procedural

> fairness is always context specific. As Saunders, J. (as he then was) stated in *Brett Motors Leasing Ltd. v. Welsford*, (1999) 181 N.S.R. (2d) 76 at para. 12:
>
> > I think it helps to recall that the small claim court's purpose is to provide an informal and inexpensive forum ... Depending on whether the parties are represented by counsel, or other circumstances, an Adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.
>
> [13] Nevertheless, a minimum level of procedural fairness must always remain. The parties are equally entitled to such protections to ensure the outcome is "just" as between them.

[20] What remains is the application of the standard of review to the issues raised on appeal.

Issue 1- Did the Adjudicator misapprehend the evidence or make unreasonable findings of fact?

[21] On this issue, Mr. Burt was of the view that the Adjudicator must have misunderstood his case. If it had been understood, the Adjudicator would not have found his rental premises uninhabitable contrary to the statutory conditions.

[22] The Adjudicator was presented with documentary evidence by both parties during the hearing. These were the same documents that had been before the Residential Tenancy Board. The parties were given the opportunity to explain the

documents but declined. The Adjudicator was left to review the evidence and make his findings of fact.

[23] Having reviewed the exhibits before the Adjudicator, I find that there was no palpable or overriding error. The findings of facts made by the Adjudicator are supported by the evidence before him. It is my view that this is simply an instance where the Adjudicator preferred the evidence of White and Osmond to the evidence of the Burts. It has not been established that the evidence was misapprehended.

Issue 2- Did the Adjudicator err in law in finding that the Burts were not entitled to one month's notice when relying on a breach of Statutory Condition 9 (1)(1)?

[24] A key finding of the Adjudicator was that the breach of Statutory Condition 9(1)(1) allowed White and Osmond to terminate the lease without the notice that would otherwise be required. This is a question of law that must be decided correctly.

[25] The ***Residential Tenancies Act*** deems certain conditions to "apply as between the landlord and tenant as statutory conditions governing the residential

premises": (Section 9(1)). Most prominent is statutory condition 1, governing "Condition of Premises," which requires the landlord to "keep the premises in a good state of repair and fit for habitation during the tenancy" and compliant with "any statutory enactment or law respecting standards of health, safety or housing."

[26] In ***Laritz v. Charter Real Estate Advisors Ltd.***, [2012] NSJ No 628, the Small Claims Court heard an appeal from a decision of the Residential Tenancy Board. The Adjudicator commented at para 22:

> the finding of a breach [of a Statutory Condition] and the remedy in each case depends on the circumstances. The courts have found that a breach of any of these conditions by the landlord can result in a reduced rent, termination of the tenancy at the tenant's option or a complete loss of rent.

[27] This foregoing remains an accurate summary of the current state of the law dealing with breaches of statutory conditions. A breach of a statutory condition may entitle the tenant to terminate the tenancy without notice. Moreover, it is reasonable to conclude that where a breach of statutory condition 1 renders the premises unfit for habitation, the tenant will have the option to terminate the lease without notice.

[28] In ***Lantz v. Hansen*** (1987), 82 NSR (2d) 392 (Co Ct), Palmeter JCC (as he then was) held that the Residential Tenancies Board had erred by permitting the

landlord to retain a security deposit where the premises had no occupancy permit. He held that the Board could not require the tenant to occupy the premises in violation of municipal occupancy ordinances. In the alternative, he indicated that the breach of statutory conditions would also permit the tenant to vacate. He commented:

> [13] Although I have already determined the matter I would comment on the Tenants' alternative objection, that being forfeiture of the lease by virtue of a breach of statutory condition 1 of the Act. Statutory condition 1 is found in s. 6(1) of the Act and set out as follows:
>
> > 1. Condition of premises. The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment respecting standard of health, safety or housing." [Emphasis by Palmeter JCC]
>
> It is clear that the Landlord had not at the time of commencement of the lease complied with the law respecting standards of housing, i.e. the acquisition of an occupancy permit. In my opinion, there was a breach of the statutory condition which must by law be part of the lease between the parties.
>
> [14] This court is referred to William and Rhodes: *Canadian Law of Landlord and Tenant* (5th Ed.), at pp. 12-39, vol. 2, concerning the effect of a breach of a "Condition" in a lease, as follows:
>
> > It is most important to distinguish between a condition and a covenant. If a breach of a condition occurs, the Landlord may re-enter without any stipulation to that effect in the lease, unless he has done some act to deprive himself of the right. But the Landlord may not re-enter for a breach of a covenant unless the right to do so is reserved in the lease or imposed by statute.
> >
> > By common law it is my opinion that only the landlord could elect to terminate the lease upon breach of a condition. The *Residential Tenancies Act* has in fact changed the old common law remedies by statute. It imposes new obligations and "conditions" on both landlords and tenants and has taken away from landlords many old common law remedies. Under the common law only

> the landlord could invoke forfeiture for a breach of a condition. In my opinion, the new *Residential Tenancies Act* now gives the tenants the right to invoke forfeiture for a breach of a condition, in this case a significant condition imposed by statute.

[29] Accordingly, the tenant could have relied on the breach of statutory condition as a ground for termination of the lease.

[30] It should be noted that in his own later decision in ***Larocque v. Goodfellow*** (1993), 119 NSR (2d) 342 (Co Ct), Palmeter JCC stated at para. 16 that the reasoning in ***Lantz*** "should only be applied in the most obvious and serious of cases." He further indicated that the tenant's remedy would depend on the seriousness of the breach; the question was whether, "[e]ven if there had been a breach of the statutory condition," was it "serious enough to allow the tenant to immediately give up occupancy."

[31] In my view, a breach which renders the premises unfit for habitation or unsafe would be serious enough to give the tenant the option of immediate termination.

[32] In ***MacDormand Construction v. Mapp*** (1991), 111 NSR (2d) 17 (Co Ct), the premises were allegedly rendered unfit for habitation due to fleas. Haliburton JCC (as he then was) followed ***Lantz*** and ***MacDougall*** and said:

> [6] Whether or not the breach of a statutory condition rendered the premises not fit for habitation is a matter of fact. The board made that finding of fact. The parties in presenting argument before this court did not dispute that fact. What conditions or what breach of the statutory conditions will, as a matter of fact, render premises unsuitable for habitation is not a matter which the court must consider here and may, perhaps, better be left to the expertise of the Residential Tenancies Board. In this case, they made such a finding and having made such a finding, it is clear that at the option of the tenant, he might have terminated the tenancy immediately with no further obligation for rental. [Emphasis in original].

[33] In ***Haley v. Dufour*** (1994), 131 NSR (2d) 192 (SC), the tenant experienced a backing-up of raw sewage into the premises, but did not immediately vacate. The Board subsequently dismissed the tenant's claim for damages for his resulting losses, holding that by staying on the premises he had accepted their condition. MacAdam J. held at paras. 9-16 that this was an error by the Board. Given the Board's implicit finding of a violation of statutory condition 1, the tenant was entitled to vacate, but also had the option of remaining on the premises and receiving compensation for loss and damage arising from the breach and the resulting nuisance.

[34] In ***Lever v. Ayer***, [1995] NSJ No 266 (SC), the Board held that the water leakage complained of by the tenant was not constant and did not render the premises "unlivable." Scanlan J. (as he then was) at para. 4 referenced statutory condition 1, which, "requires the landlord to keep the premises in a good state of

repair and fit for habitation during the tenancy and to comply with any statutory enactment or law respecting standards of health, safety or housing." In concluding that the tenants were entitled to terminate the lease, he said:

> 5 The issue for the Board in the present case is whether the premises were in good state of repair and fit for habitation. If the premises were in a condition which is a marked departure for the norm then they were not, in accordance with the statutory conditions, fit for habitation. Theoretically it could be argued that any premises, no matter what the state of disrepair, is fit for habitation. One must ask; what is acceptable to a reasonable tenant? While I could accept that premises may leak and that it would not be unreasonable for the landlord to ask for time to repair, it is not reasonable to expect a tenant to accept a leak indefinitely.

[35] In the circumstances, Justice Scanlan concluded, that the tenant was entitled to vacate without giving the required three months' notice.

[36] In the present case, the Adjudicator made a finding that the premises contained mold which was both visible and confirmed by a consultant who examined the premises. He further found that the presence of mold made the premises unsafe.

[37] The Adjudicator's findings of fact are well supported by the evidence. Mold was present and White and Osmond were suffering ill health as a result. White and Osmond presented medical evidence to support their need to avoid mold exposure.

On this basis, the Adjudicator found a breach of statutory condition 1. Implicitly, he found that the premises was not habitable and "unsafe" for health reasons.

[38] In keeping with the case law, the Adjudicator then concluded that the landlord's breach entitled White and Osmond to terminate the lease without notice. It has not been demonstrated that this was an error of law and I see no basis to disturb this conclusion.

Issue 3- Did the Adjudicator fail to allow Mr. Burt to speak in a manner that denied his right to be heard and follow the requirements of natural justice?

[39] Mr. Burt stated during his submissions that he was asked not to speak on several occasions during the Small Claims Court hearing. He did not say that he was denied the opportunity to be heard or denied the chance to articulate his position. He simply said that he was told not to speak at points during the hearing.

[40] Later in his submissions, Mr. Burt indicated that he didn't provide any oral evidence at the hearing because he thought that he would win as his case was plain and obvious. In his view, the documents spoke for themselves and didn't need elaboration. It was only later after White and Osmond's success at the hearing that

Mr. Burt questioned his strategy. It was clear on the appeal that he wanted the opportunity to reargue his case and respond to the evidence offered by White and Osmond.

[41] Mr. Burt's submission that the documents provided to the Adjudicator as evidence didn't need elaboration is consistent with the Adjudicator's Summary Report and Findings.

[42] It was the submission of White and Osmond that the Adjudicator gave the parties the opportunity to be heard.

[43] Having heard the submissions of the parties and reviewed the Summary Report of the Adjudicator, I am of the view that there was no denial of natural justice in the Small Claims proceeding. I have no doubt that Mr. Burt may have been directed not to speak at various points in an effort to ensure an orderly hearing. This direction would have been given to ensure a fair hearing and allow each party a fair opportunity to speak. This kind of direction is in keeping with the requirements of natural justice not contrary to it.

[44] I find no basis to disturb the decision of the Adjudicator on this ground of appeal.

Conclusion

[45] I find no merit in this appeal. I can identify no error made by the Small Claims Court Adjudicator. There is no basis to disturb the Adjudicator's findings of fact as no palpable and overriding error has been identified. Neither has it been demonstrated that the Adjudicator erred in law or failed to follow the requirements of natural justice.

[46] Accordingly, the appeal is dismissed.

Gogan, J.