

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *5800 South Street Limited v. Power*, 2024 NSSM 47

Date: 20240704

Docket: 531514

Registry: Halifax

Between:

5800 South Street Limited

v.

Liam Power & Kelsey Shea

Adjudicator: Darrel Pink

Heard: July 2, 2024, in Halifax, Nova Scotia

Decision: July 4, 2024

Counsel: Ryan Christen for the Appellant
Michael Power KC for the Respondents

By the Court:

Introduction

[1] It is well accepted in many cases in this Court that an ‘infestation’ of pests usually results in a finding rental premises are not ‘fit for habitation’ under Statutory Condition 1¹ of the *Residential Tenancies Act* and a remedy flows from that. This case addresses when the presence of cockroaches is an ‘infestation’ or a situation that breaches the Act.

[2] ‘Infestation’ is not defined in the Act. The Definition from Oxford Languages² is ‘the presence of an unusually large number of insects or animals in a place, typically so as to cause damage or disease’. ‘Unusually large’ suggests they are not common or habitual³. The Cambridge Dictionary definition⁴ is

‘a large number of animals and insects that carry disease, that are present where they are not wanted: a flea infestation/an infestation of cockroaches/head lice’

¹ 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 or law respecting standards of health, safety or housing.

² https://www.google.com/search?q=infestation&rlz=1C1RXQR_enCA936CA936&oq=infestation&gs_lcrp=EgZjaHJvbWUyDAgAEEUYORixAxiABDIHCAEQABiABDIHCAIQABiABDIKCAMQABixAxiABDIHCAQQABiABDIHCAUQLhiABDIHCAYQABiABDIHCACQABiABDIHCAgQLhiABDIHCAkQLhiABNIBCTk1MThqMGoxNagCCLACAQ&sourceid=chrome&ie=UTF-8

³ https://www.google.com/search?sca_esv=0835a04e1987451a&rlz=1C1RXQR_enCA936CA936&sxsrf=ADLYWILS2FF-QOOXyUtnioTCJs9fmGvUfw:1719998919805&q=unusually&si=ACC90nxMSPeZfdJJjQgDsdZJuFuJ0RCemvpUn6xTAcO1G5_g9m7SRy4tft-KFKF7ovymmowzendm25tLa0pPKudHUkxdSGpPyVigpTTuoh4u02B_Wa0-aMI%3D&expnd=1&sa=X&ved=2ahUKewjt5YOlx4qHAXX2g4kEHUZSB0wQyecJegQIExAO

⁴ https://dictionary.cambridge.org/dictionary/english/infestation#google_vignette

[3] For there to be an infestation, there must be many creatures with the potential to carry disease in a place they are not wanted. What number is a ‘large’ number will depend on the circumstances of where the creatures are located. A few insects on a floor may not be a large number, but the same number in food in a kitchen cupboard may. The requirement for ‘disease’ is an additional requirement for there to be an infestation. Nuisance, ugliness or discomfort from the presence of foreign creatures may not satisfy that requirement.

The Facts – the Tenants’ Actions

[4] The Respondents were tenants at 5800 South Street in Halifax. Under a year-to-year lease, starting in September 2023, the rented unit 504. Monthly rent was \$2099. A security deposit of \$1068.50 was held.

[5] On November 28, 2023, the Respondents noted a cockroach in the apartment. They emailed the Appellant immediately [Ex 2/p.37]. The next morning the Appellants advised ‘Every unit was baited, and we are waiting to hear when they are coming back’.

[6] The Appellant’s Property Manager testified that in October 2023, cockroaches were noted in three units. The Appellant retained the pest control company, Rentokil, to immediately address the issue. On October 19, Rentokil

entered every apartment to apply pest bait and other measures to address the issue. Their report said no roaches were present on the fifth floor.

[7] This was the activity referred to by the Appellant's message to the tenants on November 28.

[8] On December 6, the Respondents' unit was rebaited. That day the Respondents saw a baby cockroach. On December 8th another was seen in the living room outside the kitchen. Each time they saw a roach they took a photo. All were introduced.

[9] When the Respondents looked for cockroaches behind their refrigerator, they saw a gap under the cupboard where the kickplate did not meet the floor. They believed this may have been a place where the cockroaches could enter their unit from the fourth floor where they believed there had been sightings and treatment for the pests. Repair of this was the subject of a work order. The Landlord's evidence was this plate is cosmetic and there were no holes in the walls that let insects migrate to 504 from below.

[10] The Respondents left the apartment and did not sleep there after December 6. Both Respondents are resident doctors. They described the roaches as 'disgusting'. The situation caused them stress and affected their work lives, which

are busy with long hours of work and varying sleep times. They felt the Appellants mismanaged the situation. They opted to pack up and move out in mid-December. They did not pay rent in January or February 2024.

[11] The situation was described as ‘an infestation.’

[12] They gave the Appellant notice they were leaving. They declined to sublet the apartment and asked the Appellant to find a new tenant. Though a prospective tenant was found for February 1, the rental fell through. A tenant was secured for March 1. The Landlord leased Unit 504 for \$2611/month.

[13] The Respondents claimed damages for loss of a number of personal items at the hearing before the Residential Tenancies Officer. Their claim was dismissed. They did not appeal and that claim is not before me.

The Landlord’s Conduct

[14] Having treated the building in October, the Landlord advised the Tenants access to their unit was required on December 7, 2023, for a follow-up pest control treatment. That was done on December 13. The Rentokill Report [Ex2/p.69] notes a ‘Flush & Vac treatment in kitchen and Bait & Monitor in bathroom’. Following these processes, 11-25 German Roaches were found.

[15] The ‘Spray, Flush and Vac Treatment that was used on December 13, 2023, was described by Nadine Thalman, the Property Manager. [See Ex 2/p 63]. It is a pest control method for residential premises. After applying an aerosol spray to places where pests are located or are likely to hide, an insecticide is used to encourage pests to leave their harborage areas. That is followed by a vacuum that removes them from the treated areas. This procedure was used on Unit 504 and located 11-25 roaches. She described this as an effective treatment as it eliminated roaches that likely had not yet entered the living space in the apartment.

[16] Ms. Thalman did not believe the situation in the building or in Unit 504 constituted an ‘infestation.’ She felt to qualify for that label, ‘more than half of the building would have to be affected.’

[17] Rentokil performed another disinfection rocess on January 24, 2024. No roaches were found in 504. The Appellant believed their remediation program completely succeeded.

[18] Ms. Thalman was aware the Appellant was responsible for reletting the apartment when the Respondents declined to sub-let it. She said the new rent for 504 was set using a market comparison for similar buildings. [Ex2/p.86]

Issues

[19] The facts raise these issues:

1. Was there an ‘infestation’ of cockroaches in Unit 504 at 5800 South Street?
2. Did cockroaches result in Unit 504 becoming uninhabitable so as to breach Statutory Condition 1?
3. Did the Appellant mitigate its losses resulting from the Respondents’ early termination of its lease?

Findings

[20] The Respondents recorded about five roaches between November 28 and December 8. Though it is clear cockroaches present a threat to health⁵, an issue particularly of concern to the Respondents as medical residents, that does not constitute an infestation. More is required. There must be numbers that are unusually large. That is assessed objectively, not from the perspective of the Respondents. Many pests would have concerned the Respondents. What they saw created an immediate concern, but it required a reasoned response from the tenants, recognizing their legal obligations under their lease.

⁵ Cockroaches carry harmful bacteria. When spread to your food or kitchen surfaces, these germs can include and cause salmonella, staphylococcus, and streptococcus infections. The most common disease spread by cockroaches is gastroenteritis, characterized by vomiting, diarrhea, and fever. They have not been linked directly to specific outbreaks, but cockroaches have been known to cause dysentery, cholera, typhoid fever, and polio. - <https://poulin.ca/blog/diseases-spread-by-cockroaches/#:~:text=Cockroaches%20carry%20harmful%20bacteria.,vomiting%2C%20diarrhea%2C%20and%20fever.>

[21] Even a cursory review of the thirty-six reported cases⁶ of this Court dealing with cockroaches or other pest infestations shows there needs to be a number of pests that are more than one might expect in a rental accommodation. The nature of the rental market involves frequent transition of occupants, who sometimes bring with them pests from former accommodations. Rental stock is often older and with age buildings often attract insects and rodents. In rental properties, there are frequent issues with garbage and cleanliness. These contribute to pests, such as cockroaches and bedbugs.

[22] 5800 South Street, based on the evidence of Ms. Thalman took active measures to address the earliest sign of pests such as cockroaches. It is fairly common for landlords to neglect or fail to deal with insects until they become a problem. This landlord was proactive and did not let the earliest sign of a problem grow to become an infestation.

[23] I find there was no infestation of cockroaches.

[24] Though the Respondents were justified in their concern, there was nothing to suggest the Landlord's response to their communications was not taken seriously. Cockroaches had been seen in October. The Appellant started an active program,

⁶ <https://www.canlii.org/en/ns/nssm/#search/type=decision&ccId=nssm&text=infestation&searchId=2024-07-03T20%3A36%3A55%3A767%2Fcb9a598500004b86b140e3c82330085e&origType=decision&origCcid=nssm>

using a pest control company, Rentokil, to manage the presence of roaches. It was a planned approach with every unit being treated and a commitment to return for a second time. That December treatment resulted in significant success. By January, the problem was resolved, and no cockroaches were present in the apartment building.

[25] I find the standard to which a landlord is held in determining if there is a breach of Statutory Condition 1 is that of a reasonable landlord. See *Johnson v. Sarty*, 2019 NSSM 17. The subjective assessment of tenants is not the determining factor. Though the Respondents believed there was a serious problem with the apartment because of the presence of cockroaches, when viewed from an objective perspective, a reasonable person looking at the situation would not conclude what they saw resulted in a breach of Statutory Condition 1. Though the Respondents were uncomfortable, that did not make their apartment uninhabitable.

[26] Both the Landlord and the Tenants ought to have explored options that could have been available. Alternate accommodations, either in the building or outside could have been explored. The Landlord, given the occupation of these tenants, could have considered expediting treatment or at least engaging with them directly to determine what their needs were. 5800 South Street took the issue seriously regarding the whole building, but they owed a duty to every tenant to ensure their

peaceful enjoyment of their living space. The Respondents felt they did not have direct communication with the building's management, except by email, a means of communication that rarely allows for subtleties to be addressed and for simultaneous exchanges of ideas and perspectives. I agree the Landlord could have done better.

[27] I find there was no infestation of cockroaches such as to result in apartment 504 not being habitable. So the Respondents did not have a basis for unilaterally breaking their lease and vacating their apartment before the expiry of the term. Their lease obligations continued until the Appellants relieved them of further responsibility by accepting the termination, taking possession of the unit and releasing it to others.

The Appellant's Claim

[28] The Appellant seeks recovery of rent for January and February 2024 ($\$2099.00 \times 2 = \4198). They leased Unit 504 on March 1 for $\$2611$ /month, an increase of $\$512$. The increase of 24% is how this landlord is taking advantage of a rapidly rising rental market.

[29] The claim raises the interplay of two concepts – damages for breach of contract and the duty to mitigate.

[30] The Landlord's duty to mitigate is stipulated by s. 9 of the Act in Statutory Condition 6:

6. Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, **the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.** (Emphasis added)

[31] The fact rents are escalating at unheard of rates in HRM resulted in the Appellant leasing the Respondent's unit at a significantly increased rent. So from March 1 to August 31, the remaining term from of the Respondents' lease, rent generated for Unit 504 will be \$3072 ($\512×6) more than the Respondents would have paid. Who gets the benefit of this sum?

[32] The Respondents argue the Appellant should not benefit from their breach of contract and the amount the Appellant will recover in higher rent should be credited against the claim against them. I agree that is a correct application of the principle applicable to damages for breach of contract.

[33] In the Nova Scotia Barristers' Society publication 'Contracts' – February 2019⁷, prepared for articling students in preparation for the former Bar Examination, the general rule is stated at p. 54:

⁷ Available from the Nova Scotia Barristers' Society on request

When a breach occurs, the remedies that are open to a person injured by the breach fall under three main heads:

- Every breach of contract entitles the injured party to damages for the loss she has suffered;
- If when the breach occurs the injured party has already done part, though not all, of what he was bound to do under the contract, he may be entitled to claim the value of what he has done, or in other words sue upon a *quantum meruit*.
- In certain circumstances the injured party may obtain a decree for specific performance of the contract, or an injunction to restrain its breach. These are equitable remedies and are usually granted in the discretion of the court.

...

As a general rule, the objective of contract damages is to ensure the injured party receives what she or he contracted for in the bargain.

The common law remedy for breach of a contractual promise is that of damages. Unless the parties themselves limit the amount of damages to be awarded it is a matter for the jury or the judge sitting as a jury to assess damages.

...

It is said to have been established by the general principles in *Victoria Laundry*⁸ that the test under both branches of the rule in *Hadley v. Baxendale*⁹ is the same: recovery depends on “foreseeability.” The first branch deals with normal loss, and the test is an objective one. The second deals with abnormal loss and the test is subjective insofar as it requires actual and not merely imputed knowledge.

[34] On the facts here the issue is what was reasonably foreseeable as a loss by the landlord because of the Tenants’ breach of their lease. That sum would be the amount due to the Landlord for the duration of the lease, less any sums obtained by the Landlord because of their mitigation.

⁸ *Victoria Laundry Ltd. v. Newman Industries Ltd* [1949] 2 K.B. 528 (C.A.)

⁹ *Hadley v. Baxendale* (1854), 9 Ex. 341

Conclusion

[35] Here the Landlord benefited from its mitigation and releasing the apartment. That benefit of \$3072 must be credited against the damages owed by the Respondents (\$4198) leaving a balance owed by the Respondents of \$1126.

[36] The Landlord has a security deposit from the former tenants of \$1068.50. That sum may be applied to the amount owed by the Respondents leaving a balance owing of \$57.50.

[37] The Appeal is allowed. The Order of the Director of Residential Tenancies is set aside and substituted with an order requiring the Respondents to pay \$57.50 to the Appellants. In the circumstances, I decline to award costs.

[38] If counsel request, I will prepare an Order.

Darrel Pink, Small Claims Court Adjudicator