

IN THE PROVINCIAL COURT OF ALBERTA  
CIVIL DIVISION

BETWEEN:

BRIAN CRACKNELL

Plaintiff

- and -

JAMES JEFFREY

Defendant

JUDGMENT OF THE HONOURABLE JUDGE J.N. LeGRANDEUR

COUNSEL:

Anders N. Quist for the Plaintiff

Nature of Proceedings

[1] This matter arises from a landlord/tenant relationship which existed between the Plaintiff and the Defendant. The Plaintiff landlord, Brian Cracknell claims from the Defendant tenant, James Jeffrey the sum of \$645.34, being the accumulated unpaid rent, utilities, and late payment assessments which he believes he is entitled to receive. The sum of \$645.34 is the net amount of the claim after he has credited to the Defendant the \$300.00 security deposit that he held as landlord.

[2] The Defendant tenant denies any liability to the Plaintiff landlord and counterclaims for damages arising from the stress caused the tenant by the landlord during the course of the tenancy.

Issues

[3] The issues before the Court may be summarized as follows:

- a. Is the Defendant indebted to the Plaintiff for unpaid rent, and if so in what amount?
- b. Is the Defendant liable to the landlord for utility bills with respect to

- the rental property which were not paid by the tenant or were paid by the landlord, and if so, what amount is owing in this regard?
- c. Is the Defendant liable to pay \$5.00 per day by way of service charge or late rental payment assessment for late rental payments; and if so, in what total amount?
  - d. Is the Plaintiff liable to the Defendant for stress caused to the Defendant tenant during the course of their leasehold relationship?

### Discussion and Analysis

#### Arrears of Rent

[4] The Plaintiff alleges that the Defendant is in arrears of rent upon termination of the tenancy agreement in the total sum of \$225.00. This sum is premised upon the Plaintiff's position that as of March 1st, 2000 the rent for the leasehold premises occupied by the Defendant increased from \$325.00 per month, not including utilities, to \$550.00, inclusive of utilities, and that as the Plaintiff received only \$325.00 from the Defendant in March of 2000 being \$25.00 by cheque and \$300.00 credit by application of the security deposit, the tenant is in arrears and owes the Plaintiff the sum of \$225.00.

[5] The Defendant denies that he received notice of any increase in rent payable commencing the 1st day of March, 2000. The Plaintiff landlord produced to the Court a "Notice to Tenant of Rental Increase" (Exhibit #2) which he testified was posted upon the door of the tenant's premises on the 1st day of December, 1999. He did not, he testified, effect personal service of the notice upon the Defendant because the tenant was not home. The Defendant did not challenge the Plaintiff's position that personal service of the rental increase notice was not effected because of his absence from the premises, but he testified that he did not ever see any notice of increase of rent posted on his premises or otherwise.

[6] Pursuant to s.13(1)(b), of the Residential Tenancies Act, RSA, Chap.R-15.3 and amendments thereto, and given that the tenancy agreement between the Plaintiff and Defendant was one of a monthly nature, the tenant was entitled to receive at least three tenancy months notice of the proposed increase before it is effective.

[7] The Notice to Tenant of Rental Increase marked Exhibit #3 in these proceedings is dated the 1st day of December, 1999 and purported to be signed on that date. This notice was posted on the door of the tenant, I conclude from the evidence of the Plaintiff

landlord, on the 1st day of December, 1999. The new rent was to become effective March 1st, 2000. The Residential Tenancies Act defines a "tenancy month" as follows:

"tenancy month", means the period on which a month's periodic tenancy is based, whether or not it is a calendar month, and the month begins on the day rent is payable unless another date is specified in the residential tenancy agreement.

Rent was payable on the 1st day of each and every month under the terms of a tenancy agreement between the parties (Exhibit #1). In the case Jones v. Janz, June 3rd, 1999, Docket Calgary 9901-07268, a Master of the Court of Queen's Bench, determined that a landlord intending to give notice of a rent increase must strictly comply with the statutory provisions. Failure to do so leads to a non-effective and void notice. In that case service of a notice of increase in rent on September 1st, 1998 to become effective on December 1st, 1998 did not comply with the statute, he concluded. The proper three month notice effective December 1st, 1998 should have been given no later than August 31st, 1998. In keeping with that judgment, a rental increase to be effective March 1st, 2000, as sought by the Plaintiff, would require notice thereof to be served no later than November 30th, 1999. This was not done and accordingly, the rental increase claimed by the Plaintiff for the month of March, 2000 is ineffective and the landlord is entitled to receive only the sum of \$325.00 for that month, which sum has been received. The Plaintiff's claim for \$225.00 in excess of that sum is dismissed.

#### Utility Payments

[8] The Plaintiff alleges that the Defendant is indebted to him in the sum of \$270.00 for utility payments that he failed to make as required and which the landlord made and for which he is entitled to be reimbursed. Clause 4.02 of the Leasehold Agreement (Exhibit #1) between the parties requires the Defendant to pay all utilities in accordance with Clause 3 of the Leasehold Agreement. The Plaintiff explained that the understanding was that the Defendant would pay the utilities for the entire house, upstairs and downstairs, even though he was only occupying the downstairs portion of the home. The Defendant did not dispute this. At some point the Defendant failed to make such payments due to lack of financial resources and the landlord had to pay the same.

[9] As proof of outstanding utility payments, the Plaintiff relies upon Exhibit #4 which is a computer printout of the rents, utilities and penalties assessed and paid by the

Defendant since July 31st, 1999. The Defendant does not accept that statement as accurate, arguing in effect that the statement does not prove anything except that the Plaintiff landlord has prepared it. The Defendant did not admit any liability for utility assessments included in Exhibit #4 or otherwise. The Plaintiff landlord did not provide copies of any of the invoices purportedly issued with respect to the utility payments, nor any of the utility bills upon which the invoices were allegedly based. The Plaintiff alleges arrears in utility payments of \$270.00 on the part of the Defendant. In his testimony, the Defendant acknowledged that he may have paid the utility invoice #23 dated August 16th, 1999 and that he does not recall whether he paid \$132.89 towards the utility invoice #26 issued November 1st, 1999. The Plaintiff credited him with such payment and I am satisfied the Defendant did make such payments towards the utility invoices issued by the Plaintiff. He took no issue with them at the time and any issue taken by the Defendant with respect to those invoices #23 and #26 is disingenuous at best.

[10] The statement prepared by the Plaintiff, Exhibit #4, refers also to two other invoices apparently issued by the Plaintiff with respect to utilities; those being #32 in the amount of \$146.00 and #38 issued April 14th in the amount of \$99.33. With respect to this latter invoice, I am left wondering which two months does this invoice relate to, January and February, 2000 or February and March, 2000. Given that the notice of increased rent is not effective as I have concluded hereinbefore, the tenant would be responsible for payment of utilities for March in accordance with the leasehold agreement as it stood unamended. Accordingly, whether the two months water and sewer indicated in Exhibit #4 as invoice #38 relates to January and February or February and March is irrelevant as he would be liable for any utilities during the course of the months January, February or March. Indeed it would appear the landlord has failed to claim for one of the months January, February or March, presumably March, 2000, based upon his expectation that the rental increase to be effective March 1st would cover the utilities for that period. That claim however is not before the Court and accordingly I cannot address that issue. The landlord has by failure to claim those amounts for the full period of the tenancy, that is to March 30th, 2000, effectively lost his right to make any further claim in that regard in the future.

[11] The evidence satisfies me that the Plaintiff is entitled to judgment with respect to the utilities in the amount of \$270.33, as claimed.

#### Late Payment Assessments

[12] The Plaintiff claims the total sum of \$150.00 with respect to what he describes in his testimony as late payment fees. These claims are noted in Exhibit #4 as invoice #27, #29, #33 and #36. The Plaintiff relies upon Clause 3.0 of the Leasehold Agreement which states in part:

...The tenant shall be liable for a service charge in the amount of \$5.00 per day after the 1st of each month for any rent outstanding, for any reason whatsoever, including late payments or cheques returned from the bank regardless of the cause or reason.

[13] Clause 1.0 of Schedule "A" of the Leasehold Agreement also provides:

...Until all rent and NSF charges are paid in full, there will also be a late rental payment assessment of \$5.00 per day for rents not fully paid by the 1st day of the month for any reason, including cheques returned from the bank or late delivery of mail. Any balances over 30 days will be charged at 24% interest per annum and calculated monthly until paid.

[14] The question to be asked with regard to this claim is whether it is a genuine pre-estimate of damage, occasioned by the late payment of rental and suffered by the landlord, or whether it is a threat held over the Defendant *in terrorem*. (Calgary v. Janese-Mitchell Const. Co., (1919) 59 SCR 101). If it is the former, it may be enforceable, if it is the latter, it is considered a penalty and likely not enforceable. In the case Dunlop Pneumatic Tire Co. v. New Garage and Motor Co., ([1915] A.C. 79 at 86, Lord Dunedin laid down some general rules for the Court's guidance in determining whether the matter is a genuine pre-estimate of damage or a penalty. These principles were culled from other decisions and have been accepted by Courts in Canada and are still accepted by Courts in Canada:

- (1) The sum in question will be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.
- (2) If the obligation of the promisor is to pay a certain sum of money and it is agreed that if he fails to do so he will pay a larger sum, this larger sum is a penalty.
- (3) If there is only one event on which the sum agreed is to be paid, the sum is liquidated damages.
- (4) If a single lump sum is made payable upon the occurrence of one or

more or all of several events, some of which may occasion serious and others only trifling damage, there is a presumption, but no more, that the sum is a penalty. But not necessarily if it is difficult to prove actual loss.

[15] Whether the sum claimed is a penalty or a genuine pre-estimate of damage is a question of law to be decided upon consideration of the whole agreement. (Reimer v. Rosen, [1919] 1 WWR 429, Man.C.A.) Although the parties to a contract may always try to make a pre-determination as to damages, should the contract be breached, this must always yield to judicial approval of its reasonableness in the circumstances. (See: H.F. Clarke Ltd. v. Thermidaire Corporation Ltd., (1975) 54 DLR (3d) 385 per Laskin, CJC at 393) That approach is consistent with the principle that an injured party is entitled to be compensated and made whole, but not bettered by a damage award. (See: Neunier v. Cloutier, (1984) 9 DLR (4th) 986)

[16] In this case, looking at the contract as a whole and Clause 3.0 therein and Clause 1.0 of Schedule "A", and considering the nature of the sum claimed, I have no doubt that the \$5.00 per day claimed is a penalty, not a pre-estimate of damage. The exorbitance of this amount can be demonstrated by considering it in the context of the monthly rental payment of \$325.00. The \$5.00 assessment would represent a return of approximately 1.6% for one day. Over the course of a month, the landlord would get a return of approximately 46%, that is at the rate of \$5.00 per day for 30 days on indebtedness outstanding over the course of one month of \$325.00. It is to be noted as well that according to the clauses I have referred to in the Leasehold Agreement, even if the tenant were only in arrears of rent \$1.00, he would be obliged to pay \$5.00 per day for up to one month or more if the \$1.00 in arrears continued. Payment of \$5.00 per day which results in a return over the course of 30 days of 46% on \$325.00 in arrears, or payment of \$5.00 a day on any lesser sum over the course of the month is extravagant and unconscionable in comparison with the greatest loss that could possibly flow from the tenants breach, that is the landlord's loss of the benefit of the money for 30 days or however long the sum is in arrears. The \$5.00 per day assessment is clearly a penalty and not enforceable. Accordingly I dismiss the Plaintiff's claim for the sum of \$150.00 in late payment fees.

#### Interest

[17] The Plaintiff claims interest at the rate of 6.25% per annum from May 1st, 2000, being thirty days after the termination of the subject tenancy. Schedule "A" of the Leasehold Agreement (Exhibit #1) provides that interest will accrue on any balance

outstanding after 30 days, at the rate of 24% per annum calculated monthly until paid. The Plaintiff chooses to claim only interest at the rate of 6.25% per annum (simple interest) and accordingly the Plaintiff is granted interest on the judgment from the date of May 1st, 2000 to date of the within judgment.

Defendant's Counterclaim

[18] The Defendant has counterclaimed against the Plaintiff for the sum of \$3,000.00 for stress allegedly incurred by the Defendant as a result of the conduct of the Plaintiff during the course of the Defendant's occupancy of the Plaintiff's premises. The Defendant has provided the Court with no evidentiary basis and proof of the counterclaim and accordingly the counterclaim is dismissed.

Plaintiff's Costs

[19] The Plaintiff shall receive the following costs:

a.	Cost of issuing Claim	\$25.00
b.	Cost of personal service	\$20.00
	Total:	\$45.00

I award no costs to the Plaintiff with respect to the loss he says he suffered for having to attend Court to present his claim against the Defendant. The Plaintiff's time in that regard is an ordinary consequence of being involved in a landlord/tenant arrangement and does not of itself justify any special consideration in costs. His time, is simply part of the cost of doing business in that context and is not a cost that should be awarded, nor is it a damage that he has suffered.

[20] Given the very limited success of the Plaintiff and the Plaintiff's perpetuation of a claim in the nature of a penalty which was clearly extravagant and unconscionable, I award no further costs with respect to preparation for or the conducting of the trial in this regard.

Summary of Judgment

[21] The Plaintiff shall have judgment against the Defendant as follows:

a.	Judgment for outstanding utilities payable by the tenant	\$270.31
b.	Interest on outstanding utilities payable in the amount of \$270.31 at the rate of 6.25% per annum from May 1st, 2000 to date of judgment herein	\$ 12.17
c.	Costs	<u>\$ 45.00</u>
	TOTAL Judgment inclusive of interest	\$327.48

DATED at the City of Lethbridge, in the Province of Alberta, this 19th day of  
January, A.D. 2001.

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Jerry N. LeGrandeur  
Judge of the Provincial  
Court of Alberta

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