

**IN THE PROVINCIAL COURT OF ALBERTA
Civil DIVISION**

BETWEEN:

DORLAND PROPERTY MANAGEMENT,

PLAINTIFF

- and -

GEORGE HOOD,

DEFENDANT

JUDGMENT OF THE HONOURABLE JUDGE D.G. INGRAM

COUNSEL:

Rona J. Jacobs, agent for the Plaintiff
Defendant unrepresented

[1] This is a claim under a written lease by a landlord against a former tenant for unpaid rent, damages for breach of covenants to keep the premises in good repair and in clean condition, and a claim for "discounted rent" payable under an Addendum to the lease. The "discounted rent" claim prompted reservation of judgment and a consideration of the issue as to whether this patently harsh term of the contract should be enforced. No dispute note was filed; the matter came before the court by way of an ex parte application for assessment of damages. The Plaintiff was represented by an employee, not by counsel.

[2] The lease was for a 12 month term commencing August 1, 1996 at a monthly rental of \$615.00. It provided for payment of \$25.00 as a fee for any NSF cheques and \$25.00 as a penalty for any late payments. The lease provided for a security deposit in the amount of \$300.00, "inc pet deposit", which the landlord could apply to repair any damages, to clean the premises, or against any monies owing to the landlord when the tenant vacated.

[3] In my view the provisions relating to the use of the security deposit to repair any damage and to clean the premises impose obligations on the tenant more onerous than the tenant's statutory duties under the Residential Tenancies Act. The tenant's obligations are only to not do or permit significant damage to the premises and to maintain the premises in a reasonably clean condition. Section 16(e) and (f). Specifically, no deduction may be made for normal wear and tear. Section 39(0.1) (4) MacNeill 1980 118 DLR (3) 37.

[4] The landlord evicted the tenant for non payment of rent in May 1999 and, excluding the discounted rent claim, advanced the following claims:

(a) outstanding rent \$351.00. This was charged at the rate of \$550.00 per month to the date of termination and vacating of the premises and is allowed in full.	\$351.00
(b) lawn damage \$604.55. The evidence showed that the grass in the common area in front of the unit rented by the Defendant had been damaged by the tenant's pet. As the claim was not defended, I find the tenant is liable for the damage. However, the landlord produced an estimate of the cost of ripping out the existing sod and four inches of top soil and re-sodding the entire area at a cost of \$604.55. The estimate was dated May 20, 1999 but the work had not been done at the time of the hearing of the assessment in October 2000. In the absence of any evidence as to the actual damage to the premises or the cost of repair by some less expensive method, such as re-seeding, I am prepared to allow only the sum of \$100.00.	100.00
(c) suite cleaning \$96.00. An invoice was produced and marked exhibit 4 showing cost of cleaning at \$112.00 and the amount claimed is allowed.	96.00
(d) Two screens \$80.00. The invoice produced, exhibit 5, showed that the actual cost to the Plaintiff was only the sum of \$32.20.	32.20
(e) Replace doorknob set \$30.00. The invoice produced, exhibit 6, showed the actual cost to be \$26.75 which is allowed.	26.75
(f) Lightbulbs \$6.08. This item is specifically covered under the maintenance cost provision of the lease, paragraph 18, and is allowed.	6.08
Total of above items	\$612.03

[5] The claim for discounted rent, in the sum of \$630.00, arises as follows. A subsequent addendum to the lease provided as follows:

“This addendum to lease agreement has been drafted in consideration of George & Koreen Hood herein known as Tenant(s), entering into a Lease Agreement with Dorland Property Management and Reality Ltd. for the premises at #39, 1503 Millwoods Road East, Edmonton, Alberta T6L 4C2.

Maximum rental rate \$ 640

Discount rental rate \$ 550

The Landlord will offer to the tenant a rental discount of \$90.00 per month starting from the October 1, 1998 to 12:00 p.m. September 30, 1999 inclusive, provided that all of the following terms and conditions are met:

1. If the rent is received by the Manager on the FIRST of each month, or in advance where the 1st is a holiday. Any rent received after the first of the month will not be eligible for this discount and the amount due will be the maximum rent. (6 or 12 post dated cheques as per term of lease, given to the Management company will ensure your rent cheque is not received late.)
2. If the tenant does not have any amounts of rent all arrears. If any amounts are owing from a previous month the tenant will not be eligible for a discount.
3. If a payment by cheque is not honored by the payee's bank the rent will be deemed to be late and the tenant is obliged to pay the maximum rent plus the applicable charge for a returned cheque.
4. If the tenant (the Lessee) fails to live up to the terms of the Lease Agreement, this being occupying the suite for a period not less than the fixed term, the Rental Discount must be paid in full by the Lessee(s) to the Lessor.

The discount is not transferable or cumulative. At the end of this current lease, rent will automatically go back to the maximum rate unless the lease is renewed.”

[6] Under the addendum quoted above, rent at the rate of \$90.00 per month is claimed for

the months of October 1998 to May 1999. The claim is strictly contractual. There is no allegation of any loss other than non payment. In some instances, landlords seek to justify similar claims with allegations that various costs are reduced by tenants entering into long term leases rather than month to month tenancies. No justification by way of any actual or anticipated loss was advanced in this case. I note that this claim is advanced only under numbered paragraph 4 of the addendum which seeks to charge the tenant increased rent for past rental periods during which the tenant was in good standing under the lease. Further, no claim was advanced under paragraphs numbered 1 or 2 of the addendum, in respect of which the landlord may have advanced a claim for \$90.00 in respect of the May 1999 rent.

[7] Paragraph 4 of the addendum is clearly "in terrorem of the offending party" and not a "genuine covenanted pre-estimate of damage" and is therefore a penalty. See Hunt, J.A., in 32262 B.C Ltd. v. See-Rite Optical (1998) 216 A.R. 33. The questions therefore arise as to whether this Court may, and whether it should, relieve against this clause of the contract.

[8] Section 10 of the Judicature Act of Alberta provides as follows:

"Subject to appeal as in other cases, the court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the court sees fit."

[9] Under section 1 of the Judicature Act, "court" is defined as the Court of Queen's Bench or, on appeal, the Court of Appeal. The Provincial Court of Alberta is a creature of statute and has only such powers as are expressly conferred upon it; unlike a superior court, it has no inherent jurisdiction. In my view, however, in exercising its jurisdiction in civil claims, it is intended that this Court should administer civil justice in accordance with law and therefore, in adjudicating upon claims or counterclaims for debt or damages including damages for breach of contract under section 36 of the Provincial Court Act, claims under section 41 of the Residential Tenancies Act, claims under section 14 of the Fair Trading Act, or any other claims within its jurisdiction, this Court ought to apply the same rules of law and equity as would prevail in the Court of Queen's Bench of Alberta. I wish to make it clear that this is not intended to be any extension of the jurisdiction of the Provincial Court; it is, however, necessary and ancillary to its function. Surely any other interpretation would produce absurd and unacceptable results.

[10] The distinction between the jurisdiction of this Court in terms of a monetary limit, and the nature of causes of action and remedies, on the one hand, and the jurisdiction of this Court in terms of the application of rules of law and equity, on the other, is dealt with in the judgments of Hunt McDonald, P.C.J., in Durand v. Highwood Golf & Country Club (1998) 240 A.R. 320 and O'Neil, P.C.J., in Knight v. Calgary Suzuki Inc. (1996) Calgary Action No. P9590102701, with

which I am in agreement.

[11] I therefore find that this Court has the power to relieve against the penalty provided for in numbered paragraph 4 of the above quoted addendum.

[12] Penalty clauses are enforceable unless relief is given on the basis that it would be unconscionable or oppressive to give effect to them having in mind the circumstances of the case at the time when enforcement is sought. Fern Investments Limited v. Golden Nugget Restaurant (1987) Ltd., Hetherington, J. A.(1994) Calgary Appeal No. 13803 I consider that in the circumstances of this case giving effect to the clause would be unconscionable and oppressive in that it would require the tenant to pay an amount payable only because the landlord terminated the lease and unrelated and disproportionate to any possible damages suffered by the landlord by reason of any breach by the tenant.

[13] The claim for discounted rent is therefore not allowed.

[14] I therefore assess the Plaintiff's damages in the amounts outlined above, \$612.03, less the security deposit and interest of \$304.05. Accordingly there will be judgment for \$307.98 together with costs in the sum of \$100.00 inclusive of disbursements.

Dated at the City of Edmonton, in the Province of Alberta, this 17th day of October, 2000.

Judge D.G. Ingram