COMMONWEALTH OF THE BAHAMS

IN THE SUPREME COURT

Commercial Division

2021/CLE/GEN 00427

BETWEEN

DALE RODGERS

Claimant

AND

CAROLYN C. MAJOR

Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Ms Judith Smith for the Claimant
Mr Wellington Olander for the Defendant

Hearing Dates: 29 January, 2024; 6 February, 2025
Submissions received: 11 March, 2024

Breach of contract – implied terms in lease agreement – whether premises fit for habitation due to leaking and no hot water for about eight months – whether Landlord stole items

RULING

Darville Gomez, J

[1.] This is an action brought by the Claimant for breach of contract and conversion. The action was commenced by a specially endorsed Writ of Summons. The Defendant denied the claim.

[2.] The Defendant was the Landlord of the premises rented by the Claimant in #6 Eastern Estates.

[3.] In 2017 the parties entered into a written contract for the rental of an apartment for $800 per month. By the terms of the written contract entitled "Rent/Lease Agreement", (the 'Lease Agreement") signed between the parties and dated 27th August, 2017, the monthly rent included internet, water, cooking gas and security of building. Electricity was to be apportioned between the parties, with the Landlord paying the first $125 and the tenant responsible for the remaining balance.

[4.] Additionally, the Claimant alleged that:

(i) the Defendant failed in breach of the terms of the Rental/Lease Agreement to provide internet in the sum of $1,679.59

(ii) the Defendant failed to provide rental accommodation fit for habitation;

(iii) the Defendant failed to return the security deposit of $400;

(iv) the Defendant caused damage to personal articles which she had used to collect and absorb water due to the leaking roof (cooking pots, towels, bed sheets, replacement battery to operate gate) for $745

(v) the Defendant accessed her apartment and removed without her consent china dishes and a microwave in the sums of $7,990 and $300 respectively.

[5.] Therefore, the Claimant has sought special damages of $11,714.59 broken down as follows:

Electricity that she ought not have paid for	$600.00;
Internet that she ought not have paid for	$1,679.59;
Damages to personal articles	
3 stainless steel cooking pots ($175 each)	$525.00
4 large Kassatex towels ($40 each)	$160.00
3 queen size bedsheets ($10 each)	$30.00
Replacement battery to operate gate	$30.00
Security deposit	$400.00
China dishes	$7,990.00
Microwave	$300.00

[6.] The Claimant gave evidence, however, she called no other witnesses on her behalf. Similarly, the Defendant gave evidence, however, she called no other witness on her behalf.

The Evidence

Breach of Contract

[7.] The Claimant in her testimony explained that she was a tenant of the Defendant for about three years having moved into her apartment on September 1, 2017. She confirmed that the lease agreement was dated August 27, 2017 and that the rent was to be $800 per month with everything included, viz. internet, water, cooking gas and security of building. This was undisputed by the Defendant.

Security deposit

[8.] The Claimant testified that she paid $1,100 including $400 for the security deposit which was undisputed. The security deposit was to be refunded once the apartment was returned in good order. However, there is a dispute regarding the state of the apartment after the Claimant had moved out and whether the deposit ought to have been refunded. The Defendant testified that it

took her cleaner about two days to clean the apartment due to the state it had been left in by the Claimant. She had this to say:

> *"Well, first of all the apartment was very, very smoky. There was a lot of smoke in the apartment. The drapes that were in the bedroom was dirty with smoke. It had mildew in the shower area.*
>
> *"The stove was filthy and I had to hire Mr Cox to come in to clean the stove; not only clean the stove, I had to redo the entire stove and that area. It was never ever cleaned.....It took, really and truly, the lady about two days to clean the apartment after Dale said that she had somebody who came in to clean it. But it was not near clean at all.*

[9.] The Claimant was not cross examined on this issue, however, in her evidence-in-chief she said:

> *"I left the apartment in January of 2021. My housekeeper Mrs. Addaline Loquette cleaned the entire apartment before the keys were handed over to the Defendant. I gave the Defendant $200 towards the rent. I did not receive my $400 security deposit or any part of it."*

[10.] The Court was not assisted in the determination of this issue by the cleaner who was hired by the Defendant to clean the apartment after the departure of the Claimant or any photographs which showed the state of the apartment. The Defendant testified that she had taken some however, they were not in evidence.

[11.] The Court found that the evidence of the Defendant as to the smokiness of the apartment was plausible because the Claimant was a smoker (by her own evidence she smoked one and half packs a day). Therefore, I believe that after the Claimant would have lived in the apartment for three (3) years that it would have been smoky and this would have affected the drapes amongst other things. In fact, it is reasonable to believe that the drapes would have required laundering or even replacement. As to the evidence regarding the grease behind the stove and broken furniture, this is difficult to accept without any support. Therefore, I will reduce the security deposit by 50% to $200 to cover the cost of ridding the apartment of smoke and cleaning or replacing the drapes.

Electricity

[12.] The Lease Agreement provided that the Defendant was to pay $125 towards the electricity bill and the balance was to be paid by the Claimant. Sometime in 2018, the parties orally agreed to 60% of the electricity bill to be paid by the Defendant and 40% by the Claimant.

[13.] Despite the Claimant seeking special damages for electricity that she ought not to have paid for in the sum of $600, there was no evidence tendered by the Claimant to support this claim. In fact this $600 claim was inconsistent with her evidence-in-chief where she testified that she paid the sum of $400 towards electricity. In her evidence in chief she stated:

> *"Because of this inconvenience, the Defendant told me she would not charge me electricity for five (5) months. She still charged me electricity. I paid $400 for electricity for the month of September. I was not shown any evidence for this amount. I requested her to show me the bill she said that she do not have it. She could only show me the watts used. Before I travel on my vacation I gave the defendant $400 for electricity."*

[14.] The law is clear that special damages must be specifically pleaded and proven. **Timothy Bethel and Sherry Strachan v Karen McDonald** SCCivApp No. 2 of 2012

Internet

[15.] It is pellucid that provision of the internet was a term of the Lease Agreement. However, the Defendant breached the terms of the Lease by failing to provide internet. On cross examination the Claimant explained that the Defendant stopped providing internet and told her "*to apply for it for herself*". She alleged that the monthly cost of the internet was $99 and that she was owed the sum of $1,679.59 for internet that she ought not to have paid for.

[16.] The monthly cost of internet as borne out by the invoice exhibited by the Claimant showed the monthly cost as $39.99 plus VAT and not $99. The claim for reimbursement for the internet of $1,679.59 was unsupportable because the receipts produced in fact totaled $898.00.

Implied term – accommodation fit for habitation

[17.] The Claimant could not recall the date when the leak commenced in the apartment. However, she accepted on cross examination that the leak started from the sunroof. She disagreed with the Defendant's Counsel that the leak was repaired within two weeks. In fact the Defendant upon re-examination had this to say on the time it took to repair it: *"So I can't tell you how long it took him to come to repair it, but I would say it would have been about four weeks."*

[18.] The Claimant alleged that after about three months, the Defendant hired another individual to repair the roof however, it resulted in more leaks. In the interim she said that the Defendant's son placed a piece of plastic to cover the roof and that did not help. Eventually, approximately seven to eight months later between 2018 and 2019 she testified that the Defendant sought professional help to repair the leaks. After that she said that the leaks then stopped. On cross examination she disagreed that the leak was confined to the sunroof or that it was a small leak. She said that the leak was in the front area of the apartment, the kitchen area, the dining room and went over the countertops.

[19.] The Claimant submitted that because the roof leaked she had to use towels, sheets, pots and pans to absorb the water leaking into the apartment and this rendered the accommodation unfit for habitation. These personal items used were eventually damaged or destroyed from such use. She alleged that she had to endure this leak for eight months between June 30, 2018 and September 22, 2019 and she produced Whatsapp messages to support her claim.

[20.] The Court reviewed the Whatsapp messages and despite the Defendant's insistence that she spoke by telephone only with the Claimant, the messages gave a different story. I found the evidence of the Claimant to be supported by the messages which showed a back and forth on the leaking roof issue and a response by an individual that could only be the Defendant or someone related to her by the name of Freddie. The messages complained of the leak during this period, however, there were only a few messages within that time period and certainly not enough to demonstrate that it

was a continuous period of leaking or even whether the leak was significant or excessive. The only evidence of the extent of the leak was from the Claimant.

[21.] Additionally, the Claimant testified that hot water was not supplied on a continuous basis and she produced the Whatsapp messages between her and the Defendant between September 15, 2018 to October 20, 2020 regarding this. Again, I found that the Whatsapp messages painted a different story and cite a few of them below:

> September 26, 2018 12:15pm
>
> The Claimant wrote: Morning Freddie. I was away for days but was schedule to return on Oct. 7th (Family Emergency). Please I would appreciate if you come up here to turn on the hot water. Your mom turned it off the day she left. I didn't have hot water for over a week. Please come and turn on the heater, I'm tired of it.
>
> September 26, 2018
>
> The Defendant wrote: Are you in today. 2:14pm
>
> I will go and turn on the heater. 2:25pm
>
> The Claimant wrote: Good afternoon. I had to cut my trip short. Can you please ask your son to come here and turn on the hot water. Please. I don't care to shower or wash my dishes with cold water. Please ask Freddie to come.
>
> The Defendant wrote: Freddie please go to the house I think I may have left the heater off. Dale he is on his way. I will be there tomorrow. Sorry about the water.
>
> The Claimant wrote: Thank you much.
>
> November 16, 2019:
>
> The Claimant wrote: "Can you check the hot water, I have to go out.
>
> December 3, 2018
>
> The Claimant wrote: 2:51pm "Please be mindful of the fact that I am a tenant and have a right to use the hot water. I also need a receipt for November's rent."
>
> The Defendant wrote: 9:41pm I will place it under your door. I have it made up for you. The heater is on for days. Will have the plumber check as I am getting hot water.

[22.] The Claimant's Counsel has advanced that the failure to provide hot water for the approximate eight month period and the roof leak for a similar period of time constituted a breach of an implied term of the Lease Agreement that the accommodation was fit for habitation or reduced the peaceful enjoyment of the apartment. On this basis, she submitted that the court ought to award damages for mental discomfort and inconvenience.

[23.] The Court was invited to assess these damages on the authority of **Jarvis v Swans Tour Ltd.[1972] EWCA Civ J1018** where she submitted it was held that in a proper case, damages for

mental distress is recoverable in contract as damages for shock can be recovered in tort. The cited case of **Jarvis** was a claim for breach of a holiday contract.

[24.] The sum of $800 was claimed for mental discomfort and inconvenience.

[25.] At the outset, I am willing to accept that it is plausible and probable that the leaking roof and the lack of hot water for an extended time may be inconvenient and could cause discomfort (perhaps more physical than mental) to the Claimant.

[26.] I have considered the case of **Farley v Skinner [2001] ULJ: 49** where Lord Clyde cited Bingham LJ in **Watts v Morrow [1991] 1WLR 1422** where he expressed the general rule that a contract-breaker is not in general liable for the distress and suchlike which may follow upon the breach, however, he continued:

> *"But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall into this exceptional category. In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort."*

[27.] Lord Clyde then summarized the above dicta and stated that: *"In the ordinary case accordingly damages may be awarded for inconvenience, but not for mere distress; but where the contract is aimed at procuring peace or pleasure, then, if as a result of the breach of contract that expected pleasure is not realized, the party suffering that loss may be entitled to an award of damages for the distress.* That was clearly the case in **Jarvis**.

[28.] The contract was for the rental of an apartment; I am not certain that it could be construed as a contract for peace or enjoyment. However, Counsel for the Claimant submitted that the absence of hot water and the leaking roof constituted a breach of an implied term that the accommodation was fit for habitation or reduced the peaceful enjoyment of the apartment. Lord Millett had this to say about the breach of covenant for quiet enjoyment in **Southwark London Borough Council v Tanner and others Baxter v Camden London Borough Council (no 2) 2001 1 AC 1**:

> *"The covenant for quiet enjoyment was originally regarded as a covenant to secure title or possession. It warranted freedom from disturbance by adverse claimants to the property: see* ***Dennett v Atherton LR 7 AB 316; Jenkins v Jackson 40 Ch71; Hudson v Cripps [1896] 1 Ch 265.*** *But its scope was extended to cover any substantial interference with the ordinary and lawful enjoyment of the land, although neither the title to the land nor possession of the land was affected:* ***Sanderson v Berwick-upon-Tweed Corpn (1884) 13 QBD 547, 551.*** *Despite this there has lingered a belief that, although there need not be physical interruption into or upon the demised premises, there must be "a direct and physical" interference with the tenant's use and enjoyment of the land.*

*On this ground the courts have dismissed complaints of the making of noise or the emanation of fumes, **of interference with privacy or amenity**, and other complaints of a kind commonly forming the subject matter of actions for nuisance.*

[My emphasis added]

[29.] Having considered the authorities on this issue, I do not find that this case falls in the category for the award of damages for inconvenience and mental discomfort.

Missing items – Whether stolen

[30.] The Claimant asserted that the Defendant stole her china about two weeks before Christmas of 2020. It was valued at $7,990. She claimed that the Defendant was assisted by the electrician who she had brought to repair a problem with the light. Her evidence was that she left the Defendant and the electrician in the kitchen where the microwave and china was located and she went to her bedroom where she remained. She said that she could hear her dishes rattling and she heard a voice and laughter from her glass sliding down that separates the bedroom from the kitchen area. Eventually they both left. About 2 weeks later, she noticed that these items were missing. She reported the matter to the Police.

[31.] The Defendant vehemently denied this claim. She said that the Police visited her home and found none of the stolen items in her home and charges were not brought against her or the electrician who had been implicated in the theft of the items. Further, she alleged that she never saw the microwave or the china dishes.

[32.] The Defendant suggested that this claim of theft was done out of spite because she had taken the Claimant to the Magistrates Court for rent arrears. In fact, she alleged that this claim was made approximately two (2) weeks after the Court appearance.

[33.] The Claimant's Counsel submitted that either the Defendant or someone for whom she was vicariously liable for removed china dishes and a microwave from her apartment. She relied on the case of **Sang Stone Hamoon Jonoub v Baoyue Shipping [1972] EWCA Civ J 1018** which set out the law regarding conversion which was unhelpful.

[34.] The Claimant said that the apartment had not been broken into and admitted the housekeeper had access to her apartment. In fact she said that she would leave the door unlocked for her to enter or have her obtain the key from the Defendant to gain entry. However, she denied that the housekeeper would steal from her because she worked for her family for 17 years and had "*never moved a dime*". When asked about how the Defendant who walks with a cane would be able to move the items, she said *"Mr. Black could have lift it for her"*.

[35.] The Claimant alleged that the Defendant stole:

"a. about 60 dinner plates totaling $7,990

b. the microwave that went missing was a large size made by General Electric value at approximately $750.00"

[36.] Given the size of the microwave and the amount of dinner plates that were alleged to have been taken it would have taken the Defendant and the electrician some time and several trips to remove them. Also, given that others including the housekeeper had access to the apartment, I find that on the balance of probability the Claimant has not proven that the Defendant stole these items.

[37.] Notwithstanding my finding, even if I were to accept otherwise, the issue of proof of the cost of these items is non-existent save for a letter from the Claimant's brother dated January 18, 2023 that stated as follows:

> *"The cost of the china in question, inclusive of freight and duty that was "stolen" from her lodging located in Winton Estates during the past week would have a replacement cost to date with VAT (12%) included, totally approximately $7,990.*

[38.] The letter does not constitute evidence of the purchase of the items by the Claimant, or, in fact her brother. At best, the letter amounted to evidence that the items were a gift from him to her with an estimate of their current value.

Conclusion

[39.] Accordingly, having regard to what has been set out above, I make the following orders:

(i) I refuse the claim for:

(a) electricity that the Claimant ought not to have paid for in the sum of $600;
(b) internet that the Claimant ought not to have paid for in the sum of $1,679.59;
(c) personal articles viz., stainless steel cooking pots, Kassatex towels, queen sized bed sheets, replacement battery to operate gate, China dishes and microwave in the total sum of $9,035;
(d) damages for inconvenience and mental distress of $800.

(ii) I award the following sums:

(a) the sum of $898.00 representing the breach of contract to provide internet;
(b) the sum of $200.00 representing the security deposit.

(iii) I will hear the party on costs.

Dated this 24th day of February, 2025

Camille Darville Gomez
Justice