

- (a) whether the Deputy Judge committed an error in law by determining that the Small Claims Court did not have jurisdiction to hear the appellant's claim for damages
- (b) whether the Deputy Judge misapprehended the evidence and committed a palpable and overriding error by finding as a fact that a second or further Landlord and Tenant Board Hearing took place on September 20, 2013 at which time the appellant's damages claim would have been addressed.

[2] The appellant sets out the relevant facts at paragraphs 17 to 33 in the factum as follows:

On or about October 1, 2011, the respondent, Susan Griffen ("Griffen") entered into a residential Tenancy Agreement (the "Tenancy Agreement") with the appellant, Capreit Limited Partnership ("Capreit") with respect to a 4 bedroom residential townhouse municipally known as 15 Balmoral Drive, Suite 15, Brampton (the "Rental Unit").

The Tenancy Agreement was for a term commencing on October 1, 2011 and ending on September 30, 2012, following which the tenancy would become 'month-to-month' in accordance with the provisions of the *Residential Tenancies Act, 2006*.

Pursuant to the terms of the Tenancy Agreement, Griffen agreed to be liable for and to indemnify Capreit for the repair costs of any damage caused to the Rental Unit by her, her family or other persons permitted onto the premises, reasonable wear and tear excepted.

As at March 31, 2013, Griffen was up to date with the rental payments she was required to make pursuant to the Tenancy Agreement.

Between April of 2013 and August of 2013, Griffen failed to pay her monthly rent in accordance with the terms of the Rental Agreement and during this period tendered several cheques that were either dishonoured or on which she stopped payment. By August 1, 2013, Griffen was in arrears of rent in the amount of \$2,488.45.

As a result of the significant rental arrears, Capreit subsequently filed an L1 Application to Terminate a Tenancy ("the L1 Application") with the (Ontario) Landlord and Tenant Board (the "LTB"). The L1 Application was assigned LTB File No. CEL-32214-13.

Shortly thereafter, the respondent filed a T-2 Application About Tenant's Rights and a T6 Tenant's Application About Maintenance with the LTB. The respondent's tenant applications were assigned LTB File No. CET-31943-13.

Both the appellant's L1 Application and the respondent's T2 and T6 applications were heard together at the same time in a combined hearing at the LTB's Mississauga regional office on August 22, 2013.

On August 23, 2013, LTB Member Leva Martin issue an Order with respect to the appellant's L1 Application, *inter alia*, terminating the tenancy as at August 31, 2013 and ordering the respondent to pay the rental arrears to the appellant.

The respondent vacated the Rental Property on or about August 31, 2013 in accordance with the August 23, 2013 LTB order.

On September 10, 2013, the appellant conducted a customary move-out inspection of the Rental Unit and discovered that the respondent had caused significant damage to the Rental Unit including among other things, holes in the wall, cat urine stained carpets, damaged appliances and damaged counter tops.

On September 20, 2013, LTB Member Leva Martin issue an Order dismissing the respondent's T2 and T6 applications.

The appellant subsequently retained various contractors to repair the damage to the Rental Unit that was caused by the respondent. The cost of these repairs were approximately \$23,000.

On July 27, 2015, the appellant had a Plaintiff's Claim issued in the (Brampton) Small Claims Court seeking damages of \$23,214.95 from the respondent for the costs incurred to repair the damage to the Rental Unit that were caused by the respondent.

The respondent did not defend the appellant's Plaintiff's Claim and was noted in default.

An Assessment Hearing with respect to the appellant's Plaintiff's Claim was heard on September 14, 2015 by Deputy Judge Barycky. During the Assessment Hearing, the appellant's representative referred Deputy Judge Barycky to the September 20, 2013 LTB Order to establish that the LTB dismissed the respondent's allegations that the appellant failed to properly maintain the Rental Unit.

On the same day, Deputy Judge Barycky issued an order in which he dismissed the appellant's Plaintiff's Claim on the basis that the Small Claims Court had no jurisdiction to entertain the plaintiff's claim. Specifically, Deputy Judge Barycky's September 14, 2015 Endorsement in which he dismissed the appellant's Plaintiff's Claim was based on His Honour's finding of fact that a further hearing had

taken place before the LTB on September 20, 2013 wherein the appellant's damages could have been addressed.

[3] Reasons of Deputy Judge G. Barycky dated September 14, 2015:

THE COURT: So why is there jurisdiction in this court to determine the matters when it clearly could have been addressed September 20th before...

MS. JOHNSON: But at that time the tenancy had ended, so the L.T.B. normally only deals with matters when the tenant is currently residing there. Once they leave, they say you have to pursue it in Small Claims Court.

THE COURT: Jurisdiction of this Court is excluded by the *Landlord and Tenant Act*, not by some functionary making a decision.

MS. JOHNSON: Yes.

THE COURT: The matter was before the Board on September 20th, three weeks after the tenant terminated. Surely by that date the landlord would have been aware of what the damages really are. So why wasn't it addressed on September 20th? It is clearly a matter that arises out of the tenancy and went before the Board.

BARYCKY, DEPUTY JUDGE: JUDGMENT: (ORALLY)

THE COURT: The tenancy was terminated August 31, 2013 by order of the Board dated August 23rd, 2013. The plaintiff's representative advises that the tenant vacated same date. The plaintiff alleges that the defendant/tenant occasioned damages to the rental unit and did not discover such until after termination. However, there was a further hearing before the Board September 20th 2013, wherein the damages could have been addressed. There is no jurisdiction in this Court to entertain the plaintiff's claim.

The claim is dismissed.

MS. JOHNSON: Okay, thank you, Your Honour.

Standards of Review

[4] The standard of review on questions of law is correctness. In *General Motors of Canada v. Johnson* 2013 ONCA 502, the Court set out the following at paragraph 52:

The Supreme Court's jurisprudence is equally unequivocal concerning the governing standard of review on questions of law. There is no room for error by a trial judge on a pure question of law – the applicable standard is that of correctness. Thus, on matters of law, an appellate court enjoys a broad scope of review and is free to replace the opinion of the trial judge with its own: *Housen* at paras. 8-9.

[5] The standard of review relating to findings of fact as set out in *Housen v. Nikolaisen*, 2002 SCC 33 is that they cannot be disturbed on appeal unless the trial judge made a palpable and overriding error or are otherwise clearly wrong, unreasonable or not supported by the evidence.

[6] In *General Motors* the Court dealt with that issue at paragraph 51 as follows:

That said, while the principle of deference applies, a trial judge's factual findings and inferences are not immune from appellate scrutiny. In *H.L.*, at paras. 55-56, the Supreme Court, citing *Housen*, explained that a trial judge's findings or inferences of fact may be set aside on appeal if they are "clearly wrong". With respect to a trial judge's findings of fact, the palpable and overriding test is met where the findings can be properly characterized as "unreasonable" or "unsupported by the evidence" and they are likely to have affected the result at trial: *H.L.* at para. 56. With respect to a trial judge's inferences of fact, Fish J.,

writing for a majority of the Supreme Court in *H.L.*, stated, at paras. 74-75:

Not infrequently, *different* inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are “reasonably supported by the evidence”. If they are, the reviewing court cannot *reweigh the evidence* by substituting, for the reasonable inference preferred by the trial judge, an equally – or even more – persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

In short, appellate courts not only may – but must – set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of “primary” facts, or facts proved by direct evidence. [Emphasis in original.]

Issue: The Jurisdiction of the Small Claims Court

[7] Section 23(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 states:

- (1) The Small Claims Court,
 - (a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and
 - (b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount.

[8] The jurisdiction of the Landlord and Tenant Board is set out in section 168

(2) of the *Residential Tenancies Act*, 2006, S.O. 2006, c.17 (the “RTA”), which states:

The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

[9] Section 89(1) of the RTA deals with a landlord's right to compensation for damage to a rental unit and provides as follows:

89.(1) A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex and the tenant is in possession of the rental unit.

[10] The language in section 89(1) of the RTA makes it clear that a precondition to bringing an application for compensation for damages to a rental unit wilfully or negligently caused by a tenant is that the tenant must be in possession of the rental unit at the time the application is brought.

[11] In this case the tenant agreed to terminate the tenancy as of August 31, 2013 and the tenant vacated the rental property on or about August 31, 2013 in accordance with the order of the LTB dated August 23, 2013.

[12] As the tenant was no longer in possession of the rental unit the LTB has no jurisdiction to hear that landlord's application for compensation for damages.

[13] In *TET-25648-12 (Re) 2012 Canlii 46747 (ON LTB)* the LTB stated the following at paragraph 4:

The Landlord testified that when she and her husband went to the rental unit to prepare it for the next tenants, she noted damage caused by the Tenants; therefore, she proceeded to cash the April 2012 rent cheque as compensation for the alleged damages, without the consent of the Tenants. This action by landlords is prohibited by the *Act*. A landlord must apply to the Board, if the tenant is still in possession of the rental unit, for an order determining compensation for damages. If the tenant is no longer in possession of the rental unit, then the landlord must apply to a Court of competent jurisdiction, which the Landlord has done in this case. This Board has no jurisdiction to hear a claim for damages related to this rental unit and, therefore, no testimony was heard regarding the damages allegedly caused by the Tenants. Therefore, the Landlord must return the \$900.00 to the Tenants, which was the amount of the cheque cashed.

[14] In *TSL-61393-15, TST-62231-15 Re. 2015 Canlii 77364 (ON LTB)*, the LTB set out the following at paragraphs 20 and 21:

So a landlord cannot file an application with the Board for arrears of rent if a tenant is not in possession of the rental unit. Similarly, a landlord cannot apply for an order for compensation for damage to the rental unit or residential complex if the tenant is not in possession. Subsection 87(3) says:

If a tenant is in possession of a rental unit after the tenancy has been terminated, the landlord may apply to the Board for an order for the payment of compensation for the use and

occupation of a rental unit after a notice of termination or an agreement to terminate the tenancy has taken effect.

So this concept of being in possession not only dictates whether or not the landlord can apply to the Board for an order requiring the tenant to pay money, but it also is tied to the landlord's right to an order for daily compensation for use and occupation of a rental unit.

[15] In *Kipiniak v. Dubiel*, 2014 ONSC 1344, Mr. Justice H.J. Wilton-Siegel determined that any application to seek occupation arrears was required to be made to the Board so long as the tenant remained in possession of the premises. However, once the tenant was no longer in possession, the Small Claims Court had jurisdiction to hear the claim, subject to its monetary jurisdiction and the provisions of the *Limitations Act*. (See: paras 25 and 26).

[16] I am satisfied that Deputy Judge Barycky erred in law in determining that the Small Claims Court had no jurisdiction to hear the appellant's claim for compensation for damages.

Issue: Whether Deputy Judge Barycky misapprehended the evidence such that there is a palpable and overriding error.

[17] In his oral judgment Deputy Judge Barycky finds that there was a further hearing before the Board on September 20, 2013 and the damages could have been addressed at that time. This finding is incorrect. The order of the LTB dated August 23, 2013 identifies that "This combined application was heard in

Mississauga on August 22, 2013.” (See Tab 7 D of the Appeal Book and Compendium)

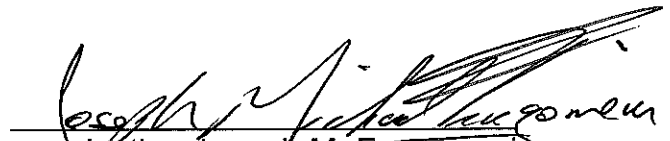
[18] The order of the LTB dated September 20, 2013 also identifies that, “This combined application was heard in Mississauga on August 22, 2013.”

[19] There was no other hearing. A hearing had not taken place on September 20, 2013. In that regard, Deputy Judge Barycky committed a palpable and overriding error in making that finding.

[20] It is important to note, however, that even if a further hearing had been conducted before the LTB on September 20, 2013, the LTB would still not have had jurisdiction to deal with the issue of damages as the tenant was no longer in possession as required by Section 89(1) of the RTA.

Disposition

[21] The order of Deputy Judge Barycky dated September 14, 2015 is hereby set aside. The appellant’s Assessment Hearing is remitted back to the Small Claims Court for a hearing before a different judge of the Small Claims Court.


Justice Joseph M. Fragomeni

COURT FILE NO.: CAPREIT LIMITED PARTNERSHIP v. GRIFFIN, 2016ONSC5150
COURT FILE NO.: DC-15-112
DATE: 20160816

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT APPEAL)
DIVISIONAL COURT

B E T W E E N:

CAPREIT LIMITED PARTNERSHIP

- and -

SUSAN GRIFFEN

FEDERATION OF RENTAL-HOUSING
PROVIDERS OF ONTARIO

Fragomeni J.

Released: August 16, 2016