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| CITATION: | *Colebatch & Colebatch v Richams Realty Pty Ltd* [2009] NTMC 053 |
| PARTIES: | WAYNE MALCOLM COLEBATCH<br>&<br>ROSEMARY ELIZABETH COLEBATCH<br>v<br>RICHAMS REALTY PTY LTD |
| TITLE OF COURT: | LOCAL COURT |
| JURISDICTION: | SMALL CLAIMS |
| FILE NO(s): | 20831258 |
| DELIVERED ON: | 29 OCTOBER 2009 |
| DELIVERED AT: | DARWIN |
| HEARING DATE(s): | 22 SEPTEMBER 2009 |
| JUDGMENT OF: | ACTING JUDICIAL REGISTRAR SMYTH |

**CATCHWORDS:**

CONTRACT – Breach of Contract – proven breach - little or no consequential loss – nominal damages

NEGLIGENCE – Damages – proof of damages required – causation and remoteness of damages

*Small Claims Act* (NT), s 12
*Residential Tenancies Act* (NT)

*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 63
*Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71
*Georgieff v Athans* (1981) 38 SASR 412
*Miller v Candy* (1981) 38 ALR 299
*Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Self Represented |
| Defendant: | Mr V Close |

*Solicitors:*

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| Plaintiff: | Self Represented |
| Defendant: | Vincent M. Close |

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| Judgment category classification: | C |
| Judgment ID number: | [2009] NTMC 053 |
| Number of paragraphs: | 33 |

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20831258

BETWEEN:

**WAYNE MALCOLM COLEBATCH**
First Plaintiff

**ROSEMARY ELIZABETH COLEBATCH**
Second Plaintiff

AND:

**RICHAMS REALTY PTY LTD**
Defendant

REASONS FOR JUDGMENT

(Delivered 29 OCTOBER 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is a proceeding brought by the first and second plaintiffs in the small claims jurisdiction of the Local Court. The plaintiffs seeks damages and costs from the defendant arising from a breach of a property management agreement or alternatively in negligence.

2. Section 12 of the *Small Claims Act* (NT) provides that the Court is not bound by the rules of evidence and may inform itself in any manner it sees fit. That does not mean that the Court will dispense with the rules of evidence altogether, but is does mean that the Court, in this jurisdiction, will tend to be considerably more flexible in relation to the manner and presentation of evidence, recognising that parties are commonly self represented. The rules of evidence have been developed in the Courts over a considerable period of time, they exist for good reason, namely they

assist the decision maker in coming to a decision as to the facts of the matter.

3. Foremost amongst the rules of evidence in civil proceedings is that the party initiating a claim bears both the evidential and persuasive burdens on each and every material fact essential to the establishing of that claim. The civil standard of proof is generally expressed in terms of the balance of probabilities.

4. At hearing the plaintiffs were represented by first plaintiff Mr Colebatch. Mr Close, a solicitor, represented the defendant company. Evidence was given under oath.

The Plaintiffs' Evidence

5. The first plaintiff's sworn oral evidence was as follows:

(a) The plaintiffs were the registered proprietors of 57/5 Cardona Court, Darwin ("the property"). They had owned the property since September 2006.

(b) The plaintiffs purchased the property though the assistance of an organisation known as the Investors' Club. The Investors' Club apparently facilitated the purchase of furniture and other chattels for the property. In this case the plaintiffs' property was fully furnished through such an arrangement.

(c) On or about 20 September 2006 the plaintiffs entered into an Residential Property Management Agreement ("the management agreement") with the defendant (exhibits P1 and D1). The terms of the management agreement provided, inter alia:

(i) Clause 3 – the Agent was to undertake the provide the owner with written reports as to the condition of the property quarterly;

(ii) Clause 7 – the owner agrees to pay the Agent in consideration of the management of the property, a sum specified in Item 4 of the Schedule from the monies received by the Agent for and on behalf of the owner. Item 4 of Schedule 1 provided a fee equating to 8% of gross monies collected plus GST.

(d) The property was brand new in 2006.

(e) It was during the period 29 June 2007 to 29 June 2008 that problems in relation to the property management arose, up until that time the property had been reasonably managed.

(f) The property was tenanted in 2006, but the first tenant (name unknown) broke the tenancy agreement in approximately December 2007. The plaintiffs were mistakenly charged a lease break fee when the tenant terminated. That was subsequently rectified by the defendant.

(g) The property was then tenanted by Ms James from approximately March 2007 to November 2007. No new documentation relating to this tenant was received. However an email confirming the tenant's name and rent payment was received after an inquiry from the plaintiffs.

(h) The property was then tenanted by Mr Johnson and Ms Ballard from November 2007 to November 2008.

(i) During 2006-7 the plaintiffs had received three reports as to the condition of the premises, dated 11 October 2006, 22 June 2007 and 17 July 2007. The reports stated that the premises were in clean and tidy condition. Only one of these reports was provided in a bundle of documents on the Court file, namely the report dated 17 July 2007 written by Megan Caswell. The plaintiffs brought the issue of the inadequacy these reports (ie. lack of detail) to the defendant's attention. The plaintiffs were unable to provide copies of these emails.

(j) Soon after, namely after the third set of tenants, the periodic reporting ceased. When the plaintiffs brought this to the attention of the defendant nothing was done.

(k) The first plaintiff arranged with the defendant to inspect the property on 9 July 2008 at 4pm. No one turned up. After inquiries with the defendant the first plaintiff was informed that the management agreement had been transferred to another firm, Alliance Realty. The plaintiffs had not been informed of the transfer.

(l) At 5pm on 9 July 2008 the first plaintiff inspected the property in the company of a representative from Alliance Realty. The property was filthy, the lounge was dirty, there was a dent in the fridge, there were some missing lamps, the microwave was missing and the car park space was filthy.

(m) On 18 July 2008 the first plaintiff sent an email to the defendant noting his displeasure (exhibit P2). The email noted issues such as damage to the property, dirty car parking spaces, missing microwave, failure to provide periodic reports and the nature of the reports.

(n) In respect to the microwave, the plaintiffs had purchased a new microwave oven for the property from Bi-Rite Electrical Darwin for $245. It was part of a package of furniture ordered to furnish the premises. The microwave oven was installed by Mr Barry Seabrook, of the Investor's Club NT Branch, who filed a statutory declaration to that effect. The microwave was installed in the property in about September 2006. The plaintiffs had seen the microwave oven at an inspection of the property in 2007. However, it was not in the property when the inspection was carried out in July 2008.

(o) The issue of the missing microwave had been raised with the defendant but the defendant denied its existence on the basis that it did not appear on an inventory for an ingoing condition report dated 10 March 2007.

6. In respect to the issue of poor management in breach of the management agreement or in negligence, the plaintiffs say:

(a) The plaintiffs were wrongly charged a tenancy agreement breach fee in December 2007, which was subsequently rectified.

(b) An ingoing condition report dated 10 March 2007 was not signed.

(c) A new tenancy commenced on 10 March 2007, no documentation was received in relation to the previous tenant.

(d) The tenancy agreement dated 20 November 2007 does not include initialled special conditions (ie. defence clause and no smoking on the property).

(e) Reports for the property inspections were not adequate or timely.

(f) The Agent did not attend to the inspection as agreed on 9 July 2008 at 4pm.

(g) The microwave was not accounted for on inventory and subsequently went missing without the defendant noticing.

7. The plaintiffs are seeking damages for breach of the management agreement. They claim that they did not get what they had contracted for, namely a professional property manager who was required to properly report, ensure in/outgoing reports were done and to ensure that the property was properly managed. As a result of a breach of the property management agreement the plaintiffs claim damages in the order of one half of a year's management fees, namely $1407.25. Alternatively the plaintiffs claim the defendant has been negligent in carrying out its duties

such that it has suffered a loss, namely the loss of a microwave which went missing from the premises, which the plaintiffs cannot now seek off the tenants as proper reports were not conducted.

8. In cross examination it was the first plaintiff's evidence that:

(a) That he had no problems with his mailing address.

(b) That he had received three condition reports noting the property was clean and tidy, but no longer had them. Although a copy of one such report has been provided and is on the Court file.

(c) That the most recent tenants were evicted a few weeks ago and damage and cleaning costs were fully recovered from the security deposit. There had been substantial recovery from the security deposit.

(d) In relation to why he did not have the microwave oven insured pursuant to clause 12 of the management agreement and why he did not make a claim, the first plaintiff said that he did not think it appropriate to claim it on insurance, where he would have to incur an excess.

(e) In relation to why he did not terminate the management agreement, upon one month's notice as the agreement provides, it was the first plaintiff's evidence that he did not become unhappy until July 2008, and that there were problems but problems he could be tolerant of.

(f) In relation to what precise damages the plaintiffs had suffered, the first plaintiff indicated that he had suffered a great amount of inconvenience, aguish, time following up matters and the replacement of the microwave. Time was money.

9. In submissions it was argued that the plaintiffs did not get what they had contracted for, namely a professional property manager. It was claimed that the defendant had breached the agreement, had been negligent and the plaintiffs had suffered a loss.

**The Defendant's Evidence**

10. Two witnesses gave evidence for the defendant.

11. Ms Megan Caswell, was the former property manager and employee of the defendant during 2007-2008. It was Ms Caswell's evidence that:

    (a) She was the former property manager for the plaintiffs' property and was employed by the defendant for 2 years, ending in June 2008.

    (b) She provided a written statement dated 21 July 2008 (exhibit D2).

    (c) It was her evidence that she personally inspected every managed property, and that she could clearly recall inspecting the property on a number of occasions for the periodical 3 monthly inspections, maintenance inspections with the tenant, vacating inspections and ingoing inspections. Inspections were carried out by filling in a report on A4 paper, essentially ticking boxes as to the condition of the premises.

    (d) That reports in relation to inspections would have been noted on the computing system, Multi-Array, which was sent to the owners along with their monthly statements. Reports would have also gone out in the mail. The administrative assistant in the office was responsible for sending the mail.

    (e) During the relevant period, June 2007 to June 2008, she recalled being in contact with the first plaintiff. She recalled emailing him in relation to inspections, maintenance or tenant issues. She believed she had a good working relationship with the first plaintiff and did not recall any mention of his dissatisfaction. She recalls on one occasion she was told by the first plaintiff that she was doing a great job and there were no issues with management.

(f) She did not recall seeing a microwave oven in the property, and notes that it would have been noted on the condition report if it had been present. She believed that the property did not have a microwave because there was no microwave hutch built in the kitchen. She tendered photographs of the kitchen (Exhibit D3) taken prior to the beginning of 2008. They show no microwave in the kitchen.

12. Ms Richly gave evidence and is the proprietor of the defendant. It was her evidence that:

(a) All documents relating to the property were handed over to Alliance Realty at the time the rent roll was sold, namely 30 June 2008. She had tried to procure all relevant documents for the hearing but believes that she had not been provided with a full set of documents.

(b) She had no real involvement with the management of the property other than being the principal of the defendant agency.

(c) In relation to the sale of the rent roll she was instructed that Alliance Realty would contact all new owners and attend to all booked appointments.

(d) In relation to producing status reports for owners it was her evidence that she was very strict in providing reports.

(e) In relation to the mailing of reports, it was her evidence that such records should be in the mail book which was kept by the administration assistant. The mail book is a book which records outgoing correspondence to tenants and landlords. The mail book would be in the possession of Alliance Realty.

(f) In relation to her dealings with owners from the Investors' Club, all such owners were given a 30 day notice period, if they were dissatisfied with the property management, they could terminate the agreement.

She was not aware of any financial loss suffered by the plaintiffs other than the claim for the microwave oven.

13. In submissions it was suggested by Mr Close that the plaintiffs did not become aggrieved until July 2008 and their protestations of spending unnecessary time because of poor property management had not been bourne out. It was submitted that there was no financial loss of rent, and that any loss for damage to the property has been compensated for by the last tenants, through forfeit of their security deposit. It was submitted that the only possible financial loss was the loss of the microwave, and the plaintiffs were obliged to insure it under the property management agreement.

Discussion

14. Part of the plaintiffs' case turns on the provision of documentation, whether it was provided by the defendant, and whether a failure to provide proper documentation was a breach of the management agreement or negligence.

15. The documentation presented to the Court is, at best, scant. The plaintiff has been unable to provide some documents which he received (ie. copies of the other two status reports and certain emails for example). However, the main problem would appear to be that most of the source documents, which go to proving liability, are in the hands of a third party (ie. Alliance Realty). No summons to produce documents was issued on the request of either party.

16. One would expect, in accordance with the *Residential Tenancies Act* (NT), there to be at least three main documents relating to each tenancy agreement: a tenancy agreement, an in-going condition report and an out-going condition report. Other documentation relating to the tenancy should also exist, such as correspondence between agent and owner, copies of

monthly statements, copies of reports, as well as internal documentation (working notes of inspections etc).

17. The plaintiffs would have the Court find that the documents are scant because it is all that they received, such receipt being indicative of poor management practices. The defendants on the other hand would have the Court believe that other documents may exist in the possession of Alliance Realty.

18. From the documentation provided relating to the property:

    (a) Tenancy #1: no documentation provided, no tenancy agreement, no ingoing condition report, no outgoing condition report. The tenant apparently broke the tenancy agreement in about December 2007. The plaintiffs say they only received one status report dated 11 October 2006 during this period.

    (b) Tenancy #2: tenant Ms James, from 10 March 2007 to 20 November 2007. There is an executed property in-going condition report dated 10 March 2007, there is no tenancy agreement and no out-going condition report. The plaintiffs say they only received two status reports dated 22 June 2007 and 17 July 2007 during this period.

    (c) Tenancy #3: tenants Ms Ballard and Mr Johnson, from 20 November 2007 to 23 November 2008. There is a tenancy application form. There is an executed tenancy agreement dated 20 November 2007. There is an unsigned and undated memorandum of variation extending the tenancy to 23 November 2008. The plaintiffs say they received no status reports during this period.

**Breach of Contract**

19. Clause 3 of the management agreement provides that the defendant is to provide quarterly written reports to the plaintiffs as to the property's

condition. It was the first plaintiff's evidence that he only received three reports, one in 2006 and two in 2007. In accordance with the management agreement there should have been at least one report in 2006, four reports in 2007 and two in 2008 (prior to transfer of the rent roll). It was the defendant's evidence that on a number of occasions periodical inspections were carried out and reports were posted to the plaintiffs. Other than Ms Caswell's recollection in relation to carrying out a number of inspections, there was no supporting evidence of all such reports having been done, or at least sent. There were no paper A4 checklists produced, there were no copies of owners account statements noting inspections had been carried out, there was no copy of the mail book showing reports having been mailed out.

20. On the basis of the evidence, I am reasonably satisfied to the required standard that the plaintiffs were not sent such reports in accordance with the management agreement. The defendant, in its defence, has not persuaded me otherwise. The defendant has therefore breached the management agreement.

21. In relation to damages for breach of the management agreement, the plaintiffs seek 50% of the yearly management fee, namely $1445.75. There is no basis for how the plaintiffs have calculated such a figure, other than they believe they only received about half of what they should have received in relation to management of the property. The onus is on the plaintiffs to prove their damages.

22. The purpose of damages for breach of contract are to put the aggrieved party back to the position they would have been in had the contract been performed as agreed (*Cth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80). The purpose is to compensate for actual loss, in so far as money can (*Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 80). However, the general rule is that substantial damages can only be recovered for

substantial loss. If there is little or no consequential loss or there is no evidence as to what the loss actually was, all that can be recovered is nominal damages.

23. I am not satisfied that there was any substantial loss as a result of the breaches, comprising a failure to provide the status reports. Further, any damage done to the property, which might be remotely linked to a failure to provide periodic reports, has been made good through the tenants' security deposit. There has been a breach, but at best the plaintiffs are entitled to nominal damages. I would allow nominal damages in the amount of $50.

24. A similar situation exists in relation to the provision of other documentation, such as unsigned copies of condition reports or tenancy extensions. However, the provision of such documentation is not an express term of the management agreement. It may be that, in the normal course of business, there may be an implied term that all source documents (such as tenancy agreements, in and out going conditions reports) should be provided to the owner. However, in the absence of an express term to that effect, and in the absence of evidence as to what was agreed in relation to the provision of such documents, I am not willing to find that the failure to have documents executed by tenants, or to provide them to the plaintiffs, was a breach of the management agreement. Furthermore, the plaintiffs could have expressly requested such documents at any time following a new tenancy. There was no evidence, other than an email in March 2007 which on its face was satisfactorily responded to, that the plaintiffs had specifically requested source documents in relation to each tenancy. I find no breach of the management agreement in relation to the failure to have documents executed properly by the tenants or to provide them to the plaintiffs.

25. If I am wrong in that regard, and if the defendants were contractually required to complete and provide in/out going condition reports to the plaintiffs, and they failed to do so, there is no evidence that such a failure has led to substantial or any damages which would warrant nominal damages above that already awarded. If there had been evidence that the failure to fill out condition reports led to damages, for example by virtue of not being able to recover the tenant's security deposit to make good repairs to the property, then there may be an argument for the plaintiffs, but this was not the case.

26. Similarly the other issues raised such as the mistaken but rectified charge for the reletting fee, a failure to attend the inspection and the missing microwave are not compensable, there is insufficient evidence to find that such conduct constituted a breach of the management agreement founding in damages.

**Negligence**

27. The plaintiff's case is alternatively pleaded in negligence.

28. Real estate agents, including property managers, are professionals. They are required to be specifically trained, licensed and are subject to a code of practice. A real estate agent has a duty of care to carry out their activities with a reasonable level of care and skill (*Georgieff v Athans* (1981) 26 SASR 412 at 413). The standard of care required is that of a reasonable property manager or real estate agent.

29. In these circumstances, as I understand the plaintiffs' case, it is argued that the defendant's conduct constituted negligence. It is alleged that the defendant's failure to properly report and provide documentation (either at all or properly executed), its failure to inspect the property, its failure to account for the missing microwave, are all indicative of negligence.

30. In order to prove negligence, unlike contract, the plaintiffs must also successfully prove that damage has actually been caused as a result of the breach of the duty. Proof of damage is required to found an action in negligence, and the damage must be causally related to the breach of the duty and must not be too remote. In this case the plaintiff claims damages, in the form of one half the year's management fees. Subject to one qualification set out in the paragraph below, the plaintiffs have not proved they have suffered damage. It may be that they have given a figure as to what they think is fair compensation for the defendant's alleged conduct, but there is a difference between picking a reasonable figure, without reference to actual loss, and proving that you have actually suffered damage (in the form of injury, damage to property or economic loss). As much as the plaintiffs may feel aggrieved by the alleged poor professionalism of the defendant, they have not suffered damage as a result of a breach of the duty of care. Apart from the half year management fee claimed, it may be that the plaintiffs have suffered inconvenience, aguish and wasted time as a result of the defendant's negligence, and it may be that a monetary amount could be put on such wasted personal time. However, I doubt whether such matters would comprise compensable damages, and in any event such damages would be too remote.

31. However, in relation to the issue of the missing microwave oven, it was the first plaintiff's evidence that he purchased it in 2006 and saw it at the property in 2007. Receipts to support its purchase were provided in support. Further Mr Seabrook attests to installing the microwave in the property in 2006. Ms Caswell disputes the presence of the microwave. On the evidence available, I prefer the evidence of the plaintiff and find that there was a microwave installed in the property, and it went missing at some time after it was installed during the term of one of the tenancies. The microwave was not listed on the ingoing condition report dated 10

March 2007 prepared by the defendant or its employees. However, it was seen in the premises by the first plaintiff during an inspection in 2007.

32. I find that the defendant's failure to properly note the presence of the microwave on its reports and to note its absence from the property constituted a failure falling short of the reasonable standard required, and therefore a breach of its duty of care to the plaintiffs. As a result the plaintiffs have suffered damages, being the loss of the value of a microwave oven which they cannot now recover off the tenants. The plaintiffs claim $245 for the purchase price of the microwave. At the time the microwave was last seen in 2007 it would have been almost a year old and may have been up to two years old at the time it was noted missing at the inspection of 9 July 2008. The basis of the measure of damages is the value of an item of equivalent quality (*Miller v Candy* (1981) 38 ALR 299). If a new chattel is purchased to replace an old one, the plaintiff can only claim the cost of the old chattel (see *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88). As there was no evidence tendered as to the cost of a replacement item of similar quality, the plaintiffs will need to provide evidence of the cost of a 1 to 2 year old similar microwave oven at an assessment of damages hearing.

33. Therefore I make the following orders:

1. There be judgment in favour of the first and second plaintiffs against the defendant for breach of the property management agreement. Nominal damages are awarded in the amount of $50.

2. There be judgment in favour of the first and second plaintiffs against the defendant for negligence, relating to the loss of the microwave oven. Damages are to be assessed at an assessment of damages hearing to be scheduled by the Court. The plaintiffs will have leave to appear by telephone at such a hearing.

3. The plaintiffs shall have their reasonable disbursements of the proceeding, namely the filing fee of $72 and ASIC company search fee of $12.

Dated this 29th day of October 2009

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**CRAIG SMYTH**
ACTING JUDICIAL REGISTRAR