



# Civil Resolution Tribunal

Date Issued: October 18, 2022

File: SC-2021-007348

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mailey v. Ellesmere Farm Corporation*, 2022 BCCRT 1134

BETWEEN:

LACI MAILEY and STEPHEN BRADLEY

**APPLICANTS**

AND:

ELLESMERE FARM CORPORATION and  
PROMERITA REALTY CORP.

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Chad McCarthy

## INTRODUCTION

1. This dispute is about a short-term home rental. The applicants, Laci Mailey and Stephen Bradley, leased the main floor of a house from the respondent, Ellesmere Farm Corporation (Ellesmere), for 3 weeks. They paid a total of \$5,990 in advance, including security and cleaning deposits. Ellesmere's representative in this dispute,

FT, is employed by the other respondent, Promerita Realty Corp. (Promerita). The applicants say Ellesmere invited them to “negotiate the rental” through Promerita’s website.

2. The applicants say the rented home was not as advertised or promised in the lease agreement and was not in an acceptable condition, so they moved out after only a few days. The applicants claim \$5,000 in damages, which is the maximum Civil Resolution Tribunal (CRT) small claims amount, and they abandon any portion exceeding \$5,000. Ellesmere says the rental unit was in good condition as agreed in the lease. Ellesmere also says the applicants did not give it an opportunity to investigate and correct any alleged deficiencies. Promerita says it was not involved in the rental at all. Both respondents say they owe nothing.
3. Mrs. Mailey represents the applicants in this dispute. Promerita is represented by its managing broker. Ellesmere’s representative, FT, is its shareholder and director.

## **JURISDICTION AND PROCEDURE**

4. These are the CRT’s formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute’s parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
8. Under the *Residential Tenancy Act* (RTA), the Residential Tenancy Branch (RTB) has jurisdiction to decide disputes involving rights and obligations under the RTA or a residential tenancy agreement. No party says that the RTB has jurisdiction to decide this dispute. Further, RTA section 4(e) excludes from the RTB's jurisdiction living accommodation occupied as vacation or travel accommodation. Here, the applicants undisputedly found the home through an online short-term rental service, and rented it for only 3 weeks while Mrs. Mailey was temporarily working in the area. So, I find that the disputed rental was for travel accommodation. This means the RTA does not apply, and the CRT has jurisdiction to decide this dispute under CRTA section 118.

## **ISSUES**

9. The issue in this dispute is whether the respondents provided accommodation to the applicants as advertised and agreed, and if not, do they owe \$5,000 in damages?

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities, meaning "more likely than not." I have read the parties' submissions and evidence, but refer only to the evidence and arguments I find relevant to provide context for my decision. Promerita did not submit any evidence, despite having an opportunity to do so.

11. At the outset, I will address whether Promerita is responsible for any aspect of the home rental. The signed lease agreement is between the applicants and Ellesmere, and not Promerita. FT signed the agreement on behalf of Ellesmere. The agreement said that FT “of Promerita Realty” was a licenced realtor and that she was a director and shareholder of a corporation that owned the rented residence. BC Company Summary documents in evidence show that FT was a director of Ellesmere, and not of Promerita. So, I find the agreement indicated that Ellesmere owned the home, and not Promerita.
12. The applicants say FT invited them to look at Promerita’s website and sometimes communicated using her Promerita email address. So, the applicants say they had “no reason to believe” that Promerita was not in a position to direct or control Ellesmere. I find this is likely why the applicants named Promerita as a respondent. However, I find the evidence is insufficient to show that Promerita was a party to the lease. I also find that the evidence does not show that FT or Ellesmere represented, through their words or actions, that they had “apparent authority” to negotiate the lease on Promerita’s behalf, as its agent (see *R & B Plumbing & Heating Ltd. v. Gilmour*, 2018 BCSC 1295). Overall, I find the evidence does not show that Promerita had any involvement in or responsibility for the lease between Ellesmere and the applicants. I dismiss the applicants’ claims against Promerita. I consider below whether Ellesmere is responsible for any damages related to the rented home.
13. Ellesmere’s online advertisements for the home described it as a “farm stay” vacation rental, on a farm featuring various farm animals. I find photos from the advertisements showed a sparsely but fully furnished house, and the parties agree Ellesmere provided more furnishings before the applicants moved in. The applicants and Ellesmere signed a lease agreement in early June 2021, for a term from June 22, 2021 to July 13, 2021. The applicants undisputedly paid \$5,990 in advance without first viewing the home in person: \$5,000 in rent, a \$750 security deposit, and a \$240 cleaning deposit. The applicants stayed at the home from June 22 to 25, 2021, after which they left and retrieved their remaining possessions over the next few days. None of this is disputed.

14. I note that the applicants do not directly claim a refund of the security or cleaning deposits paid under the lease. Rather, I find they claim damages because they say the home was not as agreed to, and was in a poor and unlivable condition, in breach of the parties' lease agreement and Ellesmere's representations in online advertisements. The applicants also say Ellesmere's alleged misrepresentations mean the contract should be rescinded and the \$5,000 rent payment refunded. In any case, the applicants claim \$5,000 in damages.
15. The applicants' complaints fall within 3 general areas: that the home lacked advertised or promised furniture and appliances and was not adequately repaired, that it was not reasonably clean for farm stay accommodations, and that Ellesmere did not respect and prioritize the applicants' privacy. I address each area below.

### ***The Lease Agreement***

16. The agreement said the applicants could cancel the lease with 30 days' written notice, but the rent charged was non-refundable. In context, I find it was an implied term of the lease that Ellesmere would not refund any rent if the applicants decided not to stay at the home during the lease term or purported to cancel the lease. That is what Ellesmere says the applicants did, although as noted the applicants say Ellesmere provided an intolerable house where they could not stay. I also find the lease did not say or imply that Ellesmere was not liable for damages if it breached the lease agreement. So, I find the agreement does not prevent the applicants from seeking damages for breach of contract, as they do here.
17. I find the lease agreement said that the property was in good condition, except for deficiencies that were obviously "historical," such as a drywall patch. The lease did not further explain what "good condition" was. In the circumstances, I find that good condition implied reasonably clean and adequately repaired for farm stay accommodations. I find the parties did not agree that the home would be spotlessly clean or in perfect repair. Further, the applicants admit the rented farmhouse was advertised as "modest," which I find is inconsistent with their submission that the rental price suggested "high-end" accommodation. So, I find the applicants knew and

agreed that they were renting modest farm-based accommodations that might not be perfectly repaired or perfectly clean. I also find the applicants knew that parts of the home were incomplete or deficient, given the lease term mentioning that.

18. The lease said that the home included several specific appliances, but did not say what furniture would be provided. I find it was an implied term of the parties' agreement that the home would have furniture reasonably equivalent to that shown in the advertised photos. The also lease said that "privacy will be respected and is a priority" without further detail.

### ***The Nature of the Applicants' Claims***

19. I find the applicants allege that Ellesmere fundamentally breached the lease agreement by failing to provide a liveable home. A fundamental breach is where a party fails to fulfill a primary obligation in a contract, depriving the other party of substantially the whole benefit of the contract (see *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC) and *Bhullar v. Dhanani*, 2008 BCSC 1202). If there is a fundamental breach, the wronged party may terminate the contract immediately, and does not have to perform any more terms of the contract (see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BCCA) at paragraph 23).
20. Further, termination by "repudiation" occurs when a party shows an intention not to be bound by the agreement and the other party accepts this repudiation. A fundamental breach may also be a repudiation because it deprives the other party of most or all of the benefit of the agreement, and amounts to a refusal to perform (see *Kuo v. Kuo*, 2017 BCCA 245 at paragraph 39). I find the applicants also allege that Ellesmere's fundamental breach repudiated the contract, and that they accepted this repudiation and now seek damages.
21. In addition, to prove their allegations of negligent misrepresentation, the applicants must show that Ellesmere made a statement that was false, inaccurate, or misleading, and that the applicants reasonably relied on it in renting the home.

22. The applicants do not dispute that they did not bring their concerns about the home to Ellesmere's attention when they discovered them, but waited until after they moved out on June 25, 2021. I find Ellesmere could have remedied many of the alleged deficiencies, discussed in more detail below, if it had known about them. Further, I find this delay is inconsistent with the alleged problems being unreasonable, or contrary to the lease agreement or Ellesmere's representations.

### ***Features and Condition***

23. As noted, the photographic evidence showed the home was fully furnished. The applicants express disappointment that a provided couch was a futon mattress. However, I find they do not say that any specific furniture promised in the lease or shown in advertised photos was missing. Further, the applicants undisputedly rented the home knowing it did not have air conditioning. So, contrary to the applicants' assertions, I find Ellesmere was not required to provide air conditioning.

24. The applicants also say portions of the house were incomplete. I find photos show some loose or missing baseboards and trim, drywall patches and other repairs, a single missing fence slat, minor paint marks on bricks, and a missing closet light fixture and door handle. However, I find those things are consistent with modest farm stay accommodations and the lease agreement. Further, I find the evidence does not support the applicants' allegations of loose floorboards, exposed nails, roaming farm animals, or any other unspecified "hazards" that made the home unfit for occupation. So, contrary to the applicants' allegations, I find that Ellesmere did not breach its duty of care under section 3 of the *Occupier's Liability Act* (OLA) to see that persons, on the portions of the premises Ellesmere occupied, were reasonably safe in using them.

25. Overall, I find the applicants have not proven that the home lacked any promised or advertised furniture or appliances, or was less complete than advertised and agreed.

### ***Cleanliness***

26. I find the applicants' photos show some minor dust and particles on surfaces and behind or under furniture. Even if that dust was present at move-in, I find it was

reasonable. Ellesmere says that the farm's hard water rapidly forms water marks like those shown in photos of glass shower panes, which were clean when the applicants arrived. I find the statement of another resident at the property, AS, confirms the rapid formation of water marks. Further, I find the photos do not show that very faint marks on button-adjacent bedding cloth are from human excrement as alleged by the applicants, rather than colour bleeding from the buttons as alleged by Ellesmere or another cause. Contrary to the applicants' allegations, I also find the evidence fails to show there was an unreasonable smoke odour, garbage left in receptacles, or bathroom mildew.

27. AS's witness statement confirmed that he assisted Ellesmere in cleaning the home before the applicants arrived. AS said that he and Ellesmere did a thorough cleaning job, which I find is consistent with photos Ellesmere says it took prior to the applicants' arrival. I find AS's statement and those photos support that the home was reasonably clean when the applicants arrived. Ellesmere says the applicants' photos were taken several days after they took possession of the home, which I accept because the applicants do not directly deny it. I find the delayed applicant photos are less likely to show how the house looked when the applicants moved in.
28. Overall, I find the home met the reasonable standards of cleanliness expressed or implied in the lease agreement and in online advertising.

### ***Noise and Privacy***

29. As noted, the RTA does not apply to the home rental, including any right of "quiet enjoyment" that the applicants say arises under the RTA. However, in the circumstances, I find it was an implied term of the parties' agreement that the home would be free from unreasonable non-farm-related noise.
30. The applicants say noise from downstairs tenants woke them at 3:00 a.m. one morning. The applicants did not raise this issue with those tenants or Ellesmere near to that time. I find the evidence does not show that the alleged noise was unreasonable. The applicants also say early morning animal noise affected their



sleep, and as noted the presence of unspecified farm animals put them in unspecified “danger.” Given that the applicants undisputedly rented “farm stay” accommodations, I find the applicants should have expected some farm animal noise. I find the evidence does not show that the noise was unreasonable in the circumstances, or that the applicants were ever in danger from unidentified roaming farm animals.

31. The applicants also say that Ellesmere failed to respect their privacy as required under the lease. Specifically, they say that after they moved out of the premises and took their possessions with them, Ellesmere entered the home. Ellesmere says it removed a bag of garbage that the applicants left behind, which the applicants dispute. Regardless, I find that Ellesmere did not fail to respect the applicants’ privacy by entering the empty home when the applicants were not there.
32. The applicants also suggest that Ellesmere re-took possession of the home during the lease term, which was a repudiation or breach of the contract. Ellesmere says that it kept the home available for the applicants’ use for the remainder of the lease term. I find the evidence does not show that the home was unavailable for the applicants’ use if they had returned to it during the lease term.
33. On the evidence and arguments before me, I find that Ellesmere did not fail respect the applicants’ privacy or to ensure noise levels were reasonable.
34. For all of the above reasons, I find Ellesmere did not breach the parties’ agreement and did not misrepresent the accommodations. I deny the applicants’ claim for \$5,000.

### ***CRT Fees and Expenses***

35. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Here, I see no reason not to follow that general rule. The applicants were unsuccessful, and the respondents paid no CRT fees. No party claimed CRT dispute-related expenses. So, I order no reimbursements.

## **ORDER**

36. I dismiss the applicants' claims, and this dispute.

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Chad McCarthy, Tribunal Member