DECISION

Dispute Codes CNL, OLC, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside two notices to end this tenancy and an order for the landlord to comply with the Act. Both parties participated in the conference call hearing.

The landlord's counsel had submitted a written request for an adjournment prior to the hearing. At the hearing the landlord's agent confirmed that the landlord wished to proceed with the hearing. The adjournment request is therefore considered to have been withdrawn.

The tenant made a request for a court reporter to attend the hearing. The request was granted, a reporter attended and a transcript was generated.

Issue to be Decided

Should the notices to end tenancy be set aside?
Should the landlord be ordered to comply with the Act?

Background and Evidence

The rental unit is an apartment in a multi-story apartment building. The tenancy in question began in 2003 under a different landlord. The current landlord purchased the residential property in 2007. On January 29, 2010 the landlord served the tenant with a two month notice to end tenancy for landlord's use of property (the "First Notice"). The First Notice stated that the rental unit would be occupied by the landlord or the landlord's spouse or a close family member. The landlord advised that the First Notice was withdrawn and on February 22 served the tenant with a second notice (the "Second Notice") which stated that a family corporation owns the rental unit and it will be

occupied by an individual who owns, or whose close family members own, all the voting shares. The tenant disputes both the First Notice and the Second Notice.

The First Notice was given under the authority of the following provisions of the Act.

49(1) In this section:

"**close family member**" means, in relation to an individual,

(a) the individual's father, mother, spouse or child, or
(b) the father, mother or child of that individual's spouse;

49(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

The landlord acknowledged that the First Notice was given in error and that the landlord is a corporate entity rather than an individual. The landlord's agent J.H. testified that he filled out the First Notice and that he checked the wrong box. J.H. testified that in his 1 ½ years as a residential manager, this was the first time he had evicted a tenant and was unfamiliar with the forms. J.H. further testified that because English is the landlord's second language, there was a misunderstanding. The tenant took the position that in issuing the First Notice, the landlord was actively concealing the fact that it was a corporation and was trying to evict the tenant by any means which would prove effective.

The Second Notice was given under the authority of the following provisions of the Act.

49(1) In this section:

"**close family member**" means, in relation to an individual,

(a) the individual's father, mother, spouse or child, or
(b) the father, mother or child of that individual's spouse;

"**family corporation**" means a corporation in which all the voting shares are owned by

(a) one individual, or
(b) one individual plus one or more of that individual's brother sister or close family members;

49(4) A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

The landlord entered into evidence a BC Company Search performed on February 22, 2010 showing that the directors and officers of the corporate landlord are A.L. and his wife J.L., both of whom participated in the hearing. The landlord also entered into evidence copies of the register of members of common shares and the register of directors for the corporation. The register of members show that A.L. and J.L. each hold one common share. At the hearing J.H. testified that he had access to a document from the Ministry of Finance which stated that the company had 10,000 common shares. A.L. and J.L. were not able to confirm whether the remaining 9,998 common shares had been issued but stated that there were only two voting shares, which are the shares which were allotted to A.L. and J.L. The tenant took the position that the landlord had not proven that all of the voting shares in the company were owned by one individual or that individual's close family members.

A.L. and J.L. testified that they have two grown sons who live with them but have expressed a desire to live independently. Early in 2010 they sold their family home and moved to unit #303 in the same building as the rental unit. They further testified that their intention is to occupy the rental unit and two other suites in the same building, indicating that their grown sons would each occupy a rental unit and that they would occupy the third unit. The current occupants of each of the units the landlord intends to occupy have been given notices to end their tenancy. The tenant questioned why A.L. and J.L. would sell a 3,600 square foot home and move into a 700 square foot apartment as it represented a significantly different standard of living. The tenant further questioned how the sons could live independently when they were living next door to their parents.

The tenant testified that he understood that the building was for sale. The landlord's agent acknowledged that the building had been listed in recent months but was not currently on the market and further testified that A.L. and J.L. had wanted to sell either their home or the building and their home sold first, so they removed the building from

the market. The tenant suggested that the fact that the building had recently been listed for sale suggested bad faith on the part of the landlord and theorized that the landlord wanted to renovate the rental unit and other suites in the building so that either the building would attract a higher selling price or they could re-rent the suites at a higher rate than what the tenant is currently paying. The tenant questioned why the A.L. and J.L. could not stay in the suite they were currently occupying and suggested that the landlord's choice to move to occupied suites which have a better view established that the landlord's purpose in ending the tenancy was to renovate suites with the goal of re-renting at a higher rate. The landlord entered evidence showing that an architect had been retained to add a den to each of the suites the family intends to occupy. The tenant maintained that this merely showed that A.L. and J.L. intend to renovate the suites and questioned whether the landlord would serve a third notice to end tenancy on the basis that renovations were taking place. The tenant further argued that the residential property is an apartment building which is not intended to be owner occupied.

The tenant entered into evidence two transcripts of conversations he had with the landlord's agent, J.H. The tenant maintains that in these conversations, J.H. made a number of statements regarding his view on whether the landlord truly intended to move into the rental unit. The January 31 transcript shows that J.H. stated that the landlord told them they intended to move into the residential premises while they renovated another building they owned, after which they intended to move into that building. The transcript further shows that there was some discussion between the tenant and J.H. as to whether the landlord would enter into a negotiation to permit him to move to another unit within the building with something akin to a right of first refusal should the rental become available in the future. J.H. testified that he was inebriated at the time he engaged in the two conversations and that he did not recall making any of the statements reflected in the transcripts.

The tenant argued that the legal doctrine of proprietary estoppel should operate to prevent the landlord from ending the tenancy. The tenant gave evidence that early in 2008 he replaced the flooring in the rental unit at his own expense and that he

understood that he would be permitted to live in the unit for the life of the flooring. The tenant maintained that the previous property manager had told him that if he wished to remain in the unit for 10 years, he should buy laminate. The tenant argued that he installed laminate flooring at his own expense in reliance on that representation. The tenant further argued that while it was open to him to terminate his tenancy prior to the life of the floors having expired, it was his understanding that the landlord was estopped from doing so.

The tenant seeks to have both the First Notice and the Second Notice set aside and further seeks an order preventing the landlord from serving further notices to end his tenancy.

Analysis

In order to establish grounds to end the tenancy under the First Notice, the landlord must prove that it is an individual, that the individual or a close family member of a individual intends to occupy the rental unit and that the First Notice was given in good faith. As the landlord has acknowledged that it is not an individual, I order that the First Notice be set aside and of no force or effect. I accept that the First Notice was given in error in part due to J.H.'s unfamiliarity with the forms and in part due to the communication difficulties between J.H., A.L. and J.L.

In order to establish grounds to end the tenancy under the Second Notice, the landlord must prove on the balance of probabilities that it is a family corporation, that a voting shareholder or a close family member of a voting shareholder in the corporation intends to occupy the rental unit and that the Second Notice was given in good faith.

There is no dispute that the unit is owned by a corporation. I find that it is more likely than not that the landlord is a family corporation. While the tenant has raised questions that there may be more voting shares in the company which are held by persons other than A.L. and J.L., I am not convinced that this is the case. The landlord does not have to prove its case beyond a reasonable doubt, in which case I may have arrived at a different conclusion. The company was established by a married couple living at the

same address and continues to be held by a married couple living at the same address and both husband and wife hold positions as officers in the company, which is a typical structure for a closely held corporation. Also typical is the establishment of multiple shares and the issuance of minimal shares. I accept that most of the shares in the company are unissued with the only two issued shares being held by A.L. and J.L.

Because the tenant raised the issue of good faith, I am required to consider the alleged existence of a dishonest motive pursuant to Taylor J.'s decision in *Gallupe v. Birch* [1998] B.C.J. No. 1023.

The British Columbia Çourt of Appeal addressed the issue of good faith in this context in *Semeniuk* v. *White Oak Stables* (1991) 56 BCLR (2d) 371 (C.A.). In that decision, the Court held at p. 276 "that the landlord must truly intend to do what it says, and that it must not be guilty of dishonesty, deception or pretence."

Residential Tenancy Policy Guideline #2 discusses the good faith requirement and articulates a two part test:

> First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

While it may be true that the tenant is paying below market rent, I am unable to find that the landlord's motive in ending the tenancy is to renovate in order to attract higher rent for this rental unit. There is no dispute that A.L. and J.L. have sold their family home and are currently residing in the residential property and there appears to be no dispute that they intend to renovate the three units they intend to occupy, having secured the services of an architect in preparation for adding a den to each of the units. While the landlord may not intend to live in the rental unit indefinitely, section 51 of the Act only requires them to use the unit for the stated purpose for at least 6 months. The landlord is not obligated to choose a vacant unit into which to move and it makes sense that the landlord would choose the units with the best view as their new home. I can accept that the landlord was motivated in part to select the rental unit as one of the units in which

they would reside because it generated lower revenues than other units. This in itself does not establish bad faith as the landlord's desire to maximize profits cannot in my view be considered a dishonest or ulterior motive. It would be nonsensical for the landlord to move into units which were attracting a higher rent and had less desirable views of the water or city, whatever the case may be.

I accept that A.L. and J.L. wish to renovate the units into which they and their sons will move and that their current living situation was never considered to be anything but temporary accommodation. I reject the tenant's argument that because the residential property is an apartment building it cannot be owner occupied as there is no logical basis for this argument. I further reject the tenant's argument that the desire of A.L. and J.L.'s adult children to live independently will not be accomplished through the occupancy of separate apartments. Rather, it seems to be an ideal compromise for this family as they attempt to balance independence with close proximity. While the rental units and other apartments that the family will occupy are smaller than the home in which they previously resided, it is not uncommon for families to downsize as older children "leave the nest."

I accept that the residential property is not currently listed for sale as there is no evidence that this is the case.

I note that the tenant appears to have had a very good relationship both with J.H. and with prior property managers. There appears to be no reason why the landlord would target the tenant other than desiring to obtain the rental unit which J.H. admitted was one of the best units according to the transcript of the conversations between he and the tenant. I note that if the low rent paid by the tenant was the landlord's primary concern, the landlord had the option of paying a $200.00 filing fee to apply for an order permitting him to issue a rent increase above the amount prescribed by the Residential Tenancy Regulations. While the landlord could have achieved a higher rent through an application to the Residential Tenancy Branch, they chose to pursue a more expensive route which will require them to pay more than double that amount in compensation to the tenant and to lose an excellent tenant in the process.

I find that the landlord has met the good faith requirement.

As for the tenant's argument that the doctrine of proprietary estoppel should operate to prevent the landlord from ending the tenancy, I find that because proprietary estoppel is an equitable remedy, it is not open to me to consider this argument as I do not have equitable jurisdiction. However, if I am wrong and it is open to me to apply an equitable remedy, I find that this situation falls outside the umbrella of circumstances to which one might apply that doctrine.

The tenant referred me to *Steeves v. Oak Bay Marina Ltd.*, 2007 BCSC 1409, an application for a summary trial which was denied. The decision on the question of whether the matter was appropriate to be decided in a summary trial was of limited assistance, but the trial decision was considerably more helpful.

In *Steeves v. Oak Bay Marina Ltd.*, 2008 BCSC 1371, tenants of a manufactured home park had been given notices to end tenancy as the landlord intended to change the use of the park to something other than a manufactured home park. The tenants had made improvements to their manufactured homes and the sites and argued that the landlord was estopped from ending their tenancies as they had thought that they would be able to stay indefinitely despite the fact that their tenancies were month-to-month. Bracken J. addressed the tests for proprietary estoppels as found in caselaw. There is some difference in the tests, but all require as one part of the test that the defendant communicate in some way to the plaintiff that they would not rely on or seek to enforce their legal rights.

The tenant provided a number of emails which he had sent to the landlord's agent D.C., who no longer seems to be employed by the landlord. In those emails the tenant initially asked if the owners would replace the flooring at their own expense, but the owners declined to do so. The tenant stated that he wished to remain a "longer term tenant" and offered to replace the flooring at his own expense. In an email dated November 5, 2007 the tenant suggested that when the time had come for him to leave the unit, perhaps the owner could contribute to the expense. In an email dated January 11, 2008 the tenant stated that when his tenancy ended if the landlord did not wish to

contribute to the cost of the flooring, he could remove it and take it with him. At the hearing the landlord indicated that they were prepared for the tenant to remove the flooring. The tenant testified that it was his understanding that his rent would not be increased as a means of compensating him in part for the flooring. The tenant's rent was increased, however, and it would appear that until he filed his application for dispute resolution, the tenant did not object to the rent increases.

Having weighed the email evidence and verbal testimony of the tenant, I am unable to find that the landlord's agent D.C. in any way indicated to the tenant that his tenancy was secure until the floor's life had expired. The tenant's repeated statement that he wished to remain a "longer term tenant" does not appear to have been met with any assurance that the installation of the flooring would ensure that the tenancy would not end. Further, the tenant himself suggested that if the tenancy ended prior to the time the flooring needed replacing, he could remove the flooring. It is clear that the tenant contemplated that the tenancy would not continue for 10 years, which was the projected life of the flooring. I do not accept the tenant's assertion that the landlord tacitly agreed that the tenant could end the tenancy at will while the landlord could not. For these reasons I find that the tenant's argument that the landlord is estopped from ending the tenancy must fail.

Another commonality among the tests for proprietary estoppels is that the defendant must know that the plaintiff has a misapprehension about his legal rights and knows or intends that the plaintiff act upon that belief. The email exchange between D.C. and the tenant show that D.C. attempted to dissuade the tenant from replacing the flooring. Although no written approval for the tenant to install new flooring was entered into evidence, the emails leave a distinct impression that D.C. attempted to dissuade the tenant from pursuing that course of action, particularly early on in the discussion. I am unable to find that the landlord was aware that the tenant understood that his tenancy would continue until he himself chose to end it or that the landlord encouraged the tenant to act in reliance on that misapprehension.

While the tenant may have met other elements of the tests, the failure to meet the elements as described above would, in my view, defeat an argument of proprietary estoppel.

I note that the tenant made an argument that section 49 of the Act which defines a landlord as one who has a reversionary interest exceeding 3 years means that the landlord must have owned the property for 3 years prior to issuing a notice to end tenancy and as the landlord purchased the building less than 3 years ago, the landlord is therefore unable to rely on section 49. The tenant is under a misapprehension, as a reversionary interest does not refer to the length of time one has owned a property prior to the time a notice is given but the length of time one's interest in the property will continue after the notice has taken effect. In this case it is clear that the corporate landlord is the owner in fee simple and therefore has an indefinite reversionary interest.

I find that the landlord has proven that the voting shareholders of the family corporation intend in good faith to occupy the rental unit and I dismiss the tenant's application to set aside the Second Notice. I also dismiss the application for an order that the landlord to comply with the Act as I find that the landlord has not failed to comply with the Act in serving the notices to end tenancy. I find that the tenant must bear the cost of the filing fee paid to bring this application.

During the hearing the landlord made a request under section 55 of the legislation for an order of possession. Under the provisions of section 55, upon the request of a landlord, I must issue an order of possession when I have upheld a notice to end tenancy. Accordingly, I so order. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Conclusion

The First Notice is set aside. The application to set aside the Second Notice is dismissed as is the application for an order that the landlord comply with the Act. The landlord is granted an order of possession effective April 30, 2010.

Dated: April 12, 2010

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