Decision

Dispute Codes: MNDC, OLC, PSF

Introduction

This hearing dealt with an application by the tenants for a monetary order as compensation for damage or loss under the Act, regulation or tenancy agreement, an order instructing the landlord(s) to comply with the Act, regulation, or tenancy agreement, and an order instructing the landlord(s) to provide services or facilities required by law. Both parties participated in the hearing and gave affirmed testimony.

Issues to be decided

- Whether the tenants are entitled to any or all of the above under the Act, regulation or tenancy agreement

Background and Evidence

The subject units are rented as affordable housing for seniors who are able to live independently. While one tenant recalled that a lease may have been signed, there are no copies of written leases or tenancy agreements in evidence for any of the subject tenancies. Evidence does, however, include a sample copy of the "confidential application for prospective tenants," and a copy of "Rules and Regulations." The tenancies vary in terms of length and amount of monthly rent.

The dispute arises out of allegations by certain tenants that the landlord has terminated and / or restricted two particular services and facilities: the "services" of a caretaker, and the "facilities" of a recreation hall. Accordingly, the tenants have calculated monetary entitlements which vary for each tenant pursuant to the amount of respective monthly rents. The landlord takes the position that the application is frivolous and vexatious.

As to the first aspect of the application, the tenants state that the services of a caretaker were terminated effective June 30, 2009. During the hearing the landlord did not

dispute this, but testified that a new caretaker was hired effective October 1, 2010. In short, therefore, the services of the caretaker have been unavailable for a total of 15 months (6 months in 2009 and 9 months in 2010).

In regard to services provided by the caretaker, the tenants testified that these previously included, but were not necessarily limited to, enabling access to units for tenants who had inadvertently locked themselves out, helping tenants move furnishings or other possessions, providing unscheduled access to storage as required, and so on.

The landlord takes the position that the caretaker is an employee of the landlord, and that his duties are an extension of the landlord's duties. The landlord states that contact names and telephone numbers are available to the tenants should any exceptional assistance be required by tenants. However, the tenants argue that there is frequently no one available to answer such calls, and telephone messages are often not returned.

As to the second aspect of the application, the tenants state that their access to the facilities of the recreation hall was limited, without any prior notice, effective May 27, 2009. Specifically, by way of a notice posted May 27, 2009, the landlord informed tenants of a change to the times of day / days of the week when the recreation hall would be available for their use, as follows:

PRIVATE FUNCTION

> Starting immediately, May 27, 2009 – indefinitely, Mondays to Fridays from 8:30 am to 3:30 pm.
>
> The Rec. Hall will not be available to tenants during these times except on rent day.
>
> Thank you,
>
> The Management.

During the hearing the landlord testified that the recreation hall has been rented for a portion of the week to a non-resident group ("PC") whose business involves providing medical related training. However, despite the details set out in the above notice, during the hearing the landlord testified that PC's use of the recreation hall is presently limited to Wednesdays, Thursdays and Fridays from 8:30 a.m. to 2:00 p.m. Following from this, during the hearing the landlord undertook to post updated signage to this effect for the information of all tenants, such that times available for tenants' access to the recreation hall will be less restrictive. In short, therefore, the most restricted access to the recreation hall has been in effect for approximately 17.5 months (May 27, 2009 to November 16, 2010); the less restricted access took effect from November 17, 2010.

Further, tenants claim that equipment which is stored in the recreation hall by PC hampers the full use of the facilities and negatively impacts the ambiance. Activities carried out there have included watching television, accessing the library collection, using exercise equipment, playing pool & shuffleboard, listening to music, solving puzzles, visiting with family and friends, and so on. Taking issue with the tenants' claim, the landlord submitted photographs taken in the recreation hall which show, amongst other things, "open space," equipment and a storage cabinet belonging to PC which are "stored against the wall," as well as tables which "are always set up for anyone's use."

The tenants reference Schedule "A" of a Land Use Contract which speaks to Schedule of permitted land use as follows:

> (a) Multi-dwelling units to provide Low Cost housing rent for Elderly Citizens which shall include a Recreation Room for the exclusive use of the tenants.

However, the landlord claims that the subject contract / schedule, which is an agreement entered into between the City of Vernon and the landlord, pertains exclusively to phase 5 of the development, whereas the tenants reside in what are phases 1 to 4. The landlord states that there is no similar provision for the inclusion of a recreation room "for the exclusive use of the tenants" in phases 1 to 4.

The landlord also claims that there are a variety of community facilities available to tenants which provide access to some of the activities carried out in the recreation hall.

Further to information that a new caretaker has been hired, and that a notice of less restricted access to the recreation hall will be posted, during the hearing the parties appear to agree in principle that periodic meetings between them may assist in addressing some of the housekeeping matters before they become more formal matters of dispute. Evidence includes a copy of what are essentially "minutes" arising from such a meeting held sometime in November 2008.

Analysis

While I have turned my mind to all aspects of the evidence presented, not all particulars of the arguments or submissions are reproduced here. Further, for the information of the parties, the full text of the Act, Regulation, Residential Tenancy Policy Guidelines, Fact Sheets, forms and more can be accessed via the website: www.rto.gov.bc.ca/

The Act defines "tenancy agreement" as follows:

> **"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

While there is no evidence of any formal written tenancy agreements in the circumstances of this dispute, based on the documentary evidence and testimony I find that a tenancy agreement exists between the parties "respecting possession of the rental unit, use of common areas and services and facilities."

The Act defines "service or facility" as follows:

> **"service or facility"** includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:

(a) appliances and furnishings;

(b) utilities and related services;

(c) cleaning and maintenance services;

(d) parking spaces and related facilities;

(e) cablevision facilities;

(f) laundry facilities;

(g) storage facilities;

(h) elevator;

(i) common recreational facilities;

(j) intercom systems;

(k) garbage facilities and related services;

(l) heating facilities or services;

(m) housekeeping services;

Section 27 of the Act speaks to **Terminating or restricting services or facilities**, as follows:

27(1) A landlord must not terminate or restrict a service or facility if

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Residential Tenancy Policy Guideline # 22 speaks to "Termination or Restriction of a Service or Facility," and provides in part as follows:

A landlord must not:

- terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
- terminate or restrict a service or facility if providing the service or facility is a material term of the tenancy agreement.

A landlord may restrict or stop providing a service or facility other than one referred to above, if the landlord:

- gives the tenant 30 days written notice in the approved form, and
- reduces the rent to compensate the tenant for loss of the service or facility.

Where the tenant claims that the landlord has reduced or denied him or her a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.

An "essential" service or facility is one which is necessary, indispensible, or fundamental. In considering whether a service or facility is "essential" to the

> tenant's use of the rental unit as living accommodation…..the dispute resolution officer will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.
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> Even if a service or facility is not essential to the tenant's use of the rental unit as living accommodation, provision of that service or facility may be a material term of the tenancy agreement. A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another.
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> In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, a dispute resolution officer will also consider whether the tenant can obtain a reasonable substitute for that service or facility. For example, if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service.

Residential Tenancy Policy Guideline # 16 speaks to "Claims in Damages," and provides in part:

> In addition to other damages a dispute resolution officer may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money

and services are considered “pecuniary” losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress, etc. are considered “non-pecuniary” losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer’s willful or reckless indifferent behavior. They are measured by the wronged person’s suffering.

Section 7 of the Act addresses **Liability for not complying with this Act or a tenancy agreement**, and provides in part as follows:

> 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other’s non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Policy Guideline # 5 addresses “Duty to Minimize Loss,” and provides in part as follows:

> Where the landlord or tenant breaches a term of the tenancy agreement or [the legislation], the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate.
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> The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant’s request for

> repairs, the tenant should apply for an order for repairs under the Legislation. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

CARETAKER:

In the application for prospective tenants, an applicant is advised that in order to qualify for housing, a tenant must be "in good health to do your housekeeping." Based on the documentary evidence and testimony of the parties, I find that while some of the duties of the caretaker likely fall within a broad definition of "cleaning and maintenance services," I also find that the principal thrust of the role is neither "essential to the tenant's use of the rental unit as accommodation," nor a "material term of the tenancy agreement." Despite this finding, I acknowledge the tenants' reliance on certain duties undertaken by the caretaker and, as earlier noted, the landlord has hired a new caretaker effective October 1, 2010.

RECREATION HALL:

Based on the documentary evidence and testimony of the parties, I find that the recreation hall falls within the definition of "service or facility," as above, in that it is a "common recreational facility." The application for prospective tenants makes reference to the recreation hall facilities as follows:

> Tenants are encouraged (but not required) to make use of the Recreation Hall facilities and participate with the support group which is made up of other tenants.

I am persuaded that when tenancies began, tenants were given to understand that access to the recreation hall was included in the tenancy agreement. While this has not apparently changed, access became more limited pursuant to the landlord's notice posted May 27, 2009. Despite this, however, I am unable to conclude that access to the recreation hall is "essential to the tenant's use of the rental unit as living

accommodation." I also find that access to the recreation hall is not a "material term of the tenancy agreement," even while its availability is an important aspect of the residential experience for tenants and they are encouraged to use it.

In part, I make the above findings on the basis that other similar facilities are available in the community. Further, there is little evidence before me in relation to *how many* tenants in the complex actually make use of the recreation hall, *to what degree* these tenants make use of the recreation hall, to what extent the restricted hours have resulted in loss and inconvenience, and to what extent such loss or inconvenience may be considered significant.

I note that it was not until October 2010 when tenants filed their applications for dispute resolution. The landlord suggests that in relation to the times when the respective "services and facilities" at issue were removed and / or restricted, the delay in filing reflects an impact on tenants of questionable magnitude.

Notwithstanding, I find on a balance of probabilities that the subject tenants have established entitlement to aggravated damages in the amount of $50.00 for intangible losses. Entitlement arises out of the absence of notice given around the introduction of restricted access to the recreation hall, the inconsideration and indifference thereby reflected, and the varying levels of inconvenience to tenants which has resulted.

Conclusion

I hereby order that the subject tenants may withhold **$50.00** from the next regular payment of monthly rent.

DATE: December 10, 2010

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Dispute Resolution Officer