

DECISION

Dispute Codes: CNC

Introduction

This application was brought by the tenants on May 13, 2011 seeking to have set aside a one-month Notice to End Tenancy for cause dated May 12, 2011 and setting an end of tenancy date of June 30, 2011.

According to the rental agreement, this tenancy began on June 1, 1998 and is eccentric in that the contract provides at clause 16 that the use of the rental unit is for "PRIVATE ARTIST LIVE/WORK STUDIO PURPOSES ONLY...." Written submissions by the parties identified the use as 30 percent residential and 70 percent studio.

This provision calls into question whether this tenancy is excluded from the jurisdiction of the *Residential Tenancy Act* by section 4 which sets out types of rental agreements that are not covered by the *Act* and includes the exception that:

"This Act does not apply to

- (d) living accommodation included with premises that
 - (i) are primarily occupied for business purposes, and
 - (ii) are rented under a single agreement,"

Residential Tenancy Policy Guideline .14 advises that:

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the 'predominant purpose' of the use of the premises is. Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presences at the premises, and visible evidence of the business use being carried on at the premise."

In addition, I have reviewed the rental agreement which includes a number of provisions common in commercial tenancy agreements but prohibited in residential tenancy agreements. For example, clause 10 states in part that in the event of non-payment of

rent, breach of the agreement or disturbance, among others, the landlord may take possession by force, remove persons and property, etc. Clause 39 contains a distress provision under which, if tenants owe money to the landlord, the landlord may take possession of personal property to recover the debt.

The question of jurisdiction in similar circumstances has been tested in the Supreme Court of British Columbia .

The matter of *Shea v. Tyrell*, 2007 BCSC 1601 is summarized in the Annotated Residential Tenancy Act, as follows:

“The landlord operates a property where the units are zoned 70% for commercial use as a working artist’s studio and 30% for residential use. A dispute arose over the return of the security deposit. The dispute resolution officer found that the tenancy was subject to the Act. On judicial review, the court found that the tenancy was excluded from the Act by s. 4(d). The court found that, in determining whether premises were excluded from the Act, the predominant use of the premises was the determining factor.”

The principle of “predominant use” was reaffirmed by the British Columbia Court of Appeal in *Gardiner v 857 Beatty Street Project* (2007), 161 A.C.W.S. (3d) 798, 2007 BCSC 1393, affd 2008 BCCA 82 in a similar tenancy which the appellate court found to be outside the jurisdiction of the *Residential Tenancy Act*.

For these reasons, I must decline jurisdiction in this matter.

June 7, 2011