Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing arose as a result of directions from the Supreme Court of British Columbia following a judicial review of a decision.

The original hearing was conducted on November 30, 2010, dealt with cross Applications filed by each of the parties, and a determination was made on December 1, 2010 (the "Original Decision").

In the Original Decision, the Dispute Resolution Officer found that it was a condition precedent to the tenancy agreement that certain repairs were to be made to the rental unit before the Tenants were to move in. The Officer wrote:

> "The landlord failed to satisfy that condition precedent to the tenancy agreement and the tenants were entitled to repudiate the agreement as they did."

In the Original Decision the Officer ordered the Landlord to pay the Tenants compensation for their losses as well as return their security deposit.

On April 19, 2011, the Landlord petitioned the Supreme Court of British Columbia for judicial review of the Original Decision. The Advocate for the Landlord and one of the Tenants appeared in chambers for the judicial review. The Landlord argued, among other issues, that it was unfair for the Officer to have made a determination based on condition precedents when that issue had not been argued in the hearing for the Original Decision.

The Honourable Mr. Justice Bracken provided oral reasons for judgment on April 21, 2011. Legal Counsel for the Tenants obtained a transcript of the oral reasons and provided a copy in evidence to the Landlord and to the Branch. Mr. Justice Bracken sets out directions in paragraph 28 of that transcript:

> "In my view, the matter should be referred back... [to the Residential Tenancy Branch] with directions that... [the Dispute Resolution Officer] hear the petitioner

> and the respondents on the issue of whether or not a condition precedent that was unsatisfied entitled the respondents to terminate or repudiate the tenancy agreement, or whether some other remedy would have been appropriate and proper under the *Residential Tenancy Act*." [Reproduced as written.]

The matter was first set for hearing before me on June 27, 2011. At that hearing the Advocate for the Landlord sought to amend their Application to include a request for further monetary compensation, which arose following their initial Application. I declined to amend the Application pursuant to section 2.5 of the rules of procedure, as I found that the proceeding regarding their first Application had not only already commenced but had also been the subject of a judicial review.

The June hearing was then adjourned to September 20, in order to allow the parties to try to reach an agreed statement of facts and to obtain a transcript of the oral reasons from the Supreme Court of British Columbia. No agreed statement of facts was provided by the parties.

On June 27, 2011, following the hearing earlier in the day, the Advocate for the Landlord filed another Application for Dispute Resolution requesting the same monetary compensation as had been sought through the declined amendment. This second Application was joined to be heard at the same time as these matters.

On September 20, 2011, the hearing was to continue. However, due to a scheduling error by the Branch, the matter had to be adjourned to October 20, 2011, and it was reconvened at that time.

Preliminary Matter

At the outset of the reconvened hearing on October 20, 2011, Legal Counsel for the Tenants questioned the attendance of the Advocate for the Landlord in this matter. The Tenant's Legal Counsel requested that his objection to the Advocate appearing be set out on the record.

The Tenant's Legal Counsel submitted that he was surprised that the Advocate was appearing, as he understood the Advocate had provided an undertaking in July of 2011, with the Law Society of British Columbia not to practise law without proper authority to do so.

The Advocate for the Landlord explained she had written a letter to the Law Society. She argued she was not practising law as she was not being paid a fee to represent the

Landlord. The Advocate submitted she is an unpaid social activist not getting one penny for her work and she is helping people with tenancy problems by using her publications and appearing on behalf of parties at hearings. She testified she had recently appeared on behalf of tenants in another matter.

I note this testimony is directly in contradiction to the statements of the Advocate during the hearing of June 27, 2011, in which the Advocate asserted she was an employee of the Landlord and was able to provide legal argument and submissions in these hearings as their employee.

While such inconsistent testimony would tend to bring the veracity of the Advocate into question were she providing evidence on facts, the Advocate only presented submissions and argument during the hearings, and ultimately I have accepted the argument of the Tenants that the findings of fact in the Original Decision went undisturbed. Therefore, the credibility of the Advocate is not a matter requiring a determination in this particular instance.

Issue(s) to be Decided

Whether or not a condition precedent that was unsatisfied entitled the Tenants to terminate or repudiate the tenancy agreement, or whether some other remedy would have been appropriate and proper under the *Residential Tenancy Act*?

Background and Evidence

The dispute between the parties began in July of 2010. The Tenants had first applied for a tenancy at the subject rental unit, and then after an initial viewing the Tenants and the Landlord signed a tenancy agreement for the subject unit.

There were repairs required to the rental unit when the Tenants first viewed it, which included but were not limited to, general cleaning, various sized holes in walls that had to be repaired and painted, the gardening had to be tended to, and a dishwasher was to be installed in the rental unit (the “Repairs”).

Approximately two weeks later, when the parties met to perform an incoming condition inspection report the Repairs had not been done. The Tenants had made all the arrangements necessary to move into the rental unit two days later. The Tenants informed the Landlord they would not be moving into the subject rental unit and would not proceed with the tenancy. The Tenants made arrangements to stay on for one more month in the vacation rental they had occupied.

As Legal Counsel for the Tenants submitted during the hearing, the Supreme Court decision did not disturb the findings of fact of the Original Decision. Therefore, for ease of reference, I have reproduced the relevant portion of the Original Decision below:

> *"Analysis*
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> *There is no dispute but that it was agreed that the landlord would attend to certain important items: cleaning, wall repair and the repainting of two bedrooms. The question is; was the landlord's agreement to do so a condition of the tenancy or was it merely a promise to attend to those items by and by. If it was a condition of the tenancy, was it a condition precedent to the start of the tenancy agreement? If it was a warranty or promise to attend by and by, then the tenants are bound by the tenancy agreement and their claim would be one for damages resulting from the landlord's failure to keep its promise.*
>
> *In all the circumstances, I find that the tenants offered to rent the home on the condition that it be clean, that a dishwasher be installed and that the walls of two bedrooms be repaired and repainted.*
>
> *It was not contemplated that they would move in and then have to live without a dishwasher or have to put up with workmen attended, moving furniture, repairing walls and repainting bedrooms, especially since Mr. B. was seriously ill. There is a significant difference between an agreement that all would be done before move in and an agreement that all would be done by and by after the tenancy started. I consider it unlikely that there was any confusion about what the tenants expected and what and when the landlord agreed to do it.*
>
> *I find that Mr. C.R. agreed during the initial viewings and before the documentation was signed that the landlord would complete the agreed repairs and repainting before the tenants moved in and that the tenants signed the tenancy documents based on that promise. It was a condition precedent to the start of the tenancy.*
>
> *Barring some other agreement, the time for the landlord to satisfy that condition precedent to the tenancy was when the landlord called the tenants to conduct a move-in inspection; the date on which landlords and tenants are to meet and agree in writing about the condition of the premises at the start of a tenancy. The landlord failed to satisfy that condition precedent to the tenancy agreement and the tenants were entitled to repudiate the agreement as they did.*

I find that the tenants suffered damage as a result of the landlord's failure to comply with the condition precedent. They were forced to pay $4000.00, an additional $1250.00, in rent for the month of August at their former location. That is damage flowing directly from the landlord's breach and the tenants are entitled to recover it."

The Landlord's Argument

The Advocate for the Landlord presented written and oral submissions regarding the condition precedent. I summarize these below.

The Advocate argued that by entering into the tenancy agreement the Tenants were bound by the terms and conditions of the agreement, and bound by their rights and obligations under the Act. The Tenants could not simply walk away, but rather under the Act the Tenants were required to move into the rental unit even if the Repairs were not done and file an Application for Dispute Resolution to compel the Landlord to make the promised Repairs to the rental unit. For this proposition the Advocate cites section 45(3) of the Act. The Advocate also submitted that, "... no 'reasonable bystander' would conclude that the tenants were not agreeing to be bound by the terms of the tenancy agreement until some undefined 'condition precedent' had been fulfilled." [Reproduced as written.]

In support of this argument the Advocate cited the following:

> G.H.L. Fridman writes in *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) where at page 15:
>
> > Constantly reiterated in the judgements is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement: is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd.* v. *Beaver Lumber Co*:
> >
> > > The parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty. [Underlining added by Advocate.]

The Advocate argues that the tenancy agreement between the parties did not contain a clause such as “this agreement is subject to” the Repairs being made by a certain date. Therefore, there was no written condition precedent for the Landlord to perform prior to the tenancy agreement coming into effect.

The Advocate also argued that even if there were a condition precedent to do Repairs before the tenancy began (which the Landlord denies), that the breach of it was not tantamount to frustrating the agreement to the point of destroying the purpose of the agreement. For this submission the Advocate cites the British Columbia Court of Appeal in *Gulston* v. *Alfred*, 2011, BCCA 147, at paragraph 46:

> “The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damamges caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract – thereby entitling the innocent party to be relieved from future performance.”

The Advocate argued that, although the Act provides in section 91 that the common law applies to landlords and tenants, the common law with respect to condition precedents does not over-rule rights and obligations under the Act. She argued that section 5 of the Act provides that the Act cannot be avoided or contracted out of and under section 16 of the Act the rights and obligations of the parties take effect from the date the tenancy agreement is entered into, whether or not the Tenants ever occupied the rental unit. Therefore, according to the Advocate, a condition precedent may not survive after the tenancy agreement is entered into.

The Advocate argued that the Tenants should have followed the provisions of section 45(3) of the Act to end the fixed term tenancy, in that they had to move into the unrepaired rental unit, provide written notice of the failure of the Landlord to make the Repairs and provide a reasonable time for the Landlord to make the Repairs. Only after this could the Tenants end the tenancy if the Landlord did not perform the Repairs.

The Advocate also argued that the payment of the security deposit by the Tenants to the Landlord indicates the Tenants acknowledged their liability or obligation under the tenancy agreement. She proposed that by their conduct the Tenants are “estopped by representation” from claiming there was a condition precedent to the tenancy agreement, and cited a passage from *Hanbury & Martin* on equity in support of this.

The Tenants' Argument

Legal Counsel for the Tenants reiterated that the Supreme Court decision did not disturb the findings of fact of the Original Decision. Legal Counsel for the Tenants reviewed some of the key findings in the Original Decision and also made submissions. I briefly summarize these below.

He submitted that there are different types of condition precedent in contract law.

Counsel submitted that due to the serious health concerns of the elderly Tenants it was important that the Repairs be done before they moved into the rental unit. Counsel submitted that due to these serious health concerns the Tenants were not satisfied by some vague promise by the Agent of the Landlord that the Repairs could still be done before they moved in.

Furthermore, Counsel argued, that because of the serious health concerns of the elderly Tenants they were in no position to move into the rental unit, and then accommodate the workers making Repairs and have to wait for the Repairs to be completed.

Lastly, Legal Counsel for the Tenants argued that the Landlord had provided no evidence they were able to provide the rental unit that was bargained for.

Analysis

Based on the above, the submissions and evidence, and on a balance of probabilities, I find as follows.

I accept that the Supreme Court has not disturbed the findings of fact of the Original Decision. This is supported in paragraph 25 of the oral reasons of April 21, 2011, where the Honourable Mr. Justice Bracken found that, "The findings of fact made by the Dispute Resolution Officer do not seem to me to be patently unreasonable..."

I accept the argument of the Landlord that once the Tenants signed the tenancy agreement they were bound to perform the contract under the provisions of the agreement and the Act. If the Landlord had made the bargained for Repairs, the Tenants could not have refused to perform the tenancy agreement or damages would have arisen to the Landlord.

However, I also find that the Landlord was bound by their agreement to the Tenants to make the Repairs to the rental unit prior to them moving in. This is supported by the findings of fact in the Original Decision:

> *I find that Mr. C.R.* [the Landlord's Agent] *agreed during the initial viewings and before the documentation was signed that the landlord would complete the agreed repairs and repainting before the tenants moved in and that the tenants signed the tenancy documents based on that promise.*

I find that the Tenants relied on the representations made by the Landlord's Agent that the Repairs would be performed before they moved in and this led them to enter into the tenancy agreement. The Tenants had paid a security deposit to the Landlord and for all intents and purposes, were ready, willing and able to perform under the tenancy agreement. The same could not be said of the Landlord here, as there was no evidence provided that the Landlord had ever done the Repairs to the rental unit.

I find that the Landlord breached the tenancy agreement by failing to provide that which was bargained for, that is, a cleaned, repaired and painted rental unit with a dishwasher installed, prior to the Tenants moving in.

I find that the reasoning of the British Columbia Court of Appeal in *Gulston* v. *Alfred*, *supra*, as submitted by the Landlord, does apply to this case.

I find that by failing to perform the Repairs before the Tenants moved in, it was unequivocal that the Landlord had refused to perform its obligations under the tenancy agreement. I further find that the unequivocal refusal of the Landlord to perform its contractual obligation was tantamount to the frustration of the tenancy agreement, to use the words of the Court, through no fault of the Tenants.

I agree with Legal Counsel for the Tenants, that there are different forms of condition precedent in law. I do not find the requirement to make these Repairs was a condition precedent to the formation of the contract, but rather, acted as a condition precedent to the performance of the contract. As the Landlord did not begin performance of the contract by making the promised Repairs, the Tenants were entitled to be of the position that they would not begin to perform their obligations and they could repudiate the tenancy agreement.

I find that the Advocate for the Landlord has interpreted the provisions of the Act too narrowly in their submission that under the Act the Tenants were required to move into

the rental unit and then file an Application to compel the Landlord to make the promised Repairs.

If we employ the “reasonable man” test cited by the Advocate, I am not satisfied that the “reasonable man” would interpret the circumstances, tenancy agreement and Act to mean that the Tenants would have had to move into a rental unit they had not bargained for, due to the unfulfilled promise of the Landlord to make Repairs, and now that they are captive to the Landlord and paying full rent, that they must file an Application against the Landlord to compel them to perform under the tenancy agreement and Act, which the Landlord had already demonstrated they were not adhering to.

It is accepted that the legislature intended the Act to represent a codification of the law of common law tenancies, which has developed over many years. Knowing that the Act could not address every possible scenario in the human realm of residential tenancies, the legislator included the provision in section 91 that, “Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia.”

The Act also recognises that there are different phases in the tenancy relationship between a landlord and tenant. For example, in section 32(1) the Act states, “A landlord must provide and maintain residential property...”. [Underlining added.]

Black’s Law Dictionary, 6th ed. (Minnesota: West Publishing Co. 1990) at page 1224 defines the word “provide” as, “To make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.” At page 953 the word “maintain” is defined as, “The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition...”

This leads me to find that the word “provide” in section 32 of the Act speaks to the condition of the rental unit prior to the Tenants moving in and to “maintain” it after the Tenants have occupied, and to conclude the Landlord was required under the Act to provide the rental unit as bargained for in the tenancy agreement prior to the Tenants moving in.

Furthermore, in section 7 of the Act a party who claims for compensation for damage or loss resulting from the other party’s non-compliance with their tenancy agreement or the Act, must do, “...whatever is reasonable to minimize the damage or loss.” In effect, this placed a statutory duty on the Tenants to mitigate their losses claimable against the Landlord.

Reading these sections and the Act as a whole, I do not interpret the legislation to require the Tenants to move into a rental unit that they had not bargained for, due to the breach of the tenancy agreement by the Landlord, and then make Application to compel the Landlord to do what is has already failed to do. This would be inconsistent with the requirement for the Tenants to minimize their losses under the Act. I also believe that it is contrary to what the "reasonable man" would have understood from the tenancy agreement. I am also not satisfied that the legislators intended that a party could take advantage of their wrong doing by engaging the legislation and demanding it be strictly construed against an innocent party.

As to the arguments in equity made by the Advocate, I explained during the hearing that I have no authority to provide equitable remedies under the Act, as that authority rests solely with the higher courts of this Province. Nevertheless, I would remind the Advocate of the legal maxim that when demanding equity one must come with clean hands.

Therefore, I find that the Tenants were entitled to repudiate the tenancy agreement due to the unsatisfied condition precedent. As a result, I dismiss the Applications of the Landlord in this matter.

Lastly, while I find that the monetary order made in the Original Decision should not be changed, I also find that that the Tenants should be compensated for the cost of providing the transcript of the Judicial Review in evidence. I find that the Landlord should have provided this in evidence, as it contained very important information about the directions made to the Branch. Furthermore, the cost of this is a loss to the Tenants attributable to the breach of the tenancy agreement by the Landlords. Therefore, under section 67 of the Act, I order the Landlord to reimburse the Tenants for the cost of the transcript, forthwith, upon receipt of the invoice from the Tenants' Legal Counsel.

Conclusion

As a result of the breach of the tenancy agreement by the Landlord prior to the Tenants moving into the rental unit, the Tenants were able to repudiate the tenancy agreement.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 2, 2011.

Residential Tenancy Branch