Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Lions Court Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL, FF

Introduction

The rental property is a 36 unit apartment building in West Vancouver. The landlord has served some of the tenants with two month Notices to End Tenancy for landlord's use. The landlord has renovated some units in the rental property and it intends to renovate a further 12 units. The landlord has given Notices to End Tenancy to the occupants of those units. Some, but not all of the tenants who received the Notices have applied to cancel them. The tenants' applications were not all filed at the same time and they were set for hearing by conference call on different dates. I was appointed to hear all of the applications. Although it would have been preferable to have all of these applications joined and heard together in one collective hearing, it was impracticable to do so because not all parties were available to attend on the same day. The two hearings set for February 19, 2015 were effectively joined and continued as one hearing. Tenants were also allowed to rely on and refer to evidence filed by other applicants and, as well, tenants who participated in earlier hearings were invited to attend subsequent hearings. I have treated all of the applications a joined for the purpose of delivering reasons and making one decision with respect to all applications. Several tenants withdrew and cancelled their applications after they were filed. The tenants whose applications were cancelled prior to the time set for hearing have not been included in the style of cause as joined applications. One tenant, Ms. M-S withdrew her application after the March 4th hearing was conducted; it is included in the style of cause and I will refer to it in the conclusion section of these reasons.

The landlord's representatives and their legal counsel attended each of the hearings. The named tenants attended on the dates specified on the cover page of this decision

The parties on each application exchanged evidence and there were some variations in the documentary evidence submitted by the landlord on different applications, but there were no objections made with respect to the evidence submitted and all parties were able to identify and respond to specific documents and photographs submitted.

Issue(s) to be Decided

Should the Notices to End Tenancy requiring the tenants to move out of their respective rental units by March 31, 2015 be cancelled?

Background and Evidence

The rental property is a 36 unit apartment building in West Vancouver. The landlord purchased the building in 2006. The landlord said that the building was constructed in 1965. The landlord's representatives testified that it has performed renovations to the building since 2010. The work has included elevator upgrades, plumbing, new water boilers, lobby renovations and landscaping and painting. Having performed general renovations, the landlord's representatives testified that they now intend to renovate the individual units in the building. Six units have been renovated. The landlord wants to proceed with renovations to a further 12 units at one time. The landlord wrote to the tenants on January 6th the letter said in part:

> Due to the age of (name of apartment building) we plan to renovate all the units in the building starting with the top three floors. The units are almost 50 years old and have had little to no upgrades.

The landlord said the electrical system is overloaded and has a fuse panel instead of circuit breakers. The cast iron bathtubs were said to be rusting out and leaking into lower units. The bathtub tiles have absorbed water and the drywall backing is breaking down. The bathroom fans are inadequate and the landlord claimed that overall the units do not meet current standards. On January 22, 2015 the landlord served each of the tenants with a two month Notice to End Tenancy for landlord's use. The ground stated was that: "The landlord has all necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant." In the letter that accompanied the Notice to End Tenancy the landlord said that it intended to do the following work:

- Replace electrical panel and increase the amount of circuits in the kitchen from one to four plus the range.
- Replace low voltage thermostat cable to zone valve motors.
- The kitchen will receive new cabinetry, solid surface counter tops, appliances and lighting.
- Level concrete throughout and replace with laminate flooring.

- In the bathroom the tub will be replaced, tile backer and waterproofing membrane will be installed, fans will be replaced, new wall and floor tiles, new vanity and lighting.

At the hearing the landlord's representatives testified with respect to the scope of the work and the reasons for choosing to perform the renovations. The landlord's representatives testified that the work to be performed will take approximately three months to complete and the work requires that the units be vacant. The landlord submitted a copy of a letter from its insurance broker dated January 31, 2015. Based on the information provided by the landlord to the broker, he advised that the tenants vacate the affected rental units for safety reasons.

The landlord's representative, Mr. K.C. testified as to the stages for the work intended to be performed, the time required to perform the work and the need for vacant possession in order to carry out the work. He referred to previous renovations of units in the rental property and the nature of the work that had to be done. He said that some of the cast iron bathtubs had developed leaks that allowed water ingress into lower suites. The 2X4 studs behind the tubs were found to be rotten and needed to be rebuilt. The landlord supplied photographs taken during the course of renovations. The landlord's representative testified that the pictures would be typical pf the work to be done to the rental units that are the subject of these proceedings. The photographs showed work performed upon vacant rental units. The work involved levelling floors, extensive drywall repairs, including rebuilding closets, and replacement of cabinets and appliances. The electrical panels were replaced and additional wiring work was performed. The landlord's representative testified that the work could not be performed with the tenant's belongings in the rental unit The landlord has had to arrange for off-site storage of materials and cabinetry to be used in the renovations.

The landlord submitted a "Suite Renovation Schedule" as evidence. According to the schedule it will take 37 days to perform the renovations to each suite. The landlord's representative said that the schedule presumed that there would be no delays in carrying out any stage of the work. The landlord stated that this best case scenario was unlikely to be achieved and accounting for holidays and delays, it is assumed that renovations to any given unit will take 12 weeks.

The applicants applied to dispute the Notices to End Tenancy on several grounds. Some of the tenants alleged that the landlord's Notice to End Tenancy was not given in good faith because the intended renovations are not being done for safety reasons, they are not necessary structurally and they are being performed for purely monetary

reasons; by this the tenant meant that the renovations would be performed so as to justify a rent increase.

One of the applicant tenants is a former building manager of the rental property. She has lived at the rental property for 27 years. The tenant provided a written submission wherein she commented on upgrades proposed by the landlord. She said that on January 23, 215, she had the fire department attend at the rental property for an inspection of the electrical system. She said that no problems were found or noted. She said that although the building uses an old fuse system, there are barriers that restrict the size of fuses that may be installed. The tenant also contended that replacement of the electrical panel does not require a tenant to vacate her unit.

The tenant denied that the bathtub in her unit is leaking, although she acknowledged this may be true in other units. The tenant submitted that replacement of a bathtub does not require a tenant to vacate the rental unit. The tenant denied that there were any moisture or drywall problems with the tiles around her bathtub and she said that the re-tiling of a bathroom can be completed in two to three workdays and does not require the tenant to vacate the unit. The tenant said that her bathroom fan was functioning adequately and she said that in any event changing the fan was a minor task that does not require a tenant to vacate.

The tenant said that she did not agree that there was any need to replace deteriorated wiring to the zone motors that control the hot water heat because the temperature is controlled adequately by a master timing unit in the boiler room. She also claimed that the rewiring the zone valve motors does not require tenants to vacate their units.

The tenant provided photographs of the interior of her rental unit. She submitted the pictures to show that her unit is well kept and in excellent condition. The tenant disagreed with the landlord's evidence that the rental units have deteriorated and do not meet today's standards. The tenant said that she does not need any of the landlord's offered updates and should not have to vacate her unit.

The landlord called Mr. G.P. as a witness. Mr. G. P. is a contractor who has performed work to the rental property at the landlord's request. G.P. testified that he reviewed the landlord's schedule and timeline for the work to be performed on each of the rental units. He said that his best case scenario for the time to complete the work was approximately 32 working days, but with delays and unforeseen remedial work the time could easily run to 36 or 36 days. He said that his estimate was based on having viewed the work performed to one of the rental units in the past month. He said that

given the scope of the work, the rental unit would have to be vacant and remain that way for the duration of the work.

One of the tenants obtained a quote from a general contractor for the performance of some of the work proposed to be done by the landlord. The quoted was based on work referenced by the landlord in its January 22, 2015 letter to the tenants. The contractor provided his time schedule for the following work; he stated as follows in a February 8, 2015 quotation provided to one of the applicants:

1. Remove and dispose of flooring, kitchen cabinets, countertops, appliances, one opening in the kitchen, bathroom fixtures and panel board.
2. Level floor.
3. Floor installation.
4. Cabinetry and countertop installation.
5. Drywall repairs.
6. Paint apartment, including ceilings.
7. Bathroom upgrades: bathtub, tile on the tub walls, tile floor, taps, sink, countertop, cabinetry, light, mirror and toilet
8. Add 2 lights over the pony wall.
9. Appliance install
10. Tenant will be able to live in unit during the renovation. It will be an inconvenience for the tenant. There will be a day or two without toilet and sink. Client may want to move out for those one or two days.
11. 4-5 weeks is the time frame to complete the renovation.
12. All supplies to be on site once start project.
13. Client to have all small personal items boxed and put on deck. (name of contractor) can shift the larger pieces of furniture if needed. Other furniture can be put on the deck and covered with plastic.

Mr. S.S., the contractor who supplied the above quote, testified at the hearing on February 26th. He said that he has worked as a contractor for 20 years. He confirmed his statement that the work listed in his report could be performed without the suites being vacant; he said that his opinion was based on having all of the counters and cabinetry pre measured and he referred to self-levelling flooring. Mr. S.S. said that if the floors had to be levelled this work might take an additional day or two. He said that his quote was based on the work mentioned in the landlord's January 22, 2015 letter.

The landlord's representative noted that Mr. S.S.'s quote was not based on the complete scope of work planed by the landlord. The landlord's representative said that the quote did not include repairs to the heating systems, including the thermostats and

zone valves and wiring. The quote also did not include drywall work and closet reconstruction and did not consider the likely prospect of additional framing work in some suites due to water leaks and rotting 2X4's. The landlord's representative testified that safety concerns and lack of workspace precluded performing the renovations while tenants continued to occupy the units. The landlord's representative also said that it was necessary to carry out work on multiple suites in order to secure contractors willing to perform the work; he said that contractors would not be amenable to commit to a perform small one off jobs in individual suites within a prescribed time frame. In order to secure competent contractors and tradesmen, it is necessary to undertake the work on a larger scale and this requires the simultaneous vacancy of multiple suites. The landlord's representative said that the work would require the units to be vacant and unoccupied for two months and there was no possibility that the work could be performed with the tenants having occupancy for all but one or two days.

Analysis

The tenants advanced several grounds for their opposition to the Notices to End Tenancy. It was submitted that the landlord's proposed work was not necessary and not desired by the tenants, who were happy occupying their units in their current state. Several tenants submitted that the landlord sought to perform upgrades for the sole purpose of obtaining a rent increase and this constituted bad faith on the part of the landlord.

Tenants also argued that the proposed work could be performed while the tenants continued to occupy the rental units. Based on the quote provided by one of the applicants, the tenants submitted that in order to perform the proposed work, it would be necessary for the tenants to move out for only a few days. The tenants referred me to the decision of Williamson J.in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)* 2007, B.C.S.C., 257 (hereinafter referred to as "Berry and Kloet"). That decision was the result of an application for judicial review from the decision of an arbitrator who dismissed an application to cancel a Notice to End Tenancy for landlord's use, based on the landlord's assertion that vacant possession was required in order to effect renovations to the rental units. In her decision upholding the Notice to End Tenancy the arbitrator stated as follows:

> The ***Act*** does not define vacancy and section 49(6)(b) merely states that the landlord can end the tenancy if the renovation or repair is done in a manner that "requires the rental unit to be vacant" without defining any specific length of time vacancy would be required in order to support a notice to end tenancy under that section. While I am satisfied that it is

> possible for the landlord to adapt the renovation schedule and conduct the renovations in a piecemeal fashion, I find that the rental unit will need to be vacant for at least 3 days to allow for refinishing of the hardwood floors and retiling of the bathroom and kitchen floors. The tenants have acknowledged that vacancy is required for some period of time. In drafting the ***Act***, legislators did not stipulate a minimum length of time that vacancy is required to support a notice to end tenancy under section 49(6)(b) and I am not willing to find as a matter of law that the legislators had intended a minimum length of time to be required. I am satisfied that the landlord has met the burden of establishing that the rental unit must be vacant in order to accomplish the intended renovations.

The Supreme Court set aside the arbitrator's decision to uphold the Notice to End Tenancy and set aside the order for of possession granted to the landlord. Williamson J. stated the following reasons for his decision:

> [18] As can be seen, the Dispute Resolution Officer found that the rental unit would need to be vacant for at least three days. She also noted the tenants acknowledged that vacancy is required. However, in this analysis she ignored the evidence before her that the tenants were prepared to vacate the premises for the period of time necessary for the renovations.
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> [19] I conclude that this was patently unreasonable. As noted, s. 49(6) of the ***Act*** sets out three requirements:
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> > (a) The landlord must have the necessary permits;
> >
> > (b) The landlord must be acting in good faith with respect to the intention to renovate; and
> >
> > (c) The renovations are to be undertaken in a manner that requires the rental unit to be vacant.
>
> [20] The third requirement, namely, that the renovations are to be undertaken in a manner that requires the rental unit to be vacant, has two dimensions to it.
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> [21] First, the renovations by their nature must be so extensive as to require that the unit be vacant in order for them to be carried out. In this sense, I use "vacant" to mean "empty". Thus, the arbitrator must determine whether "as a practical matter" the unit needs to be empty for the renovations to take place. In some cases, the renovations might be more easily or economically undertaken if the unit were empty, but they will not require, as a practical matter, that the unit be empty. That was the case in ***Allman***. In other cases, renovations would only be possible if the unit was unfurnished and uninhabited.

[22] Second, it must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based upon the purpose of s. 49(6). The purpose of s. 49(6) is not to give landlords a means for evicting tenants; rather, it is to ensure that landlords are able carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6). On the other hand, where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.

[23] This interpretation of s. 49(6) is consistent with the instruction in ***Abrahams*** and ***Henricks*** to resolve ambiguities in drafting in favour of the benefited group, in this case, tenants. Practically speaking, if the tenant is willing to empty the unit for the duration of the renovations, then an end to the tenancy is not required. It is irrational to think that s. 49(6) could be used by a landlord to evict tenants because a very brief period was required for a renovation in circumstances where the tenant agreed to vacate the premises for that period of time. It could not have been the intent of the legislature to provide such a "loophole" for landlords.

[24] In this case, the Dispute Resolution Officer turned her mind to the first dimension but failed to address the second. The renovations required refinishing of hardwood floors and retiling of bathroom and kitchen floors. Thus, as a practical matter, she found that the unit had to be empty for the renovations to take place. Indeed, the tenants acknowledged that vacancy was required for some period of time. The first dimension of the "vacancy" requirement was met.

[25] However, the second dimension was not met. The tenants were willing to vacate the premises for the amount of time required to perform the renovations. Thus, the renovations could have been performed without resorting to a termination of the tenancy. The Dispute Resolution Officer failed to address whether the renovations could be performed without putting an end to the tenancy. In so failing, she did not deal properly with whether vacating the unit was "required" as is mandated by s. 49(6) of the ***Act***.

[26] The irrationality of her conclusion is in effect acknowledged by the respondents in their submissions. Counsel observed that there was no minimum time frame for necessary vacancy set out in the ***Act***. He noted that, on the facts before her, the Dispute Resolution Officer determined that three days was enough – that is to say, if the tenants had to vacate the premises for three days, the requirements of the statute would have been met. He also observed that in other cases, perhaps one day is enough if "for example, hazardous insulation is being removed".

[27] The problem with this interpretation is that it ignores the second dimension of the "vacancy" requirement. On this interpretation, if a Dispute Resolution Officer found that <u>any</u> period of vacancy was required for a renovation, even a single day, a tenancy could be terminated. Such a finding flies in the face of the purpose of the statute, which is to balance the rights of

> tenants and landlords. It is irrational to think that a landlord could terminate a tenancy because a very brief period of emptiness was required.

In the proceedings before me several applicants have submitted that only a short period of vacancy will be required to enable the landlord to complete the intended renovations, but I did not find their evidence on this point to be convincing and I accept and prefer the landlord's evidence, including the evidence of its contractor to that of the tenants and their witness. I have photographic evidence showing the scope of work to other units in the rental property and showing the interior of the rental units while the work was in progress. The work shown is extensive and was undertaken to vacant units. I do not accept the notion that the work shown could be sensibly performed to a tenanted and furnished unit. The landlord's insurance broker commented by letter that it would be dangerous and risky for a tenant to occupy a suite while it is under construction, both because of the prospect of accident claims, but also with respect to environmental hazards. According to the quote from the tenant's contractor, his estimate of the duration of the work was 4 to 5 weeks and he based his contention that the suites need not be vacant upon the assumption that the tenants would box personal items and the contractor would move furniture onto the tenants' balconies as required. I do not accept this proposal as at all practicable and I find that there will be a need for a significant period of vacancy exceeding one month in duration and more likely two months as calculated by the landlord. I accept the proposition stated in *Berry and Kloet*, that: "It is irrational to think that s. 49(6) could be used by a landlord to evict tenants because a very brief period was required for a renovation in circumstances where the tenant agreed to vacate the premises for that period of time.", but I find that the circumstances before me are distinguishable, based on my finding that vacant possession will be required for a significant period, measured in months, not a trivial period of a few days. I find that the requirement for a period of vacancy of two months is significant and does justify the Notice to End Tenancy. I find that the landlord cannot practically perform the work piecemeal, while the rental units are occupied and furnished and I find that the landlord should not be placed in jeopardy of claims by tenants for compensation for loss of use and of the prospect of liability claims by tenants that would necessarily flow from the extensive renovation of occupied rental units.

The tenants have alleged that the Notices to End Tenancy were not given in good faith based on the assertion that the landlord wants to perform work in order to increase rents. The evidence established that the rental property was constructed in 1965 and there have been no significant renovations to most of the individual units over that 50 year period. Although the tenants may be satisfied with the condition of their respective units, I find that the landlord may not be prevented from exercising its prerogative to protect its investment in the property by performing renovations and upgrades to the

rental units. The fact that the landlord intends to increase the rent for the renovated units does not constitute bad faith. The landlord has begun the process of renovating units in the building and its decision to continue work on more units as part of a plan to renovate all the rental units in the aging building, does not show a lack of good faith or any dishonesty in its intentions..

Conclusion

I find that the landlord has the necessary permits required to perform the renovations. I find that the landlord is proceeding with the renovations in good faith and I find that the renovations will carried out in a manner that requires the rental units to be vacant for a significant period of time, likely several months. I therefore dismiss the tenants' applications. I make no award with respect to the filing fees for these applications.

Since these applications were filed, several applicants have withdrawn their applications or have chosen to move out of their rental units. One of the applicants requested an extension of time for the end of her tenancy in the event that the Notice to End Tenancy was upheld. I have no authority to grant the tenant an extension of the effective date of the Notice to End Tenancy and this request is denied. The landlord has requested an order for possession and as the effective date of the Notices to End Tenancy has passed, the landlord is entitled to orders for possession effective two days after service on the tenants. These orders may be filed in the Supreme Court and enforced as orders of that court.

One of the applicants submitted late evidence stating that she has chosen to move out of her rental unit. She complained that she has not been given one month`s free rent as required by the *Residential Tenancy Act* and her rent cheque for March has been cashed. If there are tenants who have claims for compensation that are not resolved directly with the landlord, their remedy will be to file a further application for dispute resolution to claim compensation.

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: April 9, 2015

Residential Tenancy Branch