Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT, CNL, FF, O

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- more time to make an application to cancel the landlord's 2 Month Notice to End Tenancy for Landlord's Use of the Property (the 2 Month Notice) pursuant to section 66;
- cancellation of the landlord's 2 Month Notice pursuant to section 49;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72; and
- an "other" remedy.

History of Proceedings

This hearing was heard over three separate hearing dates and totalled 229 minutes of hearing time.

The tenant CS attended at all hearings. The tenant CS was assisted by SB at the first hearing. The tenant RS attended at the second and third hearings. The landlord attended at all hearings. The landlord was represented by counsel at all hearings.

The initial hearing dealt with the issue of the Residential Tenancy Branch's (the Branch's) jurisdiction to hear this matter. At issue was whether or not the parties had a tenancy agreement within the meaning of the Act. In a decision dated 19 March 2015, I determined that the parties had a tenancy agreement within the meaning of the Act and thus this Branch had the authority to determine the dispute.

I provided the parties with an interim decision that set out my reasoning for determining that the parties had a tenancy agreement, which relied on a finding that the option agreement was extinguished.

The tenants applied for review consideration of the interim decision. The tenants put forward that they had new and relevant evidence. The tenants' application for review consideration was refused.

This decision should be read in conjunction with the interim decision.

Preliminary Issue – Scope of Hearing

At the first hearing, I asked the tenant CS which "other" remedy the tenants were seeking. The tenant CS informed me that they were seeking an order that the landlord make repairs. It was unclear from the tenants' claim of which repairs the landlord had notice. There were also privilege issues raised in the documentary evidence submitted by the tenants in support of this portion of their claim.

At the second hearing, the tenant RS informed me that the other remedy was in relation to a determination that the rental unit was not in compliance with the Act, regulations or tenancy agreement.

Pursuant to paragraph 59(2)(b), an application of dispute resolution must include the full particulars of the dispute that is to be the subject of the dispute resolution proceedings. The purpose of the provision is to provide the responding party with enough information to know the applicant's case so that the respondent might defend him or herself.

Residential Tenancy Branch Rules of Procedure (the Rules) sets out that the claims in an application must be related to each other:

> **2.3 Related issues**
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

I informed the tenants at the second hearing that as the particulars of their claim for an "other remedy" were not sufficiently set out for the landlord to have notice of the claim, I was dismissing that portion of the tenants' claim with leave to reapply. In the alternative, that portion of the tenants' claim is dismissed with leave to reapply as the issue of the fitness of the rental unit for the purposes of a tenancy is not relevant to the landlord's notice to occupy that rental unit for her own use.

The tenants' claim relating to the "other" remedy is dismissed with leave to reapply.

Pursuant to subsection 55(1) of the Act, a landlord may make an oral request for an order of possession at a tenant's application to cancel a notice.

At the second hearing, counsel for the landlord made an oral request for an order of possession. This request was reiterated at the third hearing. The landlord stated at the third hearing that if I grant an order of possession in her favour that she agrees to an order of possession effective the later of 31 May 2015 and two days from service on the tenants.

At the third hearing, counsel for the landlord asked if I would hear a claim from the landlord for a monetary order. I informed counsel that I could not hear any order for a monetary claim as there was no application pursuant to section 59 of the Act from the landlord before me. Unlike for a monetary order, there is no provision in the Act for an oral request of this nature. The landlord's request is refused.

At the second and third hearing, the tenants continued to disagree with my finding on the option's extinguishment. As I told the tenants at the second hearing, if they disagree with my determination, the avenue of judicial review is available to them. I have received insufficient evidence from the tenants to prompt me to reconsider my earlier determination, and, for the purposes of this application, that decision is final.

Preliminary Issue – Evidence at the Hearing

After the determination was made as to the scope of the proceedings, the tenant RS continued to provide testimony in relation to the condition of the rental unit and submissions as to how the condition constituted a breach of the option to purchase agreement. At the third hearing, counsel for the landlord objected to the relevance of this testimony.

At the third hearing, I informed the tenants that I was exercising my discretion to prevent evidence that was not relevant from being presented at the hearing. The tenant RS asked for reasons and I informed him that I would provide written reasons for my determination. These are the written reasons.

The Rules set out that evidence at a hearing must be relevant:

> **3.6 Evidence must be relevant**
> All evidence must be relevant to the claim(s) being made in the Application(s) for Dispute Resolution.
>
> The Arbitrator has the discretion to decide whether evidence is or is not relevant to the issues identified on the application and may decline to hear evidence that they determine is not relevant.

"Relevant" is defined in the Rules:

> **Relevant** evidence is relevant if it relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact. Argument is relevant if it relates to or bears upon the matter at hand.

The issue in dispute is whether or not the 2 Month Notice is valid. Section 49 permits a landlord to end a tenancy where he or she intends to occupy the rental unit:

> (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 issued a notice pursuant to subsection 49(3). This means that what is relevant is if the landlord intends in good faith to occupy the rental unit. The elements that remain to be shown are whether or not the landlord intends to occupy the rental unit and whether or not the landlord intends to do so in good faith. It is not relevant whether or not the rental unit complies with the standards of the Act or regulations, or whether or not the landlord breached the option to purchase agreement, or whether or not the rental unit was insurable, if it does not prove or disprove the fact that the landlord intends in good faith to occupy the rental unit.

For this reason, I declined to hear any evidence regarding the condition of the property in relation to:

- whether or not the rental unit complied with the Act, regulations or tenancy agreement;
- whether or not the landlord breached the option to purchase agreement; or
- whether or not the rental unit was insurable.

I informed the tenants at the hearing that they are at liberty to bring an application to this Branch should they choose to do so regarding the conditions of the rental unit during their tenancy, but that this issue was not before me. An application for damages for the

alleged breaches of the option to purchase agreement by the landlord would need to be submitted to the Supreme Court of British Columbia (the Supreme Court) and not the Branch. However, the evidence that would be relevant in those future potential applications is not relevant to this application.

Preliminary Issue - Suspension Pursuant to Paragraph 58(2)(c)

It is important to note that the tenants have not filed any application in the Supreme Court.

Pursuant to paragraph 58(2)(c), if the tenants had filed an application with the Supreme Court this Branch's ability to determine this dispute may have been suspended pending the outcome of that claim:

> (2) Except as provided in subsection (4), if the director receives an application under subsection (1), the director must determine the dispute unless…
>
> (c) the dispute is linked substantially to a matter that is before the Supreme Court.

This provision provides primacy to the Supreme Court's jurisdiction where jurisdiction overlaps so long as that matter is before the Supreme Court.

If the tenants sought a suspension of the decision making abilities of this Branch, the tenants ought to have filed a claim with the Supreme Court. The tenants have not filed any claim with the Supreme Court in the months that have elapsed since the filing of this application. As such, no matter is before the Supreme Court.

Issue(s) to be Decided

Are the tenants entitled to an extension of time pursuant to section 66 of the Act? Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an order of possession? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began 1 October 2011. The initial fixed-term tenancy agreement ran concurrent to an option to purchase agreement. The option to purchase agreement was extinguished 31 October 2014, when the tenants failed to complete the purchase and sale agreement. At that time, the tenancy continued as a month-to-month tenancy alone.

On 27 December 2014, the landlord issued a 2 Month Notice to the tenant. That notice was sent to the tenants by registered mail. The landlord was unable to provide me with a tracking number for the mailing. The tenants' application sets out that they received the 2 Month Notice on 29 December 2014.

The 2 Month Notice set out an effective date of 28 February 2015. The 2 Month Notice set out that it was being issued as the landlord intended to occupy the rental unit.

The tenants initially filed an application 15 January 2015 through a Service BC Office. The tenants did not provide a phone number on their application and there were deficiencies in their application. As a result of these deficiencies, no notices of hearing were generated in respect of that application.

On 26 January 2015, the tenant CS called to inquire as to when she would receive a notice of hearing in respect of the tenants' application. She was informed at that time of the deficiencies in the application. The tenant CS was cautioned about the application of subsection 59(3). The tenants elected to abandon their first application and refile. The tenants refiled their corrected application on 26 January 2015.

The landlord testified that in contemplation of this tenancy she moved into a second detached home that she purchased using a line of credit secured by her equity in the rental unit. The landlord testified that the tenants told her that they were unable to secure a mortgage. At some point after the termination of the option to purchase, the tenants began paying only $500.00 in rent. The landlord testified that she was unable to afford to maintain two homes. The landlord testified that it is her intent to move into the rental unit, to fix it up, and to sell it. The landlord testified that she estimates that she will live in the rental unit for one to two years.

The tenant RS testified to numerous deficits that he says makes the house unsuitable as a rental unit, which include:

- the hand railings;
- the elevator;
- the wood stove; and

- the grease pit.

The tenant RS testified that if the landlord says she is going to move into the rental unit then he believes that she will do so; however, the tenant RS testified that the rental unit is unsuitable for the landlord as the landlord's spouse has a disability and the home has stairs.

Relevant Submissions

The tenant RS submitted that the tenants relied on the information contained on the 2 Month Notice in determining the time that they had to file their application.

Counsel for the landlord submits that the circumstances described by the tenant do not constitute "exceptional" circumstances within the meaning of section 66 of the Act.

The tenant RS submits that it is redundant for the landlord to move in to the rental unit and fix it in order to sell it when she could fix it and sell it to the tenants.

Analysis

Tenants' Application for More Time

The tenants' application requests more time to file their application to cancel the 2 Month Notice.

The landlord issued the 2 Month Notice on 27 December 2014. Paragraph 90(a) sets out that documents delivered by mail are deemed to be received on the fifth day after its mailing. In this case that means that the 2 Month Notice, which was sent by registered mail, was deemed received by the tenants on 1 January 2015.

Residential Tenancy Policy Guideline, "12. Service Provisions" set out that the deeming provision is a rebuttable presumption with evidence to a contrary date of service, whether or not that date is earlier or later:

> Deemed service applies to all types of documents not personally served.
>
> Deemed service means that the document is presumed to have been served unless there is clear evidence to the contrary. Evidence contrary to these provisions could prove that the documents were received earlier.

The tenants filed their first application 15 January 2015. The tenants filed this application 26 January 2015. On this application the tenants stated they received the 2 Month Notice 29 December 2014. The tenant RS testified that he did not know when he actually received the 2 Month Notice. The landlord was unable to provide a tracking number that would prove or disprove the date of service.

The tenants' admission (adverse to their interests and contained in their application) that they received the 2 Month Notice on 29 December 2014 is clear evidence that they did receive the notice that date. I find that the tenants were served with the 2 Month Notice on 29 December 2014.

Section 49 of the Act sets out that tenants are conclusively presumed to have accepted the tenancy ends on the effective date of the notice were the tenants fail to apply to cancel that notice within 15 days:

> (8) A tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.
>
> (9) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (8), the tenant
>
> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
>
> (b) must vacate the rental unit by that date.

As the date of service of the 2 Month Notice is 29 December 2014, the tenants had until 13 January 2015 to file an application to avoid the deeming provision in subsection 49(9). I find for the purposes of this application that "an application for dispute resolution" includes an abandoned application. Thus, if either application fell within the fifteen-day timeline, then the tenants would avoid the deeming provision.

The tenants filed their first application 15 January 2015 and this application 26 January 2015. These dates are both later than 13 January 2015.

Section 66 of the Act allows me to extend a time limit established by the Act, including the timeline provided for in subsection 49(8):

> **66** (1) The director may extend a time limit established by this Act <u>only in exceptional</u> circumstances, other than as provided by section 59 (3) *[starting proceedings]* or 81 (4) *[decision on application for review]*….

The tenant RS submits that he relied on the information provided in the 2 Month Notice and that the tenants understood that on 15 January 2015 they were filing in time for the purposes of subsection 49(8).

The 2 Month Notice sets out the following information on the form:

WHEN THE TENANT WILL BE ASSUMED TO HAVE RECEIVED THIS NOTICE
• The date when the landlord gives this Notice to the tenant in person, or • The date when the landlord leaves this Notice with an adult (19 years or older) who apparently lives with the tenant, or • 3 days after the landlord leaves this Notice in the mailbox or mail slot for the address where the tenant lives, or • 3 days after the landlord faxes this Notice to a fax number provided by the tenant, or • 3 days after the landlord attaches a copy of this Notice to the door or other noticeable place at the address where the tenant lives, or • 5 days after the landlord mails this Notice (by registered or regular mail) to the tenant at the address where the tenant lives.
INFORMATION FOR TENANTS WHO RECEIVE THIS NOTICE TO END TENANCY
• You have the right to dispute this Notice within 15 days after it is assumed to be received by filing an Application for Dispute Resolution at the Residential Tenancy Branch. An arbitrator may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time. • If you do not file an Application for Dispute Resolution within 15 days, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the date set out on page 1 of this Notice (You can move out sooner). If you do not file the Application or move out, your landlord can apply for an Order of Possession that is enforceable through the court.

In particular, the documents set out clearly to the tenants that they had 15 days from the date of deemed service to file their application. This would mean that the tenants would have had until 16 January 2015 to file their claim in order to defeat the presumption in subsection 49(9). This is not correct.

Section 66 requires that the tenants show extraordinary circumstances in order to be granted an extension of time. In this case, the tenants had a misapprehension with respect to the law as they relied on incorrect information in a form. Generally a citizen is presumed to know the law. These circumstances cannot be said to be extraordinary circumstances as the form clearly sets out this information and it would be quite ordinary for a tenant to rely on the correctness of the information set out in a government document. Every person served with a 2 Month Notice is provided the same information. In that sense, the situation in which the tenants find themselves is ordinary; however, that does not mean that it is acceptable.

In this case, there must be some relief for the tenants for their reliance on the incorrect information provided on the 2 Month Notice. This Branch does not have equitable jurisdiction, but, pursuant to section 91, does have the ability to apply the common law. It is from the common law that I attempt to provide the tenants with relief.

In the context of a strict liability criminal offence the common law defence of “officially induced error” was codified by the court in *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.,* [2006] 1 SCR 420, 2006 SCC 12:

24 In Lamer C.J.'s view, this defence constituted a limited but necessary exception to the rule that ignorance of the law cannot excuse the commission of a criminal offence:

> Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat*.
>
> (*Jorgensen*, at para. 25)

….

26 After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six elements:

(1) that an error of law or of mixed law and fact was made;
(2) that the person who committed the act considered the legal consequences of his or her actions;
(3) that the advice obtained came from an appropriate official;
(4) that the advice was reasonable;
(5) that the advice was erroneous; and
(6) that the person relied on the advice in committing the act.

(*Jorgensen*, at paras. 28-35)

While these are clearly not criminal proceedings, similarly the tenants seek to be relieved of the strict application of (what amounts to) a penalty provision in a complex regulatory regime where they were induced to act incorrectly by information provided by an official source. In this case:

- the tenants made an error in law by considering the date of service the deemed date of service and not the actual date of service;
- the tenant RS testified the tenants made note of their obligations under the 2 Month Notice;
- the 2 Month Notice is an official notice of this Branch;
- the timeline established by relying on the deemed date of service is reasonable;

- the information on the 2 Month Notice is incorrect, or at best imprecise and misleading; and
- the tenants relied on this incorrect act to their detriment by filing on 15 January 2015.

I find that in this situation, the doctrine of officially induced error applies to relieve the tenants of the application of the conclusive presumption in subsection 49(9) of the Act. The tenants' application pursuant to section 66 is refused; however, the tenants are relieved of the conclusive presumption in subsection 49(9) because of an officially induced error.

Should the Landlord's 2 Month Notice Be Cancelled

Subsection 49(3) of the Act allows a landlord to end a tenancy with two-month notice where the landlord intends in good faith to occupy the rental unit. The landlord has the obligation of proving on a balance of probabilities that the requirements in subsection 49(3) have been met.

The landlord has testified that she intends to occupy the rental unit. The tenant RS testified that he agrees that, if the landlord says that she is going to occupy the rental unit, then she will. After considering this evidence, I find, on a balance of probabilities, that the landlord intends to occupy the rental unit.

Notices issued pursuant to subsection 49(3) have a good faith requirement. *Residential Tenancy Policy Guideline* "2. Good Faith Requirement when Ending a Tenancy" helps explain this "good faith" requirement:

> A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy…
>
> If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.
>
> If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another

purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.

The tenant RS testified that the home is unsuitable for occupation and that the home is uninsurable. This is not relevant for a determination under section 49. For the purposes of this determination so long as the landlord intends to reside in the premises in good faith, he or she may occupy an uninhabitable and uninsured home.

The landlord testified that she wants to fix the home up and eventually sell it. I find that contemplation of an eventual sale does not negate the landlord's good faith intent to occupy the rental unit. The landlord has testified that she cannot afford to keep both the rental unit and her current residence with the amount the tenants are currently paying her in rent. I find that an economic motive to minimize losses does not nullify the landlord's good faith intention to occupy the rental unit. The landlord is entitled to organize her affairs so as to maximize her ability to have a home to occupy. I find that the landlord intends in good faith to occupy the rental unit.

As I have found that the landlord intends in good faith to occupy the rental unit, the tenants' application to cancel the 2 Month Notice is dismissed without leave to reapply.

Pursuant to section 55 of the Act, where an arbitrator dismisses a tenant's application or upholds the landlord's notice and the landlord makes an oral request for an order of possession at the hearing, an arbitrator must grant the landlord an order for possession. As the tenants' application is dismissed and the landlord has made an oral request for an order of possession, I am obligated by the Act to grant the landlord an order of possession.

Where the effective date of a valid notice has passed, an order of possession is normally effective two days after it is served upon the tenants; however, the landlord has agreed that this order will not be enforceable any earlier than 31 May 2015. As the landlord agrees to this later date, I issue an order of possession for 31 May 2015 or two days from service on the tenants, whichever date is later.

Nothing in this decision prejudices the tenants' right to compensation pursuant to section 51.

Filing Fee

As the tenants were unsuccessful in their application, they are not entitled to recover the cost of their filing fee from the landlord.

Conclusion

The tenants' application for an "other" remedy is dismissed with leave to reapply.

The tenants' application for more time is dismissed without leave to reapply; however, the presumption in 49(9) is defeated due to the tenants' officially induced error.

The tenants' application to cancel the landlord's 2 Month Notice is dismissed without leave to reapply. As the tenants' application has been unsuccessful, I also dismiss their application to recover their filing fee from the landlord.

The landlord is provided with a formal copy of an order of possession effective no earlier than one o'clock in the afternoon on 31 May 2015 and two days after service on the tenant(s). Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

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

Dated: May 12, 2015

Residential Tenancy Branch