Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, LRE, MNDC

Introduction
This hearing dealt with an application by the tenant for an order compelling the landlords to comply with the Act, regulation or tenancy agreement; an order limiting the landlords' right of entry; and a monetary order. Both parties appeared and gave affirmed evidence. No issues regarding the exchange of evidence were identified.

Issue(s) to be Decided
- What order, if any, regarding the landlords' conduct should be made?
- Should a monetary order be granted in favour of the tenant and, if so, in what amount?

Background and Evidence
The rental unit is one side of a three level duplex. The lower level consists of the garage and a storage area. The second level is the living room, dining room, kitchen and family room. The third level is the master bedroom with ensuite, two other bedrooms and one other bathroom. The master bedroom is at the rear of the home and there is a small balcony off the bedroom. The second largest bedroom is across the front of the home and there is a large balcony off it. The home has a stucco exterior and is at least 20 years old.

Together the two sides of the duplex comprise a two unit strata.

The tenant is an engineering consultant and software developer who works from home. She lives in the rental unit with her nine year old son. Her son has ADHD, clinically diagnosed anxiety issues and sleep issues. He attends school, which starts at 9:00 am, and goes to an after school program.

The landlords are very experienced property owners. In the past ten years they have renovated ten homes and built two. At least one of their projects was a duplex. In addition, they have been landlords for 22 years.

The tenant had owned the unit for almost six years when she sold it to the landlords. The contract of purchase and sale was signed on May 25, 2015; the completion date was June 26; and the adjustment date was July 1; and the purchasers were entitled to vacant possession as of July 1.

One of the conditions of the sale was that: “Seller may rent back from the Buyer at $2500.00/month + utilities until July 31, 2016.”

On the property disclosure statement the tenant stated that the balcony had leaked twice in 5.5 years and new membrane and deck surface was installed. The tenant testified that while she owned the property the only other major repair was to a leaking toilet.

The tenant testified that her plan was to move to Europe in the summer of 2016. Because of her son’s special needs, which makes settling into a new place very difficult for him, she thought it better to separate the stress of selling a home from the stress of arranging and making a major move so she put the house on the market a year in advance of her anticipated move. She also testified that staying in the home and maintaining their normal routine until they moved was very important to her. In fact, she rejected a higher no-condition offer because it did not include a lease-back provision.

On June 26, 2015, the parties signed a standard Residential Tenancy Branch tenancy agreement. It provided for a one-year fixed term tenancy; monthly rent of $2500.00 due on the first day of the month; and payment of a security deposit of $1250.00. The tenant was also responsible for all utilities.

On August 24, 2015, the tenant advised the landlords by e-mail that she had just returned from Europe and discovered that a second floor toilet was leaking. The home was last checked by a friend on August 9 so she did not know how long the situation had existed.

The landlords’ made an insurance claim. The restoration company estimated that the project, which would include the replacement of drywall in rooms on all three levels of the home, would take three to four months. They recommended that the unit be vacated during this time.

The tenant did not want to move and did not feel that the repairs had to be made immediately. Only a minimal amount of repairs were made and the tenancy agreement was amended on November 2 to include the following terms:

> "The landlords will not initiate or attempt to initiate restoration or renovation nature to address cosmetic damage cause by the Water Leak during the Term without the explicit prior approval of the Tenant"; and,
> the tenant: "will indemnify and save the landlords harmless from any loss or damages of any nature or kind arising out of or in connection with the Tenant's continued occupation of the Property in its current state as resulting from the Water Leak, and any restoration as contemplated in section 2(a) of this Amendment to Tenancy Agreement; and will not seek Landlord's restoration of the damage caused by the Water Leak, nor seek reduction in Rent as compensation of the Landlord's non-restoration of such damage".

The landlord testified that the estimated cost of repair of the water damage is $60,000.00. The tenant testified that in her opinion the damage was cosmetic only and she had no concerns about living in the unit in its' after- flood condition.

Meanwhile the landlords discovered that in the spring of 2015 the adjoining unit had a water leak from the front balcony into their living room. The neighbour initiated a claim against the strata insurance.

The landlord testified that the strata insurance applies to the building envelope of the entire building. Both units pay a premium and each has a separate deductible. In addition, each unit carries separate insurance for the interior of their unit. Either unit may initiate a claim against the strata insurance.

In July of 2015 the insurance company notified both owners that they would not cover the neighbour's claim and they would not renew the insurance policy when it came due in October. It appears they based their decision on that fact that there had been six claims for water damage made by the strata since 2010 and their engineer's assessment of the structural issues with the building.

The neighbour hired and engineer who designed a solution to the structural issues that included a re-design of the front and rear balconies and the appropriate tie-in of the new balconies to the existing structure.

The neighbour told the insurance company that they were going ahead with the plan recommended by the engineer. The insurer advised the neighbour that they would not be renewing the insurance whether one or both sides were fixed.

The insurance broker continued to look for another insurer. This was critical because maintaining insurance coverage was a condition of the landlords' mortgage (as it is of every mortgage).

The landlord testified that six insurance companies refused coverage for the strata. On September 15, 2015, the broker advised the landlord by e-mail that:

> "We've just received word from the last company I had hoped for will also not be able to provide a quote, based on a partial remediation. I'm not really sure what to do now, as I am out of options. I think it would be a good idea for the 2 owners to get together and figure out the next course of action. The current policy will be expiring as of October 5th, so there's not too much time left."

The landlord testified that finally the broker found a company who would provide insurance coverage as long as repairs to the entire building began immediately. When the homeowners explained that it would take three months to obtain the necessary permits from a the local municipal authority the insurance company agreed to provided coverage for that waiting period; during the construction; and then once the remediation was complete.

The letter from the broker described the search for a new insurer as follows:

> "Eventually we were provided with a quote based on both sides of the duplex being remediated as per the attached documents, and on the basis they would be carried out ASAP.
>
> As you've requested, this confirmation letter refers to the entire strata building insurance, including the exterior walls, roof, common areas, deck, common walls, etc. We can confirm that the building itself must be insured together with the other owner, and thus repairs were/are required on both sides of the strata."

The engineer immediately filed for the building permit, which was received at the beginning of January.

By a letter dated January 19, 2016 the landlords notified the tenant that:

> ". . .we will be accessing the Property on Tuesday, January 19, 2016, at 9:30 am for the purpose of taking measurements in relation to repairs required by the insurance company that provides coverage in respect of the Property together with the neighbouring duplex property.
>
> As you are aware, repairs to the exterior decks, replacement of the two front, second floor windows and replacement of one door are required as a result of

> water ingress issues. As noted above, this work is required by our insurance company. The building permits required for this work have now been obtained from the City of Vancouver."

The tenant had her lawyer respond. The lawyer asks for more details about the repairs being contemplated and details of the insurance company's position. The key passage of the letter is:

> "As you know, there is a disagreement between our clients as to what repairs must be conducted during my client's tenancy and what can wait until afterwards. My client also apprehends access being insisted upon for an unreasonable purpose based on the fact that your client has previously indicated that she would require access to the conduct renovations which are purely cosmetic in nature and which can wait until the end of the tenancy. For these reasons, we need details."

The landlords' lawyers responded on January 28 with a preliminary work schedule for the month of February. Throughout the project, the landlords provided the tenant with a rough construction project for every month. The landlord testified that this was the information they had from the engineer and the contractor.

The work started on February 2, 2016 and ended on June 15. The completion date was later than first anticipated because of the chimney repair and a rainy spring, which delayed the application of the stucco.

The scope of the project is set out in the engineer's statement dated May 2, 2016:

> "We are the building envelope consultant for the above mentioned project. The scope of repair in the House include the replacement of the railing and the existing waterproofing membrane on South deck with new 2-ply SBS waterproofing membrane, and the replacement of windows and door and rain screen stucco on the South deck , as well as North upper deck guard wall upgrade."

Once the renovation started the engineer and contractor discovered more rot than originally anticipated. The rot extended all the way to the chimney. The engineer had to re-design the "tie-in" lines from the deck to the chimney to facilitate water flow. The wooden framework for the chimney was replaced and the area re-stuccoed. As set out in the same report:

> "[We] observed heavy staining, rotten OSB sheathing, wood studs and wood place near the southeast corner of the guard wall, as well as deteriorated OSB sheathing in most areas of the chimney chase."

The engineer's report concludes with:

> "In our opinion, the above- mentioned work is necessary and the repair work on the chimney is urgent because of the deterioration of the supporting wood frame."

The work crews were on the site at 7:30 am every business day. There was no work done on the weekends or on statutory holidays. The work crews moved back and forth between the two units.

Scaffolding was in place at the front of the unit for the whole project. A second scaffold required for the chimney repair was erected at the side of the home, over the front entrance on April 1. The scaffolding did not prevent entry to the double garage or the front door, although judging from the photographs it probably made driving into the garage a little trickier. The scaffolding was covered with tarps which blocked natural light to the rooms behind it and which was noisy in windy weather.

The portable toilet, garbage bins, materials, and the other accoutrements of a construction site were placed on the neighbour's property.

The tenant testified that with one exception, the tradespeople working on the job were pleasant and considerate. She said she had a good relationship with them and attempted to accommodate them as much as possible; even permitting entry without notice to facilitate the repairs to the rear patio.

However, the tenant and her son found the process stressful and inconvenient. The scaffolding was very close to the upstairs windows. The tenant had used the front bedroom as her home office and she found it impossible to work while the construction was ongoing. There were two periods when the noise was reduced and she was able to work from home: May 12 to May 15, and May 21 to June 15.

The tenant had attended a "coding boot camp" from October to December 2015. She was able to use shared space at the same facility when she was not able to work at home free of charge. While the space was adequate it was not the secure, private space she had in her home office. She was required to pay for parking at the alternate space.

The tenant filed parking receipts for February, March and April. Many of the receipts are for periods of less than thirty minutes so are clearly not work related. There are twelve receipts for February, six receipts for March, and two receipts for April that appear to be related to a work day. The check-in times vary from 9:20 am to 1:45 pm, but the check-out times are almost all at 6:00 pm. Regardless of the check-in time, the daily rate for parking is $10.11.

The tenant testified that the construction work had a negative impact on her son. He has trouble getting to sleep and, as a result, needs to sleep in until 8:00 or 8:15 am. In addition, the tarps on the scaffolding were noisy during the windier days of the winter. As a result, he slept in her room throughout the project.

The tenant said that it was only at the end of the project that the site manager, in a conversation with her, mentioned that if they had known about her son's situation they could have delayed work on her side until after she and her son had left for school but no one said anything to him. The landlord and her lawyer pointed out that not once in the correspondence from the tenant did she say anything about her son's sleep requirements and ask for a later start time.

The parties agree that access to the interior of the unit was only made on a few occasions and each was with proper notice. The tenant's submission also states that the workers would inform her on individual occasions when they wished to access the side or back of the property.

Analysis

By the time the hearing concluded the tenancy had ended and the requests for various orders regarding the landlords' behaviour were no longer relevant.

The *Residential Tenancy Policy Guidelines*, available on-line at the Residential Tenancy Branch web site, provide succinct summaries of the legislation and the common law applicable to residential tenancies in British Columbia. Those guidelines will be referenced in the course of this decision.

Section 32 of the *Residential Tenancy Act* requires a landlord to provide and maintain residential property in a state of decoration and repair that:

- complies with the health, safety and housing standards required by law; and,
- having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The landlord's obligation is not limited to emergency repairs. Good landlords have a program of regular scheduled renewal; they do not wait until an emergency exists.

However, renovations and repairs are disruptive for tenants. The tension between the tenant's right of quiet enjoyment and the landlord's obligation to repair is set out in *Residential Tenancy Policy Guideline 6: Right to Quiet Enjoyment:*

> "It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however, a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations. . . .In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises and the length of time over which the situation has existed."

Residential Tenancy Policy Guideline 16: Claims in Damages also gives direction on the law that applies to situations such as this:

> "Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected."

Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement.

Guideline 16 sets out the criteria an arbitrator may consider in determining the amount of damages for loss of quiet enjoyment;

- The amount of disruption suffered by the tenant.
- The reason for the disruption.
- If there was any benefit to the tenant for the disruption.

- Whether or not the landlord made his or best efforts to minimize any disruptions to the tenant.

Whether renovations were to the interior or exterior of the building is irrelevant to this principle. The location and nature of the work is only relevant to the calculation of the reduction in value of the tenancy.

Section 7(2) requires any party who claims compensation from the other for damage or loss to do whatever is reasonable to minimize the damage or loss.

Much of the tenant's claim was grounded on the argument that she should have received a separate notice every time the workmen came onto the property and that the landlords' failure to do so was a violation of the legislation.

Section 29(1) states that a landlord must no enter a rental unit except in certain specific situations which include:

> "(a) the tenant gives permission at the time of entry or not more than 30 days before the entry; and
> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
>> (i) the purpose for entering, which must be reasonable;
>> (ii) the date and time of the entry, which must be between 8:00 a.m. and 9:00 p.m. unless the tenant otherwise agrees."

Section 28(c) of the *Interpretation Act* states that in an enactment words in the singular include the plural, and words in the plural include the singular.

As a result section 29(1)(b) should actually be read as follows:

> (b) at least 24 hours and not more than 30 days before the entry, the landlord(s)gives the tenant(s) written notice that includes the following information:
>> (i) the purpose(s) for entering, which must be reasonable;
>> (ii) the date(s) and time(s) of the entry, which must be between 8:00 a.m. and 9:00 p.m. unless the tenant(s) otherwise agrees."

When read completely, the section does not require a separate notice of entry for every entry; one notice may be given for multiple entries over the next 30 days, as long as the purpose for the entry is reasonable.

The landlords did provide a notice every month that set out the expected scope of work for the next 30 days. Although the notices did not give a detailed schedule of what the workmen would be doing on any particular day during the next month, they did let the tenant know that work was scheduled and an indication of the type of work that would be done. I find that the notices were sufficient for the purposes of the legislation.

The tenant said that the general nature of the notices given to her made it very difficult for her to plan their days and their activities. An example from her submission is illustrative of her representations:

> "Based on the Landlords' prior approach to only occasionally informing me of planned work with, at best, vague details and schedule, together with the fact that rear balcony work was mentioned in vague terms in on of the letters form the Landlord and counsel, I wake every day wondering whether I will emerge from my ensuite bathroom after a shower only to find a scaffold has now been erected to the balcony abutting the master bedroom north window, with contractors working inches from my bed, dressing area and walk-in closet, all of which is immediately visible to anyone on the rear balcony if the blinds aren't drawn on the window and the door to the balcony."

Three points must be made about this argument. First of all, that scenario never did happen. Secondly, the tenant's fear could have easily been mitigated (as required by s.7(2)) by closing the blinds before she went to bed and opening them after she was dressed in the morning. Thirdly, nothing prevented her from asking the workmen what was planned for the next few days.

The tenant's arguments about the uncertainty she lived with is in contrast to her evidence and submissions which stated that the workers schedule was 7:30 am to 10:00 am; coffee break; 10:30 am to 12:30 pm; lunch break; 1:15 pm to 4:30 pm; all of which points to the predictability of the workmen's schedule.

The tenant argued that the landlords did not arrange to have the work done as quickly as possible but the evidence does not support this view. Work on the project proceeded steadily and did not appear to be plagued with the "stop-and-go" work schedule encountered on many construction projects.

I find that even though the law does not require a repair to be an emergency before the landlord undertakes it, the evidence establishes that the landlords were required to make these repairs in order to maintain the unit's insurability. The insurance company would have been aware that the property was rented. It, and not the landlord, is the

party that assigned whatever weight was going to be given to that factor - which apparently was none.

I also find that the contractors did take steps to reduce the disruption to the tenant and this shows that they were aware that the unit was rented. I note that in all of the correspondence between the tenant and the landlord, or more particularly between their lawyers, that there was no mention of the special sleep requirements of the tenant's son. Anyone asking for an accommodation must let the other side know what is required.

I find that the tenant and her son were disrupted by this construction work and that the disruption consisted of the following:

- Having workmen at the home from 7:30 am to 9:00 am on weekdays. The workmen were gone before the tenant or her son returned home in the afternoons. According to the parking records, when the tenant went to the office she stayed until 6:00 pm and her son was in an after school program.
- Having to keeps the blinds on some windows closed between 7:30 am and 9:00 am on weekdays.
- Not being able to use her home office when the construction was going on.
- Lower levels of natural sunlight in the rooms blocked by the scaffolding. This was only a significant factor on weekends and holidays.
- Loss of the front balcony for 4.5 months. The balcony is 79 square feet which represents 4.1% (79/1928) of the total interior and balcony spaces on the top two levels of the home.
- Loss of privacy and additional noise on the weekdays that were school holidays.

I find that the reduction in value of the tenancy was greater than just the loss of use of the front balcony. Clearly some days were more or less disruptive than others but considered as a whole I find that the value of the tenancy was reduced by 20% for 4.5 months, or a total of $2250.00.

In coming to this conclusion I have considered the fact that although the tenant's records with regard to her parking expenses were not sufficient to support a claim for specific damages she did have to pay for parking whenever she was not able to work from home.

The landlord had submitted an affidavit from the neighbour who said that she works from home at least one day a week and did not find the construction noise disruptive to her work. However, that suggests that she regularly works away from home several

days every week, so tasks requiring quiet and/or concentration could be scheduled for those days. The tenant needed to be able to make similar arrangements.

The tenant's claim for aggravated damages is dismissed. *Guideline 16* sets out the circumstances in which aggravated damages will be awarded. It states that they are awarded only rarely and only when the person wronged cannot be fully compensated by an award for pecuniary losses. The tenant has been fully compensated for the loss of quiet enjoyment by a monetary award. Further, the circumstances in the case do not approach the type of situation in which aggravated damages would be considered.

As the tenant was at least partially successful on her application she is entitled to reimbursement from the landlords of the $100.00 fee she paid to file it.

Conclusion

For the reasons set out above a monetary order in the amount of **$2350.00** is granted to the tenant. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court.

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: October 14, 2016

Residential Tenancy Branch