Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT CNL-4M

Introduction

This hearing dealt with the joiner of 12 applications made by tenants of the same residential property pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- cancellation of each of the landlord's Four Month Notice to End Tenancy for Demolition, Renovation, Repair, or Conversion of Rental Unit (the "**Notices**") pursuant to section 49; and
- authorization to recover each applicant's filing fee for this application from the landlord pursuant to section 72.

The landlord was represented by counsel. The landlord was also represented by two agents: the President and the Vice-President of the company that owns the landlord (itself a corporate entity).

The tenants were represented by counsel. Tenants from units 204, 303, 403, 604, 701, 704, and 1204 attended the hearing.

In an interim decision dated February 27, 2020, I addressed the sufficiency of service of the tenants' materials. Neither side raised any further issues regarding service of documents at this hearing. Accordingly, I find that all parties were served with the required documents in accordance with the Act.

Preliminary Issue – Removal of Parties

At the start of the hearing, counsel for the tenants confirmed that two of the tenants (tenant RT of Unit 102 and tenant BR of Unit 203; file numbers 31061323 and 31061326, respectively) have withdrawn their applications. I dismiss their applications with leave to reapply.

Preliminary Issue – Expert Evidence

During the hearing, counsel for the tenants sought to call an expert witness to give his expert opinion on the renovation plans of the landlord. Counsel for the landlord objected, stating that she had no prior notice of this expert witness, and that no proof of his qualifications was submitted into evidence. She argued that the landlord would be

denied an opportunity to properly respond to the expert's evidence if he were permitted to testify.

Counsel for the tenants argued that there is no requirement under the RTB Rules of Procedure that the tenants give notice to the opposing side of the witnesses they intend to call at the hearing. As such, the expert witness should be permitted to testify, and any issue regarding the witnesses qualifications should go to the weight I assign to his testimony.

Tenants' counsel is correct: there is no requirement in the Rules that a party advise another of the witnesses intended to be called. However, the Rules are silent as to expert witnesses. Expert witnesses do not give direct evidence about the events underpinning the case. Rather, they review these facts, and provide their considered opinion. Their purpose is to assist the arbitrator in evaluating the evidence presented. It is not reasonable for a party to anticipate that the opposing party would call a specific expert witness, as it would be with witnesses generally.

Accordingly, I do not think it appropriate to permit the tenants to call an expert witness without providing the landlord any opportunity to respond with expert evidence of their own.

At the hearing, I suggested, and the parties agreed, that the expert witness be permitted to give evidence and be cross-examined, and that the landlord permitted to submit a rebuttal expert report after the hearing concluded. Both counsels agreed to proceed in this manner.

In response to the tenants' expert testimony, the landlord submitted a statement written by a director and officer of the general contractor hired by the landlord to undertake the renovations to the residential property on March 13, 2020, which I accept into evidence and have considered when writing this decision.

Issues to be Decided

Are the tenants entitled to:

1) an order cancelling the Notices;
2) recover their filing fees?

If the tenants are not successful in cancelling the Notices is the landlord entitled to orders of possession for each of the units, pursuant to section 55 of the Act?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties and their witnesses, not all details of their submissions and arguments are reproduced here.

The relevant and important aspects of the parties' claims and my findings are set out below.

The tenants are all residents of a 16-story residential property (the "**Building**"). No evidence was presented at the hearing regarding how long each of the tenants has occupied their respective rental units located in the Building or how much each of them pays in monthly rent. However, it is not disputed that all applicant tenants have tenancy agreements with the landlord to rent units located in the Building.

The Building was built in 1958. It contains 58 rental units. The land the Building is located on is currently not zoned for residential use and does not allow structures to reach the height of the Building. The Building has been grandfathered in the municipality's (the "**City**") zoning plans.

The Building is owned by the landlord, which, in turn is beneficially owned and managed by **RP Ltd** (full name of company on the cover of this decision). The landlord purchased the Building in 2016.

The landlord intends to conduct an extensive renovation project of the Building (the "**Project**"). Conflicting evidence was submitted by the landlord as to the length it is estimated the Project will take to complete, but the shortest estimate is 22 months. The renovations which comprise the Project include the following:

1) hazardous material (including asbestos and lead paint) abatement throughout the residential portion of the Building;
2) removal and replacement of existing plumbing systems throughout the Building, including the installation of a new mechanical room;
3) removal and replacement of existing electrical systems throughout the Building, including the installation of a new electrical room;
4) removal of existing boiler system and installation of a new energy efficient heat pumps for the heating and cooling of all units in the Building;
5) removal of existing suite windows to install energy efficient windows, and lowering of corner windowsills to allow windows efficient double glazed for installation of larger windows;
6) installation of new roof, including roof top condensing units to facilitate Variable Refrigerant Flow Fans and Heat Recovery Box system installation within suites;
7) seismic upgrading requiring structural renovation;
8) installation of a fire sprinkler system (which the Building currently does not have) throughout the Building to code, and replacement of the existing non-complying fire alarm system;
9) demolition of all existing interior walls and shafts and replacement and realignment with new sound attenuation and fire separation code requirements. Reduced mass of interior walls further directed to reduce seismic load;
10) replacement of all suite kitchen and bathroom fixtures;

11) installation of new insulation to interior of all exterior walls in compliance with building code;
12) the subdivision of the current penthouse suite into three separate units;
13) replacement of existing elevators and modernization of Building elevator system; and
14) construction of a new Commercial Retail Unit at street level.

On November 22, 2019, the landlord served the tenants with the Notices. The tenants do not allege any deficiency with the contents or the service of the Notices.

Each of the Notices state that the tenant's tenancy is being ended to perform renovations or repairs that are so extensive that the rental unit must be vacant. They indicate that the rental unit will need to be vacant for 26 months to complete renovations. Attached to each Notice was an appendix setting out the renovations (listed above) that form part of the Project, a development permit, and a building permit. The Notice indicated that the landlord had obtained all permits necessary to undertake the renovations.

The tenants each applied to dispute the Notices within 30 days of them being served.

The tenants dispute the Notices on the basis that:
1) the landlord does not have all necessary permits and approvals required by law to undertake the Project;
2) the renovations required for the Project are not so extensive as to require the rental unit to be vacant;
3) the tenants are willing to accommodate the landlord by temporarily relocating, so termination of the tenancies is not necessary; and
4) the landlord lacks the good faith requirement of section 49(6)(b) of the Act.

I will address each of these grounds in turn.

1. Permits

The landlord has obtained three permits required to commence the Project:
1) a Development Permit
2) a Building Permit; and
3) a Street Use Permit.

(collectively, the "**Permits**")

The landlord admitted that it does not have every single permit necessary to complete the Project. It does not have any trades permits, as only the various tradespeople, and not the landlord, can obtain these permits, and they cannot do so until work on the Project is underway.

The landlord provided several written witness statements in support of its application.

In his statement dated February 14, 2020, the project manager overseeing the Project ("**GS**") wrote:

> [RP Ltd] currently has all permits it may obtain from the City […] for the Project and which it requires to perform the work contemplated for the Project. Other permits, such as electrical, sprinkler and plumbing will be obtained by the individual sub trades responsible for the permitted scope of work as they arrive on-site as required by standard industry practice and the City […].
>
> The current permits allow for [RP Ltd] to commence and advance the construction work to the point of requiring vacancy of the residential units as set out above, including shutting off services to the residential units, demolition of interior walls, removal of electrical servicing from residential units.

In his statement dated February 13, 2020, the principal of an engineering company retained by RP Ltd to prove Certified Professional and Code Consultant services for the Project ("**MJ**") wrote:

> In addition to being the Code Consultant on the Project, I am also the Certified Professional under the Building Permit. As the Certified Professional I interfaced with the City to obtain the Building Permit and oversee construction on site acting on behalf of the City. I can confirm that work could have commenced immediately following the issuances of the Building Permit on October 25, 2019. Work has been delayed due to tenants being present.
>
> I have reviewed the Building Permit and the Street Use Permit, […], and discussed the construction planned for the Project commencing April 1, 2020 with [the construction and project management companies] and confirm that service shut off to individual suites, demolition of interior walls, removal of electrical servicing from residential units, and hazmat abatement require vacancy of the Building above the main floor before construction could safely proceed as scheduled under the current permits.

And in the expert report I permitted to landlord to provide after the hearing (see *Preliminary Issue – Expert Evidence* above), the director of the general contractor retained by the landlord for the Project ("**MM**") wrote:

> To the best of my knowledge, the [hazardous materials abatement] and interior wall demolition can be performed on the basis of the building permit and development permit currently issued by the City […], without further trade permits.

The landlord submitted that Permits are all that are necessary to conduct the hazardous materials abatement, demolish the interior walls of the rental units, shut off electrical

power to the rental units, and remove the electrical servicing to from the rental unit. It argues that this work alone necessitates vacant possession of the rental units, and as such, the Notices should be upheld.

In support of this position, the landlord cited *Aarti Investments Ltd. v Baumann*, 2019 BCCA 165, in which the court, at para 46, held:

> It may be reasonable for an arbitrator to find s. 49(6)(b) is satisfied where a landlord has all the necessary permits to do enough work to require vacant possession, even if the landlord intends to do more extensive work for which it has not obtained permits. It may also be reasonable for an arbitrator to find s. 49(6)(b) is satisfied where a landlord had the necessary permits at the time of the Notice to End Tenancy but must renew them. An arbitrator cannot, however, waive or ignore the statutory requirement by issuing an Order of Possession under s. 49(6)(b) if the Landlord is not authorized and permitted, at the time it serves the Notice to End Tenancy, to conduct at least such work as will necessitate obtaining vacant possession.

The tenants argued that the landlord should not be able to rely on the fact that it or RP Ltd is unable to obtain the trades permits themselves, and that these can only be obtained by the tradespeople. They argued that the tradespeople are either the employees or the agents of the landlord, and that the requirement that they have permits is one and the same as the requirement that the landlord has a requirement to have those permits.

Secondly, the tenants argue that the work the permits currently obtained by the landlord allow the landlord to undertake does not require vacant possession of the rental unit by the landlords.

2. Necessity for Vacant Possession

The tenants submitted that the landlord only has permits to undertake the hazardous materials abatement and the demolition of the interior walls. As such, they argue, it is not appropriate to consider whether any of the other renovations forming part of the Project require vacant possession of the rental unit. Per *Aarti Investments*, in order to assess the validity of the Notices, an arbitrator must only consider whether the work authorized by the permits in hand at the time the Notices were issued require vacant possession.

The tenants argued that vacant possession of the Building is not required to undertake the hazardous materials abatement or the interior wall demolition. The tenants did not challenge the amount of time the landlords allege the Project would take to complete (22 months). Rather they argued that the renovations required did not need to be done to all units in the Building at the same time. They argued that this work can be done on a rolling basis, that it would not take a significant amount of time, and that the tenants

whose rental unit are undergoing the rolling renovation could relocate for the short period of time the renovations are being made (this last point is discussed in greater detail below).

The tenants heavily rely on the testimony of their expert witness for the proposition that the abatement and interior wall demolition could be done in a short period of time, and on a rolling basis.

a. Expert Witness – BT

The tenants called a contractor ("**BT**") to give expert evidence. BT is a red seal carpenter for 30 years and BT owns a contracting company ("**AC Inc**"). AC Inc renovates high-end homes and hotels. He testified that when renovating hotels, it is not necessary to shut down the entire hotel to complete the renovations. He testified that AC Inc has conducted a substantial renovation of a hotel in Whistler which required all rooms to be "gutted". This involved the removal of all furniture (including cabinetry) from the rooms and the removal of tiles and carpets. In some circumstances interior walls would be removed. The walls would then be primed and wallpapered, the floors tiled and carpeted, and new cabinetry installed.

BT testified that AC Inc can renovate 40 rooms per week in this manner. BT testified that it would take about a week to renovate a two-bedroom unit, including "redoing" the kitchen and bathroom and relocating interior walls.

BT testified that renovations such as this can be done in phases, staring work on the top floor of one wing of the hotel, while the other floors and wings remain open, and proceeding on a floor-by-floor, wing-by-wing basis.

BT testified that while the hotel was being renovated plumbing services were disconnected to the floors being worked on but would not affect the other floors on the hotel.

BT testified that the presence of hazardous materials such as asbestos-laced glue or caulking would not slow down the renovation process much and that it is "not that big of a deal". He testified that units are "bagged and protected inside" if a single unit is being renovated, or, if multiple units are being done at one time that the corridor is "quarantined and contained". He estimated that a hazardous materials abatement of an entire floor would take a week. He testified that if he were conducting a renovation that required an abatement, he would work floor-by-floor, conducting the abatement first, then the renovations, before proceeding to the next floor.

On cross-examination, BT testified that he does not have any experience working with concrete residential buildings built in 1950s. He testified that the Whistler hotel AC Inc worked on was concrete and was built around 2000 or 2004.

BT testified that he has not seen the Building, he does not know anything about it, and that he cannot give any evidence about the Building specifically. He testified that he does not think there is any difference between renovating a hotel and an apartment building.

BT testified that the renovation of the Whistler hotel did not involve the removal of any interior walls or the installation of a sprinkler system. He testified that AC Inc installed sprinklers in another hotel, but that that job did not require the demolition of interior walls. BT testified that he has never worked on an installation of a sprinkler system in a building with masonry walls (as is the case with the Building).

The tenants also relied on the testimony of tenant CL, a tenant of the Building since June 2004 and the manager of the Building from June 2011 to June 2016, when the landlord purchased it.

b. Testimony of Tenant CL

CL testified that in March 2016, one of the units in the Building underwent an abatement for black mold. She testified that the then-owner of the Building housed the tenant whose unit was being abated in a hotel for five to six days while the abatement process was completed.

CL gave evidence regarding the steps taken in the abatement of black mold, and how the unit was prepared for the abatement. All-told, she testified the preparation and abatement process to nine or ten days.

CL also testified that a building adjacent to the Building had all the exterior windows on one side of the building replaced. She testified that, to her knowledge, none of the tenants of that building were evicted to undertake the renovations. She testified that she did not have any role in the work being done on this building and was “simply a tenant that watched what was going on”. She testified that the basis for her knowledge as to the details of the window replacement is two residents who lived in that building and social media.

CL testified that, in 2007, the prior owner of the Building consented to her removing an interior wall in her rental unit. She testified that she removed the wall, installed a new countertop and had electrical light fixtures and pot-lights installed. She testified this took three days. On cross-examination, CL admitted that she had not obtained a permit to do this work (she testified that the owner did not require one) and that she did not get a hazardous material assessment.

CL testified that interior walls were removed, and various renovations of individual units were undertaken during the time she lived at the Building. She testified that the elevators were “overhauled” in December 2011.

CL also testified that the Building has undergone major renovations, but that she did not have first-hand knowledge of them. She testified she had interviewed some tenants who had resided at the Building since 1981, one of whom advised her of a "huge plumbing overhaul" in 1990, which lasted six or seven months. She testified that the then-owner replaced the bathroom and kitchen water lines going into each suite.

CL testified that after the landlord purchased the building, RP Ltd undertook significant elevator repairs starting in April 2018 and ending in July 2019. She testified the elevator shaft was replaced in May 2018, and that the elevators were out of service from May 3, 2018 to the end of May 2018, and on August 23 and 24, 2018. She also testified that from October 1, 2018 to the end of March 2019, one elevator was inoperable, and that on several occasions during this time the other elevator was not in service either.

CL testified that no tenancies were terminated because of any of the work described above, notwithstanding the disruption to the tenancies each these instances of work posed to the tenants.

On cross-examination, CL testified that none of the aforementioned renovation work involved asbestos remediation. She testified that she worked for an occupation hazard company which dealt with hazardous material remediation for three or four years, and she was in charge of administration, accounts receivable, and putting together quotes. However, CL testified that she has never been involved in a hazardous materials abatement project at the Building similar to the scope required for the Project.

c. Landlord's Response

The landlord disagreed that the Permits only allow the hazardous materials abatement and the interior wall demolition. It submitted that it is also permitted to shut off services to the rental unit and remove electrical servicing from the rental units.

The landlord asserted that vacant possession is required to undertake the Project, and for the renovations currently allowed by the Permits. In support of this, it cited RTB Policy Guideline 2B which states that "full interior wall and ceiling demolition" "likely requires vacancy" and that a "full rewire of the rental unit" and fire sprinkler installation/replacement" "may require" vacancy. I note that while the Permits may allow for the removal of electrical services, they also require than an "Electrical Permit" and "Sprinkler Permit" be obtained prior to completion.

The landlord also submitted a rebuttal report to BT's testimony (see above) which was prepared by MM. In it he wrote:

> The [Building] must be vacant during the abatement for the following reasons (which are not exhaustive):
>
> a) All suites and hallways will be stripped to bare concrete structure during the abatement;

b) because of the shaft and services abatement, the re-piping project requires the total removal of the plumbing system, which means there will be no running water to any of the suites for a period of 14+ months as the services will be abated and new services will be run from the new mechanical room which will be installed in the parkade;
c) there will be no storm lines (carrying rainwater) or sanitary lights (carrying all toilet, sink, shower water) to carry toilet, sink and shower water to city sewers for a minimum of 7+ months;
d) there will also be no HVAC system to provide fresh air/cooling to common corridors for an extended period of time;
e) the exterior windows of the building will be removed and replaced over an extended period of time.

It is not possible to perform the abatement on a per-unit or per-floor basis since a per- unit or per-floor plan, leaving some units occupied, has the potential of exposing occupants who remain in the [Building] to hazardous materials through the HVAC system, which is not responsible or safe.

It is my opinion as a construction professional that it would not be safe or responsible to perform the abatement while any part of the [Building] remained occupied. [The general contractor] would not take on the Project if the [Building] or some part of it was going to remain occupied as I believe that we would be jeopardizing the health and safety of those residents.

The landlord argued that conducting the renovations in phases is not practical or safe. In his statement, GS wrote:

The Project is currently not phased due to safety concerns and in order to take advantage of efficiencies of scale, timing in the completion of the work, and to mediate the hazards to occupants and workers. Phasing of the work would significantly slow down the Project, increasing the estimated Project time to 32 months, with a significant increase in associated cost to the Reliance. Phasing the work could reduce the time each unit would be required to be vacant if services could be reconnected during construction, which is not believed to be feasible at this time. This would however not eliminate the requirement of multiple periods of individual unit vacancy for extended periods of time.

Based on input from design professionals, contactors and sub-contractors it has been concluded that the project cannot be phased in a safe and practical fashion that would provide the required level of safety and protection to workers and occupants. Commencing the Project as a single build reduces the possibility that the unforeseen issues which arise on projects of this nature will impact occupied units, resulting in their need to vacate the Building on short or no notice for health and safety reasons.

[emphasis added]

As such, the landlord argued the vacancy is required of the entire Building to complete the project.

3. Tenants Willingness to Relocate

a. Tenants' Position

The tenants argue that if vacant possession is necessary to complete the Project, they are willing to temporarily relocate while the Project is completed. As such, termination of the tenancy agreements in not necessary. They rely on *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257, in which the court states:

> [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.
>
> [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.

The tenants, in a letter dated August 7, 2018, offered to "take any and all necessary steps to accommodate RP Ltd to ensure that the renovations can be completed notwithstanding the continuation of the respective tenancies. We are even prepared to completely vacate out respective units for the portions of the renovations during which vacant possession is necessary."

The tenants allege that the landlord refused to entertain this option and refused to consider the possibility of preserving the tenancies while completing the Project.

b. Landlord's Position

The landlord argued that an offer to relocate by the tenants to preserve the tenancies is not a relevant factor to consider when assessing the validity of the Notices. It argued that the circumstances in *Berry and Kloet* are significantly different from the present circumstances, as the period of relocation in *Berry and Kloet* was brief (three days) rather than the 22 months required in this case to complete the Project.

Additionally, the landlord argued that *Berry and Kloet* is no longer good law, as it was decided under a previous incarnation of the *Residential Tenancy Act* and jurisprudence has developed since it was written. The landlord cited *Aarti Investments* in which the court unanimously states:

> [29] In the case at bar, the chambers judge, similarly, considered it to be an error for the arbitrator to fail to consider the Tenant's evidence she could vacate the premises and find alternate accommodation while repairs or renovation were effected. In my view, for the following reasons, the arbitrator's failure to address that evidence was not a reversible error.
>
> [30] The chambers judge's conclusion is implicitly based on the proposition that whether the renovation is consistent with continued tenancy hinges upon the tenant's willingness to return to the premises, even if the tenant is out of possession for months. If accepted, this view would replace the question posed by the *Act*: whether, objectively, the repairs or renovation are such that they reasonably require vacant possession, with another: whether the tenant is prepared to return after giving up vacant possession. In my view the plain wording of the *Act* does not support that interpretation. Neither precedent nor common sense require the arbitrator to expressly deal with the evidence the Tenant in this case was willing to find alternate accommodation for the duration of the work.
>
> [31] In *Berry and Kloet*, there was no dispute the repairs could be effected quickly. The tenant's willingness to accommodate the work in that case was evidence going to the question whether, objectively, the repairs required vacant possession. The chambers judge found the arbitrator's decision irrational insofar as it permitted a landlord to terminate a tenancy "because a very brief period of emptiness was required": para. 27.
>
> [32] There was evidence in this case of the intention to effect extensive repairs over months. The repairs are described in detail in the decision. It was open to the arbitrator to conclude those repairs, objectively and reasonably, required vacant possession. The critical issue was addressed. There was no probative evidence contradicting the arbitrator's decision. The arbitrator's conclusion the statutory requirement was met would only be undermined by the failure to expressly address the Tenant's evidence if it were open to the court to tie the RTB's hands with a restrictive reading of the *Act*. In my opinion it is not.

[emphasis added]

The landlord argued that the Act now (unlike when *Berry and Kloet* was decided) provides a mechanism for a tenant to move back into the rental unit when renovations are completed. Section 51.2 creates a right of first refusal for a tenant whose tenancy is terminated pursuant to section 49(6)(b) (as the tenancies in this case were). The landlord submitted that by creating this right of first refusal, the legislature has specifically not taken the step to require that a tenancy be maintained through the time when vacant possession of a rental unit is necessary.

The landlord argued that the creation of the right of first refusal, the holdings of the Court of Appeal in *Aarti Investments*, and the fact that the Project will take 22 months to complete all support its position that the fact that the tenants are willing to relocate is not a relevant factor to consider when determining if the Notices are valid.

4. Good Faith

The tenants alleged that the landlord did not issue the Notices in good faith. They do not dispute that the landlord intends to undertake the Project, but rather they assert that the landlord has "dishonest and ulterior motives" in issuing the Notices, namely that the landlord desires to end the tenancies so as to be able to rent out the rental units at a higher rate once the Project is complete.

a. Landlord's Position

The landlord denied that it possessed any ulterior motive when issuing the Notices. It asserted that the Project is required to prolong the useful life of the Building. The President of RP Ltd ("**JS**") provided a statement made in February 2020, in which he wrote:

> [RP Ltd] has undertaken the Project as the Building is coming to the end of its useful life an in order to increase the service life of the Building as viable rental housing […]. The Project will restore durability of the Building by upgrading services to the rental Units, including heating and cooling, seismic and fire safety systems, and by increasing the livability of the existing Units through the installation of larger energy efficient double glazed windows and demolition of the Units' interior walls for installation of new service and fire safety systems.

The landlord argued that the Project represents a significant capital investment in the Building, that will take many years to fully pay off.

The Vice President and Chief Operating Officer of RP Ltd ("**LL**") provided a statement dated February 21, 2020, in which she wrote:

> The Building was acquired by [RP Ltd] in 2016 with an understanding that it would require significant renovations in order to be maintained as rental housing. However, the scope of the Project, originally budgeted at $8 million, has subsequently been determined to be approximately $30 million due to site conditions being worse than originally expected.
>
> [RP Ltd] will pay for the Project with a loan, which will be amortized over 30 years. This means it will take 30 years to pay for the Project, and [RP Ltd] will pay significant interest on the cost of the Renovations in the interim period.
>
> In considering the import of the Project on the financial performance of the Building, [RP Ltd] has determined that the Project will result in a reduction of the net taxable revenue generated by the Building in the range of $1 million, even if the post-Project unit rents rise to market levels.
>
> In short, we anticipate that the renovations will depreciate the financial performance of the Building in the short and medium term, [RP Ltd's] income from the Building would be better protected by not undertaking the Project and leaving the current tenancy agreements in place.
>
> The renovations are being undertaken to protect the viability of the Building in the long-term as rental housing.

The landlord denied that it issued the Notices to allow it to be able to charge higher rent on the rental units. It admitted that some (non-party) tenants vacated the Building when the Project was announced, and that the landlord has re-rented these units out, at market rates, on short-term bases in the period leading up to the start of the renovation work to help offset the cost of the Project. The landlord submitted that this is "evidence of prudent financial practices" and its efforts to offer housing units consistent with the expectations of the City. It denied that such conduct indicates an ulterior motive.

In a supplement statement made in February 2020, JS elaborated on this practice:

> During the course of the planning for the renovations, [RP Ltd] was obligated by the [City] to make a Tenant Relocation Plan. One aspect of [RP Ltd's] Tenant Relocation Plan was to offer tenants financial compensation over and above [RP Ltd's] legal obligations to enter into mutual agreements to end tenancy. Many tenants at the Building have accepted the compensation. Some tenants have decided to move out into new accommodations well before the renovations were scheduled to begin, leaving units at the Building empty.
>
> In order to provide housing to the [City] community and off-set the financial impact of the renovations, [RP Ltd] has offered vacant units in the Building on a short-term basis at market rents. It is my understanding based on discussions with housing

> staff at the [City] that the City expects [RP Ltd] to do so in order not to keep units out of the market while they could be occupied.
>
> We did not ask any tenant to leave early in order to increase rent. We did facilitate tenants who wish to leave before the scheduled end of their tenancies by providing full compensation packages and other support pursuant to our Tenant Relocation, as gestures of goodwill and to provide tenants choice and control their tenancies.
>
> Tenants leaving before their tenancies were scheduled to end and has had a negative rather than positive impact on the financial performance of the Building, and it has been our preference to maintain tenancy agreements until very shortly before the renovations were scheduled to begin. Another words, offering vacant units at market rent on a short-term basis for the renovations has not been profitable and was not a motivation to end any tenancy or to plan the renovations.

The landlord denied that failing to enter into an arrangement with the tenants whereby they could temporarily relocate during the Project, and then return when it was completed, indicated an ulterior motive. The landlord argued (as stated above) that they have no obligation to enter into such an arrangement under the Act, and that, as the Project is estimated to take 22 months to complete, the tenancies must end.

The landlord argued, citing *Berry and Kloet* at para 27, that the purpose of the Act is to "balance the rights of tenant and landlords". It submitted that this includes the right of the landlord to determine how it wishes to deal with its property. It conceded that RP Ltd does anticipate receiving higher rents after the rental units are re-rented following the completion of the Project. However, the landlord argued that this is a *consequence* of the renovation, and not a *motive* for undertaking the Project. It argued that this should not constitute an ulterior motive for the purposes of the Act, and cited RTB Decision 2050 made March 4, 2013, in which a tenant disputed a notice to end tenancy to renovate the rental unit, the presiding arbitrator held:

> In addition, given the very substantial cost of doing the work [approximately $60,000 per unit], I find the status quo would have been the path of least resistance for the landlord if the needed work had not been driven by structural threats to the building resulting from water intrusion.
>
> While the higher rent may be a consequence of the landlord's renovation program, I find it is not an ulterior motive.

b. <u>Cross examination of JS</u>

Tenant's counsel cross-examined JS during the hearing. JS testified that the Building was not purchased on the basis of what amount per square foot of rental unit RP Ltd anticipated to earn. Rather, he testified it was purchased on the basis of its strong location and being an overbuilt building. He testified that, at the time of purchase, the

renovations RP Ltd believed would have been necessary to the Building would not have necessitated any vacancy of the rental units.

The tenants' lawyer referred JS to a newspaper article dated September 26, 2018, in which JS was quoted as saying:

> The Building is currently unprofitable because the previous landlord had owned the Building for decades, did little maintenance on the Building and didn't increase rents at the maximum allowable increase.
>
> Being able to charge market rents for all of the units, around 1,500 for a 500 square foot one bedroom, is the only way to make the Building economically feasible.

JS confirmed that he said this but denied that this meant the landlord issued the Notices so as to be able to obtain market rent.

JS testified that many of the non-structural components of the Building are becoming unsustainable and unmaintainable. He testified that this included the Building's exterior windows. He testified that, to his knowledge, the windows have never been replaced, which would make them over 60 years old. JS confirmed that the windows were being replaced because they were inefficient, and that, as a result, the heating costs of the Building are increased. JS confirmed that the tenants' tenancy agreements include the cost of heating the rental units. JS confirmed that a deficiency in the windows causing heat loss means that the units cost more to heat every month.

JS denied that the windows were being replaced for the purpose of reducing the landlord's expenses. Rather, he reiterated that the windows were at their end of their useful life, and that they are "highly non-compliant with current building codes and standards."

JS testified that the City required the RL Ltd update the sprinkler systems and make seismic upgrades as a requirement of obtaining the Building Permit. The scope of the Project was changed to incorporate these requirements in 2019. He testified that the interior walls must be removed in order to be able to install the sprinkler system.

JS testified that even without the requirement to install a sprinkler system or make seismic upgrades, the scope of the Project necessitated vacant possession of the rental units. JS admitted that, at one time (he did not specify a date), RP considered making the required renovations to the Buildings five floors at a time, but that this approach was later abandoned when the extent of the hazardous materials contamination was discovered. He testified that RP Ltd relied on their experts in coming to this conclusion.

JS confirmed that all of the various renovations being done as part of the Project are "so intertwined that they can't be done one at a time". He elaborated:

> It's actually not that alone. It's the fact that the suites will be unoccupiable. You can't occupy a suite that has no -- that has had a big hole cut in the side of the building or you can't -- it has no fixtures or finishes or cabinets or plumbing fixtures or electrical service or plumbing -drainage or plumbing water service. And you can't -- you certainly can't occupy a suite that's in the middle of being abated.

c. Tenant's Position

As stated above, the tenants argued that the landlord possess the ulterior motive of issuing the Notices in order to be able to rent the rental unit out a higher rate upon completion of the Project.

The tenants argued (and the landlord did not dispute) that the landlord bears the onus to show that it does not possess an ulterior motive, rather than the tenants bearing an onus to prove that the landlord does possess one.

The tenants argued that, based on JS's statements made in the newspaper article, the landlord knew that the Building was unprofitable when it was purchased, and knew that the only way to make it profitable would be to increase the rental price of the units to a market rate. The tenants argue that the landlord failed to explore options which would allow the tenants to remain in their rental units, and this indicates that the landlord has failed to act in good faith when issuing the Notices.

Analysis

The Notices are issued pursuant to section 49(6)(b) of the Act, which states:

> (6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
>
> […]
>
> (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;

As stated by the tenants, the landlord bears the burden of proof in this application to show that the Notices are valid. The basis for this is set out at Rule of Procedure 6.6, which states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

I will examine each of the bases on upon which the tenants dispute the Notices in turn.

1. Permits

It is not disputed that the landlord does not have all permits necessary to complete the Project. However, the landlord argued that this is not necessary. Rather, it argued that all that is necessary to satisfy section 49(6)(b) is that it have the necessary permits to perform repairs or renovations that require vacant possession of the rental units. The landlord relied on *Aarti Investments* for this proposition, in which the court finds that such an interpretation may be reasonable.

It is common ground that the Permits allow the landlord to demolish all interior walls in the Building and to conduct the hazardous materials abatement. There is some dispute as to what other work the Permits allow for. However, it is not necessary for me to make a determination on this issue.

I find that while the walls are being removed and the abatement is being undertaken in a particular rental unit, the tenant of that rental unit must vacate. To find otherwise would deny common sense; I cannot see how a tenant could live in a rental unit that has no interior walls and is sealed off to contain hazardous materials within it.

The tenants argued that the Building need not be vacated entirely at any one time, and that the renovations can be done on a rolling basis, over a shorter period of time (I will address this argument shortly).

On the undisputed evidence, I find that the Permits allow the landlord to remove the interior walls and to conduct the hazardous materials abatement. I find that, should such work warrant vacant possession of the rental units, that the scope of the renovations authorized by the Permits is sufficient to satisfy the requirement of section 49(6)(b). I find *Aarti Investments* persuasive*,* and I come to this conclusion on the basis that, if the Notices were issued to conduct a hazardous materials abatement only (and that abatement required vacant possession), the landlord would possess the required permits to undertake that work, and the landlord would have satisfied the permit requirement of section 49(6)(b).

As such, I do not need to address the tenants' argument the permits only attainable by tradespeople should be required, as the tradespeople are employees or agents of the landlord.

I find that the landlord has discharged its evidentiary burden to show that it has satisfied the permitting requirement of section 49(6)(b).

2. Vacant Possession

The landlord has provided several written statements in support of its assertion that vacant possession of the entire Building is required in order to complete the Project. I accept the evidence in MM's written statement (set out above) as to why vacant possession is required generally. The landlord also submits that the renovations cannot be done on a unit-by-unit or floor-by-floor basis, as it would be unsafe due to the hazardous materials in the Building.

I do not understand the tenant to dispute that hazardous materials exist in the Building, that abatement is required, or that, while the interior walls are removed, the rental units cannot be occupied. Rather, I understand their position to be that the Project can be done on a unit-by-unit or floor-by-floor basis, which would significantly reduce the amount of time needed to complete the work in each of the units. The tenants rely on the testimony of BT for this proposition.

I do not find BT's evidence to be persuasive insofar as it pertains to renovations to be undertaken as part of the Project. By his own admission, BT has not seen the Building, does not know anything about the Building, and cannot give any evidence about the Building specifically. He testified he has never worked on a building of the age and same materials of the Building.

Accordingly, I do not find BT's evidence useful in persuading me that the evidence tendered by the landlord (that a phased renovation is unsafe) is incorrect. MJ, GS, and MM all provided evidence that vacant possession of the entire Building is required to undertake the Project. They are all familiar with the Building and the Project. I find that they are in a better position to give evidence as to the specific requirements of the Building than BT.

With respect to BT, I accept that, in some instances for some buildings, it is possible to conduct a renovation or an abatement on a floor-by-floor basis at the pace he testified possible. However, without any familiarity on his part with the Building, I cannot accept his evidence that such a process and pace would be feasible in the Building.

Additionally, I accept CT's evidence that in the past, the prior owner of the Building has undertaken renovations without evicting any tenants. However, I do not find this to be of particular relevance to the case at hand. The renovations described by CT were smaller in scope than the Project and did not impact the same number of tenants as the Project does.

I find CT's evidence with regards to the window replacement project of the neighboring building to be of little probative value. Her evidence was second-hand and lacked particulars such as the scope of the renovations, whether any hazardous materials were discovered, and the length of time the renovations took, to be of assistance to draw parallels between it and the Project.

As such, the written statements of MJ, GS, and MM are the most probative evidence I have regarding the necessity of the landlord requiring vacant possession of the entire Building to undertake the Project as a whole, and the hazardous materials abatement specifically. These statements indicate that vacant possession of the Building is necessary.

As such, I find that the landlord has discharged it evidentiary burden to show that vacant possession of the Building is required.

3. Tenants Willingness to Relocate

The landlord argued that the willingness of the tenants to relocate for the duration of the Project is not a relevant factor to consider when assessing the validity of the Notices.

The tenants argued that *Berry and Kloet* requires that their willingness to relocate be considered.

The landlord conceded that the court in *Berry and Kloet* states this is a relevant factor, but argued that it is no longer applicable, as:

1) at the time *Berry and Kloet* was decided, the Act did not contain a right of first refusal provision that the tenants could take advantage of; and
2) *Aarti Investments*, decided under the current version of the Act, explicitly states that the tenants' willingness to relocate is not a relevant factor.

I find the reasoning in *Aarti Investments* to be persuasive:

> [30] […] If accepted, this view would replace the question posed by the *Act*: whether, objectively, the repairs or renovation are such that they reasonably require vacant possession, with another: whether the tenant is prepared to return after giving up vacant possession. In my view the plain wording of the *Act* does not support that interpretation. Neither precedent nor common sense require the arbitrator to expressly deal with the evidence the Tenant in this case was willing to find alternate accommodation for the duration of the work.

Additionally, *Berry and Kloet* involved repairs which could be effected quickly, whereas *Aarti Investments* involved repairs which would take months to complete. The Project is estimated to take 22 months to complete.

I find *Aarti Investments* to be more applicable to the present facts than *Berry and Kloet*, given the duration of the Project and that the tenants have the benefit of the right of first refusal. Additionally, I agree with the court in *Aarti Investments* that the plain wording of the Act does not support the position that a tenant's willingness to temporarily relocate is a factor to consider when determining in a landlord complied with section 49(6).

As such, I find that the tenants' willingness to relocate is not a relevant factor for me to consider when determining the validity of the Notices.

4. Good Faith

RTB Policy Guideline 2B considered good faith in the context of notices to end tenancies. It states:

> In *Gichuru v Palmar Properties Ltd*., 2011 BCSC 827 the BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith: *Baumann v. Aarti Investments Ltd*., 2018 BCSC 636.
>
> Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement.

As stated above, the landlord bears the burden to prove that it acted in good faith when issuing the Notices. The tenants submitted that the landlord issued the Notices with the ulterior motive of ending the tenancies so it could re-rent them at a higher rate. Accordingly, the landlord must prove, on a balance of probabilities, that this is not the case.

I must first note that, despite my request at the hearing, no evidence was provided as to how much monthly rent each of the tenants pay. However, it was common ground during the hearing that the tenants are currently paying rent at a below-market rate.

The landlord did not deny that once the Project is completed it will likely be able to re-rent the rental units at a higher rate than the tenants are currently paying. Rather, it argued that this was not a consideration or a motivating factor when issuing the Notices.

JS testified that that the Project was undertaken to increase the service life of the Building as viable rental housing. The Building is 62 years old. The evidence indicates that it does not meet the current municipal building codes. There is no sprinkler system. It requires seismic upgrades. The windows are original to the Building. It contains asbestos and lead paint.

The evidence provided by the landlord supports the position that the Building requires significant renovations. The tenants produced no evidence to challenge the necessity of the renovations (as stated above, they have only challenged the manner in which the Project would be done).

The landlord asserted that it has not previously attempted to increase the rent of the tenants in breach of the Act or threatened to evict any of the tenants if they did not agree to a rent increase in excess of what the Act permitted. There is no evidence before me to suggest that the landlord has attempted to improperly increase a tenant's rent in the past.

The tenants assert that the Project is being undertaken, in part, in order to allow the landlord to charge higher rents. They argue that this was the landlord's intention since it purchased the Building in 2016. In support of this, the tenants cited JS's statements quoted in a newspaper in 2018, where he stated:

> The Building is currently unprofitable because the previous landlord had owned the Building for decades, did little maintenance on the Building and didn't increase rents at the maximum allowable increase.
>
> Being able to charge market rents for all of the units, around $1,500 for a 500 square foot one bedroom, is the only way to make the Building economically feasible.

I note the two years distance between this quote and the date the landlords purchased the Building. I have no information as to when this quote was made, but I find it is more likely to have been made contemporaneously with the writing of the newspaper article, than with the purchase of the Building. As such, I find that it provides insight as JS's thought process in 2018, and not when the landlord purchased the Building in 2016.

LL's evidence was that, at the time the Building was purchased, the landlord understood the Building required $8 million in renovations. I am not sure what the estimated cost was at the time JS gave the above-mentioned quote.

I do not understand JS's quote to indicate that landlord was motived to issue the Notices to increase the rent. Rather, I understand the quote to mean that the cost of conducting the required maintenance on the Building (again, I am unsure how much, but it was at least $8 million on LL's evidence) causes the Building to be unprofitable. I understand the second part of JS's quote to refer to the financial reality of the cost of making required maintenance.

It would seem that the path of least resistance for the landlord would be to not undertake a $30 million renovation of the Building, and rather allow the Building to passively generate income. I accept the evidence of LL that the landlord's income from

the Building would be better protected by not undertaking the Project and leaving the current tenancy agreements in place. I accept that that the Project will depreciate the financial performance of the Building in the short- and medium-term and is being undertaking by the landlord to protect the long-term viability of the Building.

I do not find the fact that the landlord re-rented vacant units at market rates following some occupants of the Building vacating pursuant to the landlord's Tenant Relocation Plan to be an indicator that the Notices were issued for an ulterior purpose. I accept JS's explanation as to why the landlord undertook this practice. I accept his uncontroverted evidence that such a practice has not been profitable, and was not a motivation to issue the Notices or undertake the Project.

Additionally, I am not persuaded that the landlord's refusal to enter into an agreement to allow the tenants to temporarily relocate is evidence of the landlord's ulterior motive to end the tenancies so as to increase rents.

As stated above, I do not find that this is a relevant consideration when assessing the validity of the Notices, as to do so would read into the Act a condition which is not present. The argument that the rejection of a proposal for a tenant to relocate indicates a lack of good faith functions to shunts this requirement from one part of the section 49(6)(b) analysis (necessity of vacant possession) to another (good faith). This is not appropriate.

The Act permits the landlord to end the tenancies if it meets the criteria set out at section 49(6)(b). If I were to accept the tenants' position, that the good faith requirement cannot be met if the landlord refuses to allow the tenant to temporarily relocate, I would implicitly be finding that a landlord could never end a tenancy pursuant to section 49(6)(b) without the consent of the tenant. Such a finding would not be in keeping with the Act and does not properly balance of the rights of tenants and landlords. The Act strikes a balance in section 49(6): it gives a landlord the power to end the tenancy but restricts the exercising of this power by requiring certain condition be met. It further accommodates tenants by providing for them a mechanism to return to the rental unit (the right of first refusal). I am not persuaded by the tenants' argument that, even if the landlord has met all other criteria, a tenant should be able to take some action to cause the Notice to become invalid.

I find that the landlord's purpose in undertaking the Project was not to raise the rents. Rather, I find that it was to complete necessary renovations. I accept once the Project is completed, the landlord will likely be able to command higher rents for the rental units than the tenants are currently paying. However, I find that this was not a motive of the landlord, rather this is a consequence of its undertaking the Project.

As such, I find that the landlord has proven, on a balance of probabilities, that it issued the Notices in good faith.

5. Validity of Notices

Based on the foregoing, I find that the Notices are valid, and should not be cancelled. Accordingly, I dismiss the tenants' applications.

Section 55 of the Act states:

> **Order of possession for the landlord**
>
> 55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Section 52 of the Act states:

> **Form and content of notice to end tenancy**
>
> 52 In order to be effective, a notice to end a tenancy must be in writing and must
>
> (a) be signed and dated by the landlord or tenant giving the notice,
>
> (b) give the address of the rental unit,
>
> (c) state the effective date of the notice,
>
> (d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,
>
> (d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and
>
> (e) when given by a landlord, be in the approved form.

I find that the form of the Notices complies with section 52 of the Act.

As I have dismissed the tenants' applications, and I have found that the Notices comply with section 52 of the Act, I find that the landlord is entitled to orders of possession against each of the tenants.

On March 18, 2020, landlord's counsel uploaded a letter to the RTB document portal addressed to me. The letter indicated that it was cc'd to counsel for the tenants. I note that such communications are prohibited by Rule of Procedure 6.9. Parties must direct their communications to RTB information services, who will bring such communication to the arbitrator's attention.

However, as I was awaiting a copy of the transcript of the hearing, and the statement of MM, I reviewed the letter from the landlord's counsel, not knowing that it did not form a part of either of these documents.

In the letter, counsel stated:

> We apologise for this unusual communication. However, we write in the context of the current COVID-19 crisis facing our community, which are unusual circumstances.
>
> The Landlord in the above-referenced matter would like to amend the effective date sought for orders of possession to June 1, 2020.
>
> While the Landlord appreciates that the following is outside of the scope of the RTB's jurisdiction, the Landlord would like to communicate to the Arbitrator and to the tenants that, in the event that orders of possession are issued, it is committed to working with tenants to help support their safety and housing security in this time, including by assisting them in finding new accommodations and making safe moving arrangements.

As the contents of the letter are to the benefit of the tenants, and to the detriment of the landlord, I will grant this request, despite the landlord's breach of the Rule 6.9.

I also note that *Residential Tenancy (COVID-19) Order*, MO M089 (*Emergency Program Act*) made March 30, 2020 (the "**Emergency Order**") permits an arbitrator to issue an order of possession if the notice to end tenancy the order of possession is based upon was issued prior to March 30, 2020 (as per section 3(2) of the Emergency Order).

However, per section 4(3) of the Emergency Order, a landlord may not file an order of possession at the Supreme Court of BC unless it was granted pursuant to sections 56 (early end to tenancy) or 56.1 of the Act (tenancy frustrated). The orders of possession granted in this decision are <u>not</u> issued pursuant to either section 56 or 56.1 of the Act.

I must also acknowledge the potential uncertainty that the COVID-19 pandemic has caused. I have no evidence before me to suggest that the landlord does not intend to proceed with the Project in these uncertain times. If the landlord no longer intends to undertake the Project or decides not to undertake it *before* the effective date of the orders of possession, the landlord is strongly cautioned to consider whether they will be able to rely on the protection of 51(3) of the Act before enforcing the attached orders. However, as the matter is not before me, I make no determination on this point.

Conclusion

Pursuant to section 55 of the Act, I order that the tenants deliver vacant possession of their respective rental units to the landlord by June 1, 2020 at 1:00 pm.

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 28, 2020

Residential Tenancy Branch