A matter regarding 222 Ash Street Properties Inc. and
[tenant name suppreed to protect privacy]

# DECISION

Dispute Codes **OPL-4M, FFL, CNL-4M, FFT**

Introduction

This hearing dealt with cross applications. The tenant made an application to cancel a *Four Month Notice to End Tenancy for Demolition, Renovation, Repair or Conversion of a Rental Unit* ("4 Month Notice") served on January 31, 2021. The landlord applied for an Order of Possession based on the 4 Month Notice.

Both parties appeared and were represented at the hearing. The parties were affirmed and the parties were ordered to not make an unofficial audio recording of the proceeding. Both parties had witnesses to call. The witnesses were excluded until called to testify. The parties and their respective witnesses were affirmed and subject to direct examination and cross examination. I also asked questions of the parties in keeping with Rule 7.23 of the Rules of Procedure.

The hearing was held over two dates and an Interim Decision was issued following the first hearing date. The parties confirmed receipt of the Interim Decision and the Interim Decision should be read in conjunction with this decision.

During the period of adjournment, the parties were at liberty to settle their dispute; however, a settlement was not reached during the period of adjournment. After the parties presented their respective positions on the second day of hearing, the parties were given another opportunity to settle as both parties expressed an appetite for resolving the matter by way of a settlement agreement. Although the parties did not reach a settlement while before me, I was of the view that with some more time a settlement may be reached and the parties indicated that may be the case. I informed the parties that I would hold my decision in abeyance until after August 9, 2021 and should the parties reach a settlement agreement on or before August 9, 2021 they may request withdrawal of their respective applications by providing the Residential Tenancy Branch with such a written request, duly executed by both parties. As of the date of writing this decision, I have not been provided with any request for withdrawal or any indication the parties reached a settlement.

It should be noted that the hearing was held over several hours and I was provided with a considerable amount of evidence, all of which I have considered; however, with a view to brevity in writing this decision I have only summarized the parties' respective positions and referenced the most relevant of evidence.

Issue(s) to be Decided

1. Should the 4 Month Notice be upheld or cancelled?
2. If the 4 Month Notice is upheld, when should the Order of Possession take effect?
3. Award of the filing fee(s).

Background and Evidence

The subject tenancy started on May 1, 2019 with the same terms the parties had under an immediately preceding tenancy agreement for a different rental unit located in a nearby apartment building controlled by the landlord (the nearby apartment building is herein referred to as "732") . The monthly rent is currently set at $1058.83, payable on the fist day of every month, and the tenancy is on a month to month basis.

The rental unit is described as a two bedroom ground floor apartment in an older, multiple unit (50 units) building, owned by the landlord.

It was undisputed that the tenants had been occupying a two bedroom unit at 732 since 2010. In 2019 the landlord had issued notices to end tenancy to the tenants of 732 for the stated purpose of performing a major renovation of the property. Many tenants filed to dispute their eviction notices, including the subject tenants. The majority of tenants reached a settlement agreement with the landlord for compensation; however, the settlement agreement reached by the parties involved relocating the tenants to the subject two bedroom rental unit, for the same amount of rent and on the same terms as the tenancy agreement the parties had at 732. The tenants moved into the subject rental unit on April 30, 2019 or May 1, 2019.

On January 31, 2021 the landlord served the tenants with the subject *Four Month Notice to End Tenancy for Demolition, Renovation, Repair or Conversion of a Rental Unit* ("4 Month Notice") with an effective date of May 31, 2021. The reason for ending the tenancy is stated as being the landlord intends to: "*Convert the rental unit for use by a caretaker, manager, or superintendent of the residential property*".

The tenant filed to dispute the 4 Month Notice within the time limit or doing so. The tenants have remained in possession of the rental unit and seek to continue the tenancy. The tenants have paid the monthly rent to the landlord and the payments were accepted "for use and occupation only" by the landlord pending the outcome of this proceeding.

Below, I have summarized the parties' respective submissions:

**Landlord's agent**

The landlord's agent, DC, submitted that the residential property is a larger building with approximately 50 units constructed approximately 60 years ago. There have been maintenance issues at the property, especially with respect to pests and water leaks. Currently, the management of the property is off-site and the landlord seeks to have an on-site manager. The landlord entered into an employment contract with an individual (referred to as NB in this decision) who is certified and experienced in building management. The employment contract requires the landlord to provide the employee with a two bedroom unit as the employee resides with her daughter. Currently, the employee is working for the landlord but living elsewhere and the landlord is subsidizing the employee's rent that she is paying to a different landlord. The landlord seeks to house NB in the subject rental unit.

The landlord is of the position that having an on-site manager will result in faster and improved response to maintenance issues and the manager will be on-site to provide access to the tradespersons. Currently, an agent has to drive over to the property to let the tradespersons in at the property and tenants complain that repairs take too long to resolve.

The landlord selected the rental unit for NB as it is a two bedroom unit, as required by KB, and on the ground floor. The landlord is of the position that being on the ground floor is closer to the utility rooms (elevator room, electrical room, boiler room), the building entrance and side exit. The rental unit also has a view to the front and side of the building for improved security for illegal dumping and potential break-ins.

The landlord submitted that there is only one other two bedroom unit on the ground floor but that unit is subject to a fixed term tenancy agreement and the subject rental unit is the only unit with direct access to the outside.

The landlord's agent acknowledged that in July 2020 the landlord had issued a notice to end tenancy to a different tenant (referred to as JM) so that a caretaker may occupy JM's unit. JM's unit was a one bedroom ground floor unit facing the back of the building. The landlord testified that at the time of issuing the notice to end tenancy to JM he had a single person (referred to as AK) who was going to become the caretaker and the landlord wanted JM's rental unit to house AK. In August 2020 AK declined to accept the position of caretaker and in late August 2020 the landlord and JM negotiated an agreement to end the tenancy by mutual agreement in exchange for paying JM $5000.00 and a move-out date up to December 1, 2020. JM vacated her unit earlier, as permitted under their mutual agreement, on October 1, 2020.

The landlord's agent acknowledged that he continued to negotiate the end of JM's tenancy despite knowledge that the intended caretaker AK had decided not to proceed as the caretaker.

The landlord's agent testified that JM's former unit was re-rented to a different tenant and not occupied by AK because JM indicated she was going to dispute the notice to end tenancy and AK did not want to wait. Also, the landlord had another tenant who was fleeing from domestic violence so the landlord gave her JM's former unit.

The landlord did not call AK as a witness but submitted a letter purportedly signed by AK on May 17, 2021 that is addressed to "the presiding Arbitrator" and states:

> *I am writing this letter in response to [JM's] affidavit which I have reviewed. I am aware that this letter will be provided to the RTB.*
>
> *I was the caretaker that was going to move into [JM's] suite. However, I was unable to do so and did not move into the building.*
>
> *The terms of my employment were negotiated in July 2020. [Landlord's agent DC] advised me early August 2020 [that JM] would likely dispute the Notice to End Tenancy and that a move-in date would be uncertain. Because of this uncertainty, I could not agree to accept employment at the building.*
>
> [As written except where modified to protect identities]

**Landlord's witness – landlord's employee referred to as NB**

NB testified that she was offered and accepted employment from the landlord as a property manager and she signed an employment contract in March 2020. NB has a certificate in property management and has approximately 10 years of experience as a building manager. As part of their employment contract, the landlord is to provide NB with a two bedroom apartment as she resides with her daughter. NB stated it is upon the landlord to choose the two bedroom apartment she will occupy and no specific apartment or building was chosen when she entered into the employment contract. NB still resides at a property owned by a different landlord and the subject landlord pays 50% of her current monthly rent.

Currently, NB managers 13 buildings for the landlord and will continue to do so even after moving into the rental unit.

The duties of NB include following instructions of management, showing units to prospective tenants, delivering notices to tenants, performing inspections of units, coordinating access to units and common areas with tradespersons, and providing direction to other staff.

NB is of the position that if she were to reside at the subject property, she would expedite maintenance by reacting to situations in a timelier manner, then in turn contact the appropriate repair person, and be on site to provide the tradesperson access.

**Tenant MB**

The two co-tenants appeared for the hearing; however, only tenant MB testified. Reference to tenant in the singular form refers to tenant MB.

The tenant submitted that when the landlord sought to end their tenancy at 732, the tenant disputed that eviction notice but under a settlement agreement the tenants accepted the landlord's offer to relocate to the subject rental unit, at the same rental rate. The tenant stated that they accepted a tenancy for the subject rental unit, rather than take the $30,000 being offered to them by the landlord, as this would serve the tenants best since they anticipated it would be long term affordable housing and the tenants did not expect to face another eviction notice less than two years later.

The tenant is of the position the landlord is not acting in good faith, considering the landlord issued a 4 Month notice to another tenant in the building, referred to as JM, for the purpose of converting JM's unit for use by a caretaker, and then the landlord re-rented JM's unit after she vacated.

The tenant questioned the landlord's selection of his unit for use by a manager as it is not overly convenient to the boiler room or elevator room. The tenant acknowledged that a caretaker/handyman would be helpful if that person were to perform repairs but was of the position a manager would be negligibly helpful in facilitating repairs in a timelier manner. Also, common areas have security cameras. Further, issues with garbage or dumping are at the back of the building. As such, any two bedroom unit could be chosen to house the manager.

Despite his position the rental unit is not the best suited for a manager, the tenant accepts that the landlord may intend to place a manager in his unit but is of the belief the landlord has ulterior motives in doing so, which is to end his tenancy where they pay much less than market rent, which the tenant estimates to be closer to $1800.00 per month.

The tenant's advocate pointed out the City has enacted bylaws to curtail a landlord's ability to "renovict" tenants, as this landlord has done in the past for other properties owned by the landlord. More recently the landlord has issued notices to end tenancy for conversion for use for a caretaker or manager to long term tenants paying affordable rent.

**Tenants' witness – former tenant referred to as JM**

JM testified that she resided in two different ground floor rental units at the residential property since 1982, with the most recent unit, since 1991.

JM testified that she undertook cleaning duties in 2015 under an agreement with the former landlord. The current landlord maintained her cleaning contract when the current landlord purchased the property in 2017 until she was "fired" in July 2019. JM did not know why she was fired; however, she had complained to the landlord several times about garbage accumulation in the rear of the building. Then, in July 2020, JM was served with a 4 Month Notice indicating the landlord would be ending her tenancy so that a caretaker, manager, or superintendent may occupy her rental unit. Upon receiving the 4 Month Notice, JM offered to take on the role of a caretaker but the landlord stated a caretaker had already been selected.

In early August 2020, JM obtained the services of a lawyer and JM decided not to file to dispute the 4 Month Notice but proceeded to negotiate a settlement agreement with the landlord. JM acknowledged that the compensation she was paid as part of the settlement agreement is greater than the compensation she would have received had the tenancy ended pursuant to the 4 Month Notice; however, JM testified that while in negotiations with the landlord she was not informed that the landlord's selected caretaker AK had declined to accept the caretaker position, yet the landlord continued to negotiate an end to her tenancy.

Having learned the landlord re-rented her unit rather than convert it for use by a caretaker, JM is of the view the landlord was negotiating the end of her tenancy dishonestly. JM testified that she would not have negotiated an end to her tenancy and moved out of rental unit she had occupied for so many years had she not been served with the 4 Month Notice.

JM agreed that a caretaker would be helpful in dealing with on-going maintenance issues including plumbing issues and fire alarms being set off.

JM acknowledged she does not have direct knowledge of the landlord's plans for the subject rental unit.

The landlord's legal counsel argued that the tenancy with JM ended pursuant to a mutual agreement with the landlord, including payment of compensation to her, and not because of a notice to end tenancy and I cannot take inference of the reasons the parties entered into the mutual agreement.

The mutual agreement executed by the landlord and JM include the following terms:

5. The Tenant and the Landlord recognize and understand that the tenancy agreement between them will legally terminate and come to an end at the time and date set out at section 1 above. It is also understood and agreed that this Agreement is made in accordance with section 44(1)(c) of the *Residential Tenancy Act* which provides that a tenancy ends if "the landlord and tenant agree in writing to end the tenancy".

11. The Landlord and the Tenant acknowledge and agree that this Agreement is made in settlement of disputed claims and will not be construed as an admission of liability on the party of any party to the other, or the truth of any facts alleged by one party to the other concerning the Premises.

The landlord's legal counsel pointed out that JM had a dispute with the landlord concerning her employment as the cleaner and the landlord declined to hire her as a caretaker.

**Tenants' witness – tenant at 732 referred to as SC**

SC testified that she had been a tenant at 732 when the subject tenants resided there and notices to end tenancy were issued so that the landlord may renovate the building. In response to her notice to end tenancy, SC moved to the subject residential property temporarily while the renovations were completed at 732. Then SC moved back to a renovated unit at 732, and paying a 45% rent increase. In contrast, the subject tenants moved to the residential property in exchange for vacating their unit at 732 and now they are being subject to another eviction for landlord's use.

SC testified that she witnessed JM performing cleaning duties and what SC considered to be duties beyond that of a cleaner. SC witnessed JM move out of her rental unit after the landlord issued JM a notice to end tenancy so that a caretaker may occupy JM's unit at the residential property and then JM's unit was re-rented in the weeks that followed.

SC acknowledged she has no direct knowledge of the landlord's intentions for the subject rental unit but she has formed an opinion that the landlord is not acting in good faith in ending the subject tenancy given the landlord's past actions in "renovicting" tenants in the past and ending JM's tenancy but not using JM's unit for a caretaker.

SC acknowledged that a caretaker would be helpful in facilitating maintenance at the residential property.

The landlord's legal counsel pointed out that SC had a previous dispute with the landlord concerning the end of her tenancy at 732 and that being a large landlord there are bound to be some tenants that have a negative opinion of the landlord.

Analysis

Where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenant was served with a valid notice to end tenancy and the tenancy should end for the reason indicated on the notice.

The reason for ending the tenancy, as stated on the subject notice to end tenancy, is consistent with section 49(6)(e) of the Act, which provides:

> (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:
>
> (e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;
>
> [Emphasis added by me]

There were no arguments before me that a permit or other approval is required in order to convert a rental unit to a unit for use by a caretaker, manager or superintendent and the crux of the dispute centered around the landlord's good faith intention to use the rental unit for a manager.

Residential Tenancy Branch Policy Guideline 2b provides information and policy statements with respect to ending a tenancy with a 4 Month Notice to, among other things, convert a unit for use by a caretaker, manager, or superintendent.

Under the heading good faith, the policy guideline provides:

> **GOOD FAITH**
>
> In *Gichuru v. Palmar Properties Ltd*., 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann*, 2019 BCCA 165.
>
> Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they are not trying to defraud or deceive the

> tenant, they do not have an ulterior purpose for ending the tenancy, and they are not trying to avoid obligations under the RTA or MHPTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (section32(1) of the RTA).
>
> In some circumstances where a landlord is seeking to change the use of a rental property, a goal of avoiding new and significant costs will not result in a finding of bad faith: *Steeves v. Oak Bay Marina Ltd*., 2008 BCSC 1371.
>
> If a landlord applies for an order to end a tenancy for renovations or repairs, but their intention is to re-rent the unit for higher rent without carrying out renovations or repairs that require the vacancy of the unit, the landlord would not be acting in good faith.
>
> If evidence shows the landlord has ended tenancies in the past for renovations or repairs without carrying out renovations or repairs that required vacancy, this may demonstrate the landlord is not acting in good faith in a present case.

The tenant called into question the landlord's good faith intention in issuing the 4 Month Notice and suggested the tenants' relatively low rent as being the motivation to end their tenancy.

The landlord presented a basis for placing a manager in the rental unit, primarily to have an on-site manager to aid in facilitating more timely response to repair issues, but also to increase security given the rental unit's proximity to the front and side of the building at the ground level.

The tenant questioned whether a manager would aid in more timely repairs as the manager would not be making the repairs herself and facilitation could be accomplished from another location within the building or elsewhere; and, the tenant questioned whether placement of a manager in the rental unit would aid in increasing security.

Given the residential property is an older, large apartment building, and the landlord's evidence of repair requests, I accept that the need for repairs is relatively frequent and an area of concern for residents and the landlord. I accept that an on-site manager would be more convenient and efficient for the landlord to inspect and assess a repair situation and to permit access to contractors, as put forth to me by the landlord's agent,

the landlord's manager NB, as well as the tenant's witnesses JM and SC. I also take note that it is not uncommon for a landlord to have a resident manager, especially for larger buildings, to serve as a point of contact for tenants, assess and monitor repair and other maintenance issues such as cleaning common areas, and enhance security. Therefore, I find the landlord's desire to have a resident manager at the residential property to have merit and I proceed to turn to the landlord's selection of the subject rental unit for conversion for use by the manager with a view to determining whether the landlord has a ***good faith*** intention to end the subject tenancy.

The tenant pointed to the landlord previously issuing a 4 Month Notice to JM in July 2020, a one bedroom unit in the rear of the building rather than a two bedroom in the front of the building, for conversion to a caretaker's unit. The landlord explained that issuance of the previous 4 Month notice was for a single caretaker AK; whereas, the current manager NB has a child and requires a two bedroom unit. I accept that a manager residing with her child would require a two bedroom unit; however, the landlord's previous decision to select a rear facing unit is inconsistent with the landlord's current argument that a front and side unit is more appropriate for security and to prevent garbage dumping especially having heard JM had repeatedly complained of garbage dumping during her tenancy.

Also, with respect to the previously issued 4 Month Notice to JM, the tenant pointed out that unit was not occupied by a caretaker, manager or superintendent after JM's tenancy ended. I find the tenant's argument is a relevant consideration in evaluating the landlord's good faith intention as it is in keeping with Policy Guideline 2b where it states: "*If evidence shows the landlord has ended tenancies in the past for renovations or repairs without carrying out renovations or repairs that required vacancy, this may demonstrate the landlord is not acting in good faith in a present case*". While the example in the policy guideline refers to renovations or repairs, this example is not limited to cases involving notices to end tenancy for repairs or renovations. Rather, I find the logic behind this example is that where a landlord ends a tenancy for a stated reason and does not fulfill that reason the landlord's past actions, or lack thereof, may demonstrate the landlord is not acting in good faith in the present case.

The landlord's legal counsel argued that the former tenancy with JM ultimately ended due to a mutual agreement to end tenancy and $5000.00 in compensation paid to JM and that I cannot take inference from the settlement agreement.

Section 75 of the Act provides that the rules of evidence do not apply and that I may admit any evidence that I consider necessary and appropriate and relevant to the proceeding before me. Section 75 is reproduced below for the parties' reference:

> **Rules of evidence do not apply**
> **75** The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
>
> (a) necessary and appropriate, and
>
> (b) relevant to the dispute resolution proceeding.

I consider the circumstances surrounding the landlord's issuance of a 4 Month Notice to JM, another long-term tenant paying affordable rent in the same residential property for the same stated reason in the months prior to the subject 4 Month Notice to be appropriate and relevant to evaluating the landlord's good faith intention in ending the subject tenancy and I proceed to consider those circumstances in evaluating the landlord's good faith intention.

The landlord's evidence is that the formerly selected resident caretaker AK declined the caretaker job in early August 2020 yet the landlord's agent did not disclose this to JM and continued in negotiations to end JM's tenancy. JM testified that she had been a tenant at the property since 1982 and her former unit since 1991 and JM would not have continued to negotiate an end to her tenancy had she been made aware of AKs decision not to take the position as caretaker.

While I accept that JM's tenancy was ultimately ended pursuant to a settlement agreement, a notice to end tenancy is a legal document that ought not be issued lightly as a notice to end tenancy carries serious and significant ramifications for both parties, even if the notice is subsequently cancelled or settled, and I find the ultimate settlement agreement reached by JM and the landlord does not negate the fact that the landlord did serve JM with a notice to end her tenancy for the same reason cited on the subject 4 Month Notice.

Having heard from JM, I found her testimony to be credible and I accept it is more likely than not that she negotiated the end of her 29 year tenancy because she had been served with a 4 Month Notice by the landlord and had she not received the 4 Month notice she would not have negotiated the end of her extremely long tenancy. Further, the landlord did not provide any reason for not disclosing to JM that AK had declined to take the caretaker's position and I also accept that JM would not have continued to

negotiate the end of her tenancy had she been made aware that the caretaker intended her unit had declined to accept the employment. Also, it is unclear to me why the landlord did not seek to end a different tenancy for a two bedroom after AK declined the caretaker position since NB was already employed as a manager. The landlord's agent did not provide any explanation as to why the landlord did not proceed to place a different caretaker/manager in the building for several more months. Ultimately, I find the landlord's decision to not inform JM of the change in need for her unit for a caretaker demonstrates a lack of honesty by way of a material omission of a change in circumstances. As stated in *Gichuru v. Palmar Properties Ltd*. [para. 58] "dishonesty is the antithesis of good faith".

Given the circumstances surrounding the end of JM's tenancy, I accept that JM was of the belief her tenancy was going to end so that a caretaker may occupy her unit based on the 4 Month Notice served upon her and the lack of disclosure from the landlord that the single caretaker he had selected had declined the employment.

Considering all of the above, I accept the landlord may have a desire to place an on-site manager in the residential property, and the current manager requires a two bedroom unit; however, I am of the view the landlord's selection of the subject rental unit is motivated, at least in part, to end the tenancy of tenants who had previously disputed a Notice to End Tenancy at 732 and are paying relatively low rent in the subject unit as part of their settlement agreement. In keeping with *Gichuru v. Palmar Properties Ltd*. there must be no dishonest intention to satisfy the good faith requirement and I find there is, more likely than not, ulterior motive(s) on part of the landlord to end the subject tenancy rent rather a pure good faith intention. Therefore, I grant the tenants' request that I cancel the 4 Month Notice, with the effect that the tenancy continues at this time, and I dismiss the landlord's application for an Order of Possession.

Given the tenants' success in this matter, I award the tenants recovery of the $100.00 filing fee. The tenants are provided a Monetary Order in the amount of $100.00. The tenants are further authorized to deduct $100.00 from a subsequent month's rent in satisfaction of the Monetary Order and in doing so the landlord must consider the rent to be paid in full.

Conclusion

The tenants' application is granted and the 4 Month Notice is cancelled with the effect the tenancy continues at this time.

The tenants are awarded recovery of the filing fee and are provided a Monetary Order in the amount of $100.00. The tenants are authorized to deduct $100.00 from a subsequent month's rent in satisfaction of the Monetary Order.

The landlord's application is dismissed without leave to reapply.

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: August 19, 2021

Residential Tenancy Branch