



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **CNR, FFT**

### Introduction

This hearing was convened as a result an application (“Application”) made by the Applicant under the *Residential Tenancy Act* (“RTA”) for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities (“10 Day Notice”) pursuant to section 46; and
- authorization to recover the filing fee for this application from the Respondents pursuant to section 72(1).

The Applicant’s legal counsel (“LH”), the two Respondents (“JS” and “BS”) and the Respondents’ legal counsel (“WP”) attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

LH stated the Applicant served the NDRP on each of the two Respondents by registered mail on January 20, 2022. LH submitted a registered mail receipt and tracking numbers to corroborate her testimony the NDRP was served on each of the Respondents. I find each of the Respondents were served with the NDRP in accordance with section 89 of the RTA.

LH stated the Applicant served evidence on the Respondent by email on January 20, 2022 and that service by email was consented to by the Respondents. WP acknowledged the Respondents had received the Applicant’s evidence. I find the Applicant’s evidence was served on the Respondents in accordance with section 88 of the RTA.

WP stated that the Respondents served evidence on the Applicant by email on January 28, 2022 and that service by email was consented to by the Applicant. LH acknowledged receipt of the Respondents’ evidence. I find the Respondents’ evidence was served with the Applicant in accordance with section 88 of the RTA.

Preliminary Issue - Jurisdiction

LH stated the Applicant has lived in the rental unit since 2005. LH submitted the Applicant is not a tenant of the residential property ("Property") and instead, holds a beneficial interest in the Property. LH stated the Applicant filed a Notice of Civil Claim ("Civil Claim") in the Supreme Court of British Columbia ("Supreme Court") to make a claim that the Applicant has a beneficial interest in the Property. LH submitted the Respondents are holding the Property in trust for the Applicant based on a resulting or constructive trust. LH submitted that, as the matters in dispute between the parties set out in the Application are "linked substantially" to the Civil Claim, section 58(2)(d) of the RTA requires that I must not determine the dispute.

WP stated the Respondents purchased the property on July 29, 2005 pursuant to a purchase and sale agreement dated January 3, 2003 and entered a copy of the agreement into evidence. WP stated the fee simple in the Property is registered in the names of the Respondents and entered a copy of a Title Search Report which confirmed the Respondents as the registered owners of the Property. WP submitted that the relationship between the Applicant and Respondents that of landlord and tenant. WP entered into evidence copies of a fixed term tenancy agreement between the Applicant and Respondents dated January 1, 2003 ("First Tenancy Agreement") with monthly rent of \$1,100.00 and a subsequent tenancy agreement dated June 1, 2006 ("Second Tenancy Agreement") with monthly rent of \$950.00 plus 67% of utility costs. WP stated the rent has increased incrementally since the Second Tenancy Agreement and, as of 2021, the Applicant was paying \$1,350.00 per month. WP stated the Applicant's last regular rent payment was in May 2021 and submitted a ledger of payments made by the Applicant covering the period January 2016 through to December 2021. WP stated that, as a result of the rental arrears that have accrued, the Respondents served the Applicant with the 10 Day Notice on October 5, 2021 which claims the Applicant owes the Respondents \$7,050.00 for unpaid rent as of October 2, 2021.

WP acknowledged the Civil Claim was filed on June 3, 2021 in the Supreme Court, a copy which he submitted into evidence. WP stated the Respondents responded to the Civil Claim by filing a Response to Civil Claim ("Response") in the Supreme Court on July 16, 2021, a copy of which he submitted into evidence. WP argued that I should take jurisdiction and hear the Application on the basis that the dispute set out in the Application was not linked substantially to a matter before the Supreme Court in the Civil Claim.

WP submitted that section 23(2) of the *Land Title Act*, RSBC 1996, c. 250, creates a statutory presumption whereby the person registered on title is presumed to hold their legal or equitable interest to an estate in fee simple. However, I recognize that the Supreme Court has the authority to find that a party may hold a beneficial interest in the property based on an express trust, resulting trust or constructive trust. A finding of the existence of any of the three aforementioned types of trusts may give rise to equitable rights for the beneficiary that may overcome the usual presumption under section 23 of the *Land Title Act*, R.S.B.C. 1996, c. 250. See *Suen v. Suen*, 2013 BCCA 313 at paragraph 34. Accordingly, registration of the Respondents as owners on title to the property does not preclude me, in appropriate circumstances, from finding that a matter arising from dispute set out in the Application is linked substantially to a matter before the Supreme Court.

WP also submitted that, if I did not take jurisdiction and hear the Application, it would be prejudicial to the Respondents because, among other things, it would delay the resolution of the dispute between the parties and add significant expense for the Respondents. In addition, WP argued that tenants could abuse section 58(2)(d) the RTA by making a claim in the Supreme Court that had no merit so as to subvert the jurisdiction of the director ("Director") of the Residential Tenancy Branch ("RTB"). WP referred to the First and Second Tenancy Agreements between the Applicant and Respondents as well as the evidence of payment of rent by the Applicant to the Respondents and argued that this evidence was determinative for a finding the relationship between the Respondents and Applicant was one of landlord and tenant.

WP submitted that the decisions in *Gil v. Lloyd*, 2019 BCSC 1455 ("*Gil*"), *Hashimi v. Miki*, 2019 BCSC 2287 ("*Hashimi*") and *Liu v. Tsai*, 2017 BCSC 221 ("*Liu*") were authorities for finding the matters raised in the Application were not "linked substantially" to the matters set out in the Civil Claim. As such, the Respondents argued that section 58(2)(d) RTA did not apply to this Application and that I was required, by section 58(1) of the RTA, to determine the dispute set out in the Application.

#### Analysis:

In *Habib Estate v. Komant*, 2017 BCSC 69 ("*Habib*"), Mr. Justice G. P. Weatherill reviewed the residual jurisdiction of the Supreme Court under the RTA. At paragraphs 42 to 46 he stated:

- [42] At first blush, this argument seems to have merit. Section 1 of the RTA defines a “tenancy agreement” as “an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit...”. In my view, the agreement between Dominic and Becky to pay \$700 per month would qualify as a “tenancy agreement” under the RTA, being an oral agreement between a property owner and an occupant to rent a residence.
- [43] Assuming it is a tenancy agreement, the RTA does appear to allocate issues relating to a tenancy agreement to the director of the RTA. Sections 84.1(1) and 58(1) read:

### **Exclusive jurisdiction of director**

- 84.1 (1)** The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.

...

### **Determining disputes**

- 58 (1)** Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:
- (a) rights, obligations and prohibitions under this Act;
  - (b) rights and obligations under the terms of a tenancy agreement that
    - (i) are required or prohibited under this Act, or
    - (ii) relate to
      - (A) the tenant's use, occupation or maintenance of the rental unit, or
      - (B) the use of common areas or services or facilities.

[Emphasis added.]

- [44] Read together, s. 58(1) suggests that issues with a tenancy agreement should be dealt with in a dispute resolution proceeding, which s. 84.1(1) says are within the exclusive jurisdiction of the director. If that is the case,

all issues with Dominic's tenancy agreement, which would arguably include this matter involving the plaintiffs' occupancy of the 4495 Residence, should be brought before the director and not before this court.

- [45] However, despite the provisions of the *RTA* that give the director exclusive jurisdiction over tenancy agreements, ss. 58(2), and (4) provide a residual jurisdiction for this court to hear tenancy disputes related to matters before the court. Sections 58(2), and (4) read:

58...

- (2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director must resolve the dispute under this Part unless

...

- (c) the dispute is linked substantially to a matter that is before the Supreme Court.

....

- (4) The Supreme Court may  
(a) on application, hear a dispute referred to in subsection (2)  
(a) or (c), and  
(b) on hearing the dispute, make any order that the director  
may make under this Act.

[Emphasis added.]

- [46] Accordingly, ss. 58(2) and 58(4) give this court residual jurisdiction to hear and decide disputes "linked substantially to a matter that is before the Supreme Court". As an action has been commenced in this court regarding ownership of the Property, and as Dominic's tenancy is substantially linked to it and given that what is sought here is an interlocutory order on the parties' rights with respect to the Property, I am persuaded that this court has jurisdiction to hear the plaintiffs' injunction application.

Since the decision in *Habib*, subsection 58(2) and 58(4) of the RTA have been amended to read:

- 58(2) Except as provided in subsection (4) (a), the director must not determine a dispute if any of the following applies:

- (a) the amount claimed, excluding any amount claimed under section 51 (1) or (2) *[tenant's compensation: section 49 notice]*, 51.1 *[tenant's compensation: requirement to vacate]* or 51.3 *[tenant's compensation: no right of first refusal]*, for debt or damages is more than the monetary limit for claims under the *Small Claims Act*;
  - (b) the claim is with respect to whether the tenant is eligible to end a fixed term tenancy under section 45.1 *[tenant's notice: family violence or long-term care]*;
  - (c) the application for dispute resolution was not made within the applicable time period specified under this Act;
  - (d) the dispute is linked substantially to a matter that is before the Supreme Court.
- (4) The Supreme Court may, on application regarding a dispute referred to in subsection (2) (a) or (d),
- (a) order that the director hear and determine the dispute, or
  - (b) hear and determine the dispute.

The Respondents argued the Applicant's occupancy of the Property is pursuant to a tenancy agreement and they have submitted the First and Second Tenancy Agreements and a ledger of payments of rent from the Applicant to the Respondents covering the period January 2016 through to December 2021. The Respondents argued that the dispute set out in the Application involves issues related to a tenancy, which exclusively engages the dispute resolution mechanism of the RTA. As such, the Respondents argue that this gives the Director exclusive power to hear and decide matters arising from the Second Tenancy Agreement and that I must hear and make a determination of the claims made in the Application.

The submissions of the Respondents appear to have some merit. Section 1 of the RTA defines a tenancy agreement as "an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit...". In my view, Each of the First Tenancy Agreement and Second Tenancy Agreement submitted by the Respondents appear to qualify as a tenancy agreement under the RTA.

The Applicant argued he has possessory rights in the Property arising from a beneficial interest in the Property. It is undisputed by the parties that a Civil Claim and a Response have been filed with the Supreme Court. The Applicant and Respondents in the Application are the same as the Plaintiff and Defendants in the Civil Claim. The rental address stated in the Application is the same as the address named in the Civil Claim in which the Applicant is seeking a declaration of a beneficial interest. It is undisputed that the Applicant took possession of the Property shortly after the Respondents purchased the Property in 2005 and has resided there continuously since that time.

In *Gil*, the issue before the Court was whether the monetary claims brought by the applicant exceeded the \$35,000.00 jurisdiction of the Director under section 58(2)(a) of the RTA. The Court found that a factor that weighed against consolidation of the two RTB disputes with the claim advanced in the action before the Supreme Court was that the two RTB disputes may have actually fallen within the monetary jurisdiction of the Director under the RTA. In the decision for *Gil*, Madam Justice Warren found that the arbitrator had inadvertently referred to what was then subsection 58(2)(c) of the RTA when the arbitrator was actually referring to subsection 58(2)(a) of the RTA. At paragraph 47 of her decision, Madam Justice Warrant stated:

[47] Counsel for Ms. Gil relies on *Habib Estate v. Komant*, 2017 BCSC 69, as an example of a case where a substantial link was found. In that case, however, the parties who sought to invoke this Court's jurisdiction over a residential tenancy dispute by seeking an injunction against eviction, *had also claimed, in an action in this Court, an underlying ownership interest in the property in question. The other party's right to evict was linked directly to the question of the identity of the owners.* In contrast, as already discussed, there are no significant common issues here.

[emphasis in italics added]

I find the decision in *Gil* can be differentiated from the Application before me as *Gil* involved an analysis of monetary claims under subsection 52(2)(a) of the RTA and no claim was made regarding an underlying ownership interest in the property. As such, I find *Gil* does not assist me to interpret the phrase “significantly linked” as used in section 58(2)(d) of the RTA.

In *Hashimi*, the Court considered an application for the consolidation of four separate actions brought in the Supreme Court pursuant to Rule 22-5 of the *Supreme Court Civil Rules*. Those issues before the Court in *Hashimi* involved proposed consolidation of

four proceedings filed with the Court, all of which were monetary damages claims. I find this case may be differentiated from the Application before me on the basis that none of the four actions before the Court involved a dispute in which the Director had declined jurisdiction pursuant to subsection 58(2)(a) of the RTA. I also find *Hashimi* does not assist me to interpret the phrase “significantly linked” as used in section 58(2)(d) of the RTA.

In *Liu v. Tsai*, 2017 BCSC 221 (“Liu”), the Court considered a consolidation or joinder of two actions where general and punitive damages were being claimed. I find *Liu* may be differentiated from the Application before me on the basis that neither of the two actions involved a dispute in which the Director had declined jurisdiction pursuant to subsection 58(2) of the RTA.

The Respondents submitted that, if I declined taking jurisdiction over the Application, they would be prejudiced by delays and additional expenses that will arise if they are required to pursue their dispute with the Applicant in the Supreme Court. On the other hand, the Applicant would be prejudiced in the event I assumed jurisdiction, dismissed the Application, and issued an Order of Possession requiring the Applicant to vacate the Property pursuant to section 55(1) of the RTA. However, I find the degree of prejudice to one party over party does not help inform me on making a determination whether the dispute before me is linked substantially to a matter that is before the Supreme Court.

I find *Habib* is authority for the proposition that, for the purposes of section 58(2)(d) of the RTA, a dispute is linked substantially to a matter before the Supreme Court when an arbitrator, as a delegate of the Director, determines that the dispute before the arbitrator and the civil action before the Supreme Court involves the same parties in respect of the same property and a party, who is not a registered owner of the property, claims an underlying beneficial ownership interest in property.

Based on the above, I find that the dispute before me is linked substantially to a matter before the Supreme Court as the dispute set out in the Application and the Civil Action involves the same parties in respect of the same property and the Applicant, who is not a registered owner in the property, is claiming an underlying beneficial ownership interest in the property. As such, section 58(2)(d) of the RTA requires that I must decline jurisdiction to determine the dispute set out in the Application. Pursuant to section 58(4) of the RTA, the Supreme Court, may decide to hear and determine the dispute, or alternatively, order that the Director hear and determine the dispute.



Conclusion

Pursuant to section 58(2)(d), I find that the dispute set out in the Application is linked substantially to a matter before the Supreme Court and, as such, I have no jurisdiction to hear this matter.

I make no findings of fact (either express or implicit) as to jurisdiction, the nature or terms of the tenancy agreement, or any other issue.

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: March 19, 2022

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Residential Tenancy Branch