Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

The tenants applied to the Residential Tenancy Branch [the 'RTB'] for Dispute Resolution. The tenants ask me for the following orders against the landlords.

1. Cancellation of a One-month Notice to End Tenancy for Cause, issued on or about 15 February 2023 [the 'Notice'].
2. Reimbursement for the $100.00 filing fee for this application.

The landlords appeared at the hearing on 12 June 2023. The tenants also appeared, along with an advocate.

Issues to be Decided

Have the tenants engaged in illegal activity that has damaged the landlords' property, or adversely jeopardized a lawful interest of the landlords?

If so, is this sufficient cause to end the tenancy?

Background and Evidence

The parties agreed that the landlords included in the tenancy agreement with the tenants the use of a washer and dryer owned by the landlords [the 'Machine']. The landlords had purchased this Machine in 2017 for about $1,400.00. But they weren't sure whether it was new when they bought it.

The tenants said that the Machine was old, and they wanted to use their own, newer washing machine. For them, it was important to have a good washing machine for their busy family. So, they moved in their own washing machine, and moved the landlords' Machine into the garage.

As their children grew, they needed more space in the garage for the children's bicycles. So they asked the landlords if they, 'have any use for the washing machine we have in our garage... or any place to store it?'

The landlords replied, 'Not at the moment, and I would have to hire someone to move it, when u do decide to move one day, I assume you will take the [*sic*] your machine with u and then I'll have to bring it back? Or will u leave yours?'

The tenants replied, 'Yes, I will take my washing machine with me.'

Sometime after this exchange, and without further communication with the landlords about the Machine, the tenants sold the Machine for $100.00.

Many months later, the landlords contacted the tenants and asked them if they had the Machine in the garage. The tenants replied, 'We do not have it anymore.' The landlords asked where the Machine was, and the tenants replied, 'There will be a washer in place when we leave, do not worry.'

When the landlords pressed the tenants for an answer as to what had become of the Machine, the tenants refused to disclose what they had done with the Machine.

Suspicious that the tenants had disposed of the Machine without permission, the landlords drafted and served the Notice. In this Notice, the landlords gave two reasons to end the tenancy:

1. the tenants engaged in illegal activity that has damaged the landlords' property; and
2. the tenants engaged in illegal activity that adversely jeopardized a lawful right or interest of the landlords.

After the landlords served the Notice on the tenants, the tenants wrote a letter to the landlords. In part, they wrote:

> ‘We apologize for not communicating our intentions to you earlier about replacing the washing machine... we made the decision to replace it with our own... Again, we should have communicated with you prior to making that decision... We always acted in good faith and never intended any prejudice to you. Not telling you our intentions was a mistake... If we were to receive a formal eviction notice, we will certainly dispute it.’

For their part, the tenants confirmed that they never asked the landlords if they could sell the Machine. When I asked them why they didn’t ask the landlords, they answered by telling me that they calculated that it would be too costly for them to pay to store the Machine somewhere else (though this did not appear to respond to my question).

I asked them if they believed it was okay for them to have sold the Machine. They replied that it was not okay, but that they sold it, ‘in good faith’. When I asked them if they believed it was legal for them to sell the Machine, they told me that they had never considered whether it was legal: they decided selling it was a ‘no brainer’ because they would replace the old Machine with a new one.

Analysis

I have considered all the statements made by the parties and the documents to which they referred me during this hearing. And I have considered all the arguments made by the parties.

I note that the tenants do not dispute the efficacy of the Notice *per* section 52 of the *Residential Tenancy Act* [the ‘Act’]. Rather, the tenants take issue with the reasons for issuing the Notice.

Have the tenants engaged in illegal activity that has damaged the landlords’ property, or adversely jeopardized a lawful interest of the landlords?

There is no dispute as to what occurred: the tenants sold property of the landlords without the permission of the landlords, and thereby adversely jeopardised a lawful interest of the landlords in that property (note that there is no issue before me as to whether the landlords had a lawful interest in the Machine).

The question is, was that illegal? Another way of considering this is by asking, ‘Is it legal for tenants to sell property of their landlords without permission?’

The landlords say that it is not legal to do so, and offer several past decisions of the Director on this point. The tenants argue that I am not bound by previous decisions of other arbitrators, and I agree.

The implication of the tenants' argument is that it is legal to sell a landlord's property without permission – unless there is some law that says it is not. The tenants argue that, for the landlords to succeed in their application, they must first provide a copy of the law that they allege the tenants broke. Otherwise, how can the tenants know what it is they have alleged to have done that was illegal?

They base this argument on Residential Policy Guideline 32: 'Illegal Activities' [the 'Guideline']. But just as I agree with the tenants that I am not bound by previous decisions of the Director, I also confirm that I am not bound to follow this Guideline (it does not, for example, have the force of regulation). Indeed, I do not apply it to my analysis. But I have considered and received the tenants' submissions on this Guideline, as it is meant to assist members of the public in making such submissions.

That portion of the Guideline upon which the tenants rely is useful when a landlord seeks to rely upon a lesser-known offence from the *Criminal Code*, or some labyrinthine bylaw or regulation. In those instances, a tenant and the Director might reasonably question just what is it that you say was illegal – what law was broken?

But any reasonable person would recognise that taking something that you do not own and keeping it (or getting rid of it) is 'theft'. This concept is so notorious or generally accepted as not to be the subject of debate among reasonable persons. I am satisfied that the landlords did not need to quote section 322 of the *Criminal Code* to the tenants to put them on notice as to what illegal activity the landlords allege they participated in.

In any event, the tenants have now had (pursuant to in interim decision I issued) an opportunity to argue whether section 322 applies to their actions. I summarise their argument on that point as follows:

1. for me to even consider whether section 322 applies is proof that I am biased against the tenants;
2. I have no jurisdiction to consider whether section 322 applies; and
3. there is no evidence that the tenants had the necessary intent to commit an offence under section 322.

I do not accept that providing a party with an opportunity to be heard on a particular issue that arises during the course of a dispute is indicative of bias (or even an apprehension of bias). Rather, it is a matter of procedural fairness. I also note that the tenants seek no remedy as a result of their allegation of bias: they merely make the allegation, and then leave it behind. What I am I to do with it?

The argument that the Director has no jurisdiction to consider section 322 is incongruent with section 62 (2) of the Act, which determines that the Director, 'may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act.'

In considering section 322, I am not (of course) attempting to try the tenants for a criminal offence: indisputably, the Director has no such jurisdiction. But the Act is clear that the Director may make any finding of law in resolving a dispute. Accordingly, I can consider the elements of the offence under section 322 in this dispute to determine whether something illegal occurred.

The tenants also argue that they did not have the necessary intent to commit an offence under section 322. Recently, the Supreme Court of British Columbia ['BCSC'] reiterated the intent required to prove a 322 offence (*vide R.* v. *Holtby,* 2023 BCSC 1173*,* para. 32). The court noted: 'The *mens rea* for theft requires that a person take or convert something "fraudulently and without colour of right". Fraudulent intent requires deceit or an intention to deceive, and the lack of any "proprietary or possessory" claim to the monies: *R*. v. *Beale*, 2010 ONSC 5547 at para. 5.'

That citation, in turn, cites a case from the Ontario Court of Appeal (*R*. v. *DeMarco* (1973), 1973 CanLII 1542 (ON CA)). This case also records the following principle, with apparent approval, in analysing intent: 'Conduct is not fraudulent merely because it is unauthorized unless it is dishonest and morally wrong' [p. 372].

That is particularly resonant in this dispute: the selling of the Machine is not fraudulent merely because the landlords didn't permit it – but were the tenants dishonest in selling the Machine? Did they deceive the landlords about the sale of the Machine?

To answer this, it is useful to consider what the tenants did <u>not</u> do:

1. inexplicably, they did not first ask the landlords whether they might sell the Machine;

2. once they sold it, they did not inform the landlords that they sold it, or pass on the proceeds of the sale to the landlords;
3. when the landlords later asked what became of the Machine, the tenants did not tell them; and
4. they did not offer to compensate the landlords until *after* the landlords discovered the sale and threatened an end to the tenancy as a result.

These things not done reveal a dishonesty or deceptiveness in the actions of the tenants – things done 'fraudulently' under the *Criminal Code*'s articulation of theft in section 322.

The tenants argue that they did not intend to deprive the landlords of the Machine. Rather, they intended to sell the Machine and then replace it for the landlords with a newer, better washing machine (all, apparently, without the landlords' knowledge or sanction). But they do not deny that they, in fact, deprived the landlords of the Machine. And while they have offered to buy a new washing machine to give to the landlords, there is no evidence that they have bought or given anything to the landlords. Indeed, the landlords deny that they have.

As set out above, the deceptiveness of the tenants is unearthed in what they did not do. And it is not negated by them claiming now what they *might* do to make amends for it.

If I consider the selling of the Machine in the context of section 322, then I must also consider any potential defences. While the tenants have not argued any such defences, I find it worthwhile to consider 'colour of right': perhaps the tenants' decision to sell the Machine was tinted by some such colour of right. That is, did the tenants honestly believe that they had a *legal* right (not just a moral right) to dispose of the Machine?

Both to me and to the landlords, the tenants argued that they sold the Machine, 'in good faith'. By this they appear to mean that they, 'never intended any prejudice' to the landlords. Their explanation is that the Act obliged the landlords to replace the Machine anyway, and so they were, in reality, doing the landlords a favour by disposing of the Machine. Despite this explanation, they still do not cite any section of the Act that permits them to sell their landlords' property without permission…

I am satisfied that the tenants did not honestly believe that they could legally sell the Machine. Not only did they acknowledge in their statements to me in the hearing that it was not 'okay' to do what they did, but they told me that they never considered whether

it was legal to sell the Machine. This does not support the notion that they did so by the sheen of a colour of right.

Is this sufficient cause to end the tenancy?

But is all of this sufficient to end the tenancy? The Guideline certainly suggests that tenants can do illegal things during their tenancy and not have to move out. A key part of the tenants argument is, 'It is readily apparent from RTB Policy Guideline 32 that in order to evict a tenant for alleged illegal activities, an arbitrator must weigh the impact on the affected party rather than focus on the illegality of the activity itself before ending a tenancy.' [emphasis mine]

So what is the impact upon the landlords? And is it sufficient to end the tenancy?

On the surface, the landlords have lost their Machine, which several years ago they valued at $1,400.00, and which the tenants valued at $100.00 when they sold it. The tenants say that it was an old washing machine, due to be replaced, and so the landlords have suffered no loss.

But is there a greater impact upon the landlords beyond the loss of the value of their Machine?

The Supreme Court of Canada determined that parties to a contract are bound by a duty to honestly perform their obligations under the contract [*Bhasin* v. *Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, para's 75~79]. For their part, the tenants concede that this duty applies to contracts, but submit that they are unsure why the duty to honestly perform a contract might affect this dispute. I shall set out my reasoning on that point below.

Indisputably, a tenancy agreement is a contract. And, arguably, a tenancy agreement – where one party entrusts their property to the care of another – is particularly sensitive to this duty of honest performance.

Now, the BCSC accepts that theft is dishonest [*e.g. R.* v. *Desjarlais* et al*,* 2006 BCSC 342, para's 32 & 38]. Not only was the act of selling property that belonged to the landlords without their permission a dishonest act, the tenants persisted with their dishonesty when confronted by the landlords about the whereabouts of the Machine.

So, while the value of the Machine may not have been much (though I make no finding as to what it was worth):

1. by selling the landlords' property without asking them if they could; and then
2. by keeping the money from the sale for themselves:
3. the tenants engaged in the kind of dishonesty that the courts attribute to the act of theft; and
4. the tenants failed in their duty to honestly perform their obligations under the tenancy agreement.

The landlords sought to articulate this to me by expressing their feeling of having lost trust in the tenants after this: the landlords are anxious that the tenants might also decide to do other things with the landlords' property without their knowledge and permission.

The tenants failed to honestly perform their obligations under their agreement with the landlords: they disposed of the landlords' property without permission and without colour of right, and they did so dishonestly and deceptively. Though they argue that they, 'have all times performed their duties under the contract honestly, and have further not concealed that they have sold the [Machine]', they have, in fact, done the opposite. They *did* conceal the fact that they sold the Machine, and only conceded that they had done so after receiving the Notice.

Such conduct falls short of the requirement to fulfill a tenancy agreement honestly. And if the parties cannot be assured their contract will be fulfilled honestly, then it should not stand.

As a result of this analysis, I am satisfied that the tenants illegally disposed of the landlords' property, which adversely jeopardized the landlords' lawful interest in that property. I uphold the Notice and end the tenancy.

Conclusion

I make an Order of Possession in favour of the landlords. This order is effective two days after the landlords serve it upon the tenants. If the tenants or any occupant of the rental unit fail to comply with my order, then the landlords can file this order with the BCSC, and enforce it as an order of that court.

At the end of the tenancy the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. Tenants and landlords both have an obligation to complete a move-out condition inspection at the end of the tenancy. To learn about obligations related to security deposits, damage and compensation, search the RTB website for information about after a tenancy ends.

I make this decision on authority delegated to me by the Director of the RTB *per* section 9.1(1) of the Act.

Dated: 28 July 2023

Residential Tenancy Branch