Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP, RP, FF

Introduction
This hearing dealt with an application by the tenant for a repair order. The hearing commenced April 19, 2013. The only respondent named on the application for dispute resolution was the park manager. I heard evidence on the issue of whether or not an employee of the landlord could be named as the respondent on an application of this nature.

The park manager, TS, filed evidence to show that the owner of the park is a limited company; that the limited company is listed as the landlord on the tenancy agreement; that all documentation from the landlord, including notices of rent increase, were from the limited company; that all rent payments are made to the limited company; and that he is merely an employee of the limited company. He also testified that he had no authority to make decisions regarding capital expenditures or infrastructure decisions for the par. He argued that the limited company should have been named as the respondent; not he personally. He also advised that the address for service on the company was his residence.

On April 22 I rendered an interim decision holding that the park manager could be named as a respondent.

The hearing was scheduled for continuation on May 9 at 1:00 pm. Although all parties including myself called into the hearing at the appointed time, for some reason the parties and I were never connected. Subsequently the staff of the Residential Tenancy Branch arranged a new date for continuation, May 16 at 1:00 pm. This new date was with the consent of the parties.

On May 16 the resident manager and a gentleman, TW, who was subsequently identified as the sole shareholder of the limited company appeared for the landlord. The landlord made a preliminary objection. An amended application for dispute resolution had been posted on the door of the park manager's residence on May 1. The amendment purported to remove the park manager as the respondent and substitute the park owner as the respondent.

The park manager testified that he had only received pages 1 and 2 of the amended application and that he faxed them to TW. TW said that since he did not receive the application for dispute resolution he was not sure what the tenant was claiming. He stated that TS was appearing as agent for the company and he was only appearing as a witness. TS said since he had only been the resident manager for a short time he needed to get all the relevant information from TW and needed additional time to do so.

I held that the limited company would be substituted for the resident manager as the respondent on this application and that the hearing would proceed for the following reasons:

- The landlord had originally argued that the company should be added as a party and the resident manager should be removed as a party.
- The tenant had complied with that request by amending her application for dispute resolution.
- The amended application for dispute resolution had been served at least five days before the date of the hearing.
- The landlord had not been prejudiced in its preparation for the hearing just because the document served on TS as agent for the company was not the complete package served on TS in his personal capacity.

The hearing proceeded. I was only able to hear the tenant's evidence within the time allotted for the hearing. The hearing was adjourned to June 1 at 1:00 pm with the consent of all participants.

On June 4 I was only able to hear the landlord's evidence within the time allotted for the hearing. The hearing was adjourned to June 21 at 1:00 pm with the consent of all parties.

The parties were able to complete their evidence and final arguments on June 21.

Issue(s) to be Decided

Should a repair order be made and, if so, upon what terms?

Background and Evidence

This manufactured home park was developed more than fifty years ago. There have been two subsequent owners of the park; M and the current owner.

The area is waterfront – low and wet. The original developer trenched out the marshiest area in the middle and created a canal. The trenched out soil, and other fill, was dumped on either side of the canal to create manufactured home sites.

There are 37 sites in the park. All but four are adjacent to the canal. Lots 1A to 4A are located in the first hundred feet from the bridge. This area has a high bank and these residents have never had water access.

According to the letters filed by the daughter of the original developer and the previous park manager the original developer had reinforced one side of the canal from the lake to the bridge with tires and had built a concrete retaining wall on the other side in front of lots 1A to 4A. This portion of the canal is subject to erosion because of boat action. By 2003 the concrete wall was sinking and leaning badly toward the water. Those four lots, which include the previous park manager's site, were repaired at the owner's expense.

The balance of the lots, including the tenant's, are on the canal. The photographs filed by the parties show that a wide variety of structures have been built behind each manufactured home on their portion of the waterfront. Some homes have elaborate stone retaining walls; some have tire retaining walls; some have docks or patios; some have almost nothing. All homes are within a few feet of the water.

The canal, which is 30 to 40 feet wide and about 2000 feet long, is a dead end waterway leading off Lake Okanagan. At the entrance to the canal is a sign that says "Private Canal".

Until this owner bought the property it had never been dredged. There is a small pump at the end of the canal to keep the water moving. The water level in the canal varies some four to five feet during the year. The lowest point is usually in the winter; the highest in the spring.

About five hundred feet from the lake is a bridge. At one time the area between the bridge and the lake was a public campground. The manufactured home park is from the bridge to the end of the canal.

Several years ago the current owner subdivided the camp ground from the main title and sold it to another entity, which has developed the area for a new housing subdivision. Before the property was sold the owner had to have the canal rebuilt from the bridge to the lake. This was a very large undertaking because the modern day regulations are a great deal more rigorous than when the area was first developed. The canal was excavated back twenty-five feet and proper soil was placed and planted. According to the landlord the project took about two months. The project required approvals from the Department of the Environment, Department of Fisheries, and the

municipal authorities. One of the current regulatory requirements is that all homes built in this flood zone have to be built a specified distance from the water.

The tenant's parents moved into this park in 1987. The tenant took over the tenancy on April 17, 2004. At that time she signed an application for tenancy and received a copy of the park rules. The monthly rent, which is currently $429.74, is due on the first day of the month. The same manufactured home has been on the site since 1987. Her parents built a dock on their lot which the tenant described a free floating structure – not part of any retaining system.

The relevant provision of the Park Rule is:

> "9. Maintenance of the Site and Landscaping
> The tenant must maintain the site, the landscaping and the home in good repair and in a neat, clean and sanitary condition. Maintenance of improvements is entirely the responsibility of the Tenant, and the Landlord is not responsible or liable in any way for their repair, safety, construction standards, or future condition. Unless otherwise specified in a written agreement between the Tenant and the Landlord, the Tenant is responsible for expenses and maintenance of (a) the Tenant's dwelling unit, skirting and additions; (b) the utility connection lines from the Park's service points to the manufactured home; (c) set up, blocking and periodic leveling of the manufactured home and additions: (d) the site's landscaping, fencing, rock walls, driveways or other improvement. All exterior renovations or additions must be completed within a term agreed to by the Manager and the Tenant."

In 2005 a sink hole appeared on the tenant's lot. The then park manager filled the hole with rock, which appeared to solve the problem for a while. The tenant testified that she did not pay for the repairs; the owner testified he did not pay anything either. Although the former park manager filed a letter in evidence confirming the work that he did, his letter did not say who paid for the rock or his labour.

In 2011 the water was high enough to cover the tenant's deck, a situation that lasted most of the summer. That year the tenant noticed erosion on her lot. There was a hole by her manufactured home and the land from the end of the home to the canal had slumped.

The tenant complained to the park manager about high water on her lot. She testified that the owner looked at the situation, said they would have to wait until the water levels went down to properly assess the situation, and never contacted her again. The owner

testified that he told the tenant to keep an eye on the situation and to keep them informed.

2012 was another year of high water. The tenant ended up removing her dock. She again complained about the water levels. She says the landlord told her they thought the situation had been resolved.

By this spring the situation had gotten worse. The hole is larger and more of the canal bank has disappeared. She has fenced off part of the yard due to safety concerns and so has lost the use of part of the yard and access to her boat. She again complained. The tenant said that when the response was that the landlord had made inquiries and had learned it was not responsible for maintaining the canal banks, she filed this application for dispute resolution.

The owner and the park manager did look at the situation at the end of May. The following day the owner had a contractor attend. A letter from the contractor was filed in evidence. The letter said there was a hole with about eighteen inches of water in it, which was consistent with what would be observed if a similar hole was dug on any other site in the park. The letter concludes “I suggested that the hole be filled immediately with larger drain rock to stabilize the areas under her home. I also suggested that when the water recedes in the late fall the bank should be examined and, if required, a sandbag retaining system be put in place.”

In the hearing the landlord undertook to pay for this repair as a good will gesture towards this tenant but not as an admission of liability or as a precedent setting action. By the end of the hearing, it appeared that all the arrangements had been made for this repair.

According to the landlord the contractor told him that the source of the water in the hole will not be apparent until the water recedes in the fall. If the bank is eroding from below the problem is easily remedied by putting sand bags in place; if the reason is porous rock something else could be done to restrict the flow of the water. The contractor also told him it would be most effective to place the sandbags, if that was the appropriate solution, after the area had dried out.

The landlord testified that if a new retaining wall was to be built approvals would have to obtained from a variety of authorities including the Provincial Government and the municipality. The other concern is that once someone applies for permission to build a retaining wall the manufactured home, which is currently “grandfathered” may become subject to the modern “set-back” requirements and have to be moved back from the

water. However, sand bags can be installed on the waterfront without any permits being required. Because this park is in an area designated as a flood zone the municipality provides the sand bags for free to residents living in that zone. The landlord testified that he is prepared to pay for the cost of sandbagging the canal bank in front of the tenant's site.

The tenant expressed many anxieties about the suitability of sand bags as a solution the situation; however, she has not obtained any advice from a contractor or any other person with expertise in this area.

Much of the evidence was focused on the question of who built the existing retaining walls in front of the manufactured homes and what responsibility the various landlords have assumed for maintenance of the canal and its banks.

The landlord and the park manager both gave evidence about their respective conversations with the daughter of the original park developer and the previous park manager. Both individuals subsequently filed letters refuting the landlord's and current park manager's versions of the conversation. Their letters gave some information about the retaining walls in front of lots 1A to 4A, but said nothing about the canal banks in the rest of the park.

The landlord also testified that he had been told by M that all of the structures behind the manufactured homes had been built by the residents themselves.

The parties both referenced the variety of retaining walls in place along the canal. The landlord argued that this variety is proof that they were installed by the individual residents, not by either previous owner.

In a written statement the tenant argued that: "The retaining walls were put in place when the canal and the trailer park were built; they were built with various types of concrete, tires, rocks and metal. To this date some of the original retaining walls are still there and still acting as such. Some homeowners may have done some cosmetic work to the retaining walls or added docks or decks. . . but under the structures is rock, tires or metal this is most likely the original retaining walls."

The landlord testified that the tenant did not have a retaining wall in front of her lot. The tenant argued that she did pointing to the presence of tires under the deck. She stated that her parents had not placed the tires there.

The landlord referred to a decision on file 730370, which was an application by the tenants of this park for, among other things, an order that the landlord increase the water circulation in the canal. In that decision the arbitrator found that the evidence did not disclose any health or safety hazard posed by the condition of the canal and that the tenants had a responsibility to maintain cleanliness standards on their own sites as well as common areas, which would include the canal.

Analysis

Section 26(1) of the *Manufactured Home Park Tenancy Act* requires a landlord to:

- provide and maintain the manufactured home park in a reasonable state of repair; and,
- comply with housing, health and safety standards required by law.

Subsection 5 states that a landlord is not required to maintain or repair improvements made to a manufactured home site by a tenant occupying the site, or the assignee of the tenant, unless the obligation to do so is a term of the tenancy agreement.

The landlord is responsible for maintaining the lots on which the manufactured homes are parked. Thus it is the landlord's responsibility to keep the lots stabilized by filling in any sink holes that may appear on the lot, something the landlord has already undertaken to do. **The landlord is ordered to have the hole on the tenant's lot filled with material appropriate to stabilize the lot as soon as possible.**

The landlord is also responsible for determining the reason for the sink holes. The contractor's statement that it is not possible to determine the source of the water in the hole and the reason for the appearance of the hole, until the area is no longer under water makes sense. **The landlord is ordered to have the lot examined by a qualified contractor, after the water has receded, and to comply with the contractor's recommendations, as soon as possible thereafter.**

The tenancy agreement does not specify the size of the lot. One edge of the lot is water and changes to that boundary line over the years as a result of water action are to be expected. As long as there is sufficient area on which to safely park the manufactured home and permitted additions to the home, such as porches or decks attached to the home, the landlord has met its' legal obligation.

The tenancy agreement makes it clear that the tenants are responsible for any structures added to the lot. While the agreement names many types of improvements, it does not mention retaining walls on the canal. In the absence of any term in the tenancy agreement specifying who has the responsibility for maintaining the canal walls,

the result is that if the retaining walls were built by the tenant, maintaining the wall is the tenant's responsibility; if built by the landlord then they are part of the park's infrastructure and are the landlord's responsibility.

There is no evidence as to who built the retaining walls, if any, along the main portion of the canal. The letters from the daughter of the original developer and the former park manager give information about the retaining wall in front of lots 1A to 4A, but say nothing about the balance of the park. The fact that the tenant's parents did not install the tires she says are in front of her lot does not prove that some previous tenant on that site did not do so. The photographs filed by the parties show a high degree of variation in the structures along the canal and considerable variation in the protection built into the canal banks in front of each site. Although the tenant testified there was a retaining wall under her deck on the edge of the canal all that is visible in the photographs is some concrete footings and a few tires; substantially fewer tires than on her neighbour's lot. Finally, the tenant's own written submission is just conjecture: "Some homeowners may have done some cosmetic work to the retaining walls or added docks or decks. . . but under the structures is rock, tires or metal this is most likely the original retaining walls." (Emphasis added.)

The degree of responsibility previous owners were prepared to accept in relation to the canal is not conclusive. There is evidence that the second owner did repair the retaining wall that was installed by the first owner but no evidence of any repairs done by either previous owner to any of the retaining walls in the balance of the park. The fact that the previous owners had repaired the retaining wall in one portion of the canal does not establish he had a legal obligation to do so. Further, it is clear from the previous hearing that neither of the previous owners had assumed responsibility for the canal by dredging it or removing garbage and debris from it.

Finally, as the tenancy agreement specifies that the landlord does not have any responsibility for structures or improvements added to the lot by a tenant it follows that a landlord does not have responsibility for ensuring that a tenant has access to that structure.

Based on the evidence before me I cannot find that the landlord has any legal responsibility for maintaining the canal bank in front of the tenant's home.

Conclusion

The landlord has been ordered to:

- have the hole on the tenant's lot filled with material appropriate to stabilize the lot as soon as possible.
- have the lot examined by a qualified contractor, after the water has receded, and to comply with the contractor's recommendations, as soon as possible thereafter.

If the landlord does not comply with this decision, the tenant may apply for a more specific repair order and/or an order awarding her monetary compensation. If the contractor's recommendation to the landlord results in the landlord being required to apply for any permits and the loss of the "grandfathered" status of the homes in this park, the landlord may apply for further directions.

As the tenant was substantially successful on her application I find that she is entitled to reimbursement from the landlord of the $50.00 fee she paid to file this application. Pursuant to section 65(2) that amount may be deducted from the next rent payment due to the landlord.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Manufactured Home Park Tenancy Act*.

Dated: July 18, 2013

Residential Tenancy Branch