Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1112 BROUGHTON PROJECT GP LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNL-4M, FFT

Introduction

In this dispute, nine tenants seek an order cancelling the landlord's Four Months' Notices to End Tenancy for Demolition, Renovation, Repair or Conversion of a Rental Unit (the "Notices") pursuant to section 49 of the *Residential Tenancy Act* (the "Act"). In addition, seven of the tenants seek recovery of the filing fee under section 72 of the Act.

The tenant on the primary file made an application for dispute resolution on July 22, 2020 and a dispute resolution hearing was held on September 3, 2020. All nine tenants along with their advocate attended the hearing. Also, in attendance was landlord's counsel and two witnesses for the landlord. The parties were given a full opportunity to be heard, present testimony, make submissions, and call witnesses. No issues of service were raised by the parties. Finally, I emphasized to the parties that while the hearing was scheduled from 9:30 AM to 12:00 PM, if either side required additional time to present their case that we would adjourn the hearing for additional time.

I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues of this application. As such, while the hearing lasted over two hours and there was much testimony from both sides, not all of this will necessarily be reproduced within the Decision.

Issues

1. Are the tenants entitled to an order cancelling the Notices?
2. If not, is the landlord entitled to orders of possession of the rental units?
3. Are the tenants entitled to recovery of the filing fees?

Background and Evidence

The nine tenants reside in a multi-storey building built in the 1950s. They have lived in the building, for varying lengths of time. In a few cases, there are tenancies over 25 years old. The tenants are mobile, a few are seniors, and their “community is strong,” remarked the primary tenant. There is a total of 22 rental units in the building.

The landlord wants to undertake a complete installation of a new sprinkler system throughout the building. The installation will require punching through walls. A complicating factor, though, is that because the building was built in 1953, there is asbestos in the walls. The landlord submits that it is the extensive manner of the sprinkler system installation – along with the asbestos factor – that requires the rental units to be vacant.

Additional work to be done includes some additional renovations to various aspects of the building, some cosmetic work, a roof replacement, and the stabilization and removal of the chimney. All of this work, however, is not the primary issue insofar as both sides are concerned and would not by themselves require vacancy; for this reason, I will not elaborate or comment further on that work. Indeed, as emphasized by landlord’s counsel, the primary question is whether the sprinkler work requires vacancy. Further, it should be noted that the parties disputed this matter previously, which resulted in a decision in favour of the tenants. However, I have not reviewed that decision and make no findings of fact or law based on, or in any derived from, that previous decision.

The landlord’s counsel provided some additional background as to why a sprinkler system needs to be installed, namely, to bring the building up to fire code, which, apparently, has caused mortgage and insurance issues for the landlord. The landlord’s first witness, K.S., is the property manager and they testified that the building needs to be brought up to fire codes, and health and safety requirements. The landlord “can’t get insurance” because of the code issues. A code review was conducted on the property and was included in the landlord’s evidence.

K.S. also flatly denied the suggestion, put to him in direct examination by counsel, that the renovations are part of a “cash grab” scheme by the landlord. He commented that regardless of what happens in this dispute, “at some point the building *will* need upgrades.” As for the cost of the work, the property manager testified that it will be in excess of one million dollars. And as for any profit that might result, he explained that “it would take many years to earn back the cost of the renovations.” Perhaps, he opined, seven to eight years.

Landlord's counsel again asked the property manager as to the landlord's intentions, to which K.S. answered, "to bring the building up to [fire code] standards," and that the alternative is demolition.

The other witness for the landlord, M.S., is the vice president of the construction managers assigned to do the work on the property. M.S. appeared to be an extremely knowledgeable and experienced witness, though he often presented as being rather annoyed by the lines of questions put to him. His opening remark upon direct examination was that, to paraphrase, "the work is absolutely going to happen."

Further testimony of M.S. then include extensive descriptions of the work to be done, including that of the sprinkler system, the electrical, the hardware, plumbing, lighting, new boiler system, and so forth. He provided various cost estimates for each of the different types of work to be done but added that there will be additional costs that cannot be estimated at this time until there is more certainty with the project. As explained, "one the sprinklers go in, then everything follows."

M.S. provided a thorough and excellent "walk through" of the property, as if one were visiting the building in-person. He testified that "there's going to be a significant number of holes" being made in the walls to install the sprinkler system, and "there's going to be asbestos." As to the asbestos issue, he explained that WorkSafeBC rules are such that no people (other than the workers who are doing the installation) are allowed in the building while the work is being undertaken. This safety issue is due to the asbestos abatement.

Continuing, the witness described that the work will involve workers in every floor, coming and going into and out of the rental units. He noted that there is no elevator in the building, so the stairs will be a hub of ongoing, daily work-related activity. The witness remarked that "it's simply not feasible for people to carry on living while this occurs." The witness testified that asbestos migrates through the common areas and possibly into the rental units. "If anyone's living there [in the building]," the tenants are going to get exposed to the asbestos.

Later in his testimony, M.S. said that "it is not possible [to do the work] with the tenants there." There will be "too many trades involved, moving furniture around while the work is going on [would be impractical]" and "people will be in an out." The workers, he said, "need free access." Finally, when asked by landlord's counsel if then witness had "held off the work just to evict the tenants" the witness responded, "absolutely not."

The next portion of the witness M.S.'s testimony covered the various permits that are and are not required. As the issue of whether the landlord had all required permits was not in dispute between the parties, I will not repeat this evidence further. It is worth noting, however, that, according to M.S., "you don't get a permit to do removal of asbestos, you file a notice with WSBC [WorkSafeBC]."

The witness then referred to an environment report conducted in 2018 in which, according to M.S., "found extensive asbestos" in the building. This is not to be unexpected in a building built in 1953, the witness commented. On page 53 of the report it was noted that "there must be further testing." The limitations of the report, however, were that the testing was limited to certain areas of the building.

When asked by landlord's counsel as to what the plan was regarding the asbestos, the witness responded that "it depends on how extensive it is." Further testing would, he said, require vacancy in order for the testers to come into each rental unit and conduct the testing. He then referred to a table on page 54 of the report in which it was determined that the abatement risk level is "high." More recently, asbestos was found in two additional rental units within the last couple of months (due to a water leak in which repairs were made in the walls, and which resulted in a finding of asbestos).

The landlord's witness K.S. briefly testified about the recent leak and testified that asbestos was found in the filler material. However, no other rental unit have been tested other than three in total. He explained that further testing is not practical, and that there are safety issues with such work.

Witness M.S. then provided further testimony, reiterating that "the most intrusive work is the sprinkler system. There is no sprinkler system." He went on to provide a detailed and extensive explanation of how the installation would be undertaken. Holes would be cut, pipes hung, bulkheads added, wires installed, heat and smoke detectors installed, and so forth. In other words, the witness said, "the sprinkler system is going to be built from scratch," while at the same time they "want to minimize damage to the building."

The overall time estimate for the whole scope of work is estimated at 8 to 12 months, while the sprinkler installation portion of the work would take 60 to 90 days, the witness noted. He added that there is no staging area, and that materials and tools will be in the hallways while the work is going on, and that there will be "workers everywhere." When asked by counsel as to the feasibility of moving tenants into the empty suites, he responded that "it's not feasible." He then added testimony regarding the noise, the

dust, the requirement to seal off areas of the building while work is being done, and the difficulty of having only one entrance and one stairwell.

Next, landlord's counsel referred the witness (M.S.) to an engineer's report that the tenants had commissioned. The witness discounted the entire report, including the time estimates that the engineer had provided. He commented that "99% of engineers have never worked in the field," and thus they cannot provide reliable time estimates. As for the time estimates, the witness said that the work would require about 3 weeks per rental unit to be completed.

When asked by counsel "could one rental unit be done at a time?" the witness answered, "nobody would provide work one [rental unit] at a time." He then said that "you have to test the piping, so you can't have the work done one suite at a time." According to the witness, one has to test the entire system before covering it all up (presumably, with the bulkhead). The witness stated that he got three bids from potential contractors to do the work, but none of those bids were for the work to be done one rental unit at a time.

Counsel then asked M.S. if a tenant be in a rental unit, to which the witness said no. "It's not physically possible to do drywall and install pipes while someone's living there." He concluded by saying "it is not feasible in my opinion" to have people move into another part of the property while the work is being undertaken. Moreover, he testified that he has done work involving asbestos at least 40 times and has "never had people remaining in their homes" during the work.

The hearing briefly recessed from 10:30 to 10:40 AM, after which the tenants' advocate crossed-examined the landlord's witnesses.

Tenants' advocate asked M.S. about his qualifications regarding sprinklers. The witness said that he had no specific qualifications on sprinkler systems but said that he has over 30 years' experience in the industry. And as for the installation of sprinkler systems he has "done it a zillion times."

Tenants' advocate (and landlord's counsel) both briefly referred to the relevant case law, which will be addressed further below, and whether the facts of the case support a claim for vacancy of the rental units. The advocate also spoke of other matters including licenses, testing results of the environmental report, the impracticality of moving the tenants and the and additional matters that will not be reproduced further. Somewhat curiously, however, the advocate then raised questions of whether the landlord was, in

fact, undertaking the work in good faith. (That is, the advocate's initial position was that they assumed the landlord was operating in good faith, but then later switched his position to state that "very little work has not been done in good faith." But, he then added that he would "like to assume that the landlord is not operating in good faith."

The lead tenant, P.T., then provided testimony and submissions, and she argued that "it might be impractical, but not impossible to do the work [rental] unit by [rental] unit." She added, "inconvenience and practicality are not the standards" by which eviction and occupancy are to be determined. She then spoke about the standard to be applied for occupancy and vacancy in this type of case.

P.T. then submitted that three works' worth of work per unit is manageable, and that 8-12 months is "not inconvenient." She then spoke about how relocation of all the tenants is unreasonable. In response, landlord's counsel spoke about the legal standard to be applied and noted that is it "completely impractical" for the tenants to be moved around the building into the vacant units. Moreover, he submitted that whether it is practical or impractical for the tenants to move around is not a relevant question or the test to be applied. The tenants' advocate argued that the landlord's position in regard to the work is simply that it "makes the contractors' lives easier."

Tenants' advocate submitted that the tenants are more than reasonable and willing to relocate into other rental units, and in the alternative are willing to relocate for 8 to 12 months elsewhere in the city. The lead tenant then testified again that the tenants are willing to accommodate the landlord and the contractors and willing to work with the parties when work needs to be done in the rental units. Moreover, she testified that hanging sprinkler pipes could be installed and that one day per rental unit would be all that is needed to install such hanging sprinkler pipes.

The lead tenant also described some work done in 1998 when older pipes were replaced throughout the building. "There was a lot of inconvenience and noise, but we put up with it," she said, "and we're good to put up with it again." As for the asbestos, the tenant referred to a 2019 survey which did not find asbestos in walls or ceilings (at least for those areas tested) and that there is, quite simply, not as high a level of asbestos as has been suggested. She then spoke of other issues, including that of the landlord's difficult in obtaining insurance; "today's the first we're hearing about insurance issues."

P.T. spoke briefly about her feeling "ill ease" regarding the landlord's good faith, and that the landlord is aware of the low rents that the tenants are paying.

In his final submissions landlord's counsel submitted that it has not been possible for the landlord to get a contractor to do this work on a unit by unit basis. Asbestos has been found in various other places. He referred to the report that states that the building must be assumed to have asbestos throughout. Moreover, the existence of negative tests does not confirm that there is no asbestos elsewhere in the building. Finally, counsel reiterated that it is the landlord's position that the rental units must be vacant for the work to be done.

In his final submission the tenants' advocate said that it is their position that the work does not require vacancy. However, if there is no other option then he submitted that the tenants are willing to move out for 8 to 12 months but only if they do not have to pay rent during that time, and, that they can move back in after the work is completed.

Analysis

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.

Where a tenant applies to dispute a notice to end a tenancy, however, the onus is on the landlord to prove, on a balance of probabilities, the ground on which the notice is based and issued. In this dispute, the tenants dispute the Notices. The Notices were all issued for the identical reason, namely, pursuant to section 49(6)(b) of the Act.

This section of the Act reads as follows:

> (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

Good faith was referenced by both sides, the tenants' advocate generally commented (although at times he seemed to switch positions on this issue) that they assumed that the landlord had issued the Notices in good faith. And, while some mention was made by the advocate and the lead tenant about the landlord's awareness of the under-market rent being charged, and that the landlord could re-rent the rental unit for much higher rent, the issue of good faith was not paramount. For this reason, I find that the

landlord issued the Notices in good faith. Based on the entirety of the evidence and based on the thoroughness and forthright nature of M.S.'s testimony, I have no doubt that the landlord intends to install a fire sprinkler system, along with the electrical work and other work such as the roof and the chimney.

Likewise, the issue of whether the landlord has all the necessary permits and approvals required by law was not, I find, a contentious matter. That the landlord has the necessary permits was largely accepted – or rather, not disputed – by the tenants.

What is in dispute is whether the installation of the sprinkler system (that is, the "renovate or repair") is to be done in a manner that requires the rental units to be vacant. *Residential Tenancy Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use,* provides a fairly extensive outline and summary regarding the law and policy on this type of dispute. I shall reproduce the relevant portions below:

> Vacancy requirement Section 49(6)(b) allows a landlord to end a tenancy to renovate or repair a rental unit in a manner that requires the rental unit to be vacant.
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> In *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator)* (2007 BCSC 257), the BC Supreme Court found that "the renovations by their nature must be so extensive as to require the rental unit to be vacant in order for them to be carried out." The Court found "vacant" to mean "empty". The Court also found that it would be irrational to believe that a landlord could end a tenancy for renovations or repairs if a very brief period of vacancy was required and the tenant was willing to move out for the duration of the renovations or repairs.
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> In *Aarti Investments Ltd. v. Baumann* (2019 BCCA 165), the Court of Appeal held that the question posed by the Act is whether the renovations or repairs "objectively" are such that they reasonably require vacant possession. Where the vacancy required is for an extended period of time, according to the Court of Appeal, the tenant's willingness to move out and return to the unit later is not sufficient evidence to establish objectively whether vacancy of the rental unit is required.
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> In *Allman v. Amacon Property Management Services Inc.* (2006 BCSC 725), the BC Supreme Court found that a landlord cannot end a tenancy to renovate or repair a rental unit just because it would be faster, more cost-effective, or easier

to have the unit empty. Rather, it is whether the “nature and extent” of the renovations or repairs require the rental unit to be vacant.

Renovations or repairs that objectively and reasonably require the rental unit to be vacant to carry them out could include renovations or repairs that will:

- make it unsafe for the tenants to live there (e.g., the work requires extensive asbestos remediation) for a prolonged period; or

- result in the prolonged loss of an essential service or facility (e.g., the electrical service to the rental unit must be severed for several weeks).

Renovations or repairs that result in temporary or intermittent loss of an essential service or facility or disruption of quiet enjoyment do not usually require the rental unit to be vacant. For example, re-piping an apartment building can usually be done by shutting off the water to each rental unit for a short period of time and carrying out the renovations or repairs one rental unit at a time. As long as the tenant provides the landlord with the necessary access to carry out the renovations or repairs, then the tenancy does not need to end.

Cosmetic renovations or repairs that are primarily intended to update the decor or increase the desirability or prestige of a rental unit are rarely extensive enough to require a rental unit to be vacant.

In this dispute, the landlord’s witness M.S. repeatedly and firmly testified that the nature of the work requires the tenants to be out of the building. He explained that the likely extensiveness of asbestos is the primary reason for this, along with other factors such as the workers’ coming and goings and the generally noisy and disruptive nature of the work. The tenants dispute this position, of course.

There are two issues that are worth noting at this point. One, while there may very well be asbestos throughout the building, the reports provided in evidence do not show, in my opinion, clear and concrete evidence of the extensiveness of the asbestos. Moreover, that workers will be coming and going, putting their tools in the hallways, and so forth, are not, I find, sufficient reasons to requires all of the rental units to be vacant. Workers may very well need free access, but such access does not require full vacancy. That these other reasons were provided in evidence by the landlord shows, in my mind, that the asbestos issue is not as extensive as the landlord would like to assume.

During his testimony, the landlord's witness M.S., in response to counsel's question, "could one rental unit be done at a time?" answered "nobody would provide work one at a time." He obtained bids from three contractors to do the work as they would have preferred to carry it out, namely, all at once over the entire building. What I infer from this evidence, namely, the statement "nobody would provide work one at a time" is that the work is, in fact, possible to be undertaken one rental unit at a time. There is no evidence before me to find that the landlord (that is, the project manager) made any efforts to obtain bids from potential contractors on the basis of a scope of work involving one rental-unit-at-a-time. Indeed, it is likely the case that the project manager simply did not ask for bids on such a basis.

Further, the witness suggested that a tenant cannot be in a rental unit when work is being done in the rental unit. Specifically, "It's not physically possible to do drywall and install pipes while someone's living there." I do not accept this argument; it is entirely possible for a tenant to live in the rental unit while such work is being done. They may need to leave for a short time, however, for convenience.

In summary, I find that the landlord (through the project manager) simply prefers to end the tenancies on the basis that it would be more cost-effective and easier to have the rental units empty.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving that, pursuant to section 49(6)(b) of the Act, the renovations and repairs to the rental units must be done in a manner requiring the rental units to be vacant.

As such, the Notices, which were all signed by the landlord's representative on June 29, 2020 (and copies of which were all submitted into evidence) and which were issued to the tenants on or about June 30, 2020, are hereby cancelled and of no force or effect.

Finally, section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the applicants were successful, I therefore grant seven of the tenants' claims for reimbursement of the $100.00 filing fee (two tenants obtained a fee waiver and are not entitled to this recovery.) In full satisfaction of these claims each of the seven tenants may make a one-time deduction of $100.00 in a future rent payment.

Conclusion

I hereby grant the tenants' applications.

I hereby order that all the Notices are cancelled and of no force or effect. The tenancies shall continue until they are ended in accordance with the Act.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: September 8, 2020

Residential Tenancy Branch