Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR-DR MNR-DR FFL / FFT CNR MNDCT MNRT RP RR OLC

Introduction

This hearing dealt with two application pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlords' for:

- an order of possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent in the amount of $2,600 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' application for:

- an order that the landlords make repairs to the rental unit pursuant to section 32;
- a monetary order for the cost of emergency repairs to the rental unit in the amount of $5,000 pursuant to section 33;
- the cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the "**Notice**") pursuant to section 46;
- an order requiring the landlords to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $23,000 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenants attended the hearing. Landlord SC attended the hearing. He was assisted by RC. The landlords were represented at the hearing by counsel ("**MB**").

The tenants acknowledged service of the landlords' notice of dispute resolution package and supporting evidence. MB stated that he received the tenants' notice of dispute resolution hearing package but was not formally served with any of the tenants' documentary evidence. He stated that he received a number of emails from the tenants, but he was not sure what materials have been submitted to the Residential Tenancy Branch (the "**RTB**"). He stated that, in any event, he was prepared to proceed with the hearing.

As this hearing dealt predominantly with procedural matters and the issue of jurisdiction, I advised the parties that, should this hearing be reconvened at a later date, I would order that the tenants provide the landlords with an index of documents they intended to rely on at the reconvened hearing, and the landlords could request documents listed thereon that they did not have. For the reasons that follow, such an order will not be necessary.

Preliminary Issues – Amendment of Landlords' Application

At the hearing, the landlords sought to amend their application to include a claim for July, August, September, and October 2021 rent (an additional $10,400) which they assert remains outstanding.

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
>
> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
>
> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case, the landlords are seeking compensation for unpaid rent that has increased since they first applied for dispute resolution, I find that the increase in landlords' monetary claim should have been reasonably anticipated by the tenants. The tenants confirmed they understood this Rule and did not object to the landlord's request for amendment. Therefore, pursuant to Rule 4.2, I order that landlords' application be amended to include a claim for July, August, September, and October 2021 rent, for a total claim of $13,000.

Preliminary Issue – Severing of Tenant's Application

The tenants' application dealt with a number of issues, all of which relate, at least tangentially, to repairs, remediation, and cleaning that has been done, or needs to be done, to a decorative balcony or ledge on the exterior of the rental unit (the "**ledge**"). Pigeons defecate on this ledge, which has damaged it, and there is a great deal of debate as to who is responsible for repairing and cleaning it: the landlord, the tenant, or the strata corporation.

The tenants seek monetary compensation for damage caused by the landlords' failure to address this issue, among other things. They also seek reimbursement of expenses incurred for emergency repairs, which the tenants now say exceed $15,000 (as

opposed to $5,000 specified on their application). The tenants say they withheld rent in compensation for these expenses.

The landlords' application is for an order of possession and a monetary order for non-payment of rent. They deny that the tenant undertook any emergency repairs.

In my view, while the orders sought by the tenants share some underlying facts with the landlords' application, the claims advanced by the parties can be divided into two categories: those relating to non-payment of rent and the defenses thereto (which includes paying for emergency repairs); and those relating to the repairs to the balcony and the monetary loss suffered by the tenant as a result.

RTB Rule of Procedure 2.3 states:

> **2.3 Related issues Claims made in the application must be related to each other**
>
> Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As such, I find it appropriate to adjudicate:

- the entirety of the landlords' application; and
- the tenants' applications:
  - to cancel the Notice;
  - for compensation for reimbursement of the cost of making emergency repairs, and
  - to recover the filing fee.

(collectively, the "**remaining issues**")

I find it appropriate to dismiss the balance of the tenants' application, with leave to reapply.

This severing of the tenants' applications also allows for more focused submissions on the issue of the RTB's jurisdiction to adjudicate these applications (more on this shortly).

I explained this process to the parties, and they did not object to the severing of the tenants' application. Tenant RB stated that, while he agreed to the severing, the issue of jurisdiction must be addressed before the validity of the Notice could be assessed.

Preliminary Issue – Tenants' Non-Participation

Prior to the hearing, the tenants provided the RTB with a letter dated October 2, 2021 which stated:

> We Tenants hereby respectfully confirmed that our intended **limited** appearance, at the subject hearing is for the sole purpose of assertion that RTB Directress Elder lacks jurisdiction authority to adjudicate this matter.
>
> This respectful limited appearance, devoid of any degree of participation, is not intended to mean, nor should it be interpreted as, an indication of other then the aforementioned.
>
> The Tenants have nothing to add to the record, which is replete with the Tenants submissions of voluminous statutory, case and common law authorities, all of which the tenants respectfully request be incorporated into the official record of the hearing.

At the hearing, RB confirmed that he was not attorning to the jurisdiction of the RTB by making submission on the topic of jurisdiction. I confirmed that the fact he made submission at this hearing would not automatically confer jurisdiction to the RTB.

Once the parties concluded their submissions on jurisdiction, I advised the parties I would reserve judgement on the issue. I invited the tenants to make submissions as to their making of emergency repairs. RB declined, stating he only wanted to make submissions on jurisdiction. I advised him that I would not compel him to make submissions, but that his failure to do so may act to his detriment. I reiterated that by making submissions he would not be considered to be accepting that the RTB had jurisdiction. Rather, I advised him that, in the event I assumed jurisdiction of this dispute, I would need to hear his submissions on his entitlement to reimbursement of emergency repairs. I advised him that, as there was time left in the one hour we had allotted for the hearing, I wanted to use the time efficiently.

The tenants initially decline to make any submissions and decline to answer any questions relating to this issue. However, I then allowed the landlords to make submissions on the issue of the tenants' non-payment of rent and the nature of any repairs that might have been made (which I will recount below). Once these were concluded, the tenants made brief rebuttal submissions, as set out later in this decision.

Preliminary Issue – Jurisdiction

The tenants argued that the RTB does not have jurisdiction to adjudicate any part of this dispute. Their basis for this was varied.

MB argued that their application is entirely rooted in the Act, as it is a simple claim for non-payment of rent, which itself is a breach of section 26(1) of the Act. MB submitted that the statutory defense to this is set out at section 33 of the Act (which permits amount deducted to make emergency repairs to be deducted from rent payable). MB argued that this application, at the portions of the tenants' application which relate to it, are RTB disputes, and that the RTB has jurisdiction to adjudicate them.

MB took no position on whether the RTB had jurisdiction to adjudicate the portions of the tenant's application which I severed (see above), although he stated that it "may well be that the RTB does not have jurisdiction" on these portions (I do not understand this to be a concession the issue of jurisdiction, but merely an acknowledgement of a possibility).

RB submitted that, as there was an ongoing BC Human Rights Complaint, the RTB was not permitted to adjudicate any dispute between the parties. The tenants did not provide any basis in caselaw or statute for this proposition. I asked if the tenants had any authorities to support this assertion; RB indicated that they did, but it was not immediately at hand. I granted him leave to provide me with a copy of this authority after the hearing, but he stated that he would not. As such, I rescinded such leave.

I am not aware of any authority which prohibits the RTB from adjudicating a claim pursuant to the *Residential Tenancy Act* due to the fact that a Human Rights Complaint has been made. The nature of the remaining issues does not overlap with the *Human Rights Code*. The remaining issues relate solely to whether the tenants have paid rent and whether there is a basis for them to have withheld the rent because they needed to make emergency repairs. Such an analysis does not require engaging with the *Human Rights Code*. As such, I do not decline jurisdiction on this basis.

RB argued that the Supreme Court of British Columbia (the "**BCSC**") was the proper forum for this dispute, and the dispute involves breaches of the *Strata Property Act*, the *Occupiers Liability Act*, the *BC Building Code*, and the *BC Human Rights Act*, all of which, RB submitted, the RTB does not have an authority to apply, interpret, or adjudicate disputes based on breaches of. The tenants also asserted that this dispute engaged their Charter right to have an attorney present, which the *Administrative Tribunals Act* precludes the RTB from applying.

I do not find that the tenants' Charter rights are at issue in this proceeding. Section 10(b) of the Charter of Rights and Freedoms relates to a person's "rights on arrest or detention". It does not apply to civil matters. Section 5.1 of the Act states that section 44 of the *Administrative Tribunal Act* applies, which states: "The tribunal does not have jurisdiction over constitutional questions."

This determination is not the answering of a "constitutional question". It is a plain reading of the Charter in order to determine jurisdiction. It would be an absurd result that the jurisdiction of the RTB could be negated by a parties' assertion that the Charter applies to a circumstance unrelated to the claim between the parties (in this case, the tenants' right to an attorney has nothing to do with the dispute between themselves and the landlords. Rather, as I understand it, it relates to a dispute between the tenants and their insurer, which I will touch upon later).

I do not find it necessary to apply the Charter in order to adjudicate the remaining issues before me.

In written submissions on the issue of jurisdiction they submitted prior to the hearing, the tenants wrote:

> This case is nothing but a disguised dispute, between the Strata Corporation and the Landlord, (an Owner of a Strata rental unit). In the case of *LMS 2845 v Chung* [2019 BCCRT 716,] (attached) this same Strata Council had concealed from the Respondent the existence of the Strata premise liability insurance policy, under which the Owner and the Tenant were insured.
>
> In this RTB case, the dispute between the Strata Council and the Owner has existed for many years prior to the subject tenancy. Flocks of homing pigeons have deposited vast amounts of mould infested faeces upon the Tenants' unit's inaccessible, limited common property window ledge. For more than two (2) years the Tenants had requested of the Landlord/Owner and the Strata Corporation to abate such health hazard. As documented, infra, the Strata Corporation refused, claiming that the responsibility was that of the Landlord/Owner. However, according to the mandate of the Strata Property Act and the Strata Bylaws such is the Strata Corporation's responsibility. Either way, the Tenants are not responsible for abatement, because the limited common property ledge belongs to the Strata Corporation, not even a part of the rental premises!

I have reviewed *Chung* and confirm that it is a decision of the BC Civil Resolution Tribunal (the "**BCCRT**") which adjudicates a claim between a strata corporation and an owner of a strata unit, and that the owner of the strata unit rented the unit to a tenant. That tenant was not a party to the dispute before the BCCRT.

It may be that, in this case, there exists a valid dispute about who bears the responsibility to maintain the ledger. However, it is not necessary to make such a determination in order to adjudicate the remaining issues. As such, I find *Chung* of little assistance to the present case.

In their written submissions, the tenants continue:

> In [*Janus v The Central Park Citizen Society*, 2019 BCCA 173], the Court of Appeal acknowledged that although residential tenancy disputes involve rights and obligations under the RTA [which include a landlord's obligation to maintain residential property in a state of repair that complies with safety standards required by law (s.32)] the case involves allegations of failing to maintain the safety of the building. The Court of Appeal held that such was not a "RTB Dispute" because the Plaintiff's claim did not arise solely by virtue of the rights and obligations under the Residential Tenancy Act. Instead, the Plaintiff's claim

> was based upon the Occupier's Liability Act, R.S.B.C 1996, and alternatively based upon negligence, as is this case!

I have reviewed *Janus*. In that case, the BCCA determined that the RTB did not have subject matter jurisdiction over a dispute between a former tenant and a landlord involving a claim for damages resulting from a fire in the residential property which caused the tenant to ultimately develop cancer. The BCCA determined that the RTB did not have jurisdiction because it was not an "RTB dispute" in that the relief sought did not arise from a breach of the Act, but rather arose on the basis of the *Occupier's Liability Act* and in negligence. The fact that the parties were in a landlord/tenant relationship was secondary to the dispute.

RB argued that the *Occupier's Liability Act* applied to the present case as well. He submitted that prior to renting the rental unit to the tenants, the landlords occupied the rental unit themselves. He submitted that, when the tenants moved into the rental unit, they became guests or invitees of the landlords, who were "occupiers", and were owed a duty of care. He alleged that the landlords breached the standard of care owed to the tenants. RB submitted that these applications are not "RTB Disputes" as defined by *Janus*, and as they do not derive their sole basis from the Act.

It may be that the parts of the tenant's application that I have dismissed with leave to reapply are not "RTB Disputes". However, the remaining issues fall squarely within the RTB's jurisdiction. A tenant's obligation to pay rent, to withhold rent for making emergency repairs, and to end a tenancy for non-payment of rent are all explicitly set out in the Act (at sections 26, 33, and 55 respectively). As such, I find that the remaining issues are "RTB Disputes" as defined by *Janus*.

Finally, the tenants asserted that the RTB does not have monetary jurisdiction to adjudicate their application, per section 58(2) of the Act, as their monetary claim exceeds the Small Claims Limit of $35,000.

As I have severed much of the tenants' monetary claim from this application, this argument is no longer relevant.

The tenants submitted that, if one portion of a dispute between a landlord and a tenant falls outside the jurisdiction of the RTB, then the RTB loses any jurisdiction it might have to resolve any part of the dispute. They submitted that it is not appropriate to litigate a dispute in piecemeal fashion. They submitted that this would amount to issue and/or cause of action estoppel, as it would foreclose their constitutional rights to adjudication in a court of competent jurisdiction which would afford them with constitutional safeguards such as subpoena, discovery witnesses, and litigation claims against procedurally indefensible defendants such as the Strata Corporation, the property management company and the insurance companies.

I acknowledge that the Act and the RTB Rules of Procedure do not allow for the tenants to make an application against a non-landlord entity such as a strata corporation or an insurance company. However, I do not find the means that, should a tenant have a valid claim against a non-landlord, the RTB cannot adjudicate any dispute whatsoever between the tenant and the landlord. The claim against the non-landlord can be advanced in the appropriate forum, and any claim that does not involve the non-landlord may be brought to the RTB for adjudication. If the subject matter between such disputes is intertwined, then a tenant may start a claim at the BCSC naming the landlord and non-landlord both as respondents, and the RTB would not be able to accept jurisdiction, per section 58(2)(d) of the Act, which states:

> (2) Except as provided in subsection (4) (a), the director must not determine a dispute if any of the following applies:
>
> […]
>
> (d) the dispute is linked substantially to a matter that is before the Supreme Court.

The tenant did not do this in the present case. Additionally, this section suggests a requirement beyond the mere sameness of parties in order for a matter to be outside the RTB's jurisdiction. There must be a substantial linkage between the matters.

In the present case, I do not find that there is a substantial linkage between whatever claim the tenant may have against the strata corporation or its insurance company and the remaining issues.

I find that the nature of the remaining issues is very straight forward: the tenant did not pay rent when it was owed, the landlord demands payment and an order of possession. The Act provides narrow grounds on which a tenant can withhold rent (the cost of making emergency repairs being one of them). As such, it is not necessary for me to consider the *Strata Property Act*, the *Occupiers Liability Act*, the *BC Building Code*, and the *BC Human Rights Act.*

As such, as for the foregoing reasons, I find that I have the jurisdiction to adjudicate the remaining claims.

Based on the submissions provided at the hearing, I have sufficient information to adjudicate these claims, and it is unnecessary to reconvene the hearing for additional submissions.

Preliminary Issue – Preliminary Applications

In addition to raising the issue of jurisdiction in their materials, the tenants raised the following preliminary issues:

1) summons of witnesses;
2) addition of new parties to the tenants' application; and

3) an order that their insurer provide them with legal counsel.

RB stated that the issue of jurisdiction must be dealt before any of these other applications can be resolved.

While the parties did not make oral submissions on these points at the hearing, I will address these on the basis of the written submissions provided by the tenant. I find that, in the circumstances, such submissions are sufficient, and per section 74(2) of the Act, find that this portion of the hearing is to be conducted in writing.

1. Summons of Witnesses

The tenants seek an order that I summon the President of the Strata Council and the Strata Corporations' senior property manager to attend the hearing, per Rule of Procedure 5.3. In their written submissions, the tenants wrote:

> The testimony of the aforementioned gentlemen is crucial to the determination of the legal responsibility for maintenance of the [ledge].
> […]
> Under no circumstances with the tenants be liable for the maintenance or repair of an inaccessible, purposeless ledge, that neither belongs to the unit owner nor is capable of being "utilized", "used" or "enjoyed" by any occupant of the unit!

As this application no longer deals with who bears the responsibility for maintaining the ledge, I find that the attendance of these individuals is not necessary. I dismiss this preliminary request.

2. Addition of new parties

Per Rules of Procedure 7.12 and 7.13, the tenants seek to add the strata corporation and the strata corporation's property management company as parties to the application. In their request, the tenants wrote:

> Although the RTB obviously lacks jurisdictional authority to enforce any Sections of the *Strata Property Act*, such as Section 164, since the herein dispute is nothing but a disguised Strata conflict, between [the strata corporation and the landlord], such parties must be added.

I disagree that the remaining issues to be determined is a "disguised strata conflict". Rather, it is a simple dispute between the landlords and the tenants relating to non-payment of rent for which the tenants have availed themselves of a statutory defense. The strata corporation and the strata corporation's property management do not need to be added to this dispute in order for it to be resolved, as neither has any entitlement to collect rent from the tenants. I dismiss this preliminary request.

3. Order that insurer provide tenants with legal representation

The tenants wrote:

> Because [the tenants' insurer] claims department does not consider the Tenant as an insured, under the policy, they refuse to afford such coverage. A copy of the coverage denial letter, of 03 September 2021.
>
> Thus, the dispute proceeding cannot proceed, unless the RTB Arbitrator or Director orders [the tenants' insurer] to comply with Section 155 of the Strata Property Act.

The Act does not give an arbitrator the authority to make any order of this nature. Additionally, I have no authority to apply section 155 of the *Strata Property Act*.

The tenants provided a copy of the coverage denial letter, in which the insurer wrote:

> Based on the Insuring Agreement referenced above, the policy is only able to respond with Tenants' Legal Liability coverage when property damage has occurred, and to our understanding your eviction hearing is not on the basis of property damage. For these reasons, we are unable to provide coverage for this matter.

The root of the tenants' dispute with its insurer appears to be one relating to the scope of coverage of the policy. The Residential Tenancy Branch is not the proper forum to deal with such coverage claims.

In any event, as stated above, the Charter does not afford the tenants with a right to legal representation in a non-criminal claim. As such, I decline to adjourn this matter until such time as the tenants' coverage dispute with their insurer is resolved. The landlord would be unduly prejudiced by such an adjournment, in light of the fact the tenants have refused to pay rent since June 2021.

Issues to be Decided

Are the landlords entitled to:

1) an order of possession;
2) a monetary order for $13,000;
3) recover the filing fee; and
4) retain the security deposit in partial satisfaction of the monetary orders made?

Are the tenants entitled to:

1) an order cancelling the Notice;
2) a monetary order to recover the cost of emergency repairs; and
3) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting February 1, 2019. Monthly rent is $2,600 and is payable on the first of each month. The tenants paid the landlords a security deposit of $3,975. The landlords returned $2,650 of this in December 2019. It holds the balance ($1,325) in trust for the tenants.

The parties agree that the tenants did not pay rent for the months of June to October 2021. They agree that the unpaid rent amount to $13,000.

On June 3, 2021, the landlords served the tenants with the Notice by posting it to the door of the rental unit. It specified $2,600 in arrears owing as of June 1, 2021.

The tenants argued that they withheld rent because the landlord had failed to clean fecal matter from the ledge, which necessitated the tenants to undertake emergency repairs which are now in excess of $15,000. RB testified that the repairs undertaken related to stopping the spread of black mold caused by the accumulated fecal matter. He did not elaborate as to exactly how this amount was arrived at or refer to any documentary evidence supporting this assertion.

Analysis

Section 26(1) of the Act states:

> **Rules about payment and non-payment of rent**
> **26**(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

As such, even if the landlord breached the Act by not cleaning the ledger, the tenant is not entitled to without rent.

Section 33 of the Act sets out the circumstances when a tenant may withhold rent from a landlord. In part, it states:

> **Emergency repairs**
> **33**(1) In this section, "emergency repairs" means repairs that are
> (a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
(c) made for the purpose of repairing
(i) major leaks in pipes or the roof,
(ii) damaged or blocked water or sewer pipes or plumbing fixtures,
(iii) the primary heating system,
(iv) damaged or defective locks that give access to a rental unit,
(v) the electrical systems, or
(vi) in prescribed circumstances, a rental unit or residential property.

[…]

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant
(a) claims reimbursement for those amounts from the landlord, and
(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

[…]

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

On the tenants' (albeit brief) testimony, the costs they claim for emergency repairs relate to the remediation of black mold caused by accumulated fecal matter on the exterior of the rental unit. Such repairs do not relate to repairing:

(i) major leaks in pipes or the roof,
(ii) damaged or blocked water or sewer pipes or plumbing fixtures,
(iii) the primary heating system,
(iv) damaged or defective locks that give access to a rental unit, or
(v) the electrical systems.

As such, any expense incurred as a result of making such repairs cannot be considered to be expenses incurred in the course of making "emergency repairs", as defined by the Act.

Accordingly, the tenants are not entitled to withhold any rent to offset the cost of any such repairs. I note that I explicitly make no finding as to whether expenses were incurred to repair the damage caused by the fecal matter, or, if they were, what their amount was. As the repairs could not be considered "emergency repairs", it is not necessary for me to make such determinations.

I find that the tenants have failed to pay rent for the months of June to October 2021 (inclusive) in the amount of $13,000. They do not right to withhold the rent under section 33 of the Act. They are therefore in breach of section 26 of the Act. I order that the tenants pay the landlords $13,000, representing the payment of these arrears.

I find that the tenants were served with the Notice on June 3, 2021 and that it complies with the form and content requirements set out at section 52 of the Act. For the reasons stated above, I find that it was issued for a valid reason (unauthorized non-payment of rent).

I do not find that the tenants incurred any expenses in making *emergency* repairs, as defined in the Act. I make no finding as to whether the incurred expenses making non-emergency repairs.

As such, I dismiss the tenants' application to cancel the Notice and for a monetary order for compensation for the cost of emergency repairs, without leave to reapply. I grant the landlords' application, in its entirety.

Pursuant to section 55(1) of the Act, I grant an order of possession to the landlords effective 14 days after they serve it on the tenants.

Pursuant to section 72(1) of the Act, as the landlords have been successful in its application, they may recover their filing fee from the tenants. As the tenants have been unsuccessful in their application, I decline to order that the landlords reimburse them their filing fee.

Pursuant to section 72(2) of the Act, the landlords may retain the security deposit in partial satisfaction of the monetary order made above.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlords $11,775, representing the following:

Rental Arrears	$13,000
Security Deposit Credit	-$1,325
Filing Fee	$100
Total	**$11,775**

Pursuant to section 55 of the Act, I order that the tenants deliver vacant possession of the rental unit to the landlords within 14 days of being served with a copy of this decision and attached orders by the landlords.

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: November 4, 2021

Residential Tenancy Branch