



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1630 CHESTERFIELD AVENUE HOLDINGS LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNL, FFT**

Introduction

The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act*, (*the "Act"*) and the singular of these words includes the plural.

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "*Act*") for:

- An order to cancel a 2 Month Notice to End Tenancy for Landlord's Use pursuant to sections 49 and 55; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

Both tenants attended the hearing and were represented by their counsel, EC. The corporate landlord attended the hearing, represented by JS ("landlord") and his spouse, KN. As both parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant's Notice of Dispute Resolution Proceedings package and evidence; the tenants acknowledged service of the landlord's evidence. Neither party took issue with timely service of documents, and both were prepared to have the merits of the application heard.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the *Act*.

Each party was administered an oath to tell the truth and they both confirmed that they were not recording the hearing.

Issue(s) to be Decided

Should the landlord's notice to end tenancy for landlord's use be upheld or cancelled?
Can the tenants recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree on the following facts. The landlord served the tenants with a 2 Month Notice to End Tenancy for Landlord's Use (the "notice") by posting a copy of it to the tenants' door between February 28, 2022 and March 1st. The tenants filed an application to dispute the landlord's notice on March 15th. A copy of the notice was provided as evidence and it states the landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

The landlord gave the following testimony. The tenancy began with a previous landlord and the landlord named in this proceeding purchased the building 4 years and 7 months ago. Rent is currently set at \$1,758.00 per month payable on the first day of each month. The landlord describes the tenants' rental unit as a 3-bedroom, 1 bathroom ground floor unit of an older 3 storey building comprising of 11 units. The subject unit is the largest of the ground floor units. The other ground floor units are a one bedroom and a bachelor suite.

There is no elevator in the building. As the building's owner, the landlord does not allow any of the tenants to carry bicycles up and down the stairways as it causes damage to the building. There is no onsite storage facility for tenants to park their bikes, either.

The landlord's son, who recently turned 19, and is currently residing with the landlord in the family home, intends on moving into the rental unit after the tenants vacate it. The landlord testified that this unit is the most desirable one for his son because his son

commutes by bike or e-bike and his son will be able to store his bike inside the unit without carrying it up or down stairs. The size of the unit is good for his son, since the landlord's younger son may move in with him when he is older and because his 19-year-old son may attend post-secondary education and would require the third room as a study. The landlord testified that his son is currently employed and that the place of employment is in the same locale as the rental unit. Currently, his son shares a vehicle with his mother and brother but will commute by bicycle after moving into the rental unit. The son does not own a car.

The landlord provided an affidavit which describes the ownership structure of the building. Due to privacy issues with publishing Residential Tenancy Branch decisions, while the names of the various companies have been anonymized in the body of this decision, the names are listed on the cover page. The building is owned by a holding company (A). The sole shareholder of the holding company is a real estate investment corporation (B). The sole shareholder of the investment corporation is a family trust (C). The person appearing before me today, JS, is the sole trustee of the family trust with the sole power to distribute income and designate beneficiaries under the trust. JS intends for his 19-year-old son to occupy the rental unit. A copy of the son's birth certificate was provided as an exhibit to JS's affidavit.

The landlord testified that his wife currently manages the building owned by the family trust on a day-to-day basis. The son will also assist the family in maintaining the building. Eventually, the landlord intends for all his children to live in various units in the building. This is the landlord's eldest son, just turned 19, and the landlord has never ended a tenancy for landlord's use in the past. In response to tenants' counsel's examination, the landlord testified that vacant units may undergo cosmetic renovations after the tenancy ends, depending on the state of the unit after the tenant leaves. The tenants' unit has not been renovated because it has been occupied.

The tenants' counsel submits that JS is an interest holder in several properties in BC and provided a Land Owner Transparency Registry search as evidence. The landlord testified that he is a minority investor in some of his client's properties, being a member of the BC Bar. He is not a director, simply an investor with no control over any of the buildings on the list. He acknowledges he owns a summer cottage on the Sunshine Coast which he intends on selling and a lot there which he will build upon after selling the cottage. There is a former family residence on the list that he will be selling as well.

Tenant's counsel points out that paragraph 1(a) of the family trust deed of settlement indicates JS and another investment company ("D") are the beneficiaries of the trust.

JS testified that (D) is another company wholly controlled by himself as sole director. JS testified that he has the authority to change the beneficiaries of the family trust at will. He did not provide any documents to verify it, but the beneficiaries have not changed since the creation of the family trust and that he maintains the sole power to designate who they are.

Tenant's counsel submits that the landlord has an ulterior motive to ending the tenancy. The tenants pay much lower rent than those in the neighbourhood because they have lived there for so long. Counsel provided online advertisements for similar units in the vicinity as evidence of this and provided calculations to show his clients are paying approximately a dollar less per square foot per month than market rate for the unit.

Tenant's counsel argues that there is no need for such a large unit for the landlord's son and no evidence was provided to show the landlord's second son would also move in. Counsel submits that there are other renovated units in the building that may be more suitable for his son and the "bike argument" doesn't hold up.

Analysis

The 2 Month Notice to End Tenancy for Landlord's Use was served by posting a copy to the tenants' door on either February 28 or March 1st. Taking the earlier date, the notice is deemed served 3 days after it was posted to the door, March 3rd in accordance with sections 88 and 90 of the *Act*. The tenants filed their application to dispute the notice within the 15 days required under section 49 of the *Act*.

Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member is examined in Residential Tenancy Branch Policy Guideline PG-2A. According to the guideline, the landlord bears the onus to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no dishonest motive. This is referred to as "good faith".

In Gichuru v Palmar Properties Ltd., 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: Aarti Investments Ltd. v. Baumann, 2019 BCCA 165.

Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior purpose for ending the tenancy, and they are not trying to avoid

obligations under the RTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (section 32(1)).

While tenant's counsel argues that his clients pay less than market rate for a desirable rental unit, I find insufficient evidence to satisfy me that the landlord intends on re-renting it after he regains possession of it. The landlord was forthright and honest in testifying that units in the "old" building are sometimes cosmetically renovated before re-renting them, sometimes at higher rent. Likewise, tenant's counsel did not allege repairs to the unit that have been ignored by the landlord. Further, the landlord testified that he has never in the past ended a tenancy with a 2 Month Notice to End Tenancy for Landlord's Use and this was undisputed by the tenants. Given these factors, I do not find the landlord has an ulterior motive to end the tenancy or to avoid obligations under the Residential Tenancy Act or the tenancy agreement. Nor do I find the landlord plans on re-renting the unit to another set of tenants at a higher rate. I find the landlord has an honest intention to move his son into the building.

Neither the tenants nor their counsel disputed the landlord's claim that bikes were prohibited from being carried up the stairs by tenants and that there are no bike storage facilities in the building. I heard no conflicting testimony from the tenants disagreeing with this statement. I find it reasonable that the landlord's son, who does not own a car and commutes by bicycle to a job in the same city, would want a ground floor unit in order to park his bike indoors without breaking the building rules of carrying bikes up the stairs. I find the landlord's decision to take over the largest ground floor unit of the building legitimate and reasonable, given the fact that the landlord has the right to do so as the owner of the building. In other words, I find the landlord truly intends of moving his son into the tenant's unit after it is vacated by the tenants. Accordingly, I find the landlord has shown "good faith" in ending the tenancy for landlord's use.

Section 49(1) of the Act provides definitions for "close family member", "family corporation" and "landlord" specific to ending tenancies for landlord's use of property.

Landlord's notice: landlord's use of property

49 (1) In this section:

"close family member" means, in relation to an individual,

- (a) the individual's parent, spouse or child, or
- (b) the parent or child of that individual's spouse;

"family corporation" means a corporation in which all the voting shares are owned by

- (a) one individual, or
- (b) one individual plus one or more of that individual's brother, sister or close family members;

"landlord" means

- (a) for the purposes of subsection (3), an individual who
 - (i) at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and
 - (ii) holds not less than 1/2 of the full reversionary interest, and
- (b) for the purposes of subsection (4), a family corporation that
 - (i) at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and
 - (ii) holds not less than 1/2 of the full reversionary interest;

The landlord seeks to end the tenancy pursuant to section 49(4):

A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

Tenant's counsel did not present any argument regarding the reversionary interests of the family corporation or the individual at the hearing, so I accept that the holding company (A) has the necessary reversionary interests.

Next, I turn to the definition of "family corporation" under section 49(1). The voting shares must be owned by a) one **individual** or b) one **individual** plus one or more of that individual's brother, sister or close family member. In this case, all the voting shares of holding corporation (A), the landlord in this case, are owned by real estate investment corporation (B), not an individual. The way "individual" is used in the context of section 49(4) of the *Residential Tenancy Act*, by definition, cannot include corporations. For instance, "close family member" means **in relation to an individual**, the individual's parent, spouse or child. A corporation cannot have a parent, spouse or child.

Section 29 of the *Interpretation Act* includes a corporation as a “person”. Applying the broader definition of “person” from the *Interpretation Act* to the context of section 49(1) of the *Residential Tenancy Act*, in case before me, the “person” owning the voting shares of the “family corporation” is not an individual, but a real estate investment corporation (B). (B) is not going to occupy the rental unit as an individual and (B) cannot have any “close family members” as defined in section 49(1).

While I accept that JS is an individual who intends on having a close family member (his son) occupy the rental unit after it is vacated; I find JS to be too far removed from being an **individual with voting shares in a family corporation** whose close family member intends on occupying the rental unit, after determining the directorship of the various holding companies, the shareholder relationships of the real estate corporations and trustee arrangements of the family trust.

I find that **the landlord**, identified as holding corporation (A), is not a family corporation whose voting shares are owned by an individual or one individual plus one or more of that individual's brother, sister or close family members. Consequently, I find the 2 Month Notice to End Tenancy for Landlord's Use issued by the landlord is of no force or effect and I cancel it.

The tenant's application was successful and the tenant's filing fee of \$100.00 shall be recovered. Pursuant to section 72, the tenants may reduce a single payment of rent due to the landlord by \$100.00.

Conclusion

The landlord's 2 Month Notice to End Tenancy for Landlord's Use is cancelled and of no force or effect.

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: July 11, 2022

Residential Tenancy Branch