Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ARI-C

Introduction

The Landlord applies for an additional rent increase for capital expenditures pursuant to the *Residential Tenancy Act* (the "*Act*") and s. 23.1 of the Regulations.

A.W., L.C., and A.A. appeared as agents for the Landlord. Three of the named respondent tenants were present, J.S., G.G., and F.S.. D.S. identified himself as an occupant for C.T., who he says is a tenant at the building though is not named in the application.

J.S. was represented by L.H. has her advocate. L.H. was joined by A.H. as his assistant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord's agent L.C. advised having served the notice for the participatory hearing on the respondent tenants in early June 2022. The tenants who were present raised no issue with respect to service of the notice for the participatory hearing. Based on the affirmed testimony of L.C., I find that the respondent tenants were served with the notice for the participatory hearing in accordance with the *Act*. As mentioned in my interim reasons, I found that the Landlord's initial evidence had been served on the respondent tenants, with the Landlord having provided proof of service indicating its service in April 2022.

The advocate advised that J.S.'s response evidence was served on the Landlord, which the Landlord's agents acknowledge receiving without objection. Based on its acknowledged receipt without objection, I find that the Tenant J.S.'s response evidence was served on the Landlord in accordance with the *Act*.

Preliminary Issue – Additional Evidence from the Landlord

The Landlord served an additional evidence package, with the Landlord providing proof of service indicating service occurred in early October 2022. In my interim reasons, I revised the service deadline for the parties, specifically the Landlord's service deadline was altered to 30 days prior to the hearing, rather than the 14-day deadline imposed on applicants by Rule 3.14 of the Rules of Procedure. Similarly, the respondent tenants were asked to serve their evidence 14-days prior to the hearing rather than the 7-day deadline imposed by Rule 3.15 of the Rules of Procedure. As I made clear in my interim reasons, this was done because of the number of respondent tenants and an interest in ensuring everyone, Landlord and tenants alike, had sufficient time to review the documentary evidence.

Despite my directions, the Landlord did not follow the revised service timelines. Similarly, I asked the Landlord to provide written submissions summarizing its position in advance of the participatory hearing. The Landlord failed to do so. I need not make findings on with respect to the written submissions as the Landlord's failure to provide them are largely to its own detriment insofar as the written submissions could have organized its evidence and submissions in support of its position.

Returning to the service of the additional evidence, A.W. advised at the hearing that they followed the 14-day deadline as per the evidence reminder email provided by the Residential Tenancy Branch. I have taken a preliminary view of the additional evidence, all of which appears to have been dated from 2018 to 2020, so the evidence could hardly be considered as coming into existence past the deadline, opening the application of Rule 3.17 of the Rules of Procedure for late evidence.

I wish to make clear that the email respecting the evidence submission deadline was automated and does not supersede the clear directions I provided in the interim reasons. I cannot stress enough that the revision of the service deadlines as set out in the interim reasons was not done capriciously. I did so to ensure everyone had an opportunity to review and respond to evidence in an orderly fashion, including the Landlord. There are 128 named respondents. Had they all responded with written

submissions and evidence in compliance with Rule 3.15, so 7 days prior to the hearing, the Landlord may have found itself pressed to review and organize itself in advance of the hearing given such a volume of documents.

All this is to say that I find that the Landlord has failed to serve its additional evidence in compliance with the 30-day deadline I imposed in my interim reasons. As it was not served in compliance with the time limit imposed, I find that it would be procedurally unfair to include it into the record on the basis that its late service undermined the respondent tenants' ability to review and respond in compliance with the altered 14-day deadline. Accordingly, the second evidence package is not included and shall not be considered by me.

Issues to be Decided

1) Is the Landlord entitled to impose an additional rent increase for capital expenditures?

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.

A.W. testified that residential property in question has 103 residential units, which includes a caretaker suite, and that the Landlord has not applied for an additional rent increase for a capital expenditure with respect to the property in question. I am further advised that the property was built sometime in the 1960s and was purchased by the Landlord in approximately 2009.

I was further advised by A.W. that the residential property has a parkade which the Landlord undertook restoration work and resurfacing. The Landlord's application breaks the project into the following components:

- Engineering/Architect $54,435.57
- Hazardous Material Removal $6,431.25
- Electrical $5,200.92
- Parkade Restoration $202.238.48

The Landlord's evidence comprises invoices and other documents with respect to the various companies involved in undertaking the work, including engineers and subcontractors. The Landlord's evidence does not contain page numbers nor is there a summary table for the invoices.

A.W. testified that the engineering company named in the invoices conducted regular inspections of the parkade on behalf of the Landlord. I am told that the engineers came to the property in or about November 2018 to conduct an inspection upon reports of water entering the parkade. A.W. testified that the engineers reported that the concrete had delaminated such that repairs were necessary. The Landlord's evidence does not include a copy of the engineering report.

The Landlord's application indicates the project completed on December 6, 2021. However, the Landlord's agents did not advise on the completion date at the hearing and the Landlord's invoices show the most recent invoice is dated to January 29, 2021. A.W. argued that the project was completed within 18 months of the application and that I should base that determination based on the date the last invoice was paid. It was argued that I should view the project as one whole rather view the individual components as such an interpretation would preclude longer, more extensive projects, from falling within the 18-month window imposed by s. 23.1 of the Regulations. Citing s. 23.1(2) of the Rules of Procedure, A.W. argued that multiple applications for the same project ought to be avoided.

I am advised by L.H., the advocate for J.S., that she requested documents from the Landlord in March 2022 with respect to the parkade and received none. L.H. further advised that he asked the Landlord for a series of documents from the Landlord and was provided none. I was directed to a letter in the J.S.'s evidence dated September 9, 2022 in which the request was made, which appears to have been sent to the Landlord on September 12, 2022. I was further directed to the response from the Landlord's agent in the form of an email dated September 15, 2022, also in J.S.'s evidence, in which the document request was denied.

At the outset of the hearing, I enquired whether L.H. would be seeking a summons for the documents. L.H. advised that he was not doing so and was prepared to proceed with the hearing. I was asked by L.H. to draw adverse inferences due to the Landlord's failure to disclose documents he submits are relevant to the present matter.

A.W. argued that the document request amounted to a “fishing expedition” and that if J.S., or her advocate, felt that they were relevant, they could have requested a summons for the documents pursuant to Rule 5.3 of the Rules of Procedure. A.W. argued I ought not draw any adverse inferences.

L.H., the advocate for J.S., advanced three arguments: first, that the parkade is not a major system or component falling within the definitions within s. 21.1 of the Regulations; second, that the Landlord has failed to discharge its evidentiary burden under s. 23.1; and third, the Landlord failed to adequately maintain and repair the parkade.

Both L.H. and A.W. directed me to Policy Guideline #37, which provides guidance with respect to rent increases generally, and the application of s. 23.1 of the Regulations specifically. In it, it provides the following guidance with respect to the type of projects that may be considered eligible capital expenditures, stating the following:

> Major systems and major components are typically things that are essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property. Examples of major systems or major components include, but are not limited to, the foundation; load bearing elements such as walls, beams and columns; the roof; siding; entry doors; windows; primary flooring in common areas; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security systems, including things like cameras or gates to prevent unauthorized entry; and elevators.

A.W., referring to Policy Guideline #37, submitted that the parkade is an eligible capital expenditure.

L.H., citing *Jozipovic v. British Columbia (Workers’ Compensation Board)*, 2021 BCCA 174, argued that Policy Guideline #37 is inconsistent with the ordinary interpretation of the *Act* and ought not be followed. L.H. further argued that I am not bound by the Policy Guidelines in any event.

L.H. directed me to a copy of the parking agreement in J.S.’s evidence, which was submitted is the standard form the Landlord uses with respect to the parkade. A.W. confirmed that the agreement provided by J.S. is the standard form used by the Landlord. In the parking agreement, L.H. highlighted clause 11, which is reproduced below:

11. The Licensee acknowledges and agrees that the License granted herein does not constitute a service or facility provided to the Licensee pursuant to s. 8 of the Residential Tenancy Act and that any rights granted to the Licensee herein are independent and separate from any rights arising out of the tenancy and are not part of the landlord tenant relationship. The Licensee agrees not to take any arbitration proceedings under the Residential Tenancy Act against the Licensor in regards to any matter, which is the subject of this Agreement. The Licensee agrees that if any such proceedings are taken, he will save harmless and indemnify the Licensor for the cost and expense of dealing with any such proceeding, including legal fees.

L.H. submitted that parking is outside the confines of the tenancy by virtue of the parking agreement used by the Landlord and further submitted that the parkade is structurally adjacent to the residential property. A.W. and A.A. contested that the parkade was structurally separate from the building, indicating that the bike locker and boiler room was only accessible through the parkade.

It was further submitted by L.H. that the residential property does not have enough parking stalls for all the occupant tenants. It was argued by L.H. that a rent increase imposed by s. 23.1 of the Regulations is permanent yet parking, as a service or facility, is a non-essential service or facility and can be terminated under s. 27 of the *Act*.

L.H. further argued that the parkade cannot be considered integral to the building as it is an adjacent structure and that a parking lot resurfacing should not be included in Policy Guideline #37 as such an interpretation runs contrary to the *Act*. J.S.'s written submissions argue that it is "contradictory for the Landlord to claim that parking can be said to be so removed from the tenancy that it is not even provided as a service or facility under the RTA, but then argue in this proceeding that it is a major system or component or integral to the tenancy in any way."

I was directed by L.H. to *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257, who cited it for the proposition that when interpreting the *Act* and Regulations I should resolve any ambiguity in favour of the tenants. It was argued that in this instance ambiguity in s. 23.1 of the Regulations should be interpreted in the tenants' favour.

A.W. argues that L.H. is misconstruing s. 23.1 of the Regulations and that clause 11 of the parking agreement is not relevant to the analysis. He further argued that rent increases for capital expenditures do not consider whether an individual tenant benefits from the project so long as it is considered a major component or system.

As an additional argument, L.H. argued that the Landlord has failed to provide sufficient evidence to discharge its evidentiary burden under s. 23.1 of the Regulations in any event. L.H. argued no permits were provided, no copies of relevant bylaws, no expert reports, nor any evidence indicating that the work was necessary in any way or that it would not reoccur within the next 5 years. L.H. argued that the Landlord's invoices were not clear and lacked critical information. Further, the Landlord's failure to provide the requested disclosure precluded the tenants from obtaining expert evidence themselves.

A.W. directed me to Policy Guideline #40 respecting the useful life of building elements, which indicates parking lot elements are in excess of 5 years. L.H. argued it was illogical to refer to Policy Guideline #40 with respect to this as the building was constructed in the 1960s, which would put the parkade well past its useful life as per Policy Guideline #40. In any event, L.H. argued that no maintenance records were provided nor any records to indicate when the parking lot was last repaired.

L.H. further asked that due to the non-disclosure of relevant documents pertaining to the parkade's maintenance, I should draw an adverse inference against the Landlord. L.H. argued that the present application is not for a chipped faucet, and that the residential property is a multi-million-dollar property in which the Landlord would have likely undertaken some due diligence when it was purchased in the form of building inspections. L.H. argued that if the parkade was in poor condition when the property was purchased, the Landlord could have negotiated a lower price for the property and is now seeking to download the cost of the repairs on the tenants. It was argued that this application amounted to a double dip, in the that the Landlord got a cheaper price on the property and now seeks to recoup the cost of the repairs from the tenants.

Both G.G. and F.S. testified that they are relatively new tenants and that they moved into their respective rental units after the restoration was undertaken. F.S. argued that she would have expected the Landlord to impose the increased rent when her tenancy began in September 2021. G.G. and D.S. argued that Landlord is shifting the capital expense onto the tenants while capturing the capital gain in the increased value of the property following the repairs.

Analysis

The Landlord seeks authorization to impose an additional rent increase for a capital expenditure. Sections 21.1, 23.1, and 23.2 of the Regulation set out the framework for

determining if a landlord is entitled to impose an additional rent increase for capital expenditures.

Landlords seeking an additional rent increase under s. 23.1 of the Regulations must prove, on a balance of probabilities, the following:

- The landlord has not successfully applied for an additional rent increase against the tenants within 18 months of their application.
- The capital expenditure was incurred for the repair, replacement, or installation of a major component or major system for the property.
- The capital expenditure was incurred for one of the following reasons:
    - to comply with the health, safety, and housing standards required by law in accordance with the landlord's obligation to repair the property under s. 32(1) of the *Act*;
    - the major component or system has failed, is malfunctioning or inoperative, or is close to the end of its useful life; or
    - the major component or system achieves one or more of either reducing greenhouse gas emissions and/or improves security at the residential property.
- The capital expenditures were incurred in the 18-month period preceding the date on which the landlord has applied for the increase.
- The capital expenditures are not expected to be incurred again for at least 5 years.

Tenants may defeat a landlord's application for additional rent increases for capital expenditures if they can prove on a balance of probabilities that:

- the repairs or replacements were required because of inadequate repair or maintenance on the part of the landlord; or
- the landlord has been paid, or is entitled to be paid, from another source.

Once the threshold question has been met, the Landlord must also demonstrate how may dwelling units are present in the residential property and the total cost of the capital expenditures are incurred.

Section 21.1(1) of the Act contains the following definitions:

"**dwelling unit**" means the following:

a. living accommodation that is not rented and not intended to be rented;
b. a rental unit;

[…]

"major component", in relation to a residential property, means

a. a component of the residential property that is integral to the residential property, or
b. a significant component of a major system;

"major system", in relation to a residential property, means an electrical system, mechanical system, structural system or similar system that is integral

a. to the residential property, or
b. to providing services to the tenants and occupants of the residential property;

"**specified dwelling unit**" means

a. a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or
b. a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

I am asked to draw an adverse inference by the advocate due to the Landlord's failure to disclose certain documents upon request. Though I agree with the advocate that much of what they requested was relevant, I do not agree that I should draw an adverse inference under the circumstances.

Rule 5.3 of the Rules of Procedure, which sets out the application process for a summons, states the following:

5.3 Application for a summons

On the written request of a party or on an arbitrator's own initiative, the arbitrator may issue a summons requiring a person to attend a dispute resolution proceeding or produce evidence. A summons is only issued in cases where the evidence is necessary, appropriate and relevant. A summons will not be issued if a witness agrees to attend or agrees to provide the requested evidence.

A request to issue a summons must be submitted, in writing, to the Residential Tenancy Branch directly or through a Service BC Office, and must:

- state the name and address of the witness;
- provide the reason the witness is required to attend and give evidence;

- describe efforts made to have the witness attend the hearing;
- describe the documents or other things, if any, which are required for the hearing; and
- provide the reason why such documents or other things are relevant.

In this instance, I enquired whether the advocate, on J.S.'s behalf, wished to make an application to produce the documents at the outset of the hearing. The advocate declined to do so. As mentioned above, I agree that much of what was requested, on its face, is relevant. In an ideal world, the Landlord would have complied with the request voluntarily. However, they were under no obligation to do so. Further, the Rules of Procedure do not impose a positive obligation on participants to list all documents in their possession that are relevant to the dispute in the same way the Supreme Court Civil and Family Rules do. Rule 5.3 of the Rules of Procedure, informed by s. 76 of the *Act*, very much puts the ball in the court of the party seeking the disclosure to make an application for the production of documents by establishing relevance.

J.S., through her advocate, declined to make the request for the documents despite my direct inquiry at the outset of the hearing if they wanted to do so. As no summons for evidence was requested, none was provided. I cannot say the Landlord refused to produce documents contrary to the summons as no summons was ever issued. Accordingly, I do not draw an adverse inference in the present circumstance.

Review of the documentary evidence provided by the Landlord shows a series of invoices, documents that appear to be internal accounting documents, some letters from WorkSafe BC, certificates of payment, and statutory declarations of progress payments. As mentioned in the evidence section above, the Landlord's evidence is not numbered, nor particularly well organized, despite Rule 3.7 requiring parties to do so.

Section 23.1(4)(a) of the Regulations require the capital expenditure be incurred for a specific purpose. In this instance, the relevant portions that could conceivably be relevant are ss. 23.1(4)(a)(i) and 23.1(4)(a)(ii), which I reproduce below:

> (4) Subject to subsection (5), the director must grant an application under this section for that portion of the capital expenditures in respect of which the landlord establishes all of the following:
>
> (a) the capital expenditures were incurred for one of the following:

(i) the installation, repair or replacement of a major system or major component in order to maintain the residential property, of which the major system is a part or the major component is a component, in a state of repair that complies with the health, safety and housing standards required by law in accordance with section 32 (1) (a) *[landlord and tenant obligations to repair and maintain]* of the Act;

(ii) the installation, repair or replacement of a major system or major component that has failed or is malfunctioning or inoperative or that is close to the end of its useful life;

I have been provided with no documentary evidence by the Landlord that would enable me to make a finding that the restoration was necessary as defined by s. 23.1(4)(a) of the Regulations. The Landlord's agent advises that they were told that the concrete had delaminated and that there was water ingress, though no documents were provided evidencing these findings by the engineers.

I have no opinion letter from the engineers. Nor do I have a report from the engineer inspectors pertaining to the state of the parkade in November 2018, nor do I have their recommendations. I have no inspection records with respect to the parkade despite the Landlord's agent advising the engineering firm conducted inspections of the building on behalf of the Landlord. I have not been referred to any law or code that the restoration was intended to comply. I have not been provided with evidence on the age of the parkade nor when it was last maintained other than the testimony that the building itself was constructed sometime in the 1960s.

I am asked to refer to Policy Guideline #40 respecting the useful life of building elements. I am not persuaded that I should do so under the circumstances as it would essentially discharge the Landlord from providing any evidence on why the restoration was undertaken, which is a critical component of s. 23.1 of the Regulations. Nor do I believe I could rely upon Policy Guideline #40 to make a finding that the useful life of the parkade has since passed as I have been provided no evidence to indicate when the parkade was last repaired or restored.

All I have are invoices and internal accounting documents, which only demonstrate that work was done, it was done between certain dates, and that it cost a certain amount. I am asked to infer from that and the submission without documentary evidence that the concrete had delaminated and there was water ingress that the work was incurred for

an approved purpose. That is wholly insufficient to discharge their burden of proving each element under s. 23.1 of the Regulations, particularly with respect to the necessity of the work as defined under s. 23.1(4)(a).

I find that the Landlord has failed to adduce sufficient evidence to demonstrate that the parkade restoration was required to comply with the health, safety and housing standards required by law or that the parkade had failed, malfunctioned, was inoperative, or was close to the end of its useful life.

As the Landlord has failed to discharge their evidentiary burden with respect to this aspect, I dismiss the Landlord's application for an additional rent increase for the parkade without leave to reapply. Given this, I need not consider the other arguments raised by the advocate pertaining to whether the parkade is a major component or system of the building.

Conclusion

The Landlord's application for an additional rent increase for the capital expenditure related to the parkade is dismissed without leave to reapply.

I order the Landlord to serve the respondent tenants with a copy of this decision in accordance with section 88 of the *Act*.

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 02, 2022

Residential Tenancy Branch