Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding Centurion Property Associates Inc. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing was reconvened from a hearing on April 3, 2023 regarding the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- an order that the Landlord comply with the Act, the regulations, or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

On April 3, 2023, an interim decision in this matter was issued (the "Interim Decision"). This decision should be read together with the Interim Decision.

The Tenant and the Landlord's agents AB and AH attended this reconvened hearing. The Tenant was represented by legal counsel RP and ZM. The Landlord was represented by legal counsel HF.

Issues to be Decided

1. Is the Tenant entitled to orders that the Landlord comply with the Act, the regulations, or tenancy agreement as sought?
2. Is the Tenant entitled to reimbursement of the filing fee?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

The rental unit is an apartment in a multi-unit complex. This tenancy commenced on July 1, 2021 and is month-to-month. Rent is $1,629.07 due on the first day of each month. The Tenant paid a security deposit and pet damage deposit of $777.50 each which are held by the Landlord.

Copies of the tenancy agreement have been submitted into evidence. The tenancy agreement is in the standard Residential Tenancy Branch form, and has an addendum for additional terms as well as a parking addendum.

Under section 3(b) of the tenancy agreement, water is not checked off as a service included in the monthly rent. The tenancy agreement does not contain any express terms about how the Tenant would pay for his water usage. The tenancy agreement contains an entire agreement clause.

According to the Tenant, the parties had discussed the issue of water prior to signing the tenancy agreement. The Tenant was told that water use in each unit would be metered and that the tenants would eventually pay for their own water. The Tenant's understanding was that he would eventually pay for his own water at the rate charged by the municipal government.

The Tenant confirmed he had seen an energy efficiency-related case study about the rental property prior to moving in. This case study states that "water submeters are installed to measure the hot and cold water supplied to each apartment. The information collected by the submeters will serve as the basis for individual water bill after the first year of free water use."

From the start of the tenancy until April 2022, the Tenant was not billed for water usage at the rental unit.

AH, a property manager for the Landlord, testified that the water submeters were pre-installed in the building by the developer. AH explained that it took the Landlord several months to engage in discussions and secure a contract with a submetering company. AH confirmed that the Landlord chose Metergy Solutions ("Metergy") as the best submetering company to look after the Landlord's water metering program. AH acknowledged that the Landlord's contract with Metergy was not in place at the start of the tenancy. AH indicated that nevertheless, tenants were aware there would be individual metering of their water consumption as revealed by the case study.

The Landlord sent the Tenant a notice dated April 8, 2022 advising that it would be working with Metergy for water metering. This notice asked tenants to set up accounts with Metergy and pay Metergy for their water usage effective April 1, 2022.

The Tenant received a copy of a blank Metergy customer services agreement (the "Metergy Agreement") from the Landlord on July 8, 2022. This agreement states that Metergy is the "billing and collections services agent" on behalf of a customer's "landlord, property manager, or strata corporation".

According to the Tenant, he had concerns with the Metergy Agreement, including:

- Terms in the Metergy Agreement which referred to provision of electricity, water, and/or thermal energy, without specifying which applied in this case;
- A term authorizing Metergy to advertise to the Tenant, subject only to opt-out upon 60 days' written notice, which prevents opt-out upon signing; and
- Terms requiring the Tenant to pay a security deposit and a service fee to Metergy, which is "subject to reasonable annual increases".

The Tenant was also concerned that payment to Metergy for water usage was to commence on April 1, 2022, when the Landlord did not give notice until April 8, 2022.

The Tenant emailed the Landlord to express some of his concerns on July 12, 2022.

The Landlord responded with an updated notice on July 28, 2022. This notice indicates:

- the Landlord asked Metergy to allow tenants to opt out of distribution of other services and wares without 60 days' notice
- Metergy is only used for water usage billing and not any other utilities
- the municipality does not install or monitor meters in each suite, so there is no provision for tenants to pay the municipality directly
- the Landlord researched the companies available for monitoring and billing before selecting Metergy, which has a solid reputation
- the Landlord is stopping the waiver of water billings effective March 31, 2022, as water was never included in any of the tenants' rent

According to the Tenant, he did not receive an amended Metergy Agreement that reflected the Landlord's statements in the updated notice. The Tenant submitted that the Metergy Agreement contains an entire agreement clause. The Tenant emailed the Landlord to explain this and re-asserted his concern about the retroactive billing.

The Tenant received a further notice from the Landlord dated November 17, 2022. This notice states that if the Tenant does not set up an account with Metergy and pay his outstanding balance, the Landlord will issue the Tenant a 10-day notice to end tenancy following written demand for payment.

The Tenant did not set up an account with Metergy.

In December 2022, the Tenant received a welcome letter from Metergy with the Tenant's name and address, an account number, and a customer verification number. The Tenant also received several bills from Metergy all dated December 9, 2022 with a due date of January 3, 2023 (the "Metergy Bills"), which cover usage from April 1, 2022 to November 19, 2022.

The Metergy Bills include a $50.00 service setup charge, a $2.10 paper bill service fee, monthly administration fees of $5.36, and GST on the entire bill, on top of charges for "water and sewer usage". The total amount owing in the Metergy Bills is $172.95, of which only $75.45 is for water usage.

The Tenant disagrees that he owes the amount alleged by Metergy as he did not contract with them. The Tenant is concerned that it appears the Landlord attempted to create an account with Metergy on his behalf without his permission, even though the Tenant had expressly rejected the Metergy Agreement.

The Tenant argues that he is not under any obligation to sign a contract with Metergy. The Tenant submits Metergy reads the Landlord's meters, invoices tenants for the water they use, and presumably, remits the charges for water to the Landlord, potentially along with some of the other fees they collect. The Tenant argues that Metergy itself does not provide any service to tenants; it provides a service to the Landlord, namely meter reading and billing tenants, and acts as the Landlord's agent in charging tenants for the water service that the Landlord provides. The Tenant argues that as the Landlord's agent, Metergy falls under the definition of a "landlord" under section 1 of the Act, and is therefore bound by the Act and regulations as a landlord in terms of what fees it may charge to a tenant. The Tenant argues that the additional fees charged by Metergy are unconscionable because a tenant does not receive anything in exchange for these fees, and are grossly disproportionate to the actual cost of water that a tenant is responsible for. The Tenant argues that Metergy's fees are contrary to section 7(1)(g)

of the regulations, since water is a service that is required to be provided under the tenancy agreement.

The Tenant submitted a letter of comment from the Director of the Residential Tenancy Branch to the BC Utilities Commission dated December 6, 2022 (the "Director's Letter"), which was given as part of the Commission's investigation into Wyse. The Tenant argues that while this letter deals with the submetering of electricity, the Director makes several points relevant to submetering of utilities in general, and are therefore directly relevant to this case. The Director's Letter states in part as follows:

> Section 1 of the RTA defines "service or facility" as including utilities and related services that are provided or agreed to be provided by the landlord to the tenant of a rental unit. Under the Act, essential services such as heat, electricity and hot water must be provided, but the agreement may say that the tenant pays for these. Additionally, the definition of "landlord" includes the owner of the rental unit, the owner's agent, or another person who, on behalf of the landlord, exercises powers and performs duties under the RTA, the tenancy agreement, or a service agreement.
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> In instances where a public utility is providing utilities directly to a rental unit, such as when each unit has a separate BC Hydro meter, the public utility is not considered a "landlord" under the RTA as they are not acting on behalf of an owner. In these instances, a landlord can require the tenant to put the utility account in their own name and those payments are regulated by the BCUC.
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> Otherwise, where the landlord is providing a service, which includes a utility such as electricity, but is requiring a tenant to pay for it, the expectation is that this payment is a reimbursement for a tenant's share of the utility bill with the means of calculation set out in the tenancy agreement. It is not intended that a landlord profit from having a tenant pay for utilities by charging the tenants more than what the landlord actually pays. If a tenancy agreement included a term that resulted in a landlord charging a tenant more for the utility than what the landlord pays, that term would likely be found unconscionable and, as such, not enforceable under section 6(3)(b) of the RTA.
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> Section 7 of the Residential Tenancy Regulation allows a landlord to charge a non-refundable fee for a service requested by the tenant, but only if those services are not required to be provided under the tenancy agreement. However,

as noted above, a landlord is generally required to provide electricity without any request by a tenant. The RTA and the standard terms for tenancy agreements require a landlord to provide the residential property in a state suitable for occupation by a tenant and in compliance with health, safety and housing standards required by law. Under municipal bylaws, utilities such as running water and electricity are required for a building to be suitable for habitation. Therefore, while a tenancy agreement can address how utility charges will be dealt with, it cannot be said that the landlord does not have to provide electricity until requested by a tenant and that a landlord can then charge whatever non-refundable fees it wishes.

[…]

Many landlords use service providers, such as property management companies, to collect payments on behalf of a landlord. They may also enter into contracts with companies to provide property maintenance, such as snow removal. However, if a landlord chooses to engage such a service, they cannot require the tenant to pay the service provider for costs the landlord is responsible for or fees that are associated with that service. A landlord is expected to pay these amounts from rent, and, where relevant can seek additional rent increases under the RTA to cover such costs.

[…]

As well, if a service provider, such as a property management company, wants to increase fees due to administrative costs or bad debt, these are fees that are supposed to be charged to the landlord who engages the service provider and not to the tenants. These additional fees could arguably be considered part of the rent, if Wyse is considered a landlord, given the broad definition in the RTA. In exhibit B-4 in response to 1.2.2, and in Exhibit B-10 in response to 8.1, Wyse indicates that it charges tenants monthly administration fees, in part to pay its legal and consulting costs, and as bad debt recovery fees.

Additionally, if Wyse is acting on behalf of a landlord in providing this service, it is problematic under the RTA for a further security deposit to be required beyond what is permitted under section 19 of the RTA. Finally, under section 27(1) of the RTA, a landlord cannot terminate or restrict a service if that service is essential to the tenant’s use of the rental unit as a living accommodation. This means a

landlord cannot cut off essential services, such as power or water. If Wyse is truly acting as a service provider for the landlord and it is, in fact, the landlord reselling hydro to its tenants, then the tenant's power cannot be turned off to a unit, whether or not a bill has been paid.

The Tenant argues that it does not matter whether Metergy's fees are competitive, the Landlord cannot force tenants to pay fees associated with Metergy as the Landlord's agent. The Tenant argues that the Landlord has provided no source for the Tenant's obligation to pay the fees that Metergy is trying to charge. The Tenant argues that there was no clear discussion of how submetering would work, and that it is normal to set up an account with the actual service provider. The Tenant argues that it doesn't make sense to sign up with a company that only provides bills and charges for that service. The Tenant argues that the Landlord has options other than simply dividing total water consumption among all units. The Tenant submits that the Landlord can still have Metergy read the meters, and have the Tenant pay the direct cost of water, which is what the tenancy agreement implies by not having water checked as included in the rent. The Tenant argues that it is not possible to agree to pay an undisclosed amount for water as it is an unenforceable agreement to agree, with no certainty of terms, and is contrary to freedom of contract.

In summary, the Tenant seeks:

- a declaration that the Tenant is not obligated under the tenancy agreement to sign a contract with Metergy
- an order that the Landlord cease asking the Tenant to sign a contract with Metergy
- an order for the Landlord to provide the Tenant with a way to pay for his water usage that does not require him to sign a contract with Metergy
- an order for the Landlord to refrain from charging the Tenant any additional fees related to his water usage
- an order that the Tenant is responsible for paying for water usage at the rental unit beginning within a reasonable time from the Landlord's April 8, 2022 notice, that is, beginning on May 1, 2022

In response, the Landlord agrees that Metergy is its agent for providing water meter readings and billings. The Landlord submits that the Tenant read the case study, was aware that the building has a submetering component, and that the Tenant would be charged for water under that program eventually. The Landlord acknowledges some delay with setup, which was caused by the Landlord exercising due diligence to find the

best possible service provider, and selected Metergy based on it having the lowest costs and significant national experience in submetering.

The Landlord argues that Metergy has the most reasonable fees of the contracts offered to the Landlord. The Landlord submits that in comparison to Metergy's $5.36 monthly fee, BC Hydro charges just over $12.00 per month in service fees.

The Landlord argues that it does not have any other way to determine the amount of water usage for the rental unit. The Landlord argues that the municipality does not provide this service. According to AH, Metergy reads the water meters, provides accounting for water usage over time, handles billing, and provides customer service such as answering questions about billing, setting up accounts, and assisting tenants with financial hardship through payment plans. AH stated that the Landlord hired Metergy to be its billing agent and does not have its own billing program or staff to read the water meters and invoice tenants. AH acknowledged that Metergy does not provide water to tenants.

The Landlord argues that as a submetering company, Metergy is providing services to both the Landlord and to tenants. The Landlord argues that without submetering, the Landlord would have to divide water consumption by the number of units in the building, which is more likely to result in unfair charges to tenants. The Landlord refers to Metergy's submissions to the BC Utilities Commission in the Wyse investigation, included in the Tenant's evidence, which describes the benefits of submetering for tenants.

The Landlord argues that the Tenant knew water was not included in the rent and that submetering would come into effect eventually. The Landlord submits that it was absorbing the entire cost for water billing until the submetering was organized, which was well beyond the timeline informed by the case study. AH testified that 98% of tenants in the building have signed up with Metergy and are looking after their own water bills. AH testified that the Tenant signed the tenancy agreement and had no questions at the time about how the Tenant would be paying for water through the submetering program.

The Landlord concedes that water billing will start as of May 1, 2022 as its notice was given on April 8, 2022 and not in time for April 1, 2022.

The Landlord argues that the regulations are not able to contemplate the situation of submetering, which did not exist at the time that the Act and regulations were drafted. The Landlord submits that the fees are neither expressly prohibited nor permitted under the regulations, so it should be based on what the parties have contracted into. The Landlord submits that the contract was both verbal and written. The Landlord argues that the parties have contracted for water usage to be paid for by the Tenant, and any charges by the service provider should be paid by the Tenant once set up, since there is no other way for that service to be provided.

The Landlord submits that the Tenant can discuss with Metergy directly regarding any issues with the Metergy Agreement. AH stated that he answered the Tenant's concerns but the Tenant did not like his answers.

AH stated he finds it troubling that the Tenant did not have any questions for nine months until the Tenant was notified to pay for water usage. AH stated that even if the Tenant disputes the administration fees, the Tenant still has not paid for any of his water usage.

The Landlord emphasizes that the Tenant contracted into being responsible for water payment, and there is no option for the Landlord to have the direct provider of water issue a statement to the Tenant. The only way the Landlord can measure the Tenant's direct water usage is through a submetering company. The Landlord argues that the Tenant was aware that he would be responsible for water, and it is standard for bills to have service charges, which the Tenant would have understood. Therefore, the Landlord is entitled to charge the full amounts charged by Metergy to the Tenant.

Analysis

1. Is the Tenant entitled to the orders sought?

Section 1 of the Act defines a "landlord" to include the owner's agent or another person who, on behalf of the landlord, exercises powers and performs duties under the Act, the tenancy agreement, or a service agreement. I find parties agree that Metergy is the Landlord's agent for providing water meter readings and billings to tenants. Therefore, I find Metergy to fall under the definition of a landlord and is bound by the Act and the regulations in this case.

In the present circumstances, it is not disputed that while water is not included in the rent under the tenancy agreement, the tenancy agreement also does not contain any express terms regarding how the Tenant would pay for water.

According to *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, [1973] 1 W.L.R. 601 (H.L.) at 609, as cited in *Karim v. Seo*, 2010 BCSC 746 at para. 48, an unexpressed term can be implied if and only if it is found that the parties must have intended that term to form part of their contract. It is not enough to find that such a term would have been adopted by the parties as reasonable people if it had been suggested to them. It must have been a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.

I find it is an implied term of the tenancy agreement that the Tenant will pay for his own water usage at the rate charged by the water provider, together with any charges, including any service fees or taxes, levied by that provider for the Tenant's water usage. I find the water provider for the rental property is the municipality. I find the parties agree that a start date of May 1, 2022 would be acceptable for the Tenant to commence paying for his own water usage.

I accept the Landlord may need to rely on a third-party submetering company such as Metergy to effectively run its submetering program. However, I find there are no express or implied terms in the tenancy agreement for the Tenant to enter into a contract with Metergy or any other submetering company in order to be able to pay for his water usage. I find there are no express or implied terms for the Tenant to pay additional charges imposed by Metergy or any other submetering company that would not be supplying the water. I find such terms are not implied terms necessary to give business efficacy to the tenancy agreement based solely on the fact that water was not checked off as included in the rent.

I find the case study, with its description of the water submetering system, would have allowed prospective tenants to understand that there would be submeters available to track their own water usage. However, I do not find the case study to reference submetering service agreements or additional charges by submetering companies that the tenants would have to pay for. I also find there is insufficient evidence of any pre-tenancy discussions between the Landlord and the Tenant about requirements for the Tenant to enter into a submetering service contract on specified terms or to pay additional, specified charges for submetering services. I find the Landlord had not

engaged any submetering company at the time the parties signed the tenancy agreement, and therefore would not have been able to provide the Tenant with this information. Moreover, I find the Landlord has not clearly argued why the entire agreement clause in the tenancy agreement should not be enforced. I find the tenancy agreement, including the entire agreement clause, was drafted by the Landlord and not the Tenant. I find the Tenant did not sign any agreement with Metergy or otherwise agree to pay Metergy's additional fees.

Based on the foregoing, I conclude that the Landlord, whether directly or through Metergy as its agent, does not have a contractual basis to require the Tenant to enter into the Metergy Agreement with Metergy or pay any of the additional charges (other than for the Tenant's actual water usage) imposed by Metergy.

Sections 5, 6, and 7 of the regulations contain provisions on prohibited fees, refundable fees, and non-refundable fees charged by a landlord. I find that Metergy, as a landlord under the Act in this case, is bound by the requirements in the regulations.

I note section 7(2) of the regulations states that a landlord must not charge a non-refundable fee described in sections 7(1)(d) or (e) unless the tenancy agreement provides for that fee. I find this implies that a landlord may charge the other non-refundable fees in sections 7(1)(a) through (c), (f), and (g), even if such fees are not expressly provided for in the tenancy agreement. However, I find the Landlord concedes that none of Metergy's additional fees fall under any of the permitted fees listed in sections 7(1)(a) through (c), (f), and (g) of the regulations. Therefore, I find there is no clear basis under the regulations for the Landlord or Metergy to charge its additional fees without the Tenant having specifically agreed to it.

Overall, I agree with the Tenant's submission that there is no source for the additional fees that Metergy seeks to collect from the Tenant.

I find it remains a question as to whether provisions regarding Metergy's additional fees would be enforceable even if provided in the tenancy agreement or if the Tenant had signed the Metergy Agreement. However, I find that is not a question I have to decide since I do not find the Tenant to have agreed to any such terms.

In summary, I find that:

- Metergy is a landlord in this case and is bound by the Act and the regulations.

- The Tenant is not obligated under his tenancy agreement to sign a contract with Metergy.
- It can be implied from water not being checked off as included in the rent in the tenancy agreement that the Tenant will pay for his own water usage at the rental unit at the rate charged by the water provider, together with any charges, including any service fees or taxes, levied by the provider for the Tenant's water usage. The water provider is the municipality. The parties agree for the Tenant to commence paying for his water usage effective May 1, 2022.
- The regulations do not expressly permit the Landlord or Metergy to charge Metergy's additional fees to the Tenant as non-refundable fees that do not need to be provided for in the tenancy agreement. There are no express or implied terms relating to Metergy's additional fees in the tenancy agreement and the Tenant has not otherwise agreed to pay them.

Under section 62(3) of the Act, the director may make an order necessary to give effect to the rights, obligations, and prohibitions under this Act, including an order that a landlord or tenant comply with the Act, the regulations, or the tenancy agreement.

Based on the foregoing and pursuant to section 62(3) of the Act, I grant the orders as substantially sought by the Tenant, which are stated in the conclusion below.

2. Is the Tenant entitled to reimbursement of the filing fee?

The Tenant has been successful in this application. I grant the Tenant reimbursement of his filing fee pursuant to section 72(1) of the Act.

Pursuant to section 72(2)(a) of the Act, I authorize the Tenant to deduct $100.00 from rent payable to the Landlord for the month of June 2023 on account of the filing fee awarded.

Conclusion

I conclude the Tenant is not obligated to sign a contract with Metergy under the parties' tenancy agreement.

Pursuant to section 62(3) of the Act, I hereby order:

1. the Landlord to cease asking the Tenant to sign a contract with Metergy;

2. the Landlord to provide the Tenant with a way to pay for the Tenant's water usage that does not require the Tenant to sign a contract with Metergy;
3. the Landlord to refrain from charging the Tenant any additional fees related to the Tenant's water usage; and
4. the Tenant to start paying the Landlord for water usage at the rental unit effective May 1, 2022.

The Tenant's claim for reimbursement of the filing fee is granted. Pursuant to section 72(2)(a) of the Act, the Tenant is authorized to recover his filing fee from the Landlord through a one-time deduction of $100.00 from June 2023 rent.

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: May 17, 2023

Residential Tenancy Branch