

## **Decision**

**Dispute Codes:** CNL, FF

### **Introduction**

This hearing dealt with the tenants' application to cancel a *2 Month Notice to End Tenancy for Landlord's Use of Property* (the Notice) and recovery of the filing fee. Both parties appeared at the hearing and had an opportunity to be heard and respond to other party's submissions.

### **Issue to be Decided**

Should the Notice issued December 29, 2009 be cancelled?

### **Background and Evidence**

The parties were in agreement to the following relevant facts:

- The Tenants were served with the Notice on December 29, 2009.
- The rental unit is a suite in a house which was built in 1913.
- The tenancy began in 1997.
- There are two bathrooms in the rental unit.

The Landlord has alleged the following reason on the Notice for ending the tenancy:

The Landlord has all necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant.

The Landlord's agent testified that the Landlord was bequeathed the rental premises in 1988, and had no plumbing or wiring plans for the house.

The Landlord's agent testified that the Tenants alerted the Landlord to problems with their bathroom door closing. The Landlord hired two contractors to investigate the problem and provided copies of their reports and estimates in evidence. The contractors suspect that the problem with the door may originate from water damage under the flooring, which may require extensive renovations and may extend beyond the Tenants' floor to adjoining suites.

The Landlord's agent stated that they will not know the extent of the problem until the floor boards are removed. The Landlord's agent testified that the bathrooms are located back-to-back and it would be most cost effective to renovate both bathrooms at the same time, which may take months, and therefore the rental unit will have to be vacant.

The Landlord's agent stated that the Landlord is a non-profit society and may have to suspend work on the rental unit due to financial considerations.

The Landlord's agent stated that the contractors have advised that they cannot work around the Tenants' furniture.

The Landlord's agent testified that no permits or approvals are required in order to carry out the remediation in the rental unit.

The Tenants questioned the "good faith" intentions of the Landlord. The Tenants testified that they made the Landlord aware of the problem three years ago and that the Board recognized the problem in the summer of 2009. The Tenants stated that they were away for four months and that the work could have been done at that time.

The Tenants testified that they believe the Landlord may have issued the Notice in retaliation for an Application for Dispute Resolution filed by the Tenants in June, 2009.

The Tenants stated that they do not believe the rental unit will have to be vacant for the repairs to be done, but that they are prepared to temporarily vacate the premises, should it become necessary, and to move their belongings away from the bathrooms and into an enclosed area of the suite.

### **Analysis**

The Landlord has an obligation to repair and maintain a rental unit so that it complies with health, safety and housing standards required by law. It is not in dispute that there may be renovations required to address the possibility of plumbing concerns in the bathrooms in the rental unit. The Landlord intends to address the repairs to the bathroom by removing the floor boards and accessing the damage once the boards have been removed

The reason given to end the tenancy on the Notice is based upon section 49(6)(b) of the Act which provides:

(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:

(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;

[my emphasis]

The Tenants did not dispute the Landlord's agent's statement that permits are not required in order to effect the required renovation. I must determine whether the Landlord has met the remaining criteria of section 49(6) which I characterize as a two part test: firstly, that the repair or renovation requires the rental unit to be vacant; and

secondly, that the Landlord has shown a “good faith” intention to renovate or repair the rental unit.

The first test, that the repair or renovation requires the rental unit to be vacant, has been an issue before the Supreme Court of British Columbia in *Berry v. British Columbia*, 2007 BCSC 257. The court found that the requirement that a rental unit be vacant has two dimensions that must be satisfied in order to determine that the tenancy must end:

1. As a practical matter, does the unit need to be empty for the renovations to take place? The fact that renovations might be more easily or economically undertaken if the unit was empty is not sufficient. To warrant an end to the tenancy, renovations must only be possible if the unit is unfurnished and uninhabited.
2. The landlord must establish that the only manner in which to achieve the necessary vacancy or emptiness is by terminating the tenancy.

The court also noted that if the unit needs to be vacant for only a short time, it is irrational to think that a landlord could terminate the tenancy.

The documentary evidence provided by the Landlord includes the following statements of the contractors:

- “I would suggest evacuation of the space to keep liability and costs down.”
- “There is water staining that is visible from the floor below. This is what could be the problem.”
- “The best way to get a grip on what the verdict would be to renovate the main bathroom and pull up its flooring. Then you could determine the extent of the work.”
- “Upon a site viewing, we have the opinion of water leakage doing the damage. We believe, the leak source to be the bathtub/shower in the ensuite, or possibly the main washroom. This cannot be confirmed without opening up floors and or walls in the two washrooms.”

The Landlord admittedly does not know the extent of required repairs and will not know until the floor boards have been removed. Only then will the extent of the damage

become apparent. The Tenants have offered to temporarily vacate the rental unit, should it be necessary, in order for the exploratory work to be done. Therefore, I find that the Landlord has not sufficiently demonstrated that any necessary emptiness can only be achieved by ending the tenancy. I do not accept the Landlord's position that all of the Tenants' personal belongings need to be removed from the rental unit in order for the Landlord to do the exploratory work.

Since I have found that the Landlord has not demonstrated that the rental unit needs to be vacant in order to do the exploratory work and that the only way to achieve the necessary emptiness is by ending the tenancy, the Landlord has failed the first test that the rental unit is required to be vacant in order to complete the repairs. Accordingly, I grant the Tenants' application to cancel the Notice to End Tenancy without further exploring the Landlord's good faith intention with respect to ending the tenancy. The effect of this decision is that the tenancy shall continue.

Although the Landlord's agent expressed concern over structural damage to the rental unit, I found the landlord's concern to be premature. Should the Landlord discover extensive damage, thus necessitating extensive repairs to the structure of the building, the Landlord is at liberty to obtain the necessary permits and issue another Notice to End Tenancy where appropriate.

The Tenants have been successful in their application and are entitled to recover the filing fee from the Landlord. The Tenants may deduct \$50.00 from a subsequent month's rent in satisfaction of this award and the Landlord must consider the rent paid in full.

### **Conclusion**

The Notice to End Tenancy issued December 29, 2009 is cancelled and the tenancy

remains in full force and effect.

The Tenants may deduct \$50.00 from future rent due to the Landlord.

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*.

February 8, 2010

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Date of Decision

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