IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *D. Jockel Holdings Ltd. v. Vardigans*, 2023 NSSM 16

Date: 20230221
Claim: 518224
Registry: Halifax

Between:

D. Jockel Holdings Limited

Appellant

v.

Caroline Vardigans

Respondent

Adjudicator:	J. Scott Barnett
Heard:	February 6, 2023
Written Decision:	February 21, 2023
Counsel:	Andrew Christofi Counsel for the Appellant Neil Robertson Counsel for the Respondent

By the Court:

[1] This is an appeal from an Order of the Director of Residential Tenancies dated September 15, 2022. The Appellant Landlord, D. Jockel Holdings Ltd., seeks a termination of the tenancy of the Respondent Tenant, Caroline Vardigans, in respect of the residential premises located at * (the Premises) and a vacant possession order, relief which was denied by the Residential Tenancy Officer in the first instance.

[2] The hearing before me was rather lengthy and I have taken all of the evidence into account, including the documents in the Appellant's Exhibit Book and the documents in the Respondent's Exhibit Book (whether entered by consent or as accepted into evidence by the Court) as well as the *viva voce* evidence of all of the witnesses which includes the testimony of Dan Jockel, Catherine Blackler and Caroline Vardigans. Not all of the evidence will be referred to in these reasons for judgment even though all of it has been considered.

ORDER OF THE DIRECTOR (SEPTEMBER 15, 2022)

[3] The Landlord's Application to Director, filed on July 19, 2022, sought termination of the tenancy and vacant possession of

the Premises on the basis that Dan Jockel and his partner, Catherine Blackler, were expected their first child in early September 2022 and they wanted to move from their current residence to the Premises.

[4] Of apparent significant importance to the Residential Tenancy Officer (as will become evident below), an earlier Application to Director, filed on June 23, 2022, indicated that termination of the tenancy and vacant possession of the Premises were being sought as Dan Jockel and his brother, Tom Jockel, as they were seeking to renovate the Premises by installing fire and soundproof insulation in the ceiling and by upgrading electrical and plumbing systems as necessary.

[5] It appears that both of the claimed reasons for the relief sought by the Appellant were considered by the Residential Tenancy Officer in one hearing which took place on September 6, 2022. However, the Residential Tenancy Officer did not cite Sections 10AB, 10AC or 10AD of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended (the so-called "renoviction" provisions referred to in *Bluenose Inn & Suites v. McGuire*, 2023 NSSM 4). Instead, the focus of the Order of the Director was on

Section 10(8)(f)(i) of the *Residential Tenancies Act* which states as follows:

NOTICE TO QUIT

Notice to quit

10 …

(8) A landlord may give to the tenant notice to quit the residential premises where

…

(f) the Director is satisfied that it is appropriate to make an order under Section 17A directing the landlord to be given possession at a time specified in the order, but not more than twelve months from the date of the order, where

(i) the landlord in good faith requires possession of the residential premises for the purpose of residence by himself or a member of his family;

…

[6] After reviewing the evidence, which included the testimony of Dan Jockel's brother Tom Jockel, the testimony of Caroline Vardigans, and the documentation submitted through the Service Nova Scotia residential tenancies portal for the teleconference

hearing (which documentation appears to be somewhat less in volume than that which is available to this Court), the Residential Tenancy Officer stated as follows:

> The landlord has not been convincing in that they are seeking possession of the unit in good faith. In reviewing **ALL** the evidence provided by both parties, it shows inconsistent and contradictory information by the landlord. The landlord has changed the reasoning behind seeking possession of the property. They have overloaded the claim in anticipation if one reason will not pass muster, there is another reason lined up.
>
> It is found that the landlord does not meet the threshold of "in good faith". It is believed, on the balance of probabilities, that the landlord simply is wishing to raise the rent for increased profit.

[7] It is not clear whether or not Dan Jockel was present during the hearing with the Residential Tenancy Officer. If he did participate, the Residential Tenancy Officer did not recite any evidence that he might have provided.

[8] In the result, the Appellant Landlord's Application was dismissed.

STANDARD OF REVIEW

[9] When resolving appeals to the Small Claims Court from Orders of the Director, Adjudicators have repeatedly proceeded on the basis that such appeals are conducted as hearings *de novo*. This is the proper approach: *MacDonald v. Demont*, 2001 NSCA 61, *Patriquin v. Killam Properties Inc.*, 2014 NSCA 114, *Cote v. Armstrong*, 2012 NSSC 15 and *Crane v. Arnaout*, 2015 NSSC 106.

EVIDENCE OF THE PARTIES

[10] Dan Jockel indicated that he is the sole owner of the Appellant corporation which itself owns a number of residential tenancy properties in the Halifax Regional Municipality, including the property where the Premises are located. That last mentioned property was purchased in 2021.

[11] Dan Jockel's brother, Tom Jockel, effectively functioned as the property manager for the property where the Premises are

located; he collected rent and dealt with the tenants. Tom Jockel was also the person who filed the Applications to Director.

[12] As it turns out, Dan Jockel denies any significant awareness of the exact steps that his brother was taking in an attempt to secure vacant possession of the Premises, let alone the content of the Applications to Director or the attempts to achieve a Form DR5 agreement (Agreement to Terminate for Demolition, Repairs or Renovations) with the Respondent Tenant. However, Dan Jockel and his partner, Catherine Blackler, acknowledge that Tom Jockel was well aware of their desire to move into the Premises. Dan Jockel believes that his brother was simply doing what he thought was right in order to see that Dan Jockel became an occupant of the Premises with his partner and child.

[13] The bulk of the evidence of the Appellant largely addressed the current living conditions of Dan Jockel, Ms. Blackler and their four month old infant child and the merits (or otherwise) of various other apartments in the Appellant's portfolio of residential tenancy properties as compared to the merits of the Premises.

[14] The Jockel family currently reside in a top floor one bedroom "walk up" apartment with den at *. The apartment itself is

somewhat cramped and it has no bathtub or dedicated parking. There is a small dining nook by the kitchen. There is no dedicated space for a home office. The entrance foyer appears to be cramped and the inside stairs are narrow and make a ninety degree turn about halfway up but there is no landing.

[15] Ms. Blackler described the day-to-day challenges presented by the Jockel family's current place of residence with particular regard to activities of daily living while caring for an infant. Mr. Jockel also has concerns as their infant child will get older and begin walking and yet he views the number of stairs where they currently live as being unsafe for a child.

[16] By contrast, the Premises have dedicated parking at the property, the Premises is a ground level apartment with two bedrooms and a den and the bathroom has a bathtub. Moreover, while Ms. Blackler is currently on maternity leave, she did previously walk to work in downtown Halifax. She plans to do so again when she returns to work after her maternity leave ends. Notably, the family has one car at the moment and Ms. Blackler says that they cannot afford another.

[17] For one reason or another, the other possible options in the Appellant's property portfolio were described as deficient as compared to the Premises and, as a result, Dan Jockel and Ms. Blackler would like to move into the Premises with their child.

[18] For her part, Ms. Vardigans testified that she began living at the Premises in January 2018 with her partner although she now lives alone. Rent is $875 a month. Rent has always been paid in full and on time. Until recently, Ms. Vardigans would have described Tom Jockel as her landlord since that is the person with whom she has had virtually all of her dealings as a tenant at the Premises.

[19] After the Appellant purchased the property where the Premises are located, Ms. Vardigans says that Tom Jockel contacted her in March 2021 and asked her to leave so that he could move in. She says that she believes that the tenant upstairs was asked the same thing and that person left, following which Tom Jockel did not move in and the unit was rented to someone else for twice the previous rent amount.

[20] Ms. Vardigans testified to difficult dealings with Tom Jockel, supported by the text messages that are in evidence, over issues

with storage in the basement, noise complaints that she made and what she felt to be intimidation from the Landlord. She said that if she could afford to live somewhere else, she would have left before now.

[21] There was very little testimony concerning any renovations that might still take place despite the content of the Application to Director that was filed on June 23, 2022. Dan Jockel maintained that he never applied for a building permit although his brother did so but Dan Jockel did admit that he and his brother "may have" obtained a quote for possible renovation work at the Premises.

[22] That said, Dan Jockel did not testify to any present intention to carry out any soundproofing-type work or other renovations at the Premises.

DECISION

(a) Introduction

[23] I am satisfied that the Appellant Landlord has the burden of showing, on a balance of probabilities, that it should be granted the relief it seeks.

[24] As noted, there was very little evidence about whether the Appellant Landlord has any current intention of carrying out any renovation work at the Premises. The submissions of legal counsel for the parties did not address the so-called "renoviction" provisions to which I have previously referred.

[25] Since all of the arguments were focused on whether the Jockel family actually intends to move into the Premises if this Court finds in the Appellant's favour, I will confine myself to considering those arguments. I would nevertheless find that there is no evidence that the Appellant Landlord actually intends to proceed with renovation work at the Premises even if a building permit was previously obtained in furtherance of Tom Jockel's soundproofing ideas. As a result, Sections 10AB, 10AC and 10AD of the *Residential Tenancies Act* do not appear to have any relevance here.

(b) Possession for the Purpose of Residence Required in Good Faith

[26] As previously noted, Section 10(8)(f)(i) of the *Residential Tenancies Act* provides that a landlord may issue a notice to quit if

the Director is satisfied that a vacant possession order is appropriate because "the landlord in good faith requires possession of the residential premises for the purpose of residence by himself or a member of his family."

[27] As set out in Section 17D(1)(b), this Court may make any order that the Director could have made. Section 17A sets out all of the possible subject matters of orders that can be made. Included in that list are orders with respect to the termination of a tenancy and the granting of vacant possession. The question now is whether this Court is satisfied that the Appellant, in good faith, requires possession of the Premises for the reason stated in Section 10(8)(f)(i).

(c) Use of Section 10(8)(f)(i) by a Corporation

[28] The first obvious issue is that Section 10(8)(f)(i) refers to "the landlord" requiring possession "for the purpose of residence by himself or a member of his family." In Section 2(c) of the *Residential Tenancies Act*, "landlord" is defined as follows:

> (c) "landlord" includes a person who is deemed to be a landlord, a lessor, an owner, the person giving or

> permitting the occupation of premises and such person's heirs and assigns and legal representatives;

[29] In addition, Section 2(abc) defines "family member" as meaning:

> …in relation to an individual, any of the following:
>
> (i) the individual's spouse,
>
> (ii) a child of the individual or the individual's spouse,
>
> (iii) a parent or legal guardian of the individual or the individual's spouse;

[30] In this case, the Landlord is a corporation. Thus, while the term "person" includes a corporation (see Section 7(1)(s) of the *Interpretation Act*, R.S.N.S. 1989, c. 235), a corporation cannot require possession of the Premises for the purpose of it residing there. Moreover, the Landlord, as a legal corporation, cannot have a spouse, children or parents who are members of its family within the meaning of the *Residential Tenancies Act*.

[31] A previous decision of the Small Claims Court observed that the *Residential Tenancies Act* appears to make a distinction in

some instances between a “person” and an “individual”, with the latter referring specifically to a natural person as opposed to a corporation: *Bank of Montreal v. Woodbine Park*, 2016 NSSM 39. When the word “individual” is used in the *Residential Tenancies Act*, that word is usually used in reference to someone who is a tenant and who actually exists in physical space.

[32] From this perspective, the fact that the Appellant Landlord is a corporation appears to preclude it from invoking Section 10(8)(f)(i).

[33] Regardless, I believe that it is important to observe in this case that the corporation in issue is a closely held company with one shareholder, namely Dan Jockel. Although Tom Jockel has acted as the company’s agent, Dan Jockel is the directing mind of the Appellant. This is not a company with countless shareholders, a full management team and large numbers of natural persons acting as its agents.

[34] As we also know from Section 9(5) of the *Interpretation Act*, every enactment (which includes the *Residential Tenancies Act*) is deemed to be remedial and is to be interpreted in a manner that will insure the attainment of its objects.

[35] In the case of the *Residential Tenancies Act*, it is not difficult to see that the statute grants certain protections to tenants that would not necessarily have been available to them at common law, particularly in regard to the restrictions on the ability of a landlord to issue and serve a Notice to Quit.

[36] At the same time, the statute also clearly seeks to achieve a balance as between the protection afforded to tenants and the rights of landlords, of which Section 10(8)(f)(i) is an example.

[37] Returning to the definition of "landlord" in the *Residential Tenancies Act*, one can see that the meaning of the word includes "the person giving or permitting the occupation of the premises". In the context of the Appellant, a small, closely held corporation, Dan Jockel does appear to fall within the meaning of the phrase "the person giving or permitting the occupation of the premises" as he is the directing mind of the corporation. I therefore find that Dan Jockel is a "landlord" within the meaning of the statute and he personally can seek to invoke Section 10(8)(f)(i).

[38] I take some comfort in the fact that a similar conclusion was reached in similar circumstances by the Ontario Court of Appeal in

the case of *Slapsys (1406393 Ontario Inc.) v. Abrams*, 2010 ONCA 676.

[39] Even if I am wrong with regard to whether or not Section 10(8)(f)(i) is available to the Appellant Landlord in the context of the facts of this case, I would point to Section 10(8)(f)(iii) which permits the Director of Residential Tenancies to make an Order for vacant possession when the Director "deems it appropriate in the circumstances". Given his relationship to the Appellant Landlord and the stated desire of Dan Jockel to reside in the Premises, I would be prepared to consider Dan Jockel's request as being one of the "analogous types of circumstances" to which Section 10(8)(f)(iii) can apply due to its similarity to a request pursuant to Section 10(8)(f)(i): see *Martin v. Killam Properties Ltd*., 2007 NSSM 59 at para. 23.

(d) Test to be Applied Pursuant to Section 10(8)(f)(i)

[40] We turn now to whether it has been established that Dan Jockel in good faith requires possession of the Premises for the purpose of residence by himself, his spouse and their child.

[41] While the cases of *Martin v. Killam Properties, supra*, *McHugh v. Mannette*, 2021 NSSM 18 and *Schulze v. Gillis*, 2021 NSSM 52 were cited to me, those cases are not particularly helpful in deciding whether the requisite test has been met in the current case under appeal as I find the factual underpinnings of those decisions to be very different than those before me now.

[42] In the first case, the issue was whether a deteriorated landlord-tenant relationship, allegedly the fault of the tenant, justified a vacant possession order pursuant to Section 10(8)(f)(iii). The Court found that justification for lease termination was lacking.

[43] In the second case, the evidence established that the landlord's father and brother might only occasionally stay in the residential premises in issue in order to visit the landlord; they were not actually going to reside there. Accordingly, the landlord's request for vacant possession was denied.

[44] Finally, in the third case, the Court made very strong findings of fact that the application was not made in good faith by the landlord and that the landlord was simply seeking to remove the tenant by any means possible. In fact, the landlord's unsuccessful

efforts to extract a higher rent from the tenant in the face of the rent control provisions that were brought into effect during the Covid-19 pandemic immediately preceded the request for vacant possession pursuant to Section 10(8)(f)(i).

[45] To repeat, the key wording in the statute under consideration now is as follows:

> …the landlord in good faith requires possession of the residential premises for the purpose of residence by himself or a member of his family….

[46] With regard to the word "requires", I do not think it means that the landlord must demonstrate an absolute need to take possession of the residential premises in question. In *Ireland v. Taylor,* [1949] 1 K.B. 300 at 317 *per* Somervall, LJ, as cited in *Re Cove Mobilehome Park & Sales Ltd. v. Welch* (1979), 27 O.R. (2d) 65 (Div. Ct.), it was held that:

> "Requires" may, of course, have different senses in different contexts. In its present context it is, I think, satisfied if a landlord establishes, as the landlords here did, that he wants and intends to occupy the premises. Apart from the Act, that

> is his common law right. If the legislature had intended to place some burden on him of establishing that he was reasonable or not unreasonable in requiring what was his own, plain words would have been used.

[47] One can also refer to *Kennealy v. Dunne*, [1977] 2 All E.R. 16 at 23-4 *per* Stephenson LJ (C.A.), *McLean v. Mosher* (1992), 9 O.R. (3d) 156 (Gen. Div.), *Mehta v. Ibrahim*, [1989] O.J. No. 1065 (Dist. Ct.) and *Salter v. Baljinac* (2001), 201 D.L.R. (4th) 744 (Ont. Div. Ct.).

[48] With regard to the concept of "good faith," it has been held that, in the context of similar provisions, the landlord need only show a genuine intention to terminate the tenancy for the purpose of occupation by a family member in order to satisfy the "good faith" requirement: *Salter v. Baljinac, supra*, and the cases cited at para. 20 thereof, as well as *Feeney v. Noble* (1994), 19 O.R. (3d) 762 at 764 (Div. Ct.).

[49] For point of comparison, the provision at issue in the *Salter v. Baljinac* case was Section 51(1) of the Ontario *Tenant Protection Act, 1997*, S.O. 1997, c. 24 which read as follows:

> A landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation by the landlord, the landlord's spouse or same-sex partner or a child or parent of one of them.

[50] The Court reasoned as follows at paragraphs 16 to 18:

> [16] In my view, the Legislature in s. 51(1) was seeking to balance the interests of the tenant and the landlord. The tenant has an interest in maintaining a continuity of residence. The mere fact of an existing tenancy gives a property interest in the unit.
>
> [17] The landlord, with the residual bundle of rights in the property, subject only to the tenancy, has a professed interest in gaining accommodation for a person within a defined group of family members. Both parties have common and legitimate interests, assuming the landlord is acting in good faith, that is, there is a genuine intent to occupy by a family member for the purpose of residential occupation.

> [18] In my view, s. 51(1) charges the finder of fact with the task of determining whether the landlord's professed interest to want to reclaim the unit for a family member is genuine, that is, the notice to terminate the tenancy is made in *good faith*. The alternative finding would be that the landlord does not have a genuine intent to reclaim the unit for the purpose of residential occupation by a family member.
>
> [emphasis in original]

[51] As I previously observed, a significant amount of time during the testimony of the witnesses in this case was consumed by presenting information that would permit the Court, if it wished, the evaluate the various options open to Dan Jockel in terms of potential living arrangements including not only the Premises but other possibilities as well.

[52] While I have considered the foregoing evidence along with everything else presented to me, the main focus here is on whether I find that Dan Jockel has a genuine intent to occupy the Premises as his and his family's residence, not necessarily on whether Mr. Jockel's professed choice is reasonable or unreasonable in the context of other possibilities.

[53] The landlord's motives, if they could be identified, would be useful in some cases in terms of making the determination as to whether or not the landlord's expressed desire to occupy residential premises (or to obtain possession of those premises for a family member) is genuine.

[54] At the same time, I also believe that a landlord's genuine intent to reclaim residential premises is not necessarily tainted by the mere presence of economic reasons that might lead that landlord to chose a particular apartment in which to live as opposed to another available option.

[55] Consider, for example, if a landlord owned two different apartments, one of which had a "below market" rent and the other of which had rent more in line with the current market rent. The mere fact that the landlord might be more motivated to move into the apartment with the lower monthly rent amount compared to the other apartment would not necessarily mean that the landlord could not have a genuine intent to move into that lower priced apartment.

[56] In this case, there is sufficient evidence to establish on a balance of probabilities that Dan Jockel does have a genuine intent to move into the Premises with his family.

[57] While Dan Jockel's and Catherine Blackler's stated criteria in terms of what they are looking for are obviously subjective in nature, I am not charged with evaluating those criteria on an objective basis. What I can say is that there is no doubt that their stated criteria do fit the profile of and the amenities associated with the Premises.

[58] Moreover, both Dan Jockel and Catherine Blackler indicated that, if the Court grants the requisite Order, they intend to move into the Premises. They were not shaken during cross-examination in respect of that testimony.

[59] The earliest corroborating evidence of this intention on the part of Dan Jockel is found in an email that he sent to the Respondent Tenant on February 16, 2022. The stated reasons behind that intention are the same as those about which Dan Jockel testified during this appeal.

[60] I point out that there is no evidence in this case that Dan Jockel indicated to a tenant of any of the properties held by the Appellant (or by any other company in which he might have an interest) that he intended to move into an apartment but then he

failed to do so in favour of simply raising the rent for that apartment and then bringing in new tenants.

[61] The theory advanced by the Respondent Tenant in this case is that the sole motivation of the Appellant Landlord here is to get the Respondent Tenant out of the Premises and then to raise the rent in respect of those Premises. This theory is related to Ms. Vardigans' understanding of what she believes took place in terms of a rent increase concerning the apartment upstairs from the Premises after Tom Jockel first approached the upstairs tenant (possibly around the same time that he approached Ms. Vardigans in or around March 2021). It is Ms. Vardigans' understanding that the upstairs tenant left and then the rent was substantially increased.

[62] This understanding is based in large part on text messages allegedly exchanged between the prior upstairs tenant and Tom Jockel. The text messages are undated and, in the absence of testimony from either the prior upstairs tenant or Tom Jockel, it is difficult to put much weight on these text messages, the content of which constitutes hearsay.

[63] In any event, even if the content is true, it might simply cause me to consider the motives of Tom Jockel to be worthy of

suspicion. It would not necessarily mean that Dan Jockel's motives are equally worthy of suspicion

[64] It is difficult to understand why Tom Jockel might have used renovations as a pretext for securing vacant possession of the Premises for his brother Dan Jockel when there would have been no obvious reason not to simply state that his brother Dan Jockel wanted to move into the Premises.

[65] At the same time, it is important to point out that there is not necessarily a contradiction between wanting to do renovations at the Premises and wanting vacant possession so that a family member could live there.

[66] Furthermore, depending on Tom Jockel's current living arrangements, it is possible that he might genuinely have been considering renovations that would have combined the upstairs apartment and the Premises into a single family home and then moving in himself, but he ultimately decided against it because of the "renoviction" moratorium or other considerations, including economic ones. In fairness, a person's intentions can change and not simply for illegitimate reasons – among other things, the circumstances in which a decision must be made can change and

the number of options available to the person making the decision can change.

[67] I note that Tom Jockel did not testify in this case although it was open to either party to call him as a witness, whether by subpoena or otherwise. As a result, and even though it is unnecessary to do so because this is a hearing *de novo*, it would be difficult to evaluate whether the Residential Tenancy Officer's reference to "inconsistent and contradictory information by the landlord" (i.e. Tom Jockel) is accurate or not. I would simply observe that the information provided by Dan Jockel is, in contrast to the previous characterization of the information submitted by Tom Jockel, both consistent and anything but contradictory.

[68] In short, I am satisfied that the relief sought by the Appellant Landlord should be granted on the basis that Dan Jockel has a genuine intention to move into the Premises with Ms. Blackler and the child that they have together.

(e) When Vacant Possession Should be Granted

[69] I must now determine when vacant possession should be granted with an understanding that the maximum amount of time

that can be allowed is twelve months from the date of the order granting relief pursuant to Section 10(8)(f).

[70] In recognition of the difficulty that the Respondent Tenant may face in securing other acceptable accommodations, I will set the vacant possession date as August 31, 2023, a period of slightly more than six months from now, with a termination of tenancy as of that date as well.

(f) Conclusion

[71] The Appellant Landlord has been successful on this appeal and costs should follow the event. Costs are payable by the Respondent to the Appellant in the total amount of $130.85 which represents the initial filing fee for the Application to Director and the filing fee for this appeal.

[72] An Order will be issued in accordance with these reasons for judgment.

J. Scott Barnett
Adjudicator of the Small Claims Court