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Street v Mountford Applied to Decide: A Residential Tenancy Agreement or a Licence?

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Case Commented On: *Singh v RJB Developments Inc.*, 2016 ABPC 305 (CanLII)

This Provincial Court decision by Judge Jerry LeGrandeur, Associate Chief Judge, is of interest primarily because he used the common law in order to determine whether the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*) applied to Jaspreet Singh's occupation of a portion of a building owned by RJB Developments Inc (RJB). While this resort to the common law in this context is rarely seen, we can expect to encounter it more often, given the increasing variety in short- and long-term residential accommodations. The courts usually do rely on the common law in those few borderline cases, such as this one, where the question is whether the *RTA* applies, even though the statute appears to answer all questions about its scope. However, when resorting to the common law, the courts — including Judge LeGrandeur in this case — do not always indicate why they believe it is both necessary and possible to do so. This is unfortunate because the *RTA* is usually used by non-lawyers who often rely on explanations of the statute that are provided by Service Alberta (e.g., RTA Handbook and Quick Reference Guide) or non-profit organizations such as the Centre for Public Legal Education Alberta (e.g., Renting 101: A Guide to Renting in Alberta). None of those explanations indicate that landlords and tenants need to look outside the *RTA* to find out if it applies; they all simply paraphrase the statute.

Facts

The Lethbridge building that RJB owned contained four condominium units. Each condominium unit contained four or five bedrooms, multiple bathrooms, an entry, a kitchen, and a living room. Singh occupied a bedroom assigned to him by RJB in Unit #1, and shared the use of its bathrooms, entry, kitchen, and living room — the "common areas" — with four other residents, each of whom had been assigned one of the other bedrooms by RJB. Unit #1 was fully furnished, including dishes, pots, pans, utensils, tables, desks, beds, sofas, and chairs.

All of the residents of the condominium unit, including Singh, were students. RJB only rented to students and tried to create an environment that suited a student way of life in their building. RJB also apparently modelled their agreements with Singh and the other residents on one used by Lethbridge College for its student residences (at para 9).

The question of whether the relationship between Singh and RJB was governed by the *RTA* arose because of the wording in their September 9, 2015 written agreement that set out the terms of Singh's occupation from September 1, 2015 to April 28, 2016, an eight-month occupation that Singh pre-paid for in advance. Clause 3 of that agreement stated that it was a licensing agreement and that the *RTA* did not apply.

Singh and RJB had the only keys to Singh's assigned bedroom and Singh was the sole occupant of that bedroom. However, the September 9, 2015 agreement provided that RJB had the right to reassign Singh to a different condominium unit or to a different bedroom within the same condominium unit upon 48-hours notice. Singh also had no say in who the occupants of the other four bedrooms in Unit #1 were; that was up to RJB. The agreement also provided that it could be terminated by RJB if the resident withdrew or was terminated from his or her academic program at the Lethbridge College or the University of Lethbridge.

The agreement also provided RJB with the right to enter Singh's bedroom and the common areas of the condominium unit. Clause 8(d) provided that RJB "may enter the premises any time to make necessary repairs, to maintain health and safety standards, and to ensure compliance with rules, regulations and policies." A Rules and Information Guide, made part of the September 9, 2015 agreement, reiterated that RJB "reserve[d] the right to enter student units and bedrooms" for those same purposes and concluded with the warning: "You can expect someone to enter your unit." Specific dates for inspections were separately set out in writing and agreed to by Singh.

RJB became unhappy with Singh's conduct, as well as the conduct of some visitors to his room, and, on January 15, 2016, told him that if he did not leave voluntarily the police would be called. That was followed up by a termination notice on the same day. Singh left on January 18, although Judge LeGrandeur found that he was forced out by the threat of the police and his occupation was wrongfully terminated. After leaving, Singh lived with a friend for about five days until he found another place to live. He had to give up his part-time job because his new residence was too far away from his workplace and he did not have a vehicle. RJB kept the money that Singh had prepaid for his occupation to the end of April.

Singh sued for the return of his prepayment for the period from January 18 to April 28, for punitive or exemplary damages, for the return of a small portion of a security deposit he claimed was wrongfully withheld, for interest, and for costs. He succeeded on all of these except his claim for punitive or exemplary damages. On that claim he was instead awarded $700 for RJB's breach of quiet possession, inconvenience and stress. He succeeded under the *RTA*, which Judge LeGrandeur held did apply to what he found to be their landlord/tenant relationship, and he would have succeeded under a licence had Judge LeGrandeur concluded the relationship was one of licensor/licensee.

Statute

In deciding whether the *RTA* applied to the relationship between RJB and Singh, the statute is the first place to look. It appears to define its own scope in the following provisions:

- Section 2(1), the most important provision, provides: "Subject to subsection (2), this Act applies only to *tenancies of residential premises*." [emphasis added]
- Section 1(1)(l) defines "residential premises" as meaning "any place occupied by an individual as a residence."
- Section 1(1)(t)(i) defines "tenant" as meaning "a person who is permitted by the landlord to occupy residential premises under a residential tenancy agreement."
- Section 1(1)(m) defines "residential tenancy agreement" as referring to "a written, oral or implied agreement to rent residential premises."

Based on subsection 2(2) and the relevant definitions, it would appear that if you are an individual occupying a place as a residence, the *RTA* applies to you. The definition of "residential premises", while circular, is at the core of all of these provisions.

Notably, "tenancies" is undefined in the *RTA*, while "tenant" is defined. That definition can be paraphrased to say that a tenant is an individual who is allowed by the landlord to occupy premises as a residence under an agreement to rent those premises.

And what of subsection 2(2), which subsection 2(1) states it is subject to? Subsection 2(2) provides that the *RTA* does *not* apply to a number of listed relationships, of which the most relevant are:

- (c) "rooms in the living quarters of the landlord, if the landlord actually resides in those quarters"
- (d) "a hotel, motel, motor hotel, resort, lodge or tourist camp, a cottage or cabin located in a campground, or a trailer park, tourist home, bed and breakfast establishment or farm vacation home, if a person resides there for less than 6 consecutive months"
- (e) "a tenancy agreement between an educational institution as landlord and a student of that institution as tenant if the tenant does not have exclusive possession of a self-contained dwelling unit"
- (f) "a nursing home …"
- (g) "lodge accommodation …"
- (h.1) "a supportive living accommodation …"

Decision

In deciding whether the September 9, 2015 agreement was a "residential tenancy agreement" governed by the provisions of the *RTA* or an agreement between the parties creating only a licence which would not be governed by the *RTA*, Judge LeGrandeur began by noting that the difference between a tenancy and a licence is that in a tenancy an interest in land passes but in a licence it does not (at para 19). Judge LeGrandeur then quoted from the leading statement of this principle in the decision of the Australian High Court in *Radaich v Smith* (1959), 101 CLR 209 at 22, a statement adopted by both the Supreme Court of Canada in *Ocean Harvesters Ltd. v Quinlan Brothers Ltd* (1974), 44 DLR (3d) 687 (CanLII) at 687-88 and the House of Lords in *Street v Mountford*, [1985] AC 809 at 827, [1985] UKHL 4 (BaiLII):

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licence? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of *exclusive possession* of the land for a term or from year to year or for life or lives, If he was, he is a tenant. [emphasis added]

Judge LeGrandeur went on (at paras 20-22) to note that although exclusive possession is essential to a tenancy, exclusive possession alone may not be enough to decide whether a tenancy or a licence has been created. Whether or not the parties call their agreement a lease or license does not determine the issue. Instead, the court must consider the surrounding circumstances, the negotiations, the nature and extent of the accommodations, and the mode of occupation of the accommodation (at para 20, citing *AG Securities v Vaughan* (HLE), 1991 AC 417).

This led Judge LeGrandeur (at para 23) to set out the relevant provisions of the *RTA*, namely subsection 2(1) and its limiting the scope of the RTA to "tenancies of residential premises," and the definitions of "residential premises", "residential tenancy agreement, and "tenant", all quoted above. He then stated (at para 24), in the crucial passage that allowed the common law of "lease or licence" to be relevant:

> Although it is necessary that the premises be residential premises, … the fact that a person occupies the premises as a resident does not mean that they do so under a residential tenancy agreement that is governed by the Act. *The fact that it is occupied as a residence is only one consideration.*[emphasis added]

Unfortunately, Judge LeGrandeur does not say why occupation as a residence is not enough. My guess is that he focused on subsection 2(1) which limits the scope of the *RTA* to "*tenancies* of residential premises," with the emphasis on "tenancies," a term undefined in the *RTA*. Whatever the reason that Judge LeGrandeur found that occupation of premises as a residence was not enough to determine whether the *RTA* applied, his analysis of this issue is almost entirely a common law one, taking up all but two of the 34 paragraphs he uses to deal with the issue.

Having held that it was not enough for an individual to occupy the premises as a residence, Judge LeGrandeur then turned to the parties' agreement. He noted, among other things, that it was titled "Residential Tenancy Agreement" and defined "resident" as a person living in an assigned room in the unit (at para 25). He noted RJB's promise that the resident shall "peaceably hold the room during the term of this agreement, all in accordance with the terms and conditions of this agreement," deciding this gave the occupier "peaceful possession and enjoyment of the room", consistent with the landlord's promise in section 16(b) *RTA*. He acknowledged that the agreement specifically stated that the residents did not have an exclusive right of possession to the premises, that the relationship was a licence, and that the resident could not rely on the *RTA* (at para 27), but he ruled these provisions were not decisive.

Judge LeGrandeur also examined the provisions allowing RJB to enter Singh's unit and bedroom "to make necessary repairs, to maintain health and safety standards, in order to ensure compliance with rules and policies" (at para 31), as well as the provision allowing the landlord to reassign a resident to a different unit or a different bedroom on 48 hours notice (at para 33).

Having canvassed the parties' September 9, 2015 agreement, Judge LeGrandeur then returned to the common law and, specifically, the leading case of *Street v Mountford*, with its thorough review and discussion of "the question of whether the occupation of a single room is capable of being a tenancy or whether it is limited to that of an occupier by license" (at para 34). Judge LeGrandeur stated that the rule that *Street v Mountford* laid down was: "where residential accommodation is been granted for a term, at a rent, with exclusive possession, the grantor providing neither attendance nor services, the legal consequence was the creation of a tenancy" (at para 36).

After setting out that rule, Judge LeGrandeur then strung together seven more paragraphs of quotes from *Street v Mountford* that restated the distinction between a tenant and a lodger in different ways (at paras 37-43). Of prime importance for this post is those portions of the quotes which describe the type of licensee known as a lodger. For example, *Street v Mountford* approved of a passage from *Allan v Liverpool Overseers* (1874) LR 9 QB 180 at 191-192, where

the court said that a lodger has "the exclusive use of rooms in the house, in the sense that nobody else is to be there… yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he is agreed to give the exclusive enjoyment of the occupation to the lodger" (at para 39).

Judge LeGrandeur followed this recitation of the law by noting that the primary question is therefore whether Singh was granted exclusive possession or simply a personal right to occupy the bedroom in Unit #1 (at para 45). In answering this question, he discusses the fact that Singh occupied his room as his residence and that he was entitled to privacy and peaceful possession, subject to RJB's limited right to enter, repair and view the bedroom (at para 45).

The existence of RJB's limited right to enter Singh's room led Judge LeGrandeur to discuss the concept of exclusive possession (at paras 46-48), focusing on how it is enforced by the state. Thus, he notes that exclusive possession is secured by a tenant's right to maintain a trespass action (at para 46, quoting *Radaich*), to keep out strangers, including the landlord unless the landlord is exercising the limited rights of entry, repair and viewing that he reserved (at para 47, quoting *Street v Mountford*), and exercise sole possession or dominant control good against the world at large (at para 48, quoting *Ocean Harvesters*).

Judge LeGrandeur concluded that Singh had exclusive occupation at a rent for a term and therefore the relationship was a tenancy (at para 50). He based this conclusion on the following facts:

> It is an occupation of a premises (room) as a home away from home, for a lengthy period of time – school term – for school purposes, with payment in advance for the term, which premises including the individual rooms were dedicated to the safety and well being of the occupants and to facilitate successful completion of school requirements over that lengthy period of time and the occupants were assured of peaceable possession and privacy (at para 49).

Just what the school purposes of the occupation and the repeated references to school have to do with the law of lease or license is not made clear. However, that passage does mention the residential nature of an occupation for which privacy was assured, for a term and at a rent. Judge LeGrandeur went on to describe RGB's power to reassign Singh to a new room or a new condominium unit as simply a contractual term substituting a new residence for the initial one without the need to enter into a new residential tenancy agreement (at para 51).

Comments

(a) On the borderline

Based on the facts and both the *RTA* and the common law test for distinguishing between tenants and lodgers, this is a borderline case. In some ways, this case is typical of those that have followed *Street v Mountford*. That House of Lords case settled the law but shifted the conflict between freedom of contract and security of tenure from law to facts. (See, e.g., D.M.R. Townend, "Recent Development in Land Law: Continuing Difficulties in Distinguishing the Lease from the Licence" (2010) 29:3 The Law Teacher 352 more on this argument.)

Statutorily, Singh's situation is close to that of a roomer. Many types of roomers and boarders are explicitly excluded from the *RTA* by subsection 2(2), noted above. When the forerunner of the *RTA*, the *Landlord and Tenant Act, 1979*, SA 1979, c 17, was recommended by the then Institute of Law Research and Reform (now the Alberta Law Reform Institute), the question of whether these types of lodgers should come under the recommended statute was addressed. The Institute did not think that roomers or boarders should be included in the proposed statute because "a roomer often shares facilities such as a bathroom with the owner and other roomers, and the arrangement is *more personal* than a tenancy": Institute of Law Research and Reform, Residential Tenancies, Report No. 22 (February 1977) at 12 [emphasis added]. A boarder's arrangement is, of course, even more personal because meals are included.

Had Singh shared the unit with the landlord, the *RTA* would not have applied to him according to subsection 2(2)(c); he would have been a roomer. Instead, he shared the unit with other residents assigned to their rooms by the landlord and so subsection 2(2)(c) did not apply. RJB was not an educational institution, so subsection 2(2)(e) did not apply either. And the exceptions for roomers and boarders living in motel-like accommodations, nursing homes, lodges, and supportive living facilities in subsection 2(2)(d), (f), (g) and (h.1) were equally inapplicable.

As for the common law and its test, it is true that Singh appeared to have the exclusive *use* of his bedroom, but did he really have *exclusive possession* of that bedroom and of the common areas jointly with the other residents? The landlord appeared to retain quite a bit of power to enter Singh's bedroom and the common areas, including the ability to do so in order to ensure compliance with the house rules and policies. RJB rented only to students and tried to create an environment that suited a student way of life on the basis that students all had a similar lifestyle and similar schedules and similar goals. Nothing was to disrupt that student way of life (at para 9). That suggests that RGB was there to have its officers and employees look after the conduct of the residents, as well as their use of Unit #1. That is more intrusive than are most landlords. There is also the fact that RJB got to choose who the other residents of the five-bedroom Unit #1 were. Singh did not. And Singh was assigned a bedroom by RJB and RGB had reserved to itself the right to assign Singh to a different unit or a different room in the same unit on 48 hours notice. This also suggests an arrangement that was much more personal in nature than the usual landlord and residential tenant relationship.

I do not disagree with Judge LeGrandeur's conclusion that Singh was a tenant and therefore within the *RTA*. But I do think that it was a close call. The decision seems to conflate "exclusive possession" and "exclusive occupation". There is little doubt that the five residents of Unit #1 collectively had exclusive occupation of the unit. However, if one of them left, the remaining four did not have the right to exclude anyone else from the unit. They could not exclude a fifth resident chosen by RJB and assigned to the vacant bedroom. The discussion of the similar fact situation in *AG Securities v Vaughan* by Jonathan Hill in "Shared Accommodation and Exclusive Possession" (1989) 52:3 The Modern Law Review 408 at 415-16 expands on this point.

(b) The use of the common law to determine the RTA's scope

My primary concern is whether or not *Street v Mountford* and its lease or license distinction, and the cases following it, are appropriate sources of law for the resolution of the question of whether the *RTA* applied.

Judge LeGrandeur did not discuss subsection 2(2) of the *RTA*, set out above. That subsection lists a variety of situations to which the *RTA* does not apply. None of those situations applied in

this case, as noted above. But the question raised by the existence of the subsection 2(2) list of situations to which the *RTA* does not apply is whether or not there is room for case law that distinguishes between leases and licences.

In Canada, under the doctrine of parliamentary sovereignty, parliament or a provincial legislature has the authority to repeal or modify any principles set out in case law provided that it does so in accordance with constitutional limitations: G. Gall, *The Canadian Legal System*, 4th ed. (Toronto: Carswell, 1995) 41. If a particular common law rule or body of law is in need of reform, a legislature can enact legislation to repeal or modify that rule or laws. The Ontario Court of Appeal in *Re W.D. Latimer Co. Ltd. et al. and Bray et al* (1975), 1974 CanLII 698 (ON CA), 6 OR (2d) 129 at 157 put this idea as follows:

> Where a statute by its terms or by clear implication precludes the introduction of a common law rule and where the imposition of such a rule would frustrate the will of the Legislature or of Parliament as expressed in the statute, the court is not free to insist that the common law rules prevail, however, inviting it may be for a court to do so.

Generally speaking, the question is whether the legislature intended the *RTA* to be a complete code and thus overrule the common law or whether it did not intend it to be a complete code, thus leaving the common law untouched when the Act is silent or the two can co-exist in harmony. Unfortunately, while the *RTA* is almost a complete code, it omits any mention of the landlord's remedy of distress, which is governed substantively by the common law and procedurally by the *Civil Enforcement Act*. So the question is whether the common law of lease or licence can co-exist in harmony with section 2.

It seems to me that there is at least a question as to whether or not subsection 2(2) of the *RTA* has spoken about which lodger-like situations and relationships are excluded from the *RTA.* Because the *RTA* has excluded a large variety of the lodgers and licensees that *Street v Mountford* and subsequent cases distinguished from tenants, is it really appropriate for a court to resort to the common law? If a court thinks that there is still room for the common law rules that distinguish between tenants and lodgers, borders, roomers and other licensees, then it should state its reasons for thinking so.

I do think the answer to those questions might be found in subsection 2(1), which states: "Subject to subsection (2), this Act applies only to *tenancies* of residential premises" [emphasis added]. This subsection can be read as demanding that a relationship must be a landlord and tenant relationship before the question of whether it is a residential tenancy arises. This argument is bolstered by the fact that the absence of any definition of "tenancy/ies" in the *RTA* was deliberate. The Institute of Law Research and Reform, Residential Tenancies, Report No. 22 (February 1977) at 11 recommended the proposed legislation not attempt to define "tenant" or "tenancy". It felt that drawing the line between a tenancy and another type of legal relationship was more properly a judicial function than a legislative one because the courts could resolve borderline cases in a more flexible and responsive manner and because a definition of "tenancy" would be too complex to provide certainty. Tenancy was not defined in the original act and it continues to be undefined in the *RTA*. It could therefore be argued that the common law understanding of tenancy is relevant. However, this argument is weakened by the fact that "tenant" is defined in the *RTA*, contrary to the Institute's recommendation. Section 1(1)(t)(i) defines "tenant" as meaning "a person who is *permitted* by the landlord to *occupy* residential premises under a residential tenancy agreement" [emphasis added]. The language of "permission" and "occupation" is the language of licences, not leases.

Judge LeGrandeur is not alone in relying on the common law to decide whether the *RTA* applies in a particular situation. The best example is *990713 Alberta Ltd. (Airport Motel) v. Cook*, 2013 ABPC 36 (CanLII). Cook occupied a room at the Airport Motel for five-and-a-half years and was sued for more than $25,000 in outstanding charges. The question of whether or not the *RTA* applied to Cook's stay at the motel was raised because a number of rent increases had been imposed, but not in accordance with the rules in the *RTA*. Subsection 2(2)(d) excludes motels from the RTA "if a person resides there for less than 6 consecutive months." Cook argued that, since he had resided at the motel for more than six consecutive months, the RTA did apply. The Airport Motel argued that his occupation was under a license and there was no tenancy. Judge L.E. Nemirsky held (at para 30) that "more has to be established than the mere fact of there having been at least six consecutive months of residency" in order for the *RTA* to apply. The facts also had to support a lease having been entered into and that required that Cook be shown to have had exclusive possession. Cook was held to be a licensee because he was free to walk away at any time, he was assigned first one room and then a different room, and the motel staff had access to his room daily or weekly to provide housekeeping services.

Arguably, the *Cook* case is an easier case to find that the *RTA* was silent then is this one. As Judge Nemirsky pointed out (at para 37) subsection 2(2)(d) does not say that the *RTA* shall apply where there has been at least six months of continuous residence in the listed types of establishments. It only says that the *RTA* shall not apply if there have been less than six months of continuous residence. Judge Nemirsky therefore held that continuous residence over six months only left open the possibility that the *RTA* applied, leaving room for the common law to determine if the relationship was one of landlord and tenant.

Conclusion

The *RTA* is a piece of consumer protection legislation. As such, the more landlords and tenants are required to research the law outside the confines of the *RTA*, the greater the barriers to access to justice for parties who cannot afford lawyers. Reliance on the undefined word "tenancies" in section 2(1) of the *RTA* is a proverbial trap for the unwary.

Alberta can do better for its residential tenants and landlords, It could enact a modern, all-inclusive statute that does away with property law concepts and adopts a power-balancing, consumer-friendly approach that addresses issues such as — to name but a few — Airbnb, retirement villages, quickly enforceable minimum housing standards, companion animals for the elderly and others, and affordable housing for the half of people with disabilities who live in shared living arrangements or rooming/boarding houses with others who are not family members (Council of Canadians with Disabilities, "As a Matter of Fact: Poverty and Disability in Canada").

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