CITATION: Cowton v. Landlord and Tenant Board, 2024 ONSC 6753
COURT FILE NO.: DC-23-63
DATE: 20241203

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	
RILENE COWTON and EMILY COWTON-RICHES Appellants	Carey Blake, for the appellants
– and –	
LANDLORD AND TENANT BOARD, LEONARD SEECHARAN, JAYSON CAVANAGH, and PATRICK CORMIER[1] Respondents	Andrea Seecharan, for the respondent Leonard Seecharan Anna Solomon, for the respondent Landlord and Tenant Board
	HEARD: December 3, 2024

THE HONOURABLE JUSTICE RANJAN K. AGARWAL

I. INTRODUCTION

[1] The respondent Landlord and Tenant Board made an order evicting the appellants Rilene Cowton and Emily Cowton-Riches from their rental unit for nonpayment of rent. Rilene and Emily appeal the Board's decision.

[1] The respondents Jayson Cavanagh and Patrick Cormier didn't participate in this appeal.

[2] This appeal raises two issues: (a) did the Board deny Rilene and Emily procedural fairness when it found that they were given notice of the application; and (b) did the Board make an error of law in misinterpreting the *Residential Tenancies Act, 2006*, SO 2006, c 17, s 202(1)?

[3] I dismissed the appeal without calling on the respondents. These are the reasons for my decision. First, Rilene and Emily weren't denied procedural fairness—it was fair for the Board to determine the service issues first. Second, Rilene and Emily's arguments about section 202(1) are really about their disagreement with the Board's factual findings. They identify no legal error made by the Board.

II. BACKGROUND

A. Facts

[4] The respondent Leonard Seecharan is the landlord of a rental unit at Upper Level, 52 Horton Crescent, Brampton. Rilene, Emily, and the respondents Patrick Cormier and Jayson Cavanagh were tenants of the rental unit.

[5] In August 2022, Leonard gave Patrick four copies of an N4 Notice to End a Tenancy Early for Non-payment of Rent and a Form LI Application to Evict a Tenant for Non-payment of Rent and to Collect Rent the Tenant Owes. He claimed that the tenants owed him rent arrears.

[6] Patrick and Jayson moved out in October 2022. Leonard, Patrick, and Jayson agreed that Patrick and Jayson had paid their share of the rent.

B. The Board's Decision

[7] The hearing of the application was in October 2023. The Board held, among other things:

- Leonard served the tenants with the N4 Notice
- Leonard and all four tenants were in a joint tenancy
- the tenants had rent arrears of $29,650 as of October 31, 2023

[8] The Board ordered that the tenancy was terminated unless the tenants paid $29,836 in rent arrears to the landlord or the Board before October 31, 2023.

C. Legal Framework

[9] If a tenant fails to pay their rent, the landlord can give them a notice of termination. See *RTA*, s 59. The notice can be "given" by "handing it to an apparently adult person in the rental unit". See *RTA*, s 191(1)(c). The landlord may apply to the Board for an order terminating a tenancy and the payment of rental arrears if it has given appropriate notice to the tenant. See *RTA*, s 59, 69, 87.

[10] Any person affected by an order of the Board may appeal the order, but only on a question of law. See *RTA*, s 210(1). The applicable standard of review is correctness.

See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 37. Questions of law are about the correct legal test. Questions of mixed fact and law are questions about whether the facts satisfy the legal test. See *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at para 35.

[11] On a statutory appeal on a question of law alone, the focus is "whether the decision-maker correctly identified and interpreted the governing law or legal standard relevant to the facts found by the decision-maker." See *Linhares v Rahman*, 2023 ONSC 1435, at para 9 (Div Ct). Questions of law include a breach of procedural fairness—was the appropriate level of procedural fairness afforded to the appellant? See *Okoye v De Melo*, 2021 ONSC 6201 (Div Ct), at para 13; *Abara v Hall*, 2022 ONSC 7093, at para 24 (Div Ct).

D. Preliminary Issues

[12] The appellants and Leonard raise two preliminary issues. First, Leonard says that Rilene and Emily haven't paid all of the December rent. Justice Emery's appeal management order, dated December 11, 2023, required them to pay $2200 each month until further order of the court. They paid $500 last week. Justice Emery's appeal management order dated April 3, 2024, states that the parties can schedule a conference with him if rent is unpaid on five days' notice. I interpret Justice Emery's order as giving Rilene and Emily a five-day cure period, which hasn't expired yet.

[13] Second, Rilene and Emily told Justice Emery in April that they intended to move for leave to introduce fresh evidence. His endorsement required them to do so before me. They sought to do so at the start of the appeal, but they haven't filed a motion for this relief. They abandoned this request.

III. ANALYSIS AND DISPOSITION

[14] Rilene and Emily make two arguments on this appeal. First, they submit that they were denied procedural fairness because the Board's found that the N4 Notice was served properly before it considered their arguments about the nature of the tenancy. Second, they argue that the Board erred in law by misinterpreting section 202(1) of the *RTA* to find that they, Patrick, and Jayson were joint tenants.

A. Did the Board deny Rilene and Emily procedural fairness?

[15] The Board found that the N4 Notice was given to Patrick, who was an adult person in the rental unit. The Board's finding was based on:

- the Certificate of Service, which states that Leonard gave the notice to "the tenant"
- Patrick's evidence that he received the N4 Notice
- Leonard's evidence that he gave four copies of the notice to Patrick

- at the hearing, Rilene and Emily didn't dispute that Leonard gave Patrick the notice

[16] Their argument, at the hearing, was that Patrick and Jayson both said they gave Rilene and Emily a copy of the notice. They submitted that one of them must be lying.

[17] The Board rejected this argument as irrelevant. The *RTA* doesn't require the landlord to give the tenant notice. It only has to give an adult in the rental unit a copy of the notice. It also doesn't require that person to give the tenant notice. As there was no dispute that Leonard gave Patrick the notice, it doesn't matter if he then gave Rilene or Emily the notice. As a result, Rilene and Emily had notice of termination.

[18] In this court, Rilene and Emily argue that the hearing was procedurally unfair because the Board "found that the N4 was correctly served before finding that the Appellants were in a joint tenancy with the other tenants." In other words, the Board denied the appellants procedural fairness by deciding the service issues first. They say they were denied the opportunity to argue that they weren't a joint tenancy once the Board decided the service issue.

[19] I don't agree with appellants. "Service is the fundamental start of the proceeding. It is the act that invites the defendant into the Court's process. It initiates the right to take part." See *Darlind Construction, Inc. v Rooflifters, LLC*, 2009 CanLII 13617, at para 31. The Board was correct to determine whether Emily and Rilene were served before it heard their arguments on the merits. As disclosed by the Board's reasons, it

then considered, at paragraphs 18 to 22 of the decision, whether Rilene and Emily were joint tenants with Patrick and Jayson. Rilene and Emily were given ample opportunity to challenge service, and then dispute Leonard's position on the form of the tenancy.

[20] Rilene and Emily's real complaint on this appeal is that they don't agree with the Board's decision that they were given notice. That's a question of fact that isn't appealable. There's no procedural unfairness here.

B. Did the Board incorrectly interpret section 202(1)?

[21] In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants and in doing so: (a) may disregard the outward form of a transaction or the separate corporate existence of participants; and (b) may have regard to the pattern of activities relating to the residential complex or the rental unit. See *RTA*, s 202(1).

[22] Section 202 of the *RTA* imposes a statutory duty on the Board to determine questions of fact and to apply governing principles of law to determine the real substance of the transactions and activities regarding the rental units at issue. See *Pinto v Regan*, 2021 ONSC 5502, at para 40 (Div Ct).

[23] The Board made these findings of fact:

- Jayson and Patrick vacated the rental unit, but Rilene and Emily continued to live there
- there was no separate tenancy agreement between Leonard, and Riley and Emily
- Rilene and Emily created letters for Leonard to sign to help them obtain financial assistant to pay the rent arrears, but those letters didn't sever the existing joint tenancy or create new tenancies with Rilene and Emily

[24] In this court, Rilene and Emily argue that section 202 is limited to "situations where there was ambiguity." They rely on *The Landlords, Tenants, Occupants and Residential Tenancies Interpretation Guideline 21*, which states that if the tenancy agreement is unclear, the Board can determine who's a tenant by looking at several factors.

[25] First, the *Guidelines* are not binding on the Board: "a Member is not required to follow a Guideline and may make a different decision depending on the facts of the case."

[26] Second, the *Guidelines* don't purport to limit section 202(1) only to situations of ambiguity. To the extent there's some lack of clarity, the Board will determine who's the tenant based on the activities and transactions relating to the residential unit. But section 202(1), even in cases where there's no ambiguity in the tenancy agreement,

still requires the Board to determine the reality of the tenancy based on substance not form. See *Amini v Blue Stellar Real Estate*, 2023 ONSC 2659, at para 22.

[27] At the Board, Rilene and Emily urged the Board to rely on the letters they drafted to determine a separate tenancy agreement between them and Leonard. The Board rejected this view using its powers under section 202(1)—the letters were for a different purpose ("to assist in obtaining those financial resources to the arrears", at para 19).

[28] Rilene and Emily are really arguing that the Board erred in finding that they were joint tenants despite the lease and Leonard's letters. Those are errors of fact, and they're not appealable.

IV. CONCLUSION

[29] Rilene and Emily have identified no errors of law in the Board's decision. Their real complaint is with the factual findings made by the Board, which isn't appealable. As a result, their appeal is dismissed. The Board and Leonard don't seek their costs. Thus, no costs are awarded.

Agarwal J

Released: December 3, 2024