CITATION: Highfields Farm Corp. v. Francis, 2024 ONSC 6732
OSHAWA DIVISIONAL COURT FILE NO.: DC-24-00001562-0000
DATE: 20241203

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
HIGHFIELDS FARM CORP. Landlord (Appellant)	)	Rob L. Winterstein, for the Landlord (Appellant)
– and –	)	
JAKE FRANCIS Tenant (Respondent)	)	Jake Francis, Self-Represented
	)	Nicola Mulima, Counsel for the Landlord and Tenant Board
	)	**HEARD:** November 29, 2024

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REASONS FOR DECISION

CHARNEY J.:

[1] The Appellant/Landlord, Highfields Farm Corp., appeals from the Review Order of the Landlord and Tenant Board (the "LTB") dated May 17, 2024, which removed the Respondent/Tenant, Jake Francis, as a responding party to the application because he was not a tenant in possession of the rental unit at the time the Landlord's application to terminate the tenancy was made.

Facts

[2] On January 12, 2023, the Landlord served the Tenants, Jake Francis and his brother Mike Francis, with an Application to Evict a Tenant for Non-payment of Rent (L1 Application).

[3] The LTB held a hearing on July 17, 2023. The Landlord and one Tenant, Mike Francis, were represented, but the tenant Jake Francis did not appear at the hearing.

[4] On July 28, 2023, the LTB found that the Tenants were still in possession of the unit, had not paid rent for over one year, and were $16,176 in arrears.

[5] The LTB ordered the termination of the tenancy and that the Tenants must vacate the unit if the arrears and costs were not paid by August 8, 2023.

[6] On December 18, 2023, Jake Francis requested that the July 28, 2023 LTB Order be reviewed by the LTB. He argued that he was not in possession of the unit when the Landlord's Application was filed and that he did not receive the Notice of Hearing because he was no longer living in the unit.

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Review Hearing

[7] The Review Hearing was held on April 29, 2024. On May 17, 2024, the LTB granted the request to review, and varied the July 28, 2023 LTB Order by removing Jake Francis as a responding party to the Application. The remainder of the Order was confirmed and remained unchanged.

[8] The primary issue on the Review was whether Jake Francis had "ceased to be in possession" of the unit before September 1, 2021. That date was important because of amendments made to the *Residential Tenancies Act*, S.O. 2006, c. 17, (RTA) that were proclaimed in force on that date.

[9] Section 87(1) of the RTA authorizes the LTB to order payment of rental arrears. That section provides:

> 87 (1) A landlord may apply to the Board for an order requiring a tenant or former tenant to pay arrears of rent if,
>
> (a) the tenant or former tenant did not pay rent lawfully required under the tenancy agreement; and
>
> (b) in the case of a tenant or former tenant no longer in possession of the rental unit, the tenant or former tenant ceased to be in possession on or after the day subsection 18 (1) of Schedule 4 to the *Protecting Tenants and Strengthening Community Housing Act, 2020* comes into force.

[10] Prior to September 1, 2021, the LTB could only consider an application made by a landlord claiming rent arrears if the tenant was in possession of the rental unit when the landlord's application was filed. Claims made after the tenant ceased to be in possession of the unit were not within the jurisdiction of the LTB, and the landlord had to bring his claim in the Small Claims Court or the Superior Court, depending on the amount of arrears. Prior to September 1, 2021, s. 87(1) of the RTA read:

> s. 87(1) A landlord may apply to the Board for an order for the payment of arrears of rent if,
>
> (a) the tenant has not paid rent lawfully required under the tenancy agreement; and

(b) the tenant is in possession of the rental unit.

[11] The RTA was amended by the *Protecting Tenants and Strengthening Community Housing Act, 2020*, to permit the landlord to bring a claim for rent arrears to the LTB "no later than one year after the tenant or former tenant ceased to be in possession of the rental unit": RTA s. 87(1.1). However, for the LTB to grant an application for rent arrears against a tenant who was no longer in possession of the rental unit, the tenant must have ceased to be in possession of the rental unit on or after the proclamation of the amendment on September 1, 2021.

[12] The phrase "in possession of the rental unit" is generally understood to mean "still living" in the unit. Once a tenant moves out, they are generally not "in possession" of the unit. But, as in most things legal, the concept of "possession" is more complicated than that. The meaning of "in possession of the rental unit" was considered by the Ontario Court of Appeal in *1162994 Ontario Inc. v. Bakker*, 2004 CanLII 59995 (ON CA). At that time, s. 87 of the RTA was s. 86 of the RTA. The Court stated, at paras. 16 and 19 - 21:

> A "tenant in possession" must be a tenant as defined in s. 1 of the Act. The status of tenant is, however, not enough under s. 86 of the Act. While some sections permit the Tribunal to make orders against tenants without any qualification (e.g. s. 77), s. 86 adds the qualifying words "in possession of the rental unit". The phrase "tenant in possession" must refer to a subset of the broader group identified as tenants under the Act. Not all tenants will be "tenants in possession". Some persons who qualify as tenants under the Act will not be in possession of the rental unit and will, therefore, not be subject to an order under s. 86.
>
> …
>
> Some further assistance in defining "tenant in possession" is found by an examination of s. 86(2). That subsection provides that a landlord may be compensated for "the use and occupation" of a rental unit after notice of termination of the lease. A landlord can only be compensated, however, if the tenant is "in possession of the rental unit" when the landlord's application is made. This suggests that a "tenant in possession" is a person who was using or occupying the rental unit at the time of the application but does not necessarily indicate that the phrase is limited to users and occupiers.
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> Possession is a difficult concept to define. Both in common and legal parlance, it connotes some form of control over the thing said to be possessed: e.g. D. Dukelow, B. Nuse, The Dictionary of Canadian Law 2nd ed., (1995) Carswell at p. 916; The Shorter Oxford English Dictionary, Vol. II (1973) p. 1635. Clearly, possession in s. 86(1)(b) is not limited to immediate physical control. For example, a tenant who locks up a rental unit and leaves on an extended vacation, continues to exercise sufficient

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> control over that rental unit so as to qualify as a "tenant in possession" for the purposes of s. 86(1)(b). In my view, possession of a rental unit refers to some form of control over that unit as demonstrated by factors such as access to, use of, or occupation of the unit.
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> There will be cases, although I would not think a great many, where a determination of whether the tenant was "in possession of the rental unit" at the time of the application will raise a difficult issue. In those cases, the Tribunal will have to decide, based on the evidence, whether there is a sufficient connection between the rental unit and the tenant to permit a finding that the tenant was "in possession" of that rental unit.

[13] In its Review Order, the LTB correctly identified the legal test to apply in determining whether Jake Francis was in "possession of the rental unit". The LTB stated, at para. 10:

> In *1162994 Ontario Inc. v. Bakker*, 2004 CanLII 59995 (ON CA), the Ontario Court of Appeal determined that "possession of a rental unit refers to some form of control over the unit as demonstrated by factors such as access to, use of, or occupation of the unit".

[14] The LTB reviewed the following evidence (at paras. 4-8) in arriving at its decision:

> Mr. Jake Francis agrees that he was a joint tenant on the lease agreement with his brother (Mike Francis) at the commencement of the tenancy on or about April 2015, but testified that he vacated the rental unit on or about July 31, 2021 after purchasing his own property.
>
> The Tenant submitted into evidence email correspondence between himself and the prior landlord's property manager dated July 2, 2021… The email advises the landlord that he would be vacating the rental unit at the end of the month (July 2021) and that his brother and co-tenant (Mike Francis would be assuming all responsibility for the rental unit. The Tenant also submitted into evidence a Statement of Adjustments confirming that on July 14, 2021, the Tenant closed an agreement of purchase and sale on a property.
>
> Carol Francis provided oral testimony at the hearing and appeared as witness for the Tenant. Ms. Francis is the mother of the two named Tenants. Ms. Francis testified that her son and the Tenant, Jake Francis purchased a home of his own with his girlfriend in July 2021 and vacated the rental unit. Ms. Francis stated that as of August 2021 only Mike Francis occupied the rental unit.
>
> The Landlord's representative opposed the Tenant's request to be removed from the order and stated that when the current Landlord purchased the rental unit in November 2021, that they were advised by the prior landlord that both Tenants were residing in the rental unit.

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> The Landlord further submitted that the Tenant still has mail being sent to the rental unit and submitted into evidence photographs of bank statements being mailed to the rental unit in 2024 addressed to Mr. James Francis. The Landlord also submitted into evidence screenshot images from the prior property manager. The screenshots suggest that no emails were received from the Tenant during the month of July 2021 to the former landlord.

[15] The LTB explained its reasons for preferring the direct testimony of Jake Francis over the evidence of the Landlord. He held that "the Landlord's representative provided insufficient evidence to support that the Tenant Jake Francis was in possession of the rental unit at the time the application was filed". (paras. 11 and 12).

[16] The LTB concluded, at para. 9: "Based on the evidence and submissions before the Board, I find on a balance of probabilities that the Tenant Jake Francis vacated the rental unit on or about July 31, 2021 and as such was not in possession of the rental unit at the time the Landlord's application was filed."

[17] Since Jake Francis was not "in possession of the rental unit" on September 1, 2021, the amendment of the RTA did not apply to him and the LTB had no jurisdiction over the Landlord's claim for rent arrears from Jake Francis.

Issue

[18] The Appellant/Landlord appeals from the Review Order and argues that the LTB erred in law "by misapplying, or failing to consider and statutorily interpret, the relevant provisions of the RTA to determine if Jake was a tenant in possession of the Rental Property", and that the LTB erred "in failing to consider Jake's liability as a joint tenant".

Standard of Review

[19] An appeal from an order of the LTB lies to this Court only on a question of law: RTA s. 210(1). This Court does not have jurisdiction to hear an appeal on a question of fact, or of mixed fact and law: *Solomon v. Levy*, 2015 ONSC 2556, at para. 33; *Devenne v. Sedun*, 2020 ONSC 6141 (Div. Ct.), at para. 26; *Zouhar v. Salford Investments Ltd.*, 2008 CanLII 27484 (Div. Ct.), at paras. 8-9.

[20] The Supreme Court of Canada clarified the difference between questions of law, fact, and mixed fact and law, in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35: "Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."

[21] In determining whether the proposed appeal raises a question of law, the analysis must be based on the totality of the tribunal's decision, not one isolated paragraph or phrase. It is not appropriate to select fragments of the decision and parse them under microscopic

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scrutiny to the detriment of an overall analysis of the decision as a whole: *Marquis Manors Ltd. v. Kennedy*, 2023 ONSC 1134, at para. 8.

[22] The applicable standard of review on questions of law is correctness.

[23] In hearing the appeal, the court must consider that the Board is a specialized tribunal, and the legislature has deliberately limited appeals from its decisions to, inter alia, ensure a process that is streamlined, timely and cost-efficient: *Jedadiah Drummond v. Ridgeford Charitable Foundation*, 2024 ONSC 4658, at para. 16.

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Analysis

[24] In the present case, the appeal relates to a question of mixed fact and law.

[25] There is no dispute that the LTB identified the correct legal question: was the tenant in possession of the rental property on September 1, 2021, and correctly identified the Court of Appeal decision in *Bakker* as the leading authority for the meaning of "possession". The LTB considered the correct test and therefore did not make an error of law.

[26] The application of the *Bakker* test to the facts is a mixed question of fact and law; this is clear from para. 21 of *Bakker*, where the Court stated: "the Tribunal will have to decide, based on the evidence, whether there is a sufficient connection between the rental unit and the tenant to permit a finding that the tenant was "in possession" of that rental unit". The LTB reviewed the evidence in this case, and, after weighing the evidence and the various factors, came to the conclusion that there was not a sufficient connection between the rental unit and the tenant to permit a finding that the tenant was in possession of the rental unit on the relevant date.

[27] The question of whether the facts of this case satisfy the "possession" test in Bakker is a question of mixed fact and law, and not subject to an appeal. That is sufficient to dispose of this appeal.

[28] The Appellant argues that contrary to the decision in *Bakker*, the LTB focused only on whether Jake Francis had vacated the unit and based its decision exclusively on that one factor. It relies on para. 9 of the LTB's decision, where the LTB held: "…I find on a balance of probabilities that the Tenant Jake Francis vacated the rental unit on or about July 31, 2021 and as such was not in possession of the rental unit at the time the Landlord's application was filed."

[29] Reading the decision as a whole, it is clear from the LTB's summary of the evidence at paras. 4 – 8 of its decision, that it considered all of the relevant factors that were brought to its attention by the parties. The fact that Jake Francis vacated the unit on July 31, 2021, was not the only factor considered by the LTB, although, given the evidence, it may well have been the most important factor.

[30] The Appellant also argues that Jake's tenancy was never terminated in accordance with the provisions of the RTA and that the Lease Renewal Agreement was in Jake's name alone.

As such, Jake remained a legal tenant even though he had vacated the property on July 31, 2021. As a legal tenant, Jake had a legal right to enter the property at any time, even if he never exercised that right, and the Landlord could not have denied him access. The LTB failed to consider this factor.

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[31] This argument must be rejected. The LTB began its analysis with the premise that Jake Francis "agrees that he was a joint tenant on the lease agreement with his brother". The LTB's entire analysis was premised on the assumption that Jake was a tenant. The issue for the LTB was not whether Jake was a tenant, but whether he was a tenant "in possession of the rental unit". As the Court of Appeal stated in *Bakker*, at para. 16: "Not all tenants will be 'tenants in possession'. Some persons who qualify as tenants under the Act will not be in possession of the rental unit and will, therefore, not be subject to an order under s. 86."

[32] If the Appellant's contention were correct, all tenants would remain "in possession" because, until their tenancy is legally terminated, they have a legal right to re-enter the property even if they previously vacated it. That, however, is not the test established in *Bakker*.

[33] Accordingly, the appeal is dismissed.

[34] None of the parties have requested costs, and there will, therefore, be no order as to costs.

Justice R.E. Charney

Released: December 3, 2024

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