# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Vancouver Luxury Realty
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes MNDC, OLC, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the respondent to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover their filing fee for this application from the respondent pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The respondent's representatives (the respondents) confirmed that they received the tenants' March 27, 2013 written notice to end this tenancy by April 30, 2013 a day or two after it was couriered to them by the tenants. The female respondent (the respondent) confirmed that on March 9, 2013, the respondents received a copy of the tenants' dispute resolution hearing package sent by registered mail on March 8, 2013. I am satisfied that the tenants served the above documents in accordance with the *Act*. I am also satisfied that both parties served one another with copies of their written evidence packages in sufficient time for both parties to confirm that they had an adequate opportunity to consider one another's written evidence and prepare for this hearing.

Since the tenants issued their notice to end this tenancy after they submitted their application for dispute resolution and this tenancy will end shortly, I find that the tenants' application for the issuance of orders against the landlord/respondent is for the most part a moot point. In accordance with Rule 2.3 of the RTB's Rules of Procedure, I have dismissed this aspect of the tenants' application without leave to reapply. I do so as this tenancy ends later this month and I find little purpose to considering this aspect of the tenants' application submitted at a time when the tenants planned to remain in this tenancy.

At the hearing, the female tenant (the tenant) did not dispute the respondent's testimony that the amount of the tenants' security deposit was $1,500.00 and not $3,000.00 as cited in the tenant's application for dispute resolution and written evidence. As such, the tenant reduced the amount of the tenants' requested monetary award from $20,000.00 to $18,500.00.

Issues(s) to be Decided

Are the tenants entitled to a monetary Order for losses arising out of this tenancy? Are the tenants entitled to recover their filing fee from the respondent?

Preliminary Issues

At the commencement of this hearing, the female tenant (the tenant) requested an adjournment as she wanted to ensure that I had been given a proper opportunity to review the evidence packages sent by both parties. Although some of the written evidence provided was late, I advised the parties that I had reviewed all of their evidence packages and was prepared to proceed with this hearing. Both parties agreed to proceed with this hearing.

At the commencement of this hearing, I addressed the following concern raised by the respondent in her March 26, 2013 written submission:

> *...The Landlord named in the complaint is JG who is no longer the landlord as of March 7th 2013. Therefore the complaint filed March 8th 2013 is no longer valid as ownership has changed...*

I noted that the landlord/respondent identified by the tenants in their application has been the former owner's (JG's) agent from the commencement of this tenancy. The Residential Tenancy Agreement (the Agreement) identified the respondent as the landlord. A representative of the respondent's realty company signed the Agreement as the landlord on October 31, 2012. The male respondent at the hearing, who identified himself as the CEO of the respondent realty company, testified that the respondent has a written agency agreement with JG who was aware of this hearing and chose not to participate. Both of the respondent's representatives at this hearing confirmed that all of the tenants' monthly rent is paid until the end of April 2013, when the tenants intend to vacate the rental unit. The male respondent testified that although his company has no written current agency agreement with the current owner of the property, his company is continuing to act as the agent under a "presumed" agency agreement. He confirmed that his company continues to look after the operational functions of this tenancy with the tenants of this rental home.

Section 1 of the *Act* defines a landlord in part as follows:

***"landlord"**, in relation to a rental unit, includes any of the following:*

*(a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,*

*(i) permits occupation of the rental unit under a tenancy agreement, or*

*(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;...*

*(d) a former landlord, when the context requires this;*

At the hearing, I advised the parties that the respondent very clearly qualifies as a landlord under the definition of the *Act*, as set out above. I noted that the tenants' undisputed written evidence demonstrates that the tenants have been repeatedly advised that they are to deal with the respondent as the owner's agent and not the actual owner of this property. There are repeated emails to this effect, as the tenant found it difficult at times to receive responses from the respondent, so attempted somewhat unsuccessfully to communicate directly with JG. On these occasions, the tenant was reminded that all communication regarding the tenancy was to be with the respondent. Although the tenants did mention in a document they attached to their application for dispute resolution that they were seeking an order requiring the landlord/owner (JG) to comply with the *Act* and a monetary Order of $20,000.00, they did not name JG as a respondent in their application. It is the applicant's choice to name whichever respondents they wish to identify that fall within the definition of a landlord provided under section 1 of the *Act*. In the letter they attached to their application, they explained that they had been told that they were not allowed to communicate with JG and for that reason appear to have selected the respondent, the company that signed the lease, as the landlord in this dispute.

I advised the parties that I found no merit whatsoever to the respondent's assertion that the tenants were somehow prevented from launching their application for dispute resolution because the former landlord sold the property the day before they filed their application for dispute resolution. All of the events identified in the tenants' application for a monetary award relate to events that occurred prior to the closing of the sale of this property by JG. The respondents also continue to act as agent for the new owner of this property, a fact confirmed by the male respondent's proposal of a possible way of resolving issues in dispute that effect both their representation of the former owner and the current owner.

Background and Evidence

This two-year fixed term tenancy in a two-unit rental home commenced on December 1, 2012. Monthly rent is set at $3,000.00, payable in advance on the first of each month, plus utilities. The respondent gave undisputed sworn testimony that the tenants paid a $1,500.00 security deposit and a $1,500.00 pet damage deposit on or about November 1, 2012.

The tenants' amended application for a monetary award of $18,500.00 includes the following items:

| **Item** | **Amount** |
|---|---|
| Two Month's Rent(January 2013 and February 2013) for Loss of Quiet Enjoyment | $6,000.00 |
| Legal Costs | 1,250.00 |
| Tenants' Time Dealing with this Matter (65 hours @ $50.00 per hour = $3,250.00) | 3,250.00 |
| Moving Costs | 5,000.00 |
| House & Pet Deposits (Amended at the Hearing to $3,000.00) | 3,000.00 |
| **Total Monetary Order Requested** | **$18,500.00** |

The tenants also applied to recover their $100.00 filing fee for this application.

In the Details of the Dispute section of their attachment to their application for dispute resolution, the tenants submitted that they entered into this fixed term tenancy for the following two main reasons:

- a fenced and grassed backyard for their two small dogs;
- privacy, peace and quiet

In the tenants' extensive written and photographic evidence contained in a binder and their response to the respondent's written evidence, they outlined the circumstances surrounding repairs to remove a carport and replace it with a garage that commenced on January 17, 2013 and were not completed until March 5, 2013. Although they understood when they signed the Agreement that the owner was planning to replace the carport likely in the spring of 2013, these plans were advanced when subjects were placed on a sale agreement for the property in mid-January 2013. Work to replace the carport had to be completed by the March 7, 2013 closing date for JG's sale of this property. When this construction process commenced, it was anticipated that it would take about a week. However, in order to comply with various municipal bylaws, the

replacement garage required excavation of the backyard, digging drainage ditches, and considerably more work than anyone had expected. This led to an ongoing series of work by JG's contractor, frequent inspections and the tenants' loss of the backyard for the period of construction.

At the hearing, the respondent testified that her company was not advised of the work that the owner was undertaking or the contractor's construction schedule until January 21, 2013. JG had retained the contractor and was not using the respondent company to communicate with the tenants until January 21, 2013. Both representatives of the respondent testified that the respondent promptly forwarded schedules conveyed to them by the owner's contractor as soon as these were provided to them commencing on January 24, 2013. The male respondent testified that" the job was slightly more complex than expected." However, the respondents asserted that some of the delays were caused by the tenant's lack of co-operation with the process of letting the contractor undertake the work required to complete this project.

There is written evidence of the respondent attempting to act as a mediator in this dispute between the owner and the tenants. The tenants provided a written request for the resolution of a number of their concerns plus an agreement to waive two month's rent to take into account the disruption that they had encountered by the owner's efforts to meet the condition of the sale agreement by March 7, 2013. The tenants requested the following items:

- Power-wash the deck and walkway once the yard work was finished;
- Provide the completion date for the projects underway
- Provide assurances that the tenants would be given adequate notification of future property repairs, improvements and renovations (including commencement dates and completion dates)
- Re-sod the backyard
- Clean 23 of the tenants' landscaping pots used by the contractor for excavating footing material
- Ensure that gate latches were firmly in place
- Re-stain/Refresh the front porch and railings in the spring

Although JG refused to allow the tenants compensation for their loss of quiet enjoyment, he did agree to all of the above requests. This agreement was conveyed to the tenants by the respondent. At the hearing, the male respondent testified that the new owner remains committed to the above undertakings and that the respondent still plans to implement the above commitments, although some of these items such as re-sodding will have to wait until the weather permits such action.

When it became apparent to the tenants that JG was not willing to grant them rent relief as requested, they retained the services of a lawyer who pursued this aspect of their dispute. They applied for dispute resolution to obtain a monetary award when their lawyer's efforts were not obtaining the results they were seeking.

Analysis

I first note that the only issues before me in this application are the tenants' application for a monetary Order for loss of quiet enjoyment, loss in the value of their tenancy, and losses they have incurred as a result of this tenancy. Whether or not the tenants are justified in ending their fixed term tenancy early or whether the new owner or the respondents are entitled to any form of relief for the tenants' actions in ending this tenancy are clearly not before me. In fact, as was noted earlier, the tenants did not give the respondent their notice to end this tenancy until well after they submitted their application for dispute resolution.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the Agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the tenants bear the burden of proving their losses.

As noted at the hearing, the tenants have not submitted any receipts or invoices to substantiate their claim for the reimbursement of their lawyer's fees, identified as $1,250.00 in their application for dispute resolution. As they have not yet moved, they have no moving costs to date. They have not submitted any documentary evidence to substantiate their claim for $5,000.00 in moving costs. As they have decided to end their fixed term tenancy early, they would normally be expected to incur their own costs of relocating. At the hearing, I advised the tenants that the only costs that they would normally be entitled to recover from the respondent would be their filing fee for their application. I advised that they would not be entitled to a monetary award for their time devoted to dealing with this dispute. For these reasons, I dismiss the above portions of the tenants' claim for a monetary award without leave to reapply.

As this tenancy continues, I cannot consider the tenants' request to include a recovery of their pet damage and security deposits (the deposits) within the monetary award they are seeking. The return of their deposits is contingent upon the condition of the rental

premises at the end of this tenancy and whether there are any other claims to be made against their deposits by the landlord/respondent. While the issue of the return of their deposits is not technically before me, I dismiss this portion of their monetary claim with leave to reapply.

The remaining substantive portion of the tenants' claim for a monetary award is their claim for a $6,000.00 monetary award, equivalent to two month's rent. In considering this aspect of the tenants' application, I have given regard to section 28 of the *Act*, which reads in part as follows:

***Protection of tenant's right to quiet enjoyment***

> ***28*** *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;*
>
> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Section 65(1)(f) of the Act allows me to make an order "that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement." Section 65(1)(c)(i) of the *Act* enables me to make an order "that any money paid by a tenant to a landlord must be repaid to the tenant." Section 67 of the *Act* enables me to order that a party not complying with the *Act* or a tenancy agreement pay compensation to the other party.

Although the male respondent asserted during this hearing that his company dealt with the tenants' concerns appropriately throughout, he noted that the former owner of the property never agreed to a monetary settlement with the tenants. At the hearing, I asked the female respondent to confirm the accuracy of the following wording of her two January 23, 2013 emails to the tenant entered into written evidence by the tenants.

> *I have read your email and I am now aware of the nightmare you have been living through. My question is how can your living circumstances be ameliorated specifically until the work is terminated...*

(January 23, 2013 8:27 a.m.)

*...While I fully understand the invasion which you are living through as outlined in your email I cannot find the solution or outcome you would like for the inconvenience that you have endured...*
(January 23, 2013 8:44 p.m.)

The female respondent confirmed that the above wording of her January 23 emails was accurate as she was intending to convey that she was very sympathetic to the tenants' concerns. The male respondent observed that the purpose of these emails was to seek an acceptable resolution of this situation with the tenants and that some of this wording may have been ill-advised.

The respondent entered into written evidence a copy of the following January 24, 2013 email to the owner of the property at that time (JG).

*I've finally managed to get a concrete understanding of what the tenants want. All the points she makes about fixing the yard, cleaning the deck and giving time lines are valid and should be attended to. The part regarding the 2 months rent abatement is excessive. How long has the work been going on for and how long do you expect it to continue? I would say free rent for the duration of the work being done is sufficient and I'm sure this isn't 8 weeks worth of work.*
*Let me know your thoughts.*

Although at that time, it did not seem possible that the construction work on this rental property would take 8 weeks, the tenant gave undisputed sworn testimony at the hearing that the construction period extended from January 17, 2013 until March 5, 2013, a few days before the closing of the sale of the property.

I find the above three emails sent by the respondent's representative most actively involved in the interaction with the tenants provide very compelling documentary evidence to support the tenants' claim that there was a significant loss of quiet enjoyment in their tenancy, a loss that entitles the tenants to a sizeable monetary award. While I accept the male respondent's observation that some of the language used by the female respondent in describing this as a "nightmare" and "an invasion" may be ill-advised phraseology, I am nevertheless satisfied by these descriptions, the other written and photographic evidence and the sworn testimony of the parties that there was a significant loss in the value of this tenancy during the period of construction from January 17, 2013 until March 5, 2013.

In assessing the extent of the reduction in value of this tenancy caused by the construction to the tenants' backyard, there are a full range of estimates available. The tenants requested a full rebate of their entire monthly rent for January and February 2013, even though the construction itself did not begin until January 17. The female respondent's email estimate of January 24, 2013 suggested to the then owner that the tenants should be given free rent for the duration of the work done. This would result in a return of the rent paid for 15/31 of January's rent, all of February's rent and 5/31 of March's rent. Although JG chose not to participate in this hearing, I have given some consideration to his January 24, 2013 response to the female respondent in which he noted that the backyard represented a small portion of the overall $3,000.00 in monthly rent that was being paid by the tenants. At that time, he estimated that the work would take no more than "2-3 weeks max" and suggested that an appropriate reduction in rent would be $150.00.

I accept that the presence of a gated and grassed backyard for the tenants had more significance to the tenants because of their two small dogs than would be the case for a typical tenancy. I recognize that the disruption was significant and ongoing, complete with a long list of inspections that were required that also added stress to their tenancy and reduced the tenants' quiet enjoyment of their premises. However, I cannot overlook the fact that the tenants did continue to occupy this rental home for the duration of this construction despite the significant disruptions they encountered as the construction occurred.

Under these circumstances, I find in accordance with sections 28, 65 and 67 of the *Act* that the tenants are entitled to a monetary award. I find that the value of their tenancy was diminished by 2/3 for the undisputed period of construction, extending from January 17, 2013 until March 5, 2013. I issue a monetary award in the tenants' favour which allows them to recover 2/3 of the rent they paid over the above-noted period. This results in a monetary award of $967.74 for January 2013 (15/31 x $2,000.00/$3,000.00 = $967.74), $2,000.00 for February 2013 (2/3 x $3,000.00 = $2,000.00), and $322.58 for March 2013 (5/31 x $2,000.00/$3,000.00 = $322.58). In reaching this determination, I find that the tenants are not eligible for any reduction in rent for loss of quiet enjoyment or loss in value of their tenancy as of March 6, 2013, the day after the construction on this property was completed.

As the tenant's have been partially successful in their application for dispute resolution, I allow them to recover $50.00 of their filing fee from the respondent.

Conclusion

I issue a monetary Order in the tenants' favour under the following terms which allows the tenants to recover losses arising out of this tenancy and to recover one-half of their filing fee:

| **Item** | **Amount** |
|---|---|
| Reduction in Rent for Loss of Quiet Enjoyment and Value of Tenancy from January 17 – 31, 2013 ($2,000.00 x 15/31 = $967.74) | $967.74 |
| Reduction in Rent for Loss of Quiet Enjoyment and Value of Tenancy for February 2013 | 2,000.00 |
| Reduction in Rent for Loss of Quiet Enjoyment and Value of Tenancy from March 1-5, 2013 ($2,000.00 x 5/31 = $322.58) | 322.58 |
| Recovery of Filing Fee for this Application | 50.00 |
| **Total Monetary Order** | **$3,340.32** |

The tenants are provided with these Orders in the above terms and the respondent must be served with this Order as soon as possible. Should the respondent fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss the tenants' application for the issuance of other orders against the respondent without leave to reapply.

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*.

Dated: April 9, 2013

Residential Tenancy Branch