# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes:

**MNDC, FF**

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for damage or loss under the Act and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matters

The parties both confirmed there had been a previous hearing; the landlord indicated that he had not previously made a claim for compensation that only the tenant's application was heard. The parties were told I would review the previous decision to ensure that it would not impact the applications before me.

The landlord submitted 3 pages of evidence that were late; the tenant did not have time to supply a written response. Therefore, that evidence was set aside and the landlord was at liberty to make oral submissions.

Issue(s) to be Decided

Is the landlord entitled to compensation in the sum of $1,000.00 as liquidated damages?

Is the landlord entitled to filing fee costs?

Background and Evidence

This 1 year, fixed-term tenancy agreement commenced on May 1, 2012. The tenancy agreement required the tenant to pay monthly rent of $1,800.00 by the first day of each month; a deposit in the sum of $1,800.00 was paid.

The tenant ended the tenancy effective September 30, 2012; prior to the end of the fixed-term, April 30, 2013.

The tenancy agreement included a liquidated damages clause (5) which required payment of $1,000.00 if the tenant ended the fixed term tenancy before the end date set out in the agreement. The clause states:

> *If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in B above, or any subsequent fixed term, the tenant will pay to the landlord the sum of $1,000.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the residential property.*

There was no dispute that the landlord's agent presented the tenancy agreement to the tenant and had her sign the document on March 30, 2012. The tenant confirmed that she was made aware of the liquidated damages clause. The tenant said that the agent told her she must pay this sum, as a penalty, if she were to terminate the contract. The tenant did not know what liquidated damages were, but she accepted she would have to pay a $1,000.00 if she ended the tenancy early.

On August 22, 2012, the tenant gave the landlord written notice she would end the tenancy effective September 29, 2012 and pay the "liquidated damages" amount. The tenant indicated she expected the balance of her deposit to the returned. A copy of this note was supplied as evidence. On October 9, 2012 the landlord returned $407.50 to the tenant, after making the deduction for the liquidated damages and other costs.

A hearing held on January 21, 2013 resulted in an Order, returning double the $1,800.00 deposit to the tenant; the landlord had made a cross-application and was found to be owed $50.00.

The landlord said that the tenancy agreement clearly set out that the sum of $1,000.00 was liquidated damages to be paid by the tenant. At the start of the tenancy the landlord did have an agent act on their behalf; that person arranged the tenancy, took the application and had the tenant sign the tenancy agreement 1 month prior to the start of the tenancy. The agent worked for the landlord until just prior to the end of the tenancy. The landlord first met the tenant on April 28, 2012; at which time it appears the landlord signed the tenancy agreement.

The landlord explained that they could have expected a number of costs to be incurred if the tenant ended the tenancy early, such as:

- Potentially hiring a new property manager;
- a standard fee equivalent to 50% of the first month's rent plus other management fees;
- the landlord lives on the lower mainland and the rental unit is on Vancouver island, which would resulting ferry costs, loss of wages, accommodation and other time to the landlord such as reviewing Residential Tenancy rules; and
- advertising costs.

The landlord could not deny what his property manager may have told the tenant at the start of the tenancy, but that term was included to cover the potential costs, should the tenant leave prior to the end of the tenancy.

The tenant said she had agreed to pay what she believed was a penalty and that she did not understand what was meant by liquidated damages until she had contact with the Residential Tenancy Branch.

The landlord was able to locate a new occupant effective October 1, 2012.

Analysis

In order to ensure that the previous hearing did not impede the application made by the landlord I have received that decision (file 799423 and 802132.) Both parties had in fact made applications for dispute resolution and the claims were heard as a cross-application hearing. The decision indicated that the matter in relation to liquidated damages had not been decided and the landlord was given liberty to apply in relation to that matter.

In relation to the claim for liquidated damages, I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable.

Policy suggests that an arbitrator should determine if a clause is a penalty clause or a liquidated damages clause by considering whether the sum is a penalty. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

In considering whether the sum is a penalty or liquidated damages, policy also suggests an arbitrator will consider the circumstances at the time the contract was entered into. In

this case I have relied upon the written contract that was signed between the parties. The tenant said that the landlord's agent had described the liquidated damages as a penalty, yet when the tenant gave her notice on August 22, 2012, she indicated she would pay the "liquidated damages" owed and that the $1,000.00 could be deducted from her deposit.

The tenant did sign a tenancy agreement which clearly indicated that the liquidated damages sum was not a penalty. Despite what the tenant may have been told; she accepted the terms of that agreement. I find this was borne out by the tenant's August 22, 2012 letter to the landlord, allowing the landlord to retain the liquidated damages from her deposit.

Policy indicates there are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach;
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty; and
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

I have considered the landlord's submission of the costs they expected they could have incurred should the tenant end the tenancy early, in relation to what the greatest possible loss could have been. When the tenancy commenced the landord had a property manager, who would have been tasked with locating a new occupant, at a potential cost to the landlord in the sum of $900.00; one-half of 1 month's rent. I find that this sum alone would place the liquidated damages within what would be a reasonable estimate of possible costs the landlord could expect to incur should the tenant end the tenancy early and that it would not represent a penalty.

There was no evidence before me that the liquidated damages clause required the tenant to pay an amount that was greater, if she should fail to pay the amount indicated on the tenancy agreement. Therefore, I find that the clause, for this reason, is not a penalty.

In this case there was no requirement that liquidated damages would be paid on the occurrence of several events; therefore, I find the clause is not a penalty for that reason.

Therefore, after considering the evidence before me I find, on the balance of probabilities, that the clause is not a penalty and that the landlord is entitled to compensation in the sum of $1,000.00 in liquidated damages.

As the landlord's application has merit I find that the landlord is entitled to the $50.00 filing fee cost.

Based on these determinations I grant the landlord a monetary Order in the sum of $1,050.00**.** In the event that the tenant does not comply with this Order, it may be served on the tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord is entitled to a monetary Order in the sum of $1,050.00 for liquidated damages and the filing fee cost.

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 29, 2013

Residential Tenancy Branch