# Dispute Resolution Services



Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding COLWELL BANKER CITY CENTRE REALTY
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent, liquidated damages, and authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matter

The tenants acknowledged receiving the Notice of Hearing and the landlord's evidence but claimed they were not served with the landlord's Application for Dispute Resolution and Fact Sheets that are to form part of the hearing package. The tenants indicated; however, that they wished to proceed with the scheduled hearing as they had been able to determine the amount claimed by the landlord and what that sum was included. I read the details of dispute, as it appears in the landlord's application, to the tenants. The tenants stated they were prepared to respond to the landlord's claims. Therefore, I deemed both tenants sufficiently served with the hearing documents and continued to hear the matter.

Issue(s) to be Decided

1. Is the landlord entitled to recover unpaid rent from the tenants for the month of January 2014 and liquidated damages?
2. Is the landlord authorized to retain the security deposit?

Background and Evidence

The fixed term tenancy commenced February 15, 2013 and was set to expire February 28, 2014. The tenants paid a security deposit of $975.00. The tenants also paid to the landlord a total of $300.00 for a move-in and move-out fee charged by the strata

corporation. The tenants were required to pay rent of $1,950.00 on the 1st day of the month.

Clause 5 of the tenancy agreement provides:

> Tenant acknowledges that should notice of intent to vacate be given for a time earlier than the end of the lease period, they will be held liable for any re-leasing costs incurred by the landlord, including any vacant periods. The Landlord acknowledges that all reasonable efforts will be made to re-lease the property as quickly as possible.

[reproduced as written]

Clause 34 of the tenancy agreement provides:

> Should the tenant fail to complete the lease term, the tenant will be held liable for an Liquidated Damages for a minimum of $495 + HST/GST (four hundred ninety-five dollars + 12% tax) **not including any re-renting costs, such as advertising, credit checks & vacancies, which are additional costs.** The Agent is authorized to deduct this from the security deposit. The Tenant authorizes the Agent to withdraw this amount from the tenants account on or before vacating.

[reproduced as written]

The landlord acknowledged that the landlord has became aware that the part of clause 34 that provides for deducting liquidated damages from the security deposit is non-compliant. Nor, did the landlord withdraw the liquidated damages from the tenant's bank account as indicated in clause 34.

On November 27, 2013 the tenant sent an email to the landlord indicating the tenants wished to end the tenancy effective December 31, 2013. The landlord responded, via email, advising the tenants that they would be breaking their lease and would be held liable for paying a lease break fee and any vacancy costs. The landlord went on to say that an emailed notice to end tenancy is insufficient and that once the landlord received a signed letter from the tenants the landlord would start advertising the unit until a new tenant was found. On November 28, 2013 the tenants delivered a signed letter to the landlord expressing their intent to vacate the unit by December 31, 2013. The tenants moved out of the rental unit at the end of December 2013. On January 8, 2014 the landlord entered into a tenancy agreement for a tenancy set to commence February 1, 2014.

The landlord is seeking to recover loss of rent for the month of January 2014 and a lease break fee of $495.00.

The landlord submitted that advertising efforts commenced December 1, 2013 by way of postings on the landlord's website and Craigslist. The landlord's agent appearing at the hearing scheduled three showings to prospective tenants in early December 2013, although one prospective tenant did not show up for the appointment. Then, on or about December 16, 2013, another agent for the landlord showed the unit to three more prospective tenants. Unfortunately, suitable tenants were not secured until January 8, 2014. The landlord attributed the less than usual volume of showings to the time of year.

The tenants pointed out that the Craigslist advertisements provided as evidence by the landlord were marked as "flagged for removal". The tenants submitted that "flagged for removal" postings are those that Craigslist will take off its website due to a violation or complaint. The landlord testified that he was unaware of postings ever being taken off Craigslist for such reasons. The landlord also pointed out that there were showings in the month of December 2013 meaning the advertisements were obviously still on the internet. I noted that the advertisements provided as evidence were all printed on January 22, 2014, after the rental unit had been rented.

The tenants submitted that they were of the belief the unit had been rented by prospective tenants that viewed the unit on December 16, 2013 as those people seemed very interested in the unit; however, the landlord's agent asked the prospective tenants if they had a Canadian bank account. The tenants suggested such a question may have offended the prospective tenants. Further, in late December 2013 the landlord's agent asked when he could retrieve the keys from the tenants, implying the unit had been re-rented. As the landlord did not notify the tenants that the unit had not been re-rented the tenants did not attempt to find replacement tenants or a sub-letter themselves. The landlord responded by stating the landlord would advise the tenants if the unit had been re-rented. Further, the agent's question regarding the keys was a general enquiry made for the purpose of planning and did not mean the unit was re-rented.

The tenants submitted that the landlord's agent did not have a key to the rental unit and as a consequence, the tenants had to be home during showings. The tenants confirmed that every requested showing time was accommodated by the tenants.

In summary, the tenants were of the position the landlord could have done more and tried harder to re-rent the unit for January 2014 meaning the landlord does not deserve to collect rent for January 2014 and a lease break fee from the tenants.

Finally, the tenants were of the position they should be credited with $300.00 they paid for the move-in and move-out fees since the term in the tenancy agreement does not indicate it is non-refundable. The landlord responded by stating the fee is paid to the strata corporation pursuant to the strata by-laws and is non-refundable.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

**Loss of Rent**

Under the Act, a tenant is required to pay rent when due until the end of the tenancy. A tenant with a fixed term tenancy is required to fulfill the fixed term portion of the tenancy. Where a tenant ends a fixed term tenancy before the expiry date the tenant may be held liable to pay rent for the remainder of the fixed term. Where landlord makes a monetary claim for loss of rent against a tenant, the landlord must be able to show the landlord did "whatever is reasonable to minimize the damage or loss" under section 7 of the Act.

Policy Guidelines also suggest that a landlord put a tenant on notice that the landlord will hold the tenant responsible for loss of rent in the event the tenant ends the tenancy early. In this case, I find the landlord did put the tenants on notice that they would be held liable for loss of rent should they break the fixed term and the landlord suffer a vacancy by way of his email in November 2013. Therefore, I consider the tenants fully aware of the potential liability and I find they made an informed decision to end the tenancy early.

I find the issue at hand is whether the landlord did whatever is reasonable to mitigate the loss of rent. It is important to note that this requirement means the landlord must act reasonably in the circumstances and it does not mean the landlord must take every possible step to minimize loss of rent.

I find I am satisfied the landlord was advertising the rental unit throughout December 2013 since there were showings of the rental unit to prospective tenants during the month of December 2013. I reject the tenants' suggestion that the landlord's advertisements were taken down by Craigslist. Rather, I find it more likely the "flagged for removal" notation is present on the print-outs because the advertisements were

printed on January 22, 2014 which is well after the date the new tenants entered into a tenancy agreement. Therefore, I find it would make sense the advertisements were "flagged for removal" on January 22, 2014.

The landlord scheduled showings for 6 prospective tenants during the month of December 2013 and I accept the landlord's position that this figure is lower than usual due to the time of year is reasonable. Although the tenants observed prospective tenants that seemed interested in a rental unit, the expression of interest, which may even include a tenancy application, does not always translate into a successful applicant. The landlord is not bound to enter into a new tenancy agreement with just anybody who expresses interest in a unit, as that would be unreasonable in many situations. Rather, the landlord is at liberty to ensure a tenancy applicant meets its screening requirements which may include credit checks, reference checks, employment confirmation, and the like. I find there is no requirement in the Act for the landlord to share information with the existing tenants as to whether a prospective tenant was a successful applicant. Therefore, I reject the tenants' position that they should have been informed by the landlord that the prospective tenants who expressed interest were not successful.

Whether the landlord's agent had a key for the rental unit did not appear to impact the showings to prospective tenants as the tenants were willing and did accommodate all requests for showings. Therefore, I consider this point moot.

In totality, I find I am satisfied the landlord took reasonable measures to mitigate the loss of rent by advertising the unit and showing the rental unit to prospective tenants. Despite these reasonable measures the landlord suffered a loss of rent for the month of January 2014 which, I find, is the liability of the tenants since they breached their fixed term tenancy agreement. Therefore, I award the landlord loss of rent in the amount of $1,950.00 as claimed.

**Lease break fee**

Liquidated damages are often referred to as a lease break fees in a tenancy agreement and monetary claims. As such, I have used both phrases in this decision.

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the amount of damages payable in the event of a breach of the fixed term by the tenant. The amount agreed upon by the parties must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a

penalty or liquidated damages, an Arbitrator will consider the circumstances at the time the contract was entered into.

Section 6 of the Act provides that in order for a term in a tenancy agreement to be enforceable it must not violate the requirements of the Act or Regulations or be unconscionable; and, that it must be expressed to that it clearly communicates the rights and obligations under it.

Upon review of the Clause 34 of the tenancy agreement, I am not satisfied that the amount of $495.00 represents a genuine pre-estimate of damages due to a breach of the fixed term since this amount is payable in addition "re-renting costs, such as advertising, credit checks & vacancies" which liquidated damages are usually intended to cover. The uncertainty as to how $495.00 was determined and what it is intended to cover, in conjunction with the other non-compliant statements contained in clause 34, lead me to find the entire clause unenforceable under section 6 of the Act. Therefore, I deny the landlord's request to recover a lease break fee of $495.00 from the tenants.

**Security Deposit, filing fee and Monetary Order**

I authorize the landlord to retain the tenants' security deposit in partial satisfaction of amount owed to the landlord for loss of rent. As the landlord was partially successful in this claim, I also award the landlord recovery of one-half of the $50.00 filing fee paid for this application.

I do not give the tenants any additional credit for the move-in and move-out fee they paid since the Residential Tenancy Regulations provide that a landlord may charge such non-refundable fees where the fees are required by the strata corporation.

In light of all of the above, I provide the landlord with a Monetary Order in the amount of $1,000.00 [calculated as: $1,950.00 rent + $25.00 filing fee – $975.00 security deposit]. To enforce the Monetary Order it must be served upon the tenants and it may be filed in Provincial Court (Small Claims) to enforce as an Order of the court.

Conclusion

The landlord has been authorized to retain the tenants' security deposit and has been provided a Monetary Order for the balance of $1,000.00

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: May 01, 2014

Residential Tenancy Branch