# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

**Dispute Codes** MNDCL-S, FFL
MNDCT, MNSD

**Introduction**

This was a cross application hearing that dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damage or compensation under the Act, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

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

- a Monetary Order for the return of the security deposit, pursuant to section 38; and
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67.

Landlord S.Z. and tenant M.B. attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. Tenant M.B. was represented by counsel and supervising counsel.

**Issues to be Decided**

1. Are the landlords entitled to a Monetary Order for damage or compensation under the Act, pursuant to section 67 of the *Act*?
2. Are the landlords entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?

3. Are the landlords entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?
4. Are the tenants entitled to a Monetary Order for the return of the security deposit, pursuant to section 38 of the *Act*?
5. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?

## Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlords' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 14, 2018 and ended on August 31, 2019. This was originally a fixed term tenancy set to end on April 30, 2020. Monthly rent in the amount of $3,495.00 was payable on the first day of each month. A security deposit of $1,747.50 was paid by the tenants to the landlords. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that they had a previous arbitration regarding the same rental address. A Residential Tenancy Branch Decision dated May 15, 2020 was entered into evidence. The file number for the previous arbitration is on the cover page of this decision. The May 15, 2020 Decision stated in part:

> In this case the tenants have not complied with section 38 and section 88 of the Act. As they must provided the landlord written notice of their forwarding address and serve it in a method approved of under section 88 of the Act. Email is not an approved method of service and the landlord denied it was received. I find the tenants application for the return of the return of the security deposit premature. Therefore, I dismiss this portion of the tenants claim with leave to reapply….
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> In this case, the tenants ended their fixed term tenancy on August 31, 2019. I find the tenants breached the fixed term tenancy as the earliest date they could have legally ended the tenancy was April 30, 2020….

The tenants testified that they re-served the landlords with their forwarding address via email and registered mail on June 8, 2020. A letter containing the tenants' forwarding address dated June 8, 2020 was entered into evidence. Landlord S.Z. testified that the tenant physically dropped the forwarding address letter at his door on June 9, 2020 and that he received it on June 9, 2020.

The landlords' applied for dispute resolution on June 22, 2020, less than 15 days after receiving the tenants' forwarding address in writing.

The tenants testified that they are seeking the return of double their security deposit in the amount of $3,495.00. Counsel for the tenants submitted that at the previous hearing the tenant forgot to enter into evidence proof that the landlords received the tenants' forwarding address via email. Consequently, the previous arbitrator found that the landlords were not served with the tenants' forwarding address via email. Counsel submitted that since the tenants were granted leave to re-apply for the return of their security deposit, I should consider the evidence regarding the service of the tenant's forwarding address that the tenants forgot to submit in the previous hearing. Counsel submitted that the tenants served the landlord with their forwarding address in October of 2019 via email and it was received by the landlords in October of 2019.

Counsel for the tenant submitted that the landlords should have filed a separate application for dispute resolution against the deposit and that the landlord did not have a right to withhold the tenants' security deposit for a liquidated damage claim.

Counsel for the tenants submitted that the landlords had no intention of ever returning the tenants' security deposit.

The landlords testified that they are seeking liquidated damages in the amount of $1,834.88. The landlords entered into evidence an invoice from their property management company in the amount of $1,834.88 which is comprised of the placement fee in the amount of $1,747.50 and GST in the amount of $87.38.

Section 24 of the Addendum to the Tenancy Agreement states:

> In the event of an early termination, the Tenant acknowledges and agrees that the sum of $1,747.50 plus applicable tax will be paid by the Tenant to the Landlord as a liquidated damage, and not as a penalty, to cover the commission costs of [a property management company] re renting the Property….

Counsel for the tenant submitted that the liquidated damage fee should be struck down because it is a penalty clause and is extravagant compared to the possible costs incurred by the landlords. Counsel for the tenant submitted that the clause is designed to withhold the tenants' deposit. Counsel for the tenant submitted that the landlord has not provided a break down of how the advertising costs were calculated. Counsel for the tenant submitted that the liquidated damages are meant to cover the cost of advertising the unit for rent, not to pay commission fees charged by property managers.

Counsel for the tenant cited 652732 BC Ltd v. Nazareth, 2010 BCSC 1754 (*Nazareth)* which is a Judicial Review of a Residential Tenancy Decision. In *Nazareth*, the court found that the arbitrator's finding that the liquidated damages clause in that case was a penalty clause, was not patently unreasonable. Counsel for the tenant submitted that *Nazareth* is an example of a case in which the liquidated damage clause was held to be a penalty clause. Counsel did not provide submissions on how the facts of the original *Nazareth* arbitration are related to this case and did not provide the original arbitration decision for review.

The landlords testified that in addition to liquidated damages, the landlords are seeking $1,050.00, the cost of arbitration preparation charged by the landlords' property managers. An invoice for same was entered into evidence. Counsel for the tenant submitted that claims for legal and administrative fees, other than the $100.00 filing fee, are not permitted under the *Act.*

## Analysis

### Liquidated Damages

Section 7(1) of the *Act* states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the *Act* states:

> Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Policy Guideline #4 states that a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to 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. 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 in a penalty.
- 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.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. 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.

Section 7 and 67 of the *Act* operate to return a party to the position they would be in had the other party not breached the *Act, Tenancy Agreement* or *Regulation.* The May 15, 2020 Decision clearly find that the tenants breached the tenancy agreement by ending the tenancy before the end of the fixed term. Section 24 of the Addendum to the tenancy agreement clearly sets out the tenants are liable to pay $1,747.50 plus applicable tax if they end the tenancy prior to April 30, 2020.

Counsel for the tenant submitted that section 24 of the addendum is a penalty clause because the sum of $1,747.50 plus applicable tax is extravagant in comparison to the greatest loss that could follow ending the tenancy before the end of the fixed term. I do not agree with counsel’s submissions. The landlord entered into evidence an invoice from his property manager in the amount of $1,834.88 ($1,747.50 plus GST), which he paid the property manager, to find a new tenant. I find that the loss suffered by the landlord is fully made out and is exactly the amount set out in section 24 of the Addendum to the Tenancy Agreement. I find that the landlord is not required to provide a breakdown of advertising costs incurred by the property management company.

Counsel for the tenant submitted that the tenant should not have to bear the cost of the property management company's commission. I find that, pursuant to the sections 7 and 67 of the *Act,* the tenant is responsible for the costs incurred by the landlord that stemmed from the tenants breach of the Tenancy Agreement, which, in this case, are the fees charged by the property management company to find a new tenant.

I do not find *Nazareth* to be helpful in this case other than that it confirms that a liquidated damage clause can be found to be penalty clause.

I find that the tenants signed the Tenancy Agreement and Addendum and that they are liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damage clause was clearly and carefully laid out in the Addendum to the Tenancy Agreement and detailed the consequences of breaking the fixed term Tenancy Agreement to the parties.

I find that the tenants are liable to pay liquidated damages in the amount of $1,834.88.

Arbitration Preparation and Filing Fees

The dispute resolution process allows an applicant to claim for compensation or loss as the result of a breach of the Act. With the exception of compensation for filing the application, the Act does not allow an applicant to claim compensation for costs associated with participating in the dispute resolution process. I therefore dismiss the landlords' claim for arbitration preparation fees.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act.*

Security Deposit

Under the *Act,* I do not have authority in this hearing to overturn a finding of the Residential Tenancy Branch made in a previous hearing. Had the tenants wished to appeal the May 15, 2020 decision, they would have had to apply for Review Consideration or Judicial Review. I find that I am bound to the findings made in the previous hearing and cannot alter them. The May 15, 2020 Decision states:

> I find the tenants application for the return of the return of the security deposit premature. Therefore, I dismiss this portion of the tenants claim with leave to reapply.

An application for the return of the security deposit is premature if the tenancy has not yet ended or if the tenant has not provided the landlord with their forwarding address in writing. The previous arbitrator found that as of May 15, 2020, the tenants had not served the landlord with their forwarding address in accordance with section 38 and 88 of the *Act*. I find that I cannot overturn this finding. The tenants had their opportunity to provide evidence and testimony on the service of their forwarding address on the landlords up until May 15, 2020. I find that service of the tenant's forwarding address on the landlords up to May 15, 2020 is res judicata, meaning that it cannot be re-heard, the tenants are not entitled to re-litigate this issue.

In the previous hearing, the tenants were granted leave to reapply because their application was pre-mature, meaning that once the tenants served the landlords with their forwarding address, they could apply for the return of their security deposit.

Based on the testimony of both parties, I find that the landlords were sufficiently served for the purposes of this *Act,* pursuant to section 71 of the *Act*, with the tenants' forwarding address on June 9, 2020. The landlords applied for authorization to retain the tenants' security deposit on June 22, 2020, less than 15 days after the landlords received the tenants' forwarding address.

Section 38(1) of the *Act* states:

> **38** (1)Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a)the date the tenancy ends, and
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> (b)the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlords made an application for dispute resolution claiming against the security and pet damage deposits pursuant to section 38(1)(a) and 38(1)(b) of the *Act.*

Counsel for the tenant submitted that the landlords were not entitled to retain the tenants' security deposit for their liquidated damages claim; however, counsel did not provide any authority to support this submission. Section 38(1) of the *Act* states that the landlord must either return the security deposit within 15 days of receiving the forwarding address or make an application for dispute resolution claiming against the security deposit. The *Act* does not state that only certain types of monetary applications may be made to claim against a security deposit, it is wide open and nonprescriptive.

The landlords filed this application for dispute resolution on June 22, 2020. As stated earlier in this decision, the landlords' application sought authorization to retain the tenants' security deposit. I find that this application was properly made within 15 days of the landlords' receipt of the tenants' forwarding address. Therefore, the tenants are not entitled to double their security deposit.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlords are entitled to retain the tenants' security deposit in the amount of $1,747.50.

Conclusion

I issue a Monetary Order to the landlords under the following terms:

| **Item** | **Amount** |
|---|---:|
| Liquidated damages | $1,834.88 |
| Filing Fee | $100.00 |
| Less security deposit | -$1,747.50 |
| **TOTAL** | **$187.38** |

The landlords are provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this

Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: October 23, 2020

Residential Tenancy Branch