Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

This hearing dealt with the Tenants' application under the Residential Tenancy Act (the "Act") for:

- compensation due to the Landlords having ended the tenancy and not complied with the Act or used the rental unit for the stated purpose pursuant to section 51; and
- authorization to recover the filing fee for this application from the Landlords pursuant to section 72.

One of the Tenants, TT, and the Landlord's agent, SL, attended this hearing. They were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

All attendees at the hearing were advised that the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") prohibit unauthorized recordings of dispute resolution hearings. They confirmed they were not recording this dispute resolution hearing.

Preliminary Matter – Service of Dispute Resolution Documents

TT acknowledged the Tenants did not serve the Landlords with a copy of the notice of dispute resolution proceeding package and the Tenants' evidence. SL testified the Landlords became aware of this hearing when they received an email reminder from the Residential Tenancy Branch approximately 10 days before the hearing. In light of the circumstances, I offered to adjourn the hearing to a later date. However, SL confirmed she was prepared to proceed with the hearing and did not wish to seek an adjournment for the Landlords.

Rule 3.5 and Rule 3.14 of the Rules of Procedure state:

> **3.5 Proof of service required at the dispute resolution hearing**
> At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.
>
> **3.14 Evidence not submitted at the time of Application for Dispute Resolution**
> Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.
> In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.
>
> (emphasis added)

I find the Tenants have not served the Landlords with their documentary and digital evidence in accordance with the Rules of Procedure. As such, I exclude the Tenants' documentary and digital evidence from consideration for the purposes of this hearing.

Issues to be Decided

1. Are the Tenants entitled to compensation under section 51(2) of the Act?
2. Are the Tenants entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

The parties agreed that the tenancy commenced on October 1, 2008 and ended on August 31, 2021. The parties agreed that at the time the tenancy ended, the Tenants paid rent of $1,336.00 per month to the Landlords. The parties indicated that there was a written tenancy agreement, but neither the Landlords nor the Tenants have a copy of it anymore. The parties agreed the style of cause on this application reflects the parties as noted on the tenancy agreement.

The parties agreed that the Landlords issued a two month notice to end tenancy dated July 4, 2021 (the "Two Month Notice"), with an effective date of October 1, 2021. The parties agreed that the Two Month Notice was in the approved form provided by the Residential Tenancy Branch (the "RTB"). The parties agreed that the Two Month Notice was signed by one of the Landlords, JK, and states that the landlord or the landlord's spouse will occupy the rental unit. The parties agreed that a copy of the Two Month Notice was given to the Tenants in person.

TT testified that the rental unit has three bedrooms. TT testified the Landlords had wanted to increase their rent to $2,000.00 at the beginning of COVID-19. TT testified the Tenants did not know at the time that this was an illegal rent increase. TT testified the Tenants could not afford that amount and could not come to an agreement with the Landlords. TT testified that the Tenants had to find a new place to live.

TT testified the Tenants were told that one of the Landlords, HK, was going to live in the rental unit. TT testified that the Tenants spoke with the Landlords to inform them that the Tenants would be moving out earlier on August 31, 2021.

TT testified the Landlords started renovating the rental unit a few days before the Tenants had fully moved out. TT stated that the Landlords replaced the carpets with wooden flooring, replaced closet doors, and possibly patched up walls.

TT testified that approximately four months after the Tenants moved out from the rental unit, he went to the rental unit to pick up a package that had been delivered to the rental unit by mistake. TT stated that when he knocked on the door, the person who opened the door was not HK. TT testified that this person told him she was renting there for $1,000.00 per month, and that she was working. TT stated he did not want to be rude and ask what the person's relationship to the Landlords was. TT stated he told the person that he used to live at the rental unit. TT testified he was unsure of the exact date that he went to the rental unit, but he had recorded his conversation with the person who opened the door.

TT stated that about two weeks ago, he received an email from JK with a copy of the tenancy agreement with the current tenant, which shows that the rental unit has been rented for $2,500.00 per month since March 2022.

SL testified that HK is her mother and JK is her uncle. SL testified that the rental unit is owned 50% by JK and 50% by SL's grandmother, who is also the mother of HK.

SL testified that HK moved into the rental unit on September 1, 2021. SL testified the Tenants had left behind damage, including water damage, with the Landlords had to fix. SL stated the Landlords changed the carpets because the Tenants left earlier.

SL testified that HK is single and lives with roommates. SL testified that HK takes care of SL's children during the day and works nightshifts.

SL testified that HK had a roommate move in sometime in September 2021. SL testified that HK wanted to move out and decided to give the roommate full tenancy on March 13, 2022. SL stated that she did not know the exact amount charged by HK to the roommate. SL stated that the roommate shared utilities with HK. SL stated that the utilities were in HK's name.

SL stated that the water damage was significant and would not have been covered by the Tenants' security deposit. SL stated the Landlords decided to return the security deposit to the Tenants because they didn't want to deal with the hassle.

TT testified the Tenants lived at the rental unit for around 10 years, but the Landlords never mentioned any water damage. SL responded that the Landlords would not have known before.

Analysis

1. Are the Tenants entitled to compensation under section 51(2) of the Act?

Section 49(3) of the Act permits a landlord who is an individual to end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. Section 49(1) defines a "landlord" as an individual who, at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years and holds not less than 1/2 of the full reversionary interest. Section

49(1) further defines an individual's "close family member" to include the individual's parent, spouse, or child, or the parent or child of that individual's spouse.

I accept SL's testimony that the rental unit is owned 50% by JK and 50% by SL's grandmother, who is also the mother of HK. I find that JK and SL's grandmother would each fall under the definition of a "landlord" under section 49(1) of the Act. I find that HK would not be a "landlord" but would be a "close family member" of the landlord under the definitions of section 49(1).

I note section 1 of the Act has a broader definition of "landlord", which includes an owner's agent, such that HK may be a landlord for the purposes of the parties' tenancy agreement and this application, but not for the purposes of a notice under section 49.

I find TT acknowledged the Tenants were told that HK would be moving into the rental unit, such that it would be reasonable in the circumstances to amend the Two Month Notice under section 68(1) of the Act, to state that the rental unit will be occupied by "the child of the landlord", rather than the landlord or the landlord's spouse.

Based on the parties' testimonies, I find the Two Month Notice is otherwise a valid notice to end tenancy in form and content pursuant to section 52 of the Act.

I find the parties later agreed to an earlier move-out date for the Tenants. As such, I find the parties' tenancy was ended on August 31, 2021 under the Two Month Notice and in accordance with section 49(3) of the Act.

In this application, the Tenants seek compensation of 12 months' rent from the Landlords under section 51(2) of the Act, which states:

> **Tenant's compensation: section 49 notice**
> 51 […]
> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that

> (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and
> (b) the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Policy Guideline 50. Compensation for Ending a Tenancy ("Policy Guideline 50") states:

> The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under sections 49 or 49.2 of the RTA or that they used the rental unit for its stated purpose under sections 49(6)(c) to (f) for at least six months. If this is not established, the amount of compensation is 12 times the monthly rent that the tenant was required to pay before the tenancy ended.

Based on the evidence before me, I am unable to conclude the Landlords have proven on a balance of probabilities that the stated purpose of the Two Month Notice was accomplished as required under section 51(2) of the Act.

First, I find the Landlords have not provided any evidence to corroborate SL's testimony that HK moved into the rental unit and lived there for at least six months. I accept TT's testimony that when he went to the rental unit approximately four months after the tenancy ended, the person who answered the door was not HK, and this person told TT that she was renting for $1,000.00 per month. I find the Landlords have not provided sufficient evidence to demonstrate that more likely than not, HK in fact resided in the rental unit together with the other individual at the rental unit. I note that neither of the Landlords nor the roommate were called as witnesses to testify in this hearing.

Second, even if I were to accept that HK moved into the rental unit on September 1, 2021 and moved out sometime in March 2022, I am not satisfied that HK can be said to have "occupied" the rental unit when a portion of the rental unit was re-rented to another person in September 2021.

According to Policy Guideline 50, a landlord cannot end a tenancy for the stated purpose of occupying the rental unit, and then re-rent the rental unit, or a portion of the rental unit, to a new tenant without occupying the rental unit for at least six months.

In *Blouin v. Stamp*, 2021 BCSC 411, the Supreme Court of British Columbia dealt with a situation where the landlords had reclaimed a two-bedroom rental unit under a two month notice to end tenancy for landlord's use and reconfigured a portion of the rental unit into a one-bedroom AirBnb suite. The Court agreed with the Arbitrator's conclusion that renting out a part of the rental unit for AirBnb rentals during the six-month period could not be characterized by the Landlords' occupying that space for their own residential purposes, as intended under section 49(3) of the Act.

The Court in *Blouin* stated at paragraph 60 as follows:

> [60] Indeed, I agree with Mr. Stamp that any other interpretation would allow a landlord to terminate a tenancy, take over only a small or insignificant portion of the space and then re-rent the remainder at far greater rent amounts. Providing such a "loophole" for landlords would clearly be contrary to the remedial objectives of the Act and the protections intended to be afforded to tenants by the Act: *Berry and Kloet* at para. 23 and *Schuld* at para. 17.
>
> (emphasis added)

I note the Landlords did not provide any evidence as to whether HK's roommate shared a kitchen or bathroom with HK or whether the roommate had her own space within the rental unit. However, I find that even if HK and the roommate did share a kitchen or bathroom, I am not satisfied that HK may be considered to have "occupied" the rental unit due the following circumstances:

- I accept TT's testimony that the Landlords had sought to increase the Tenants' rent prior to issuing the Two Month Notice.
- At the end of the tenancy, the Landlords performed upgrades to the rental unit such as replacing carpet with flooring.
- The roommate who moved into the rental unit in September 2021 paid $1,000.00 per month in rent, or approximately 75% of what was paid by the Tenants. I find the amount of rent being paid by the roommate was substantial relative to the rent paid by the Tenants, such that I do not find the arrangement to be incidental to a primary purpose of using the rental unit as a residence.
- By March 2021, the Landlords were renting out the entire rental unit at $2,500.00 per month, or approximately 187% of the rent paid by the Tenants.
- According to the timeline given by the Landlords, HK's stay at the rental unit would have been the bare minimum, which was slightly over six months from the

date the tenancy ended (August 31, 2021) and in fact less than six months after the original effective date as stated on the Two Month Notice (October 1, 2021).

- The Landlords did not offer any reasons to explain why HK would have wanted to move into and then out of the rental unit in this relatively short time frame.

Moreover, I find the above arrangement would have allowed the Landlords to achieve an effective rent increase of approximately 20% when averaged over a one-year period.

In these circumstances, I find on a balance of probabilities that the Landlords' primary intent in issuing the Two Month Notice was to increase the rent. I find that section 49(3) of the Act would not have permitted the Landlords to end the tenancy for this reason.

As mentioned previously, I have also found the Landlords' evidence to be sparce such that I am doubtful as to whether HK did in fact move into and reside in the rental unit as claimed.

I conclude that due to the circumstances described above, I do not find HK to have "occupied" the rental unit for a residential purpose within the meaning of section 49(3) of the Act. I adopt the reasoning of the Court in *Blouin* as I find that any other interpretation in these circumstances would create a "loophole" for a landlord to terminate a tenancy, take over only a small portion of the space, re-rent the remainder, and receive an overall rent increase.

Accordingly, I conclude the Landlords have not proven on a balance of probabilities that the stated purpose of the Two Month Notice was accomplished as required under section 51(2) of the Act.

Where a landlord has not met the requirements of section 51(2), section 51(3) allows the landlord to be excused from paying compensation to the tenant if there were "extenuating circumstances" that "prevented" the landlord from accomplishing the stated purpose of the notice, as follows:

> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from

(a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
(b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Policy Guideline 50 further states as follows:

G. EXTENUATING CIRCUMSTANCES

The director may excuse a landlord from paying additional compensation if there were extenuating circumstances that prevented the landlord from accomplishing the stated purpose for ending a tenancy within a reasonable period after the tenancy ended, from using the rental unit for the stated purpose for at least 6 months, or from complying with the right of first refusal requirement.

These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement.
- A landlord entered into a fixed term tenancy agreement before section 51.1 and amendments to the Residential Tenancy Regulation came into force and, at the time they entered into the fixed term tenancy agreement, they had only intended to occupy the rental unit for 3 months and they do occupy it for this period of time.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy the rental unit and then changes their mind.

- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.
- A landlord entered into a fixed term tenancy agreement before section 51.1 came into force and they never intended, in good faith, to occupy the rental unit because they did not believe there would be financial consequences for doing so.

In this case, I find the Landlords do not assert any extenuating circumstances which may have prevented them from accomplishing the stated purpose of the Two Month Notice. Accordingly, I find that the Landlords are not excused from paying compensation to the Tenants under section 51(2) of the Act.

I conclude that pursuant to section 51(2) of the Act, the Tenants are entitled to compensation of 12 months' rent from the Landlords, in the amount of $1,336.00 × 12 months = $16,032.00.

2. Are the Tenants entitled to recovery of the filing fee?

The Tenants have been successful in this application. I grant the Tenants' claim for recovery of the $100.00 filing fee under section 72(1) of the Act.

The total Monetary Order granted to the Tenants on this application is calculated as follows:

Item	**Amount**
Section 51(2) Compensation ($1,336.00 × 12 months)	$16,032.00
Filing Fee	$100.00
Total Monetary Order for Tenants	**$16,132.00**

Conclusion

Pursuant to sections 51(2) and 72(1) of the Act, I grant the Tenants a Monetary Order in the amount of **$16,132.00**. This Order may be served on the Landlords, 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: November 03, 2022

Residential Tenancy Branch