Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

FINAL DECISION

Dispute Codes:

CNR, MNDC, RR, OPR, MNR, FF

Introduction

This was a cross-Application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for an order of possession, compensation for unpaid rent and damage or loss under the Act and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

The tenants submitted an Application to cancel a Notice issued for unpaid rent, for compensation for damage or loss under the Act, that the tenants be allowed to reduce rent for repairs, services or facilities agreed upon but not provided and to recover the filing fee costs.

Preliminary Matters

This hearing took place over 4 separate hearing dates and involved a significant amount of evidence. I have considered all of the evidence and testimony presented by the parties in reaching my findings. The first hearing held on June 28, 2010, reconvened on September 1, October 18 and November 17, 2010.

The tenant's request to amend the monetary amount claimed in their Application was denied in my interim decision issued on June 28, 2010. This final decision should be read in conjunction with my June 28, 2010, interim decision.

The Order of possession is no longer required as the tenants have vacated the rental unit; therefore, cancellation of the Notice ending tenancy is also not required.

All events referenced in this decision occurred in 2010.

Background and Evidence

This was a fixed-term tenancy that commenced on September 1, 2009, and was to end on August 31, 2011. Rent was $2,600.00 per month, a deposit in the sum of $1,300.00 was made on July 2, 2009. The tenants were renting a strata unit that was part of a multi-unit building. The deposit, less agreed costs, has been returned to the tenants.

On February 8, 2010, a remediation project began to the exterior of the building; at the start of the tenancy the tenants had been aware that this work was to take place to the exterior of the building.

A copy of the written tenancy agreement submitted as evidence included a liquidated damages clause in the sum of $5,200.00, payable:

> *"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…the tenant will pay to the landlord the sum of $5,200.00 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…"*

The landlord's claim for compensation is as follows:

	Claimed
May rent	2,600.00
Moving tenant's belongings	2,020.00
TOTAL	9,820.00

Upon review of the details of the tenant's claim submitted on May 10, 2010, I established that the tenant's April 19, 2010, attachment to their Application submitted to the Residential Tenancy Branch, included the following claim and I found that this amount will not be amended:

Loss of use March 25 – 31, 2010	361.29
Loss of use April 25 - 30, 2010 $143.00/day	858.00
Carpets	2,600.00
TOTAL	5,099.29

During the hearing the parties agreed to the following facts:

- That the exterior remediation of the building commenced on February 8, 2010;
- That the tenants paid rent in the sum of $2,600.00 in each of February and March, 2010;
- That the landlord provided compensation for the months of February and March, 2010, in the sum of $1,300.00 for each of those months, which resulted in no rent payment owed for April;
- That no rent was paid in May, 2010; and
- That the tenants vacated the rental unit on May 30, 2010.

Tenant's Submission

The tenants provided a two hundred and seventy three page evidence submission; all referenced documents were part of that submission.

On February 3, the tenants attended a strata meeting where upcoming renovations to the building were discussed. On February 3, the tenants were assured that during remediation vapour barriers would be in place and that the children's play area would continue to be accessible.

The work on building remediation began on February 8, and from this time onward, renovations caused disruption and health problems, due to the tenant's pre-existing asthma. Ultimately the tenants each went on sick leave from work due to the health problems and stress caused by the remediation work on the building. The tenant's experienced a loss of quiet enjoyment which was so severe that they abandoned the rental unit.

The tenants lived in the rental unit with their young children.

The landlord lived out of the country much of the time and had an agent who acted on her behalf.

The tenants outlined the following events that occurred up to the end of March:

- Once remediation began the north patio wall of the unit was demolished;
- The children's outdoor play area was impacted, with items stored in the area;
- The patio door to the unit was removed and nailed to the exterior of the building allowing dust into the unit, resulting in a loss of space in the kitchen, loss of heat and quiet enjoyment;
- On March 2 the landlord was informed of the serious level of disruption caused to the tenants;
- On March 3 the gas to the rental unit was terminated;
- On March 15 one half of the ceiling in the children's room was removed and left open;

- On March 25 the living room was flooded by contractors;
- On March 25 the landlord offered compensation which was rejected by the tenants;
- On March 25 three months notice ending the tenancy was given by the landlord;
- On March 25 the tenants went to stay in a friends boat to escape the noise and as a result of the flood; and
- The tenants returned on March 26 to find the living room ceiling had a section removed due to water.

On March 3 the tenants were provided with a counter-top stove, but the gas to the stove, oven and fireplace was expected to be off for 4 to 5 weeks. On March 4 the tenants emailed the landlord as they had not been informed they would lose gas service to the fireplace, stove and oven. A toaster oven was offered to the tenants by the strata council.

On March 15 the landlord sent the tenants an email acknowledging the disruptions and offering reduced rent for March and April, in the sum of $800.00 per month and that assessment of conditions in May and June would be made.

A June 15 letter written by the tenant's insurance adjuster reviewed his visit made to the rental unit on March 31 during which he observed the kitchen area covered in dust, a wired baseboard heater lying on the floor, cracks around the patio door that would allow entry of ants and part of the recreation room ceiling that had been removed. The adjuster concluded that the home was not habitable due to the possible presence of asbestos, dust, safety hazards and noise.

On April 2 the tenants responded to a voicemail left by the landlord on that same date, in which the tenants described the flood and the recommendation of their adjuster that a hazard assessment be completed. The tenants acknowledged the landlord's offer of compensation, now in the sum of $2,600.00 for February and March; which then satisfied payment of April rent that was due.

The tenants requested additional compensation for March as a result of the flood and the 7 days they had to remain out of the unit at the end of the month. The tenants also accepted the landlord's offer that the tenancy end by July 31, 2010.

In an April 15, 2010, email the landlord acknowledged the noise, dust, flood and the need to cut into the living room ceiling. The landlord offered to end the tenancy on July 31, 2010 and stated that by April 15, 2010, interior and exterior repair would take place addressing concerns raised by the tenants. The landlord also acknowledged that further disruptions might be necessary. The landlord asked that the tenants agree to protect their belongings from dust, assume responsibility for the security of their belongings and that they supervise their children when playing around exterior scaffolding. The letter also indicated that all of the tenant's belongings had been moved out of their bedroom to enable replacement of joists and the ceiling.

On April 16 the worksite within the rental unit was shut down by Work Safe BC as the result of the discovery of asbestos in the unit ceiling texture coat. Assessment of the contamination was undertaken and it was determined that before any further work could proceed decontamination of the unit and affected areas would be required and that the area was to be immediately sealed off. The April 19 report issued by an environmental consulting firm also determined that "other asbestos products may remain unidentified."

On April 23 the landlord told the tenants not to enter the suite as environmental clean-up was taking place. The tenants responded that they would proceed to locate alternate accommodation at the cost of $143.00 per day until the end of April, their proposed end of tenancy. On April 24 the landlord responded accepting the April 31 end of tenancy.

On April 25, 2010, the landlord responded to concerns issued by the tenants which confirmed her understanding that they had left the property on March 25 as the result of water egress; however, the landlord disputed the need to leave the unit and their failure to return due to their fear of asbestos. This note from the landlord also confirmed that the tenants had been clear they did not plan on returning to live in the unit. There is evidence before me that on April 29 the tenants emailed the landlord indicating they could not move out by April 30 and, that in the absence of a mutual agreement, they would end the tenancy effective May 31, 2010. This final notice asked that the contractors stay out of the unit until the end of May.

On April 27, 2010, the environmental consulting company issued a report indicating that air samples obtained from bags of the tenant's belongings were all below Work Safe BC air clearance levels and that "all personal affects have been decontaminated satisfactorily with respect to the impacted asbestos containing materials and the property is safe for occupancy."

On April 30 the landlord sent the tenants a final offer that they remove their property from the rental unit by May 4. The tenants responded on May 4 that the unit had further asbestos testing completed on April 30; that any rent owed would need to be decided through arbitration. The landlord then served the tenants with a notice ending tenancy for unpaid rent.

A copy of a May 10 letter to the tenants from the same environmental consulting firm that had completed previous asbestos testing in the unit indicated that on April 30 asbestos was found to be present on the main floor and north bedroom ceiling of the rental unit. This report warned that some asbestos products may not have been accessible on the day of the survey and could remain unidentified.

On May 11 the tenants emailed the landlord that additional testing of the unit had been completed. On May 13, the strata council agreed to further testing of the unit if the tenants would accept this as a final attempt. The tenants did not move back into the unit and attended at the unit on May 22 to catalogue their belongings.

The tenants attended a move-out condition inspection on May 30 at which time they agreed to deductions in the sum of $250.00 for carpet cleaning and $50.00 for kitchen cleaning; the balance of the deposit was returned to the tenants. The report indicated that the tenants relinquished all of their belongings left in the unit, to the landlord.

The tenants provided verification of an inter-bank payment made for the March boat costs in the sum of $1,091.00; a hotel inter-bank payment in the sum of $1,006.00 for the period of April 25 to May 1 and a receipt for hotel costs for the night of April 12 in the sum of $267.14.

When the tenants moved into the unit they purchased new carpeting with the landlord's permission, as they expected to remain in the unit for 2 years. As the tenancy came to an end due to the unexpected disruptions and the presence of asbestos, the tenants have claimed a portion of the $5,090.26 cost of the carpets that were left in the unit for the landlord's use and benefit. The tenants provided a copy of the August 31, 2009, invoice issued at the time the carpet was purchased.

The tenants testified that they believed the landlord did not intend to be malicious or do anything deliberate; only that her response to the deterioration of the value of the tenancy was inadequate. After the asbestos report was issued on April 27 the tenants continued to have considerable apprehension of health risks, as they believed that only a small sample of their belongings had been tested.

The tenants do not believe that they owe the landlord any liquidated damages as the clause required payment in the case of a breach of the contract by the tenants. The landlord had agreed on a number of occasions to end the tenancy and the state of the unit resulted in an end of tenancy that could not have been foreseen by either party.

Landlord's Submission

The tenants had rented the unit fully aware that building remediation would take place, yet none of the parties – the landlord, tenants, strata council or builders understood the extent of the disruption that would eventually occur. The landlord agreed that the tenants were entitled to some compensation and she had; to date, provided compensation equivalent to half of rent owed for each of February and March.

The landlord offered and the tenants accepted the equivalent of 1 month's rent in recognition of the inconvenience to the tenants during February and March, 2010. As the tenants had paid rent for those months, no rent was given for April, with the landlord's approval. At his point $2,600.00 in compensation had been provided.

The tenants had decided to leave the unit on March 25; the date the water egress occurred. The tenants did not suffer any damage to their belongings as a result of the water egress. They were not present in the unit beyond this time, outside of trips to and

from the unit and did not suffer a loss, due to their absence from the unit. While the tenants were out of the unit the landlord had requested that work within the unit be accelerated in the hope that the tenants could return to the unit.

The court yard continued to be available for use and a temporary guard rail was installed which conformed to building standards. Even though the gas service was disconnected the electric baseboards continued to function, except in the children's room; a space heater was provided for that room. By April 1 the baseboard was reattached to the wall.

On March 31 it became apparent that major construction work was required to the interior of the rental unit; this was not foreseen by either party. Discussions with the tenants resulted in a settlement offer made on April 15, of $1,500.00 compensation for May and termination of the lease July 31, 2010.

On April 2 the tenants requested compensation in excess of $6,200.00, that all work cease in their unit and that the tenancy end April 30. On April 24, 2010, the landlord emailed the tenants, acknowledging that they must vacate the unit temporarily as asbestos testing was not yet completed. The landlord accepted the tenant's notice ending the tenancy April 31, indicating she would agree to end the tenancy with short notice.

The landlord did not intend to breach her responsibilities and did her best to respond to the needs of the tenants and, while the construction work was unpleasant, the tenants had decided to retain the rental unit. The landlord made multiple offers of compensation to the tenants, none of which were accepted, outside of the initial $2,600.00 rent reduction over the 2 months of February and March.

The landlord had passed on the tenant's claim for alternative housing to the construction company, as the landlord felt she should not be held responsible for the costs. The landlord then offered an additional $1,000.00 compensation to the tenants and agreed to end the tenancy effective April 30 with no liquidated damages; the tenant's rejected this offer. The landlord understood the tenants wanted to leave and felt there was little more she could do to assist them and that this offer would release the tenants from further responsibility.

The landlord then attempted to reach agreement that the tenancy end effective May 4 and this was again rejected by the tenants. The tenants extended the tenancy to the end of May, but did not wish to pay rent.

The landlord's evidence indicated that the tenants had vacated the unit on March 25 and that she did not suggest they should occupy the unit in May. The landlord acknowledged that effective May 25 the tenant's belongings remained in the unit and they had not lived there since March 25, 2010.

The landlord questioned why the tenants returned to the unit in May to retrieve items, such as a clown costume, if the tenants had felt their items were contaminated with asbestos. No test results were produced that showed the unit was contaminated and unfit for habitation after April 27, 2010.

The landlord acknowledged that the tenants had, with her permission at the start of the tenancy, installed new carpeting in the rental unit. The landlord stated that if the tenants had not left all of their belongings in the rental unit, resulting in costs to her, she would have been open to the cost-sharing of the carpet purchase. The landlord did not dispute the costs of installation submitted by the tenants.

In relation to the claim for liquidated damages, the tenants breached the tenancy agreement by their failure to provide proper notice ending the tenancy, resulting in their obligation to pay the amount included in the liquidated damages clause of the agreement signed on July 22, 2009. As the tenants did not pay May rent and continued to have possession of the unit they are responsible for May rent owed. A notice ending tenancy for unpaid May rent was issued on May 3; on May 10 the tenants submitted their application that included a request to cancel the notice.

The tenants left 120 bags of belongings behind after they moved out, due to the fear of contamination; the landlord has claimed costs for removal of these items. No receipts verifying the costs were supplied. The landlord submitted a typed list of costs associated with the removal of the belongings totaling 76 hours at $20.00 per hour. The landlord submitted that the tenants abandoned their belongings, that the official testing had indicated the belongings were not contaminated and that the landlord was left to photograph the items, store the items and that an additional cost of $500.00 will be incurred to move the items for disposal.

The tenants signed the move-out condition inspection report on May 30, 2010, which indicated that the tenants relinquished all belongings left in the rental unit.

Analysis

There is evidence before me of multiple notices given, by each party, in attempts to end this fixed-term tenancy as the result of the disruptions caused by the remediation work to the building. In relation to the end of the tenancy, I have considered the evidence before me and find, on the balance of probabilities, that by the end of April the tenancy had effectively ended.

The evidence before me indicated that the landlord understood the tenants had left the rental unit and would not return to reside in the unit. This was contained in the landlord's email sent to the tenants on April 25, in which she acknowledged that the tenants had been clear in their April 19 letter to her that they had no intention of returning to the rental unit and at this point I find the landlord had no expectation that the tenancy would continue.

The disruptions caused to the tenants have been acknowledged by the landlord, who could certainly not have expected the tenants to remain in the unit with their young children without explicit assurance that asbestos did not remain in the unit or on any of their belongings and that further disruptions and loss of value of the tenancy would not occur.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract. I find that this tenancy, due to no fault of either party, was frustrated effective April 30, 2010.

I find that the written notice given by the tenants on April 30, 2010, was not required, as by the end of April the tenancy had ended. The only matter outstanding was the on-going dispute in relation to the tenant's claim for compensation and the disposition of their belongings. As stated above; the landlord understood that effective April 19, the tenants would not return to occupy the unit as a result of the on-going disruptions and concerns related to asbestos.

The environmental consulting report issued to the tenants on May 10 in relation to an assessment completed on April 30 confirmed that the tenants could have no confidence in the safety of the rental unit, as asbestos was found in the unit. I find this lack of confidence was more than reasonable. I find that the report issued by the environmental consulting firm on April 19, 2010, also provided no assurance to the tenants that they and their children would not be exposed to asbestos, as the report concluded with the statement: "other asbestos products may remain unidentified."

There is no evidence before me that the landlord had any control over the loss of quiet enjoyment due to the exterior remediation work, but I find that the landlord did have at least some control over what occurred within the rental unit and the compensation provided to the tenants for loss of use of the unit.

Up to the discovery of asbestos the tenant's endured disruptions that had not been contemplated when they had rented the unit. The tenants had been willing to accept a unit that would undergo exterior remediation, but I find, on the balance of probabilities, that the intrusions that resulted, devalued the tenancy and placed the tenants in a position where they were forced to vacate.

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Residential Tenancy Branch policy suggests that a dispute resolution officer may also award “nominal damages”, which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right. I find this to be a reasonable approach.

Section 32 of the act provides, in part:

> ***32*** *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*
>
> > *(a) complies with the health, safety and housing standards required by law, and*
> > *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.*

I find that the remediation to the exterior of the building very quickly resulted in disruptions to the tenants that negatively impacted the value of their tenancy and created a state that resulted in a breach of section 32 of the Act. The tenants lived in the unit until March 25, at which point they left, due to a flood. The tenants did not return to reside in the unit, as a result of the discovery of asbestos.

The landlord has provided compensation for February and March in the sum equal to one half of rent owed for those months. The tenants are requesting further compensation for March and compensation for costs incurred in April when they could not live in the rental unit.

The tenants have provided verification of living costs from March 25 to 31 in the sum of $1,091.00 and living costs incurred in April in the amount of $1,273.14.

Therefore, I find, based upon the loss of value and use of the rental utni that the tenants are entitled to the following compensation:

	Claimed	Accepted
Loss of use April 1 – 24, 2010	1,280.00	1,273.14
Loss of use April 25 - 30, 2010 $143.00/day	858.00	858.00
Carpets	2,600.00	2,600.00
TOTAL	5,099.29	5,092.43

There is no evidence before me verifying the costs claimed for April in the sum of $143.00 per day; however, I find that the value of the tenancy during April was reduced to the point where it was equivalent to that of a storage unit, as a result of ongoing work within the unit and the loss of gas services.

The tenants did not pay April rent owed as the landlord applied April rent owed to the compensation given for February and March loss of use. Essentially, the full rent paid in February and March, satisfied the payment of April rent.

I find, on the balance of probabilities, that the tenants are entitled to the costs claimed based on the verified amount for April 1 to 24, in the sum of $1,273.14 and a rent reduction in the amount claimed from April 25 to 30, in the sum of $858.00. This rent abatement recognizes the continued loss of use of the rental unit throughout April and results in the tenants having paid $468.86 rent for April.

I find that the original agreement made between the parties in relation to the carpet stands. The landlord agreed to the installation and I find, based on the evidence before me, that the tenants are entitled to compensation for one half the value of the carpet, as they paid for the carpets, they could not remain in the unit to enjoy the use of the carpets and the landlord will benefit from the value of the new carpeting that has remained in the unit. Verification of the cost of the carpet has been provided.

In relation to the landlord's claim, I have considered the liquidated damages term of the tenancy agreement. 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 amount of liquidated damages is a penalty or liquidated damages, Residential Tenancy Branch policy suggests that I consider the circumstances at the time the contract was entered into. As I have found that by April 30 the tenancy was frustrated, the liquidated damages clause is of no force. The tenancy ended due to no fault of either party and, as such, there is no liability to the tenants. Therefore; I dismiss the claim for liquidated damages.

In relation to the payment of May rent, as I have found that the tenancy was frustrated effective April 30, 3010, I dismiss the claim for unpaid May rent.

The landlord has requested costs incurred as a result of the tenant's abandoning an excessive amount of belongings in the rental unit. I find that the tenants did not abandon their belongings, as defined by the Residential Tenancy Regulation. The Regulation allows a landlord to consider belongings as having been abandoned if a specific set of circumstances have occurred. In this case I find that the tenants essentially gave the landlord their belongings. However, the landlord was then left with the responsibility of disposing of the 120 bags of belongings from the unit.

The tenant's belongings could then reasonably be considered as trash, and the removal costs should be the responsibility of the tenants. The landlord has submitted a typed list of costs itemizing time spent and costs incurred. The landlord did not provide any verification of the amount claimed in the form of a cancelled cheque, receipt for services

provided or any other evidence of payment for the removal of the items. Therefore, in the absence of verification of the costs claimed I find that the landlord is entitled to a nominal amount in the sum of $100.00 for removal of items left in the unit by the tenants.

Therefore, I find that the landlord is entitled to the following:

	Claimed	Accepted
May rent	2,600.00	0
Moving tenant's belongings	2,020.00	100.00
TOTAL	9,820.00	100.00

As each party's application has at least partial merit I decline filing fee costs to either.

The balance of each claim made is dismissed.

Conclusion

The tenant's are entitled to compensation for damage or loss in the sum of $5,092.43 which includes rent abatement in the amount of $858.00.

The landlord is entitled to compensation in the sum of $100.00.

Based on these determinations I grant the tenant's a monetary Order for $4,992.43**.** In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims 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: December 08, 2010.

Dispute Resolution Officer