



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD, FF

### Introduction

This hearing was convened by way of conference call in response to the landlord's application for an Order permitting the landlord to keep all or part of the tenants' security deposit; and to recover the filing fee from the tenants for the cost of this application.

The tenants and landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

### Issue(s) to be Decided

Are the landlords entitled to keep all or part of the tenants' security deposit?

### Background and Evidence

Both parties agree that this tenancy started on December 01, 2011. This was a fixed term tenancy which was due to expire on November 30, 2012. The tenants gave the landlord Notice to end tenancy on March 21, 2012 and moved from the rental unit on April 28, 2012. The tenants' paid a security deposit of \$750.00 on The tenants gave the landlords their forwarding address by e-mail on May 05, 2012 and again in writing on May 08, 2012.

The landlords seek an Order to retain the sum of \$452.72 from the tenants' security deposit. The landlord attending testifies that the tenants breached the fixed term tenancy agreement by moving from the unit on April 28, 2012. The landlords could not re-rent the unit until July 01, 2012.

The landlord testifies that the tenancy agreement clause 19 states that the tenants are responsible for rent until the termination date of the agreement if they vacate the unit before the termination date and for costs associated with re-renting the unit such as credit check fees, advertising fees, property management fees and other costs associated with obtaining alternative tenants. This clause also states the tenants would be responsible to pay the landlords termination fee of \$250.00.

The landlord testifies that they have tried to reach an amicable solution to these fees currently standing at \$452.72 however the tenants are arguing over the legality of the termination fee. The landlord testifies that they are not pursuing the tenants for a loss of rental income for June and July, 2012.

The landlord testifies that the fee charged for terminating the tenancy is a legitimate fee, it is not extravagant, it is a pre-estimate of the costs and is only tied to the breach of the tenancy agreement, it is a cost pre-estimated for less than the costs incurred as a result of the breach of the agreement by the tenants and the tenants signed this agreement to agree to these costs at the start of the tenancy.

The landlord testifies that when the tenants gave notice to end the tenancy attempts were made to re-rent the unit. An advertisement was placed on Craig's List and the tenants took pictures of the unit. The tenants did find another tenant but at the pre-screening that tenant was found to be unsuitable. The unit was shown to 10 or more prospective tenants but only three applications to rent the unit were made. Of these three applications credit checks were carried out at a cost of \$90.72 and the landlords incurred the property management fees of \$112.00 to show the unit. Eventually the unit was rented for July 01, 2012 and the landlords suffered a loss of income for June, 2012.

The tenants testify that they believe that the landlords verbally agreed to the tenants ending the tenancy. The tenants state that due to this they never considered that they were breaking the contract with the landlords and they helped the landlord to find new tenants. The tenants' testify that the person they put forward as a prospective tenant was initially turned down by the landlords but state the landlord later came back to this person and offered her the tenancy which she then declined. The tenants testify that they wanted to assign or sublet the unit for the remaining term of the lease but the landlords were very particular as to who they wanted to rent the unit and the tenants state the landlords did not mitigate the loss.

The tenants testify that they felt the management fee was unfair as they had found a tenant for the unit which the landlord had turned down. However the tenants agree to pay the fees incurred for the credit checks on prospective tenants and the management fee to show the unit. The tenants' state that the landlords' termination fee is doubling up the fees the landlord is able to charge, as the landlord has already charged the costs associated with terminating the tenancy and the actual cost incurred are one and the same thing. Therefore the landlord is not able to charge an additional amount of \$250.00 solely for a termination fee and it is therefore a penalty.

The landlord argues that the termination fee is an amount pre-estimated for hard to quantify damages and is in line with the Residential Tenancy Policy Guidelines #4 because it is a sincere pre-estimate of the difficult to quantify loss at the time the contract was made and it does not fall into the penalty category based on the tests in the Residential Tenancy Policy Guidelines. This fee is not an amount that is extravagant in comparison to the greatest that could follow a contract breach, it does not involve an increasing amount on a failure to make a payment and it is not a single lump sum paid on the occurrence of trivial and serious events.

#### Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. I refer to the Residential Tenancy Policy Guidelines #4 concerning liquidated damages:

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 is 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. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

In the agreement between the parties clause 19 deals with the tenants financially responsibly to the landlords if the tenants end the tenancy before the end of the fixed term. Clause 19(1)(2) and (3) states

1. Rent until the termination date or such earlier date as the landlord begins receiving rent from an acceptable(at the landlord discretion) replacement tenant
2. Credit check fees, advertising bills, property management fees and other costs as the landlord incurs in the landlords efforts to obtain an alternative tenant
3. Payment of the landlords' termination fee of \$250.00.

I have considered both arguments and reviewed the test used for liquidated damages noted above.

I find that the landlords are attempting to charge the tenant for two separate liquidated damages fees, one that is quantifiable and one that is not. These two fees appear to be one and the same thing but worded in a different manner. A landlord is entitled to charge a tenant for liquidated damages and must state that these are not a penalty. These damages must be a genuine cost for the loss incurred by the landlords in re-renting the unit. I find the landlord has incurred costs for the credit checks of \$90.72 and the property management fee of \$112.00.

I find the termination fee to therefore be a penalty and as such is not enforceable under the *Residential Tenancy Act (Act)*. The landlord cannot charge another fee because the tenants breached the tenancy agreement and ended the tenancy before the end of the fixed term by applying this as a liquidated damages fee. This fee is not intended to compensate the landlord for any loss of rent and the landlord is entitled to recover any loss of rent by filing an application to do so.

Consequently, I uphold the landlords claim for the sum of \$202.72 and the landlords are entitled to deduct these amounts from the tenants' security deposit.

As the landlords have been partially successful with their claim I find the landlords are entitled to recover half the \$50.00 filing fee paid for this proceeding to the sum of \$25.00 pursuant to s. 72(1) of the Act and may deduct this sum from the security deposit also.

### Conclusion

I HEREBY FIND in partial favor of the landlords claim to keep part of the tenant's security deposit. I ORDER the landlord to keep **\$227.72** from the security deposit.

The balance of the security deposit of **\$522.28** must be returned to the tenants. A Monetary Order has been issued to the tenants for this amount. This Order must be served upon the landlords and may be filed in the Provincial Court of British Columbia, Small Claims division and enforced as an order of that Court if the landlords fail to comply with the Order.

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: July 11, 2012.

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Residential Tenancy Branch