



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Langara Gardens Holdings Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MND, MNSD, MNDC, FF

### Introduction

This was the hearing of an application by the landlord for a monetary order and an order to retain the security deposit. The hearing was conducted by conference call. The landlord's representative and the tenant called in and participated in the hearing.

### Issue(s) to be Decided

Is the landlord entitled to payment of liquidated damages as claimed?  
Is the landlord entitled to a monetary order for loss of revenue?  
Is the landlord entitled to an order to retain the tenant's security deposit?

### Background and Evidence

The rental unit is an apartment in Vancouver. The tenancy began on December 1, 2012 for a fixed term ending November 30, 2013 and thereafter month to month. Rent in the amount of \$1,650.00 was payable on the first of each month. The tenant paid a security deposit of \$825.00 on November 3, 2012.

The tenancy agreement contained the following provision:

**LIQUIDATED DAMAGES.** 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 as set out in B above, or any subsequent fixed term, the tenant will pay to the landlord the sum of \$825.00 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 and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.

On March 28, 2013 the tenant gave the landlord written notice that he intended to end his tenancy contract effective the end of April, 2013. The tenant testified that he gave notice because he was laid off from his employment and could not afford to continue his tenancy. He paid rent for April but moved out on or about April 20, 2013.

In its application for dispute resolution the landlord claimed payment of the sum of \$4,750.00. This was said to be made up of liquidated damages of \$825.00, payment of the landlord's damage and repair costs of \$625.50 and loss of revenue for the months of May and June.

The landlord's representative testified that the landlord used its best efforts to re-rent the unit but was not able to rent it until May when a new tenancy agreement was signed to commence on June 1, 2013. The landlord said that the tenant has paid the landlord's repair costs and forfeited his security deposit as liquidated damages so the landlord is now seeking a monetary order in the amount of \$1,650.00 for loss of revenue for May plus the filing fee for its application. According to the condition inspection report the tenant's \$100.00 key deposit was applied to the amount claimed for repairs and cleaning, leaving a balance of \$525.50.

The tenant said that he took part in a condition inspection of the rental unit on April 25<sup>th</sup>. He did not agree with the landlord's charges for repairs and painting, but he signed the condition inspection report agreeing to the charges and paid them because he "wanted to move on" and did not want to enter into a dispute with the landlord. The tenant testified that he was aware of the landlord's liquidated damage clause and agreed to forfeit his deposit because he ended the tenancy early. The tenant said that he went to the landlord's office and gave the landlord's employee a cheque for \$525.50, being the balance of their claim. He said that he was assured by the employee that this payment satisfied his obligations to the landlord and the tenant wrote a memo on his cheque that said: "close account" to signify that this was a final payment. The tenant questioned whether the landlord had made proper efforts to rent his unit. He said that they showed the suite only once during his occupancy after he gave notice ending the tenancy.

The landlord's representative testified that all efforts were made to find new tenants, but the rental market was slow when the tenancy ended.

The landlord's representative said that the liquidated damage clause in the tenancy agreement was intended to compensate the landlord for the costs of advertising, showing the rental unit and processing rental applications and that the landlord was entitled to claim for loss of revenue as well.

The landlord collected a liquidated damage payment before it commenced this application wherein it has claimed payment of liquidated damages as provided by the tenancy agreement as well as loss of revenue for the month of May, 2013. And cleaning and repair costs. At the hearing the landlord's representative said that the claim had been reduced to the sum of \$1,650.00 plus the filing fee.

### Analysis

The tenancy agreement is a contract of adhesion drawn by the landlord. If the tenant wished to rent from the landlord he was obliged to accept the terms of the agreement without modification. The liquidated damage clause must therefore be interpreted having regard to the *contra proferentem* doctrine: simply put, this means that any ambiguity in the clause in question must be resolved in the manner most favourable to the tenant.

The liquidated damage clause provided that if the tenant ended the tenancy before the end of the term he will pay to the landlord the sum of \$825.00 as liquidated damages and not as a penalty. The tenancy agreement purported to exclude from the damages considered to form part of the liquidated damages, amounts owed to the landlord, such as unpaid rent or for damage to the rental unit, (emphasis added), but it did not exclude loss of revenue. I regard loss of revenue, which is future rent that is not then owed, but may become payable, to be distinguishable from unpaid rent that is owed when the tenant ends the tenancy.

In contract law the term "liquidated damages" refers to a genuine pre-estimate of the loss that will be suffered in the event of a breach of the contract; it is not used to describe some subset of damage that the landlord requires the tenant to pay, in addition to general damages flowing from a breach of the contract.

In Elsley v. J.G. Collins Ins. Agencies, [1978] 2 SCR 916, Dickson J., speaking for the Court, said:

It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression. If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out

to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount. As expressed by Lord Ellenborough in *Wilbeam v. Ashton*[23]: “Beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself entitled to.” Of course, if an agreed sum is a valid liquidated damages clause, the plaintiff is entitled at law to recover this sum regardless of the actual loss sustained.

In the context of the present discussion of the measure of damages, the result is that an agreed sum payable on breach represents the maximum amount recoverable whether the sum is a penalty or a valid liquidated damages clause.

The landlord invoked the liquidated damage clause in the tenancy agreement and elected to claim the liquidated damage amount. I find that by so doing it has fixed the amount of damages to which it is entitled at \$825.00. The landlord has already collected this sum from the tenant along with an additional amount for cleaning and repairs. I accept as well the tenant's evidence that he was assured by the landlord's employee, when he made a final payment by cheque, that this payment was in final satisfaction of his obligations to the landlord. The tenant has already agreed in writing to forfeit his security deposit in the amount of \$825.00; no order is required to authorize the landlord to retain the deposit.

### Conclusion

For the above reason the landlord's application for a monetary order is dismissed without leave to reapply.

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: August 09, 2013

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Residential Tenancy Branch

