# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AFFORDABLE HOUSING SOCIETIES
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes O, FF

Introduction

This hearing convened as a result of cross applications. In the Tenant's Application for Dispute Resolution, she sought an Order pursuant to Section 6(3)(b) of the *Residential Tenancy Act* (the "Act") for a finding that Clause #5 of the residential tenancy agreement, namely, the five month fixed term tenancy term, be found unconscionable and therefore not enforceable. The Landlord sought an Order ending the tenancy pursuant to Clause #5 and section 44(1)(c) of the Act.

Both parties appeared at the hearings which were conducted on December 8, 2014, January 13, 2015, February 11, 2015, and February 17, 2015 by conference call. The hearing process was explained and the participants were asked if they had any questions. All witnesses provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the witnesses, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. The hearing of this matter occupied over eight hours of hearing time. While the evidence was voluminous, only the evidence relevant to the issues and findings in this matter are described in this Decision. That

Issues to be Decided

1) Is the five month fixed term tenancy term in the residential tenancy agreement unconscionable? And if so, should the term be cancelled from the residential tenancy agreement and the tenancy continue on a month to month basis?

2) Should the tenancy end pursuant to the five month fixed term tenancy?

3) Is the Landlord entitled to receive recovery of the fee paid to file their application?

Background and Evidence

*TENANT'S EVIDENCE*

The Tenant presented her case first. Her evidence was provided through her advocate, D.S., who identified himself as a lawyer, but acknowledged he was not called in British Columbia. The Tenant did not provide affirmed testimony.

The Tenant, through her advocate, submitted the following timeline with respect to her tenancy.

May 29, 2014

The Tenant and M.D., Resident Manager, met to discuss and agreed upon the terms of her tenancy.

June 29, 2014

Two days before the Tenant moved into the rental unit, she again met with M.D. At this time, M.D. provided the Tenant with the tenancy agreement. D.S. alleges that this is the first time that the Tenant was informed of the five month fixed term. D.S. alleges that the Tenant was, at that time, informed by M.D. that she would be subject to a five month "probation" and that if she did not commit any crimes she would be permitted to live there "forever".

D.S. submitted that the Tenant had already incurred approximately $2,000.0 in moving costs at the time of her meeting with M.D. on June 29, 2014. No evidence of these costs was presented in evidence by the Tenant.

D.S. submits that pursuant to Section 3(3) of the Residential Tenancy Act, the Landlord should have provided the Tenant with a copy of the agreement 21 days after the May 29, 2014. Specifically D.S. argued that the Tenant should have been provided a copy of the agreement on June 19, 2014, 10 days prior to when it was provided to her, and had that been done, she would have had time to consider the implications of the five month fixed term and likely declined the rental.

Introduced in evidence by the Tenant was a copy of her residential tenancy agreement, dated May 29, 2014 (the "Agreement"). The Agreement indicates that the tenancy began on July 1, 2014. Clause #5 of the Agreement provides that the tenancy is for a fixed length of time of 5 months, ending on November 30, 2014. The box which provides that the tenancy is to continue on a month-to-month basis or another fixed length of time is not checked and is in fact crossed out; conversely, the box which indicates the tenant must move out after the tenancy ends is marked with an "X" and initialled by both "MO" on behalf of the Landlord and the Tenant.

D.S. further submitted that the Landlord did not provide the Tenant with a copy of the Agreement in accordance with the Act; rather, the Landlord provided it to her the day she arrived, while the movers were moving her items into the rental unit. D.S. stated that the Tenant was told that she would not receive her keys until she signed.

When D.S. was asked if the Tenant was alleging she didn't understand the five month term, or that she signed under some form of duress, D.S. stated that the tenancy term was misrepresented. He stated that she was told it was a probationary period, that if she didn't sell drugs, she could stay forever. Further, he submits that had the Tenant known she had to move out in five months, and not had this term misrepresented to her, that she would not have moved in.

D.S. submitted that this misrepresentation as to the tenancy duration is part of the Landlord's pattern. D.S. stated that by creating this "probationary period", the Landlord avoids the Act, or otherwise bypasses the Act's requirement that a Landlords show sufficient cause to end a tenancy, and thereafter possibly be subject to the scrutiny of an Arbitrator hearing an application by a tenant to set aside such a notice to end tenancy for cause. In sum, D.S. argued that the five month fixed term tenancy is, on its face, unconscionable considering the age of the residents.

In support of this alleged pattern, D.S. submitted that other tenants were informed that the fixed term was merely a: "five month probation" and that they were provided this information as they were moving into the rental unit. In support, the Tenant submitted a Declaration from another occupant of the rental building, J.S. who declares:

> "5. I was not informed when I made my deposit, on November 24, 2014 or any time prior that that date, that this would be a fixed term lease and that I would have to move out at the end of the fixed term of five months. Rather, what I was told was that there was a probation period of five months.
>
> 6. I was never looking for, and never agreed to, a fixed term lease. I was looking to move to [building name] indefinitely.
>
> 7. I only received a copy of the Residential Tenancy Agreement on the date I moved in, which was December 1, 2014.

The Tenant further submitted a Declaration from M.M., another occupant of the rental building, who declares:

> "9. When I made the deposit, on January 17, 2012 and again when I moved in, on February 1, 2012, I was informed by the manager of [rental building], that there was a five month probationary period and that if I do not sell drugs or engage in any criminal activity, I will receive a new lease that will allow me to stay here on a month to month basis thereafter. None of this was put I writing.

> 10. I was never informed that I actually signed a fixed tenancy agreement. All that was mentioned was that there was a probation period. The promise of a month-to-month agreement thereafter was orally and not in writing.
>
> 11. After my probation period expired, on August 30, 2012, I was indeed offered a month-to-month lease. I am still a resident to this day."

D.S. submitted that on October 14, 2014 the Tenant was advised by the Landlord that they would not be extending the tenancy. He submitted that despite requests for reasons, the Landlord failed to advise the Tenant as to why her tenancy would not be extended.

The hearing did not complete within the scheduled time and was necessarily adjourned. As the signatures and initials on the Agreement were not clear, I directed that the Landlord provide in evidence the original Agreement. Further, I directed the Landlord to provide written submissions and evidence with respect to the Landlord's policy reasons for fixing tenancies at five months, should such a policy exist.

On December 18, 2014, the Landlord complied with my request to provide the original Agreement. The Agreement included the following:

- an Addendum for units where the rent is related to the tenant's income. Notably, paragraph 3 provides that, "…only those persons listed as tenants and occupants are allowed to live in the rental unit, unless the landlord consents in writing"; and

- a "Residential Tenancy Agreement Addendum for Crime Free Housing" which provides that, "...A single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material non-compliance with the Residential Tenancy Agreement."

Further, in response to my direction that the Landlord provide the policy reasons for the five month fixed term tenancy, if any, the Landlord submitted an unsigned letter dated December 18, 2014. The Landlord confirmed at the continuation on January 13, 2015 that the letter was from R.N., the CEO, of the housing society. Included in this letter is the following:

> "For new tenancies [Landlord] enters into is a strict 5 month fixed term agreement. It clearly states that the Tenant must vacate the unit at the end of the term. This clause is initialed by both the Landlord and the Tenant. <u>The reason the term is fixed at 5 months and does not go for a longer term is to prevent the subletting of the tenancy.</u>
>
> [emphasis added]

The Landlord also submitted a letter from L.E., the Executive Director, dated December 16, 2014 wherein L.E. writes the following:

> "I am writing to confirm that our non profit housing organization has a policy of offering all of our incoming tenants a five month fixed term tenancy. We have followed this practice for the past fourteen years."

While I clearly directed that neither party submit further evidence, the Landlord also submitted letters from other tenants of the rental building. The Tenant submitted a letter on January 5, 2015 wherein she wrote that she opposed the introduction of those letters, yet confirmed she intended to reserve the right to use the various statements made in those letters for the questioning of L.S. and M.D.

For the purposes of the issues before me, I find that the following passages in those letters to be relevant:

- December 15, 2014 letter from R.P., "…Upon successful completion of the fixed term tenancy agreement, if I chose to stay, I would be offered a month to month tenancy agreement."

- December 11, 2014 letter from G.T., "I was invited for an interview on Jan. 20, 2014 during which I was asked if I would be willing to sign a 5 month fixed term Tenancy Agreement which later could be renewed."

- December 11, 2014 letter from N.E., "On the day we were first invited for an interview, it was explained to us that we would be signing a fixed 5 month tenancy and after its completion we would have the option of signing a month-to-moth tenancy agreement."

[Reproduced as Written]

The Tenant called a witness, J.S., who also resided in the rental building. The relevant portions of his testimony are as follows.

- He is 64 years old.
- He was interviewed for the rental building in November of 2014.
- He believes there is a crisis for affordable housing for seniors and he was "thrilled" with the offer to live in the rental building.
- He moved into the rental building on December 1, 2014. Prior to moving, he lived at another low income residence operated by the same housing society.
- He was provided with a copy of his residential tenancy agreement his present residence on the day he moved in, December 1, 2014.
- On the day that he was moving in, he was told by M.D., about the five month fixed term. He says that she told him that after a five month "probationary period" without criminal activity, that his tenancy would be extended permanently with a lease.

- He stated that he was “a little surprised” when he read Clause #5 as it was contradictory to what M.D. said to him. When he raised this with her, M.D. stated to him that it was merely a “formality”, and that after the five month probation he would be offered a lease.
- He confirmed that he never agreed to move out after the five months but that he trusted M.D. and relied on what she told him.
- Indeed, after the end of five months he was offered a month to month lease.

In cross examination, J.S. confirmed that he had signed a similar five month fixed term at the residence he lived in prior to the rental building as they were both operated by the same housing society. In response, he stated that was homeless at the time he moved into the first residence and that he “would have signed anything to have a roof over [his] head”.

In cross examination, the Landlord suggested that J.S.’s tenancy agreement for his present residence was in fact provided to him on November 21, 2014 and that in fact he signed the move in Condition Inspection Report on the day he moved in. In response, J.S. stated that he was asked to sign the inspection report, and confirm the condition of his rental unit as “fine”, even though the carpets were being removed, the holes in the wall were being fixed. He stated that he felt that everything was being done in a rush.

In redirect, J.S., confirmed the contents of his declaration as true to the best of his knowledge and belief.

*LANDLORD’S EVIDENCE*

On the third day of hearing, the Landlord presented their case. S.T., the property manager, was affirmed and provided the following testimony.

- Clause #5, the five month fixed term tenancy clause in the Agreement, is part of a standard document which was created years ago after a number of hearings and in consultation with the Residential Tenancy Branch.

- Prior to the implementation of this clause, the residential tenancy agreements used language which provided that a tenant *may* move out. The agreements were changed to provide that the tenants must move out.

- A decision was made on October 20, 2011 before the Branch which directed the Landlord to use a mandatory move out clause in the event the Landlord wanted to end a tenancy after a fixed term.

- Many other organizations use a similar fixed term tenancy agreement.

- The Landlord uses this five month fixed term tenancy to “take a chance on people who would otherwise not qualify for housing”.

- The accepted standard procedure used by the housing society is contrary to what was alleged by the Tenant and J.S. The Landlord cannot take a security deposit without a signed residential tenancy agreement and assigned unit.

- The policy reason for the five month fixed term tenancy is to prevent subletting.

When asked if 100% of the people who move into the rental building move out after five months, S.T. said "No". He was not able to provide any estimate of the number of people who stay as opposed to move out.

When asked if there was a policy as to who gets to stay, S.T. said no such policy existed. He confirmed that it is entirely up to the Landlord as to who gets to stay.

In cross examination S.T. was asked to speak to the information provided by letters from other occupants and in particular their apparent misunderstanding of the degree of their input, or choice in staying beyond the five month fixed term. In response S.T. stated that he could not speak to their thoughts, or "get in their heads" but that they were all wrong if they believed they had a choice as the decision was entirely up to the Landlord.

Notably, a review of the October 2011 decision referred to by S.T. confirms that the Arbitrator found, pursuant to section 44(3), that without a requirement in an agreement that a tenant must vacate, the parties are deemed to have renewed the tenancy agreement. The Arbitrator did not deal with the issue before me, that is, whether this clause is unconscionable in the circumstances of the housing provided by the Landlord.

The Landlord did not provide any evidence to support S.T.'s claim that consultation had occurred between the Landlord and the branch with respect to the fixed term tenancy clause.

Further, when I asked S.T. whether his description of "take a chance" was the same as the alleged "probationary period", S.T. did not respond to my question and simply replied that the term was clear and the tenants must move out.

The Landlord called R.P. as a witness and he provided the following relevant testimony:

- Prior to living in the rental building, he lived at another residence for 30 years.

- The property manager went over his tenancy agreement in detail and explained all the clauses carefully to him.

- He provided his security deposit after signing the tenancy agreement.

In cross examination, R.P. confirmed that he knew the rules and did not anticipate any problem being offered an extension of his tenancy after the five months, but that he knew he had to move if the Landlord asked him to do so. He clarified that he believed that if after five months the Landlord was happy with him and he was happy with the rental building that he would have a chance to stay. R.P. denied the Tenant's claim that the Landlord used the word "probationary period" to describe the five month fixed term.

R.P. confirmed that he did not know of anyone who had been asked to move out after their five month fixed term.

The Landlord also called G.M., the resident manager at another rental building operated by the Landlord. D.S. questioned the relevance of G.M.'s testimony and S.T. stated that he was called in response to J.S.'s testimony. G.M. gave evidence as to his discussions with J.S. and the standard procedure for rentals operated by the Landlord.

In cross examination, G.M. was asked directly what the rule was as to who gets offered an extension beyond the five month fixed term. In response, G.M. stated that in the five months the staff would have an opportunity to "figure them out". When asked if the five months was a "probationary period", he agreed that it was. He was then asked what a tenant had to do to be offered an extension and he responded "just figure them out" and he then stated that it was not a "probationary period".

When G.M. was asked what the percentage was of residents who are permitted to stay as opposed to move out after five months, G.M. could not answer. He confirmed he had worked for the Landlord for 13 years, yet could not specify when the last person moved out after their five month fixed term.

On the last day of hearing, the resident manager, M.D. was called as a witness by the Landlord. She provided evidence as to the general process of renting out space at the rental building. She also provided the following relevant testimony:

- She has worked as a resident manager for 13 years, and 7 years for the Landlord.
- She cannot accept a security deposit without a signed tenancy agreement.
- Tenancy agreements are signed at a meeting prior to the move in date.
- The Condition Inspection Report is signed on the day the tenants move in, and they are provided a key, fob and garage opener.
- The subject Tenant, T.M. was desperate to move into the rental building as she had been on the list for a long time.

- She acknowledged that seniors are in need and she felt compassion for the Tenant.

- She discussed the five month fixed term with the Tenant on May 26th, 2014 and discussed this clause with the Tenant on that date. She told the Tenant there are no guarantees and that it was entirely the Landlord's discretion.

- The Tenant signed the Agreement on May 29th, 2014, not the day she moved in as alleged by D.S.

- The only document the Tenant signed on the day she moved in was the Condition Inspection Report.

- That the Tenant, T.M. was informed by letter dated October 14, 2014, that she was not going to be offered an extension.

- That the Tenant, T.M. was the only tenant in the rental building, to her knowledge, who has not been offered a new tenancy agreement.

In cross examination M.D. was asked if there was a policy with respect to who is offered an extension after the five month fixed term and who is not offered such an extension. In response she stated it was the Landlord's discretion and that it is a collective decision. She did not provide any further information.

When asked if she gave any advice to Tenants as to hwo they can improve their chances of staying she responded "in life we have to follow rules". She then stated that she does not provide such advice, but that she tells the tenants they have to follow their tenancy agreements.

She confirmed that the five months fixed term was a trial for both parties, but that she there is no guarantee and denied that it was a mutual choice at the end of the tenancy.

M.D. stated that nobody expects to move out, and was not aware of the consequence to unsuccessful tenants as to whether they go to the bottom of the housing "list" or not.

M.D. did not provide any evidence as to why the Tenant was not offered an extension of her tenancy after the completion of her five month fixed term.

During closing submissions, I also asked S.T. why the Tenant was not offered an extension of her tenancy after the completion of her five month fixed term. In response S.T. stated: "after careful consideration, we decided it was not in our interest to offer a new tenancy agreement [to the Tenant]". He did not provide any specific reasons.

D.S. confirmed that despite the Tenant's request, she too was never provided any reason for why her tenancy was not extended.

Analysis

In consideration of the evidence before me, and on the balance of probabilities, I find that the five month fixed term, represented as Clause #5 in the Agreement, is unconscionable and should be struck from the Agreement. The tenancy shall continue as a month to month tenancy until ended in accordance with the Act.

My reasons are as follows.

Section 3 of the Regulations provides:

**Definition of "unconscionable"**

> **3** For the purposes of section 6 (3) (b) of the Act *[unenforceable term]*, a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

> **Unconscionability**
>
> [28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (***Fountain v. Katona***, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:
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> > (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
> >
> > (b) proof of substantial unfairness of the bargain obtained by the stronger. ***Morrison v. Coast Finance Ltd***. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).
>
> [29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (***Warman v. Adams***, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).
>
> [30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (***Morrison***, at713).

> [31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (***Warman*** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in ***Morrison*** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (***Harry v. Kreutziger*** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

I find that there was an inequality of bargaining power between the parties. M.D. acknowledge that the Tenant was desperate and in need of housing. D.S. submitted that she had been on a waitlist for many years. Further, J.S.'s testimony about the scarcity of low income seniors' housing further supports a finding of inequality in bargaining power between the Landlord and prospective tenants.

I note that the Tenant did not testify and was not subject to cross examination. Despite this, and while it may be that the Tenant was informed of the fixed term tenancy clause prior to moving into the rental unit, I find that the term was not well explained and in fact was misrepresented to the Tenant by M.D..

I accept J.S.'s testimony as to the information he was provided with respect to the five month fixed term tenancy clause and his assertion that he was also told it was a probationary period. I note that the Landlord's witness, G.M. initially agreed that the five months was indeed such a "probationary period". Although he resiled from this terminology shortly thereafter, he did not provide any information which would explain the five month policy, nor did he have any information as to how a prospective tenant could improve their chances of staying on after the five months, or how many tenants were denied this opportunity.

The letters provided by the Landlord from other occupants, support a finding that the Tenants are misinformed as to the operation of this five month fixed term tenancy clause, and the degree to which they have any control over the decision made.

The resident manager, M.D., was unable to explain the five month fixed term tenancy policy, and also could not provide information as to how a prospective tenant could improve their chances of staying on after the five months, or how many tenants were denied this opportunity. As she was the agent for the Landlord who was charged with informing the Tenant of this particular clause, her lack of knowledge of such basic information supports the Tenant's assertion that it was represented as merely a "formality"

I further accept that the consequences of this five month fixed term were not fully explained to the Tenant. The resident manager, M.D., was unaware of the consequences of a denial of a

month to month being offered to tenants at the expiration of the five months and in particular, how such a denial would affect their placement on the “housing list”. As it was her responsibility to explain this term, her lack of understanding leads me to conclude that she could not have possibly explained the term to the Tenant in enough specificity for the Tenant to have fully understood this term.

I accept the submissions of the Tenant that it was “a take it or leave it” proposition and that no other alternatives were available to her, which further supports a finding of imbalanced bargaining. I find that the Tenant was led to believe she need not worry as the fixed term was a mere formality and that she would be permitted a month to month tenancy following the five month term.

The next part of the test is whether the bargain was fair, just and reasonable, or framed differently: was the transaction as a whole, sufficiently divergent from community standards of commercial morality?

The Tenant alleged that the fixed term tenancy was misrepresented. The Landlord’s own evidence, particularly the letters from other occupants, does not rebut the presumption of misrepresentation. Those other occupants, while not using the terminology “probationary period”, misunderstood the five month fixed term and believed they would be offered a month to month tenancy, and/or that they had a choice in whether the tenancy continued after the five months. Their misunderstanding, supports a conclusion that the transaction was unfair, unjust and unreasonable.

M.D. agreed that the tenants of the rental building are looking for long term housing. It is unfair, unjust and unreasonable for such vulnerable tenants to be misled into signing a fixed term tenancy of only five months.

On the balance of probabilities, I find that the five month fixed term tenancy was not fair, just or reasonable and that it constituted a significant divergence from standards of commercial morality due to its misrepresentation.

Section 13(3) of the *Act* in conjunction with section 3 of the *Regulations* set out a statutory definition of unconscionability. Under the *Act* for a term to be unenforceable it need only be shown that: “it is oppressive or grossly unfair to one party.” To the extent that Clause #5 of the Agreement requires the Tenant to move out after five months, without any defensible cause, I find that clause to be unconscionable and therefore unenforceable.

I find that the unspecified policy reasons, are an attempt to bypass the Act’s requirement that a Landlords show sufficient cause to end a tenancy, and thereafter possibly be subject to the scrutiny of an Arbitrator hearing an application by a tenant to set aside such a notice to end tenancy for cause.

The Landlord's application is dismissed. The Tenant, having been substantially successful, shall recover the fee paid to file her application. She may deduct the $50.00 from her next month's rent.

Conclusion

The Tenant's application is granted and the five month fixed term tenancy clause in the Agreement is unenforceable. The tenancy shall continue as a month to month tenancy until ended in accordance with the Act. The Tenant shall recover the $50.00 filing fee.

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: March 12, 2015

Residential Tenancy Branch