



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PW Comox Holdings Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

### **Dispute Codes:**

**MNDC, MNSD, 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 requested compensation in the sum of \$1,000.00 as liquidated damages, to retain the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

The tenants applied requesting return of double the security deposit paid in the sum of \$737.50.

The agent for the landlord provided affirmed testimony that on November 4, 2014 copies of the Application for Dispute Resolution and Notice of Hearing were sent to the each tenant, to the service address provided on the tenant's application. The landlord provided the tracking numbers for each tenant. The male tenant's hearing documents were returned and marked by Canada Post as unclaimed. The female tenant's mail was accepted. After service was completed the landlord and female tenant did discuss the hearing during telephone calls.

These documents are deemed to have been served on the 5<sup>th</sup> day after mailing, in accordance with section 89 and 90 of the *Act*; however neither tenant appeared at the hearing.

### **Tenants' Claim**

The hearing commenced at 1:30 p.m.; the landlord was present at the start time of the hearing. The hearing ended after 24 minutes. Neither tenant entered the hearing. The landlord confirmed receipt of Notice of the tenant's hearing and confirmed that the security deposit has been returned to the tenants.

Residential Tenancy Branch Rules of Procedure provides:

### **10.1 Commencement of the dispute resolution proceeding**

*The dispute resolution proceeding must commence at the scheduled time unless otherwise decided by the arbitrator. The arbitrator may conduct the dispute resolution proceeding in the absence of a party and may make a decision or dismiss the application, with or without leave to re-apply.*

Therefore, in the absence of either tenant at the hearing, in support of their claim, I find that the tenant's application is dismissed.

#### **Issue(s) to be Decided**

Is the landlord entitled to compensation for damage or loss in the sum of \$1,000.00 as liquidated damages?

#### **Background and Evidence**

On June 11, 2014 the parties signed a tenancy agreement. The agreement was to commence on September 15, 2014. Rent was \$1,475.00 per month; a security deposit in the sum of \$737.50 was paid. A copy of the tenancy agreement was supplied as evidence.

At the time the tenancy agreement was signed the 180 unit building was under construction. The tenants did not wish to wait until the show suite was ready to be viewed and signed the agreement, despite not seeing anything more than the plans.

Once the tenants saw the show suite they determined they did not wish to rent the unit. On July 21, 2014 the landlord received a letter from the tenants; a copy was supplied as evidence. The tenants explained that they were ending the tenancy as a result of misrepresentation of the landlord; that the size of the unit was not sufficient.

The landlord did not accept the end of the tenancy until September 1, 2014 when the tenants refused to participate in a move-in condition inspection. Up to this time the landlord made numerous efforts to accommodate the tenants. They were offered a 2 bed-room unit with free rent for the 1<sup>st</sup> two months. The tenants were not interested.

In early September 2014 the tenants were warned the landlord would attempt to locate new occupants for the unit but that any loss could be the responsibility of the tenants. The landlord had been marketing the units and in September perhaps 60% of the units in the building had been rented. A new occupant was located effective the start date of the tenancy; there was no loss of rent revenue.

The landlord has requested compensation as set out in clause 5 of the tenancy agreement. The clause requires payment in the sum of \$1,000.00 as liquidated damages. The clause requires payment should the tenant vacate before the end of the

fixed term, or if the tenant breaches the agreement. The sum is not meant as a penalty but for all costs associated with re-renting the unit.

The landlord submitted a breakdown of the cost; \$100.00 per hour for 10 hours, as the cost of re-renting the unit after the tenants breached the fixed term. Clause nine of the landlord's written submission referred to the fact the tenants had been informed there would be penalties for a breach of the agreement. The landlord said that he did not intend to refer to the clause as a penalty clause.

After the landlord accepted that the tenants were not going to take possession of the unit the landlord spent considerable time actively marketing the unit; over a period of several days, before the new occupant could be identified. The liquidated damages clause was meant to reflect the costs estimated to be required if a breach of the contract occurred.

### Analysis

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.

In relation to the claim for liquidated damages, I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that 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.

Based on the submission of the landlord and, in the absence of either of the tenants who were served with notice of the hearing, I find that clause 5 of the tenancy agreement is enforceable. Even though at what I find to be the high range of pre-estimated costs, the landlord was faced with the cost of re-renting, which had been estimated and agreed to by the parties at the time the tenancy agreement was signed. The marketing for units was on-going and the tenants unit had been considered rented. Once the landlord accepted that the tenancy had ended they were faced with the real costs of marketing that specific unit in the hope of mitigating the loss of rent revenue.

Therefore, in the absence of any evidence that the parties had anything else in their minds at the time the agreement was signed, I find that the liquidated damages clause does not constitute a penalty and that the landlord is entitled to compensation in the sum of \$1,000.00.

As the application has merit I find that the landlord is entitled to recover the \$50.00 filing fee from the tenants.

Based on these determinations I grant the landlord a monetary Order in the sum of \$1,050.00. In the event that the tenants do not comply with this Order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

### Conclusion

The landlord is entitled to compensation in the sum of \$1,000.00.

The landlord is entitled to filing fee costs.

The security deposit has been returned to the tenants.

The tenants' application requesting double the security deposit is dismissed.

This decision is final and binding and 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: April 01, 2015

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Residential Tenancy Branch

