



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding HOMELIFE GLENAYRE REALTY CHILLIWACK LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, FF

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 0942 in order to enable the tenant to connect with this teleconference hearing scheduled for 0930. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The agent confirmed he had authority to act on behalf of the landlord.

The agent testified that the landlord served the tenant with the dispute resolution package (including all evidence before me) on 18 June 2015 by registered mail. The agent testified that the package was sent to the rental unit at which the tenant was still residing. The landlord provided me with a Canada Post customer receipt that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

### Preliminary Issue – Scope of Landlord's Application

At the hearing the agent informed me that the tenant had vacated the rental unit. I asked the agent if the landlord still sought an order of possession. The agent confirmed that the landlord no longer required an order of possession.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution. As there is no prejudice to the tenant in amending the landlord's application I have amended the application as requested.

The landlord sets out that it is seeking recovery of \$700.00 in rent for June, \$700.00 as a rental loss for July and \$20.00 in late fees for each of June and July. The landlord has only indicated the box for a claim of lost rent; however, on the basis of the details of dispute contained on that application, I find that the landlord has sufficiently pleading that it seeks a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67.

#### Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

#### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 January 2015. The tenant and landlord entered into a written tenancy agreement dated 21 December 2014. The tenancy agreement set out that it was for an initial term of one year ending 31 December 2015. Monthly rent of \$700.00 was due on the first. The agent testified that the landlord continues to hold the tenant's security deposit in the amount of \$350.00, which was collected on 17 December 2014.

The agent testified that the addendum to the tenancy agreement contained a clause in relation to late fees. I was not provided with a copy of the addendum to the tenancy agreement.

On 9 June 2015, the landlord served a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice). The 10 Day Notice set out that the tenant had failed to pay \$720.00 in rent that was due 1 June 2015. This arrears amount included one late fee for June. The 10 Day Notice set out an effective date of 22 June 2015.

The landlord provided me with an email from the tenant dated 15 June 2015 confirming that she was vacating the rental unit by the end of June.

The agent testified that the landlord began advertising the rental unit as soon as the tenant confirmed that she would be vacating. The agent testified that the landlord posted the rental unit's availability on its website, a free internet site, and a local newspaper. The agent testified that the landlord has held seven showings. The agent testified that the rental unit is still vacant.

The agent testified that the tenant has not paid any amount to the landlord since the issuance of the 10 Day Notice. The agent testified that, to the best of his knowledge, the tenant was not entitled to deduct any amount from rent.

### Analysis

The landlord claims for June's rent. Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant failed to pay her rent due 1 June 2015. There is no evidence before me that the tenant was entitled to deduct any amount from rent. The landlord has proven its entitlement to June's rent.

The landlord claims a rental loss for July. *Residential Tenancy Policy Guideline*, "3. Claims for Rent and Damages for Loss of Rent" provides guidance in determining damages in an application such as the landlord's:

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. ...[A]s a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. ...

On the evidence before me, I find that the tenant fundamentally breached the tenancy agreement by failing to pay rent due 1 June 2015. I find that the landlord's application dated 16 June 2015 provides the tenant with sufficient notice that the landlord has claimed for this loss.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, regulations or a tenancy agreement, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The agent has testified that the rental unit was not rerented for June. I find that the landlord has established a rental loss for July. This loss was the result of the tenant breaching her fixed-term tenancy agreement. The agent testified as to various efforts that have been made on the landlord's behalf to rerent the rental unit. On the basis of the agent's sworn and uncontested testimony, I find that the landlord has proven it has mitigated its loss. As such, the landlord is entitled to the full amount of its proven loss: \$700.00.

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulations) provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee.

In this case, there is only oral evidence on the existence of the late fee before me. The landlord has failed to provide the addendum, which purportedly contains a clause pertaining to late fees. Oral evidence provided in the place of available documentary evidence is given less weight as it is inherently less reliable. This is especially the case where documentary evidence is available that could easily substantiate the landlord's case: The best evidence available should be provided.

There is no addendum to the tenancy agreement in evidence before me. Accordingly, the landlord has failed, on a balance of probabilities, to prove that the tenancy agreement contains a clause regarding the payment of late fees and the quantum of any such payment.

As the landlord has been successful in its claim it is entitled to recover the filing fee paid from the tenant.

The agent testified that the landlord continued to hold the tenant's \$350.00 security deposit, plus interest, paid on 17 December 2014. Over that period, no interest is payable. Although the landlord's application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlord to retain the security deposit in partial satisfaction of the monetary award.

### Conclusion

I issue a monetary order in the landlord's favour in the amount of \$1,100.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Unpaid June Rent	\$700.00
July Rent Loss	700.00
Offset Security Deposit Amount	-350.00
Recovery of Filing Fee for this Application	50.00
<b>Total Monetary Order</b>	<b>\$1,100.00</b>

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: July 20, 2015

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Residential Tenancy Branch

