



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding HOLLYBURN ESTATES LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MND, MNSD, MNDC, MNR, FF, OPB

### Introduction

This hearing convened as a result of a Landlord's Application wherein the Landlord sought a Monetary Order, authorization to retain the Tenant's deposits, an Order of Possession based on a breach of the tenancy agreement and recovery of the filing fee.

Only the Landlord's representatives appeared at the hearing. C.W., the Landlord's Property Administrator, testified on behalf of the Landlord and stated that the Tenant was served the Notice of Hearing and the Landlord's application materials by registered mail on November 18, 2015. She provided the tracking number in evidence and confirmed that according to the tracking information obtained the Tenant received the mail on November 30, 2015. Based on the testimony of C.W., I find the Tenant was duly served with Notice of the hearing and I proceeded in his absence.

The Tenant failed to attend the hearing and failed to file any evidence in response.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Preliminary Matter

C.W. confirmed that as the Tenant had already vacated the rental unit, the Landlord did not seek an Order of Possession. Accordingly, the request for an Order of Possession is noted as being formally withdrawn.

### Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenant?

2. Should the Landlord be entitled to retain the Tenant's security deposit?
3. Should the Landlord recover the filing fee?

### Background and Evidence

The residential tenancy agreement was provided in evidence and confirmed that this one year fixed term tenancy began May 15, 2015. Monthly rent was payable in the amount of \$1,425.00 on the first of the month. The Tenant paid a security deposit in the amount of \$712.50 on May 13, 2015 and a \$50.00 parking garage gate key deposit.

Introduced in evidence was a copy of the "Occupant Ledger" indicating that as of November 1, 2015 the sum of \$548.25 was owed by the Tenant. C.W. testified that to the best of her knowledge this sum was correct.

C.W. also stated that The Tenant gave notice to end the tenancy on October 5, 2015; the Tenant vacated the rental unit as of November 1, 2015; and, the rental unit was re-rented as of November 15, 2015.

Introduced in evidence was a copy of the move out condition inspection report which was completed on November 1, 2015. C.W. confirmed that the Tenant was present during the inspection but refused to sign the document.

In the within hearing C.W. confirmed that the Landlord sought the following:

Rent for November 1, 2015 to November 14, 2015 (base on a prorated amount of \$47.50 per day)	\$665.00
Liquidated damages as per paragraph 2.10(b) of the tenancy agreement	\$300.00
Carpet cleaning (note this amount is less than the \$106.50 claimed on the application)	\$70.00
Drape cleaning (note this is less than the \$165.75)	\$113.40
Fridge cleaning	\$45.00.
General cleaning	\$28.50
Filing fee	\$50.00
<b>TOTAL CLAIMED</b>	<b>\$1,271.90</b>

The Landlord introduced in evidence copies of receipts for the amounts claimed above.

The Landlord also requested authorization to retain the \$712.50 security deposit and the \$50.00 parking gate card deposit against the amount claimed.

### Analysis

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

The condition in which a Tenant should leave the rental unit at the end of the tenancy is defined in Part 2 of the *Act* as follows:

#### **Leaving the rental unit at the end of a tenancy**

*37 (2) When a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.*

Normal wear and tear does not constitute damage. Normal wear and tear refers to the natural deterioration of an item due to reasonable use and the aging process. A tenant is responsible for damage they may cause by their actions or neglect including actions of their guests or pets.

I accept the undisputed testimony of C.W. that the Tenant did not pay rent for the 14 days of November when the Tenant was in occupation of the rental unit. The Tenant gave notice to end the tenancy on October 5, 2015. Pursuant to section 45, the effective date of the Tenant's notice to end the tenancy is November 30, 2015. As this is a fixed term tenancy, the Tenant could have been liable for the balance of the term. Fortunately, the Landlord was able to re-rent the unit as of November 15, 2015. In all the circumstances, I award the Landlord compensation for the 14 days of November rent as claimed.

The Landlord also sought the sum of \$300.00 in liquidated damages as the Tenant gave notice to end the tenancy before the expiration of the fixed term.

*Residential Tenancy Policy Guideline 4—Liquidated Damages* provides in part as follows:

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.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

In the case before me, there was no dispute that the Tenant signed the residential tenancy agreement providing for a payment of \$300.00 as “liquidated damages” in the event of a breach of the fixed term tenancy. There was also no dispute that the Tenant breached the fixed term tenancy.

In a recent decision of the B.C. Supreme Court, *Super Save Disposal Inc. v. Daily Sun Investment Co. Ltd.* [2011] BCSC 1784, the Court held as follows:

[31] Judicial interference with a liquidated damages provision will be justified if enforcement of the term results in payment of a sum which is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: 32262 *B.C. v. See-Rite Optical, supra*, at para. 13.

[32] Conversely, a liquidated damages provision is more likely to be enforced where the claim approximates the amount to which the claimant would otherwise have been entitled according to principles of general contract law: 32262 *B.C. v. See-Rite Optical, supra*, at para. 16 to 18.

[33] The onus of establishing that a stipulated sum is a penalty rather than a genuine pre-estimate of damages that the parties have agreed in advance will be sustained in the event of a breach of the contract, rests on the party against whom the stipulated sum is claimed.

In this case, I find the liquidated damages clause to be enforceable. \$300.00 is not extravagant in comparison to the greatest loss that could follow a breach. In this case, the tenancy was scheduled to end on May 31, 2016; as the Tenant vacated the rental unit six months prior, I find the \$300.00 sum to be a reasonable estimate of the amount the Landlord would lose in the event of the breach and accordingly I award the Landlord compensation in this amount.

I accept C.W.'s testimony that the rental unit required cleaning after the tenancy ended. I am also persuaded by the notations on the move out condition inspection report which indicate the required cleaning. The amounts claimed by the Landlord at the hearing were less than the amounts noted on the Application for Dispute Resolution, for which the Tenant had notice. The Landlord also provided receipts in evidence to confirm the amounts claimed.

In consideration of the foregoing, I find the Tenant failed to honour his obligations to clean the rental unit pursuant to section 32 of the *Residential Tenancy Act*, and I award the Landlord the amounts claimed for cleaning.

In sum, I award the Landlord monetary compensation in the amount of \$1,271.90 for the following:

Rent for November 1, 2015 to November 14, 2015 (base on a prorated amount of \$47.50 per day)	\$665.00
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Liquidated damages as per paragraph 2.10(b) of the tenancy agreement	\$300.00
Carpet cleaning (note this amount is less than the \$106.50 claimed on the application)	\$70.00
Drape cleaning (note this is less than the \$165.75)	\$113.40
Fridge cleaning	\$45.00.
General cleaning	\$28.50
Filing fee	\$50.00
<b>TOTAL CLAIMED</b>	<b>\$1,271.90</b>

I authorize the Landlord to retain the security deposit in the amount of \$712.50 and the parking gate key deposit of \$50.00 towards the amounts claimed, and I award the Landlord a Monetary Order for the balance due in the amount of **\$509.40**. This Order must be served on the Tenant and may be filed and served in the B.C. Provincial Court (Small Claims Division) as an Order of that court.

### Conclusion

The Landlord is awarded the sum of \$1,271.90 for unpaid rent for November 1, 2015 to November 14, 2015, liquidated damages in the amount of \$300.00 and the cost of cleaning the rental unit in addition to recovery of the filing fee. The Landlord may retain the Tenant's deposits towards this amount and is granted a Monetary Order for the balance due in the amount of **\$509.40**.

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: June 13, 2016

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Residential Tenancy Branch