



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Century 21 Performance Realty & Management  
and [tenant name suppressed to protect privacy]

## **DECISION**

### Dispute Codes

Tenants' application: DRI, O, OLC, RP

Landlord's application: OPC, OPB, FF

### Introduction

This was a hearing with respect to applications by the tenants and by the landlord. The hearing was originally scheduled to be heard by conference call on September 9, 2016. At the hearing on September 9, 2016, the arbitrator adjourned the hearing because the tenant, C.H, who is profoundly deaf, was unable to communicate by telephone. The landlord's cross application was also not available during the hearing. The arbitrator directed that the hearing proceed as an in-person hearing at the office of the Residential Tenancy Branch in Burnaby on September 16, 2016 at 11:00 A.M., but he said that the landlord could choose to attend the hearing by conference call.

I was appointed to conduct the hearing on September 16, 2016. I determined that because of the tenant's hearing impairment and in order to assure that the tenant had a full opportunity to understand and respond to the landlord's claims, the landlord's representative should be required to attend the in-person hearing rather than participating by conference call. The Residential Tenancy Branch was instructed to inform the landlord that the landlord's representative would be required to attend the hearing in person at the offices of the Residential Tenancy Branch in Burnaby for the hearing on September 16, 2016.

The tenants attended the hearing at the appointed time. The landlord's representative did not attend the hearing, although the hearing was delayed for 15 minutes before it proceeded in the absence of the landlord. I heard the evidence of the tenants and reviewed documentary evidence filed in both applications.

In the landlord's application filed on August 5, 2016 it requested an order of possession based on a breach of the tenancy agreement and for an order of possession pursuant to a Notice to End Tenancy for cause. The tenants' application to dispute the rent increase was filed on July 6, 2016 and amended to remove a party incorrectly named as landlord. The tenants did not amend their application to dispute the Notice to End Tenancy. In the tenants' application they requested more time to find other accommodation.

In the absence of an appearance by the landlord's representative the landlords' application for an order of possession is dismissed with leave to reapply.

#### Issue(s) to be Decided

Have the tenants established that the landlord has imposed an illegal rent increase?  
Should the landlord be ordered to comply with the *Residential Tenancy Act*, Regulation or tenancy agreement?  
Should the landlord be ordered to make repairs?

#### Background and Evidence

The rental unit is a strata title townhouse in Squamish. The tenancy began on August 31, 2010 for a fixed term ending August 31, 2011. The monthly rent was \$1,475.00. The tenants paid a security deposit of \$737.50 at the start of the tenancy. The tenancy agreement stated that at the end of the term the tenants must move out of the rental unit. The tenancy has been continued for a succession of renewal terms created by a series of tenancy agreement addendum forms extending the term of the tenancy by an additional year in each case. In August, 2014 the addendum prepared by the landlord extended the date that the tenant was required to vacate the rental unit to August 31, 2015. The addendum also provided that the monthly rent would increase by \$50.00 per month to \$1,525.00 effective September 1, 2014.

In August 2015 the landlord prepared another addendum extending the move-out date to August 31, 2016 and increasing the monthly rent to \$1,650.00 effective September 1, 2016.

The tenants testified that they objected to the increase they received in 2015. The tenants were told in July, 2016 that the landlord would not offer an extension of the tenancy agreement and told them to move out by August 31, 2016. The tenant said they have been told that the landlord wants to evict them so she can raise the rent to \$2,500.00 per month.

The tenant said at the hearing that they are looking for other accommodation, but they have not found a place to move. The tenants said that they are disputing the rent increase charged by the landlord commencing September 1, 2016 whereby their rent was raised by \$125.00 per month, from \$1,525.00 per month to \$1,650.00 per month when the maximum increase permitted by the *Residential Tenancy Act* and regulation in 2015 was 2.5%. The tenants requested a refund of the increased rent paid since September, 2015.

The tenants testified that although they have struggled to get the landlord to perform repairs, at present there are no urgent repairs that are required and they withdrew their request for a repair order.

### Analysis

The tenants have applied for relief to dispute a rent increase on the ground that the increase does not comply with the rent increase provisions of the *Residential Tenancy Act* and Regulation. Section 43 of the *Residential Tenancy Act* provides that a landlord may impose a rent increase only up to the amount calculated in accordance with the regulations, as ordered by the director upon an application by the landlord, or agreed to by the tenant in writing.

The *Residential Tenancy Act* provides by section 5 that:

### **This Act cannot be avoided**

- 5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

- (3) A term of a tenancy agreement is not enforceable if
- (a) the term is inconsistent with this Act or the regulations,
  - (b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 3 of the Residential Tenancy Regulation gives the following 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.

The landlord has required the tenants to enter into a succession of fixed term tenancies if the tenants wished to continue to reside in the rental unit. The fixed term provision was for the benefit of the landlord; the tenancy agreement provided that the tenants would be liable to pay liquidated damages to the landlord in the event that they sought to end the tenancy before the end of the fixed term, even after occupying the rental unit for several years. The landlord also relied upon the fixed term as the basis for increasing the rent above the amount permitted by the *Residential Tenancy Act* and Regulation. The latest addendum to the tenancy agreement operated to raise the monthly rent by an amount of \$125.00. The increase permitted under the *Act* and Regulation would have been in an amount of slightly more than \$38.00. The question therefore is whether the use of the fixed term provision in the tenancy agreement coupled with the increase made by the addendum amounts to an attempt to contract out of the legislation or whether it is oppressive or grossly unfair to the tenants.

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:

(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**, at 713).

[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.)

The *Residential Tenancy Act* provides that parties may not avoid or contract out of the provisions of the *Act* or Regulation. It is my view that the landlord's use of the fixed term provision of the tenancy agreement as it has done here for successive terms over more than five years and the use of the provision to avoid or defeat the mandatory rent increase provisions of the legislation does amount to an attempt to contract out of the legislation. I make this finding, not based on the singular employment of a fixed term tenancy agreement, but based on its repetitious use over a period of years and upon its use to increase the rent beyond the amount permitted by Regulation. The *Residential Tenancy Act* does not prohibit a fixed term tenancy agreement, but to condone the use of serial fixed term tenancies would amount to the nullification of important provisions of the legislation intended to protect tenants. I further find that the use of a fixed term tenancy in this manner is unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenants and this commercial landlord in circumstances where the tenants had no alternative but to accept the proffered agreement or find a new home on short notice in difficult circumstances.

In the particular circumstances of a fixed term tenancy continued for five years, I find that the use of the fixed term provisions to impose a rent increase more than three times

the amount permitted by legislation is unconscionable; it does amount to an attempt to contract out of the Act and Regulation and it is therefore of no force or effect. I find that the tenants are entitled to a monetary award for the amount of the illegal rent increase paid over the last term of the tenancy in the amount of \$1,500.00, being 12 payments of \$125.00. The tenants are entitled to recover the \$100.00 filing fee for their application, for a total award of \$1,600.00 and I grant the tenants an order under section 67 in the said amount. This order may be filed in the Supreme Court and enforced as an order of that court.

### Conclusion

The tenants have been granted a monetary award in the amount stated. The landlord's application for an order of possession has been dismissed with 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: September 20, 2016

---

Residential Tenancy Branch