Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

The Application for Dispute Resolution filed by the Tenants on September 9, 2016 seeks the following:

a. A monetary order in the sum of $10,936 including aggravated damages in the sum of $3900.
b. An order to recover the cost of the filing fee.

On October 13, 2016 the Tenants filed an amendment to their claim increasing the claim to $15,936.72 which included:

a. An additional claim of $2000 for “Breach of Agreement”
b. An additional claim of $3000 for “Aggravated Damages.”

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Preliminary Matters:

Both parties filed a large number of documents much of which is was not relevant or was marginally relevant. The tenant testified for 75 minutes on the date of the first scheduled hearing. It became apparent that it was necessary to require the parties to focus on the relevant evidence and to present it in a manner that does not unnecessarily delay the hearing.

Section 74 of the Residential Tenancy Act provides as follows:

How the hearing may be conducted

74 (1) Subject to the rules of procedure established under section 9 (3) *[director's powers and duties]*, the director may conduct a hearing under this Division in the manner he or she considers appropriate.

(2) The director may hold a hearing

(a) in person,

(b) in writing,

(c) by telephone, video conference or other electronic means, or

(d) by any combination of the methods under paragraphs (a) to (c).

(3) The director may administer oaths for the purposes of this Act.

(4) A party to a dispute resolution proceeding may be represented by an agent or a lawyer.

Section 1 of the Rules of Procedure provides as follows:

Rule 1 – Objective

1.1 Objective

The objective of the Rules of Procedure is to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

The Residential Tenancy Branch sets hearings down for 1 ½ hours. At the end of the first day of hearing I consulted with the parties and made the following interim order dated November 1, 2016"

"The tenant presented oral testimony for approximately 75 minutes. At that stage it was apparent that she was not going to complete the presentation of all the evidence that she wished to present.

I advised the parties that I would be adjourning the matter to the next available date.

After consultation with the parties I further ordered as follows:

- The tenants are to be given 15 minutes to complete the presentation of her evidence relating to issue 2 in the original Application for Dispute Resolution.
- The tenants are to be given a further 15 minutes to present evidence relating to the issues raised in the Amendment filed by the tenants.
- The landlord will be given one hour to respond to the tenant's claims.
- The tenants will be given 15 minutes to respond.
- The parties are given liberty to present a short summary of the arguments they wish to make with reference to the evidence."

The matter was reconvened on December 21, 2016. On that date the Tenant requested an adjournment because of ill health caused by the stress of the hearings. The landlord opposed the adjournment. In the circumstances I determined the landlord would not be significantly prejudiced by the adjournment and I granted the Tenant's request because of her health concerns. The Registry set the matter down for hearing on January 25, 2017.

At the hearing set for January 25, 2017 the Tenant failed to provide a short summary of the arguments … with reference to the evidence."

I find that the Application for Dispute Resolution/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord resides on September 9, 2016. I find that the Amended Application for Dispute Resolution was served on the landlord by mailing, by registered mail to where the landlord resides on October 13, 2017. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to a monetary order for the reduced value of the tenancy and if so how much?
b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

On December 20, 2015 the parties entered into a one year fixed term tenancy agreement that provided that the tenancy would start on February 1, 2016, end on January 31, 2017 and become month to month after that. The rent was $1300 per

month payable in advance on the first day of each month. The tenancy agreement provided that the tenants paid a security deposit of $650 on December 20, 2015.

The rental unit is part of a strata property. The landlord does not own the rental unit immediately above the Tenants.

Tenant's Claim for Compensation for the landlord's demand that the Tenants sign the Form K

The tenant provided 25 page summary including e-mails relating to this issue. She gave the following evidence relating to the landlord's efforts to get them to sign the Form K:

- The landlord failed to get the Tenants to sign the Form K at the time they signed the tenancy agreement. There was no mention of the Form K at that time.
- There is nothing in the tenancy agreement that requires them to sign the Form K and they do not have a legal obligation to do so.
- After the tenancy agreement was signed the landlord requested the tenant's pay a $200 move-in fee. The tenants agreed provided they pay it directly to the Strata.
- On January 4, 2016 the tenants hired movers to move them in on February 1, 2016.
- On January 7, 2016 the tenants e-mailed the landlord advising they were planning to move in on February 1, 2016. The strata failed to respond. They sent a second e-mail to the strata on January 12, 2016.
- On January 13, 2016 the strata manager responded by e-mail advising the Tenants that move in arrangements would have to be made by the landlord.
- On January 13, 2016 the tenants e-mailed the landlord requesting that she make the arrangements. The landlord responded that she would be out of town and could not do this until the following week.
- On January 17, 2016 the landlord contacted the strata manager to make an arrangement to move in.
- On January 18, 2016 the movers cancelled the tenants' reservation for February 1, 2016.
- On January 18, 2016 the landlord received an e-mail from the strata manager setting out the procedure for moving in and advising the landlord that they required the tenants to sign and return the Form K prior to moving in.
- On January 18 2016 the landlord requested the tenants sign the Form K "in order to proceed with the setting up of the move."

- On January 18, 2016 the tenants advised the landlord they were refusing to sign the Form “K” and that the landlord should advise the strata manager that the signing of the Form K is not a prerequisite for moving in.
- On January 19, 2016 the landlord advised the tenants that the strata manager was refusing to allow them to move in unless the Form K was signed. The e-mail also states the tenants can decide if they wish to move in.
- On January 20, 2016 the landlord e-mailed the Tenants acknowledging it was her responsibility to disclose the bylaw and it was the Tenants responsibility to confirm the tenants received a copy of the bylaws – “Otherwise I don’t dare to hand keys to you.
- On January 20, 2016 the tenants responded with an e-mal demanding the landlords provide them with the keys.
- On January 20, 2016 the landlord advised the tenants that she sent an unsigned copy of the Form K to the strata manager and that they would discuss it with the strata council.
- On January 20, 2016 the landlord e-mailed the tenants asking them to confirm they had received the bylaws, rules and Form K that she mailed to them yesterday.
- On January 20, 2016 the tenants asked the landlord to change the locks.
- On January 21, 2016 the landlord e-mailed the tenant stating the following:
    - She had contacted the RTB who advised that the tenants are obliged to obey the strata act whether it was written into the lease or not.
    - Previously the Form K could by turned in after the tenants moved in. Recently, with the change in the management company the form was required to be collected before the tenants move in.
    - “Though you don’t want to sign the form, I still need to deliver it together with the strata bylaws and rules when we do inspection and it will be part of the inspection report.
    - Since you requested change of lock I need time to finish it. The earliest time I could do an inspection is 4 p.m. on January 31, 2016.
    - “If you want to cancel the lease agreement anytime before Feb. 1, 2016 I would agree on it with the security deposit fully returned to you. If you choose to move in, you can still follow strata law regarding early moving out.”
- On January 25, 2016 the tenants informed the landlord they had rescheduled their move in. Most likely it would be Feb. 3 or 4th.
- The tenants made arrangement with their previous landlord to stay an extra few days.

- On January 30, 2016 the landlord e-mailed the Tenants advising that the strata manager was processing their request for an elevator key and they were still awaiting confirmation
- The landlord later advised the tenants could still move in on the date requested and that the elevator key is just to help you move stuff more effectively but it was not necessary.
- On February 3, 2016 the landlord responded to the Tenant's emails saying she had not heard from the strata manager but that she should check under the door.
- The keys were under the door and the Tenants were able to move in on February 3, 2016.
- The tenants paid their previous landlord $151.26 for the cost of over-holding allowing that sum to be deducted from their security deposit.

The landlord gave the following evidence with respect to this issue:

- At the time the tenancy agreement was signed the Tenants were verbally instructed that the condo bylaws had to be complied with.
- She thought it was obvious to them
- The Tenants agreed to pay the $200 move-in fee after the tenancy agreement was signed.
- On January 5, 2016 the tenants requested the strata manager's contact so that they could make move in arrangements.
- Her former tenants made arrangements with the strata company directly and she though this was the way the process worked.
- On January 13, 2016 she was advised by the Tenants that the strata manager requested the landlord contact her directly.
- I was scheduled to be out of town and I advised the tenants I would make arrangements on Monday. The tenants' responded saying "sounds good."
- From January 5 to 17 the tenants did not contact me to advise they were worried about the delay in moving. During that time the tenants failed to advise me they had difficulties arranging the moving with the strata manager.
- On January 18, 2016 I provided them with a Form K. They refused to sign it on the same day.
- The materials provided by the landlord indicate she felt stress.
- The landlord offered to the tenant they could move out in 3 months with up to 1 month rental compensation.
- The tenants moved in without signed the Form K. The tenants were living in several different strata's so they should know their responsibilities.
- Moving companies generally allow tenants to cancel up to a couple of days before the scheduled move in date without charge.

- The tenants got the elevator key on time and move in their furniture on February 3, 2016.
- The Form K provides notice to the Tenants:
    - They must comply with the bylaws and rules of the strata corporation that are in force from time to time.
    - The current bylaw and rules may by changed by the Strata Corporation, and if they are changed, the tenant must comply with the changed bylaw and rules
    - If a tenant or occupant or a person visiting the tenant or admitted by the tenant contravenes a bylaw or rule, the tenant is responsible and may be subject to penalties, including fines, denial of access to recreational facilities and if so the strata corporation incurs costs for remedying the contravention of those costs.

<u>Tenant's Claim for Compensation for the devaluation of the tenancy from ongoing excessive noise from the upstairs tenant:</u>

The parties submitted lengthy summaries of history of communications between the tenants and the landlord, the tenants and the strata manager, the tenants and M, the manager of the upstairs unit that is too lengthy to record in detail. The tenants' evidence included over 150 pages of summary in small font. The landlord produced a similar length. It is not reasonably possible to set out the complete interaction between the parties. In essence of the tenants evidence is set out as follows

- They realize that the offending upper rental unit is out of our landlord's control (given that it is not owned or managed by our landlord). However they have suffered a devaluation of the rental unit based on the following:
    a. The serious level of noise disruption
    b. The aggressive nature of the ongoing noise disruption/harassment which targets our sleep ours
    c. The longevity of the excessive noise disruptions
    d. The all pervasive serious nature of the interference that affects every area of our rental unit and deprives us of the right to peaceful enjoyment which is still ongoing and unresolved since with moved in.
- The tenant provided 69 pages of contemporaneous notes and transcription of disturbances which occurred almost daily. The logs show the tenants cannot count on the following:
    a. Being able to sleep undisturbed at nights
    b. Sit and have a discussion
    c. Talk on the phone

d. Read a book
e. Enjoy our patio
f. Have a relaxing bath
g. Take a nap
h. Eat dinner
i. Watch a movie
j. List to music
k. Use any appliances including circulatory aid device for mobility issues)
l. Making any chopping sound when preparing food

- The tenants testified the conduct of the upstairs tenant is deliberate and targeted sudden, loud, nerve jarring, stomping, jumping, banging screaming.
- The tenants sought compensation in the sum of $520 being 10% rent abatement for the 4 months from February 2016 to May 2016
- In addition the tenants sought compensation of $13565 being 35% of the tenancy for June 1, 2016 to August 31, 2016.

The tenants claimed $3000 for breach of the tenancy agreement alleging the landlord failed to manage their concerns and failed to act fully and in a timely manner on behalf of the tenants including the following:

- The landlord failed to make pivotal decisions of availing herself of option under the strata bylaws that may have expedited a resolution of this situation.
- The landlord neglect or failed to make any personal efforts to conduct on site investigation which may have acted to increase her conviction when representing the tenants.
- The landlord failed to take appropriate steps to represent the tenancy during this period.
- The landlord failed to take into account probable conflict of interest that exists between the Property Manager of the rental unit above and the Strata Manager.
- The landlord deliberately edited out noise complaint and minimized the seriousness and longevity of the noise disruptions.
- The landlord failed to disclose crucial elements
- The landlord failed to disclose to the strata council crucial information and failed to honour her initial appraisal that our noise recordings were clear evidence of of noise over a normal time limit.
- The landlord failed to make a full inquiry.

The tenant seeks aggravated damages on the basis that

- Our landlord either neglected or adamantly refused to consider taking steps under the bylaws.

- The landlord initially requested clear evidence but later backtracked on this request
- The landlord is in a power position that the her backtracking was an abuse of that power position.
- We are seniors with mobility issues that were caused by significant physical and emotional stress as the tenants attempted to collect, catalogue and transcribe the recorded “proof”.

The tenant gave the following oral evidence at the hearing:

- During the period February 1, 2016 to November 1, 2016 they were subject to excessive and aggressive noise from the upstairs tenants. The disturbances occurred on a daily basis (20 to 30 times). Sometimes they lasted up to one hour in length.
- The landlord acted in an adversarial way towards them.
- The logs show 85 fist pounds against the wall.
- The strata council gave us a warning in a letter dated September 26, 2016 which we strongly disagree with. The strata council stated they would review their decision in a letter dated November 22, 2016.
- There is a conflict of interest between the manager of the upstairs rental unit and the strata corporation.
- The landlord wrote a letter dated May 27, 2016 where she stated she does not trust the evidence of the upstairs tenants.
- The landlord edited there noise complaint in early June and did not submit the full complaint.

The tenant gave the following testimony in the hearing on January 25, 2017:

- She has suffered a significant loss of enjoyment because of the noise from the upstairs tenants.
- The landlord has acted negligently and delayed in presenting their complaints to strata council.
- The tenant referred to a number of e-mails and other documents confirming her complaints.
- They have kept more than 500 files relating to the noise complaints. Of those 128 have occurred after 9:30 p.m. at night.
- The tenants spent many minutes identifying specific dates and the noise complaints. She testified it appears the adults in the upstairs unit work different shifts. One comes home late at night and that is disturbing. It also involved their child being up late at night.
- The landlord’s Notice to End Tenancy was cancelled.

- The upstairs tenant dumped urine from their balcony.

The landlord disputes much of the Tenants' evidence. She provided the following evidence:

- On February 15, 2016 I received the tenant's first complaint about noise from the upstairs tenant and I forward it to the strata manager right away. The strata manager responded requesting more details to be written down for further potential review by strata like, time, length, volume, frequency and types. I forwarded this to the tenants right away.
- On February 17, 2016. I phoned M, the rental manager for the upstairs tenant and left a voice message as he was not in. He responded the next day and agreed to talk to his tenants.
- I did not receive any complaints from the tenants for approximately one month.
- On March 16, 2016 the tenants e-mailed from M, the rental manager for the upstairs tenant directly to complain of noises like pounding, stomping, kid's running or jumping. He advised me that he talked to his tenants and they told him they had been trying to put more mats to isolate the noises and tried their best to limit kid making noises.
- I did not receive any further noise complaints until May 18. I considered the issue had been resolved.
- On April 13, 2016 I received an email from the Tenants confirming they would like to stay after the 3 month period as they were allowed to move out. No issue was made about the noise issue.
- On May 18 the Tenants sent an email "final warning" of noises and accusing "child abuse and neglect"
- On May 19 M responded after talking to the upstairs unit explaining that they could not hear anything from downstairs and rejected the tenant's complaints. They complained to M that the tenants would pound on the wall of the balcony when the kid in the upstairs unit was talking on his balcony.
- On May 20 M confirmed the upstairs Tenants had put rugs on the dining area.
- The tenants forwarded 2 videos (audio 1 and audio 2). One of the video was trying to sow the stomping/running/jumping from the upstairs unit, the second was trying to show a kid running and yelling at the balcony. The recoding were inconclusive in that quite a few noises were coming from the recording action itself were louder the noises they were trying to show. The kid yelling on the balcony seemed normal as the kids were just playing overhead.
- On May 23 the tenants sent me an e-mail for compensation. I told them I was not prepared to pay a claim for compensation as the noises were not higher than

normal living. The tenants email requested I submit this to strata so they could proceed with a claim to the Residential Tenancy Branch.

- On May 24 the Tenants started to send noise logs to me and M every day. I received several emails each day.
- On May 25 the Tenants requested confirmation that I sent the complaints to the Strata. I rejected this request as in my view the audios did not show enough proof.
- On May 26 the tenants advised they could not send the videos out due to the size and requested both M and I go over to their home and listen on their equipment. M was not able to attend on the scheduled date. He offered to attend but the tenants refused.
- On May 27 I went to the tenants' home and heard 5 videos. Most were the same as the previous ones and amounted to normal user. The last one showed excessive noise.
- We were unable to resolve the issue and I decided to send the tenant's letter to the strata.
- After several days of preparation the tenants sent me a complaint letter targeting the tenants and marked based on their own thoughts instead of enough supporting proof. I asked they provide the noise logs and also provide more proof to show noises after 10 p.m.
- On June 5-6 I prepared the complaint letter with proof received from the tenants and sent it to the strata manager. The strata manager confirmed the receipt and stated she would forward it to the strata council for the next strata meeting.
- The tenants objected to the form of complaint letter stating it "does not address the longevity or seriousness of our noise complaint" and they started to send logs to both me and the strata manager every day.
- On June 14, 2016 the strata manger asked the tenants to send the logs to me so that it can be forwarded to the strata manager.
- I sent a copy of the latest strata meeting minutes to the tenants to sow the date of the next meeting. The tenants used the confidential information of strata council's names and address for their own distribution of complaints.
- On July 10, I responded the Tenant's request regarding meeting schedule.
- On July 11, I applied to attend the council meeting and got approval.
- On July 11, I spent 8 hours to organize all logs received from the tenants on daily basis and sent them to the strata manager.
- On July 14, I updated the tenants that I attended the meeting and the strata council received the full package including the complaint letter, list of all logs and 1 CD. The tenants told me they themselves delivered some documents without informing or providing a copy.

- The parties waited for the decision of the strata. On July 27 the tenants started to bang on the ceiling and the upstairs tenants called the police.
- M complained to me about the conduct of my tenants including taking pictures of their child, pounding on the ceiling when an adult walks.
- The tenants continued to send in logs of noise complaints. The strata corporation demanded they be sent once a week rather than on a daily basis and that it be sent through the landlord. The tenants refused and insisted on sending it themselves.
- On August 29 a third batch of logs was sent to the strata manager. The tenants sent their own complaint letter.
- The ongoing disputes between the tenants and the upstairs continued.
- On September 26, 2016 the landlord was advised that the strata council had completed their review of the multiple noise complaints made the tenants and the upstairs tenants. The letter states the council have deemed that a majority of the sound emanating from unit (upstairs unit) are occurring during the daytime hours and are within normal levels that would be expected to be heard in a wooden frame building. The letter also warns the landlord of complaints they have received about the tenants and a warning letter was given with respect to the following conduct:
    - The sending of correspondence from the tenant to council members
    - Inappropriate pictures taken of a minor child while he was playing on common property.
    - Responsive banging on the ceiling.
    - Harassment of the tenant in the upstairs unit by the tenants.
    - Harassment of council members by the tenants.

- The landlord produced a copy of a letter from the manager broker of the strata manager addressed to the Tenants but copied to the landlord dated November 10, 2017 that responding to the tenants concerns including the following:
    - The strata council reviewed your miscellaneous correspondence sent over the last several months regarding noise from the upstairs tenants
    - They also reviewed the information from the tenant and property manager of the upstairs tenant.
    - A Notification of Bylaw Infraction was sent to the owner of the upstairs unit on July 14, 2016. They were informed the tenants made some changes to their unit to try to lessen the noise.
    - “The sounds/noises that you are describing could be considered regular everyday living noises where there is a child living in the unit of a wood frame building. In reviewing the correspondence, the main concerns

seem to be that of walking, thumping, occasional dropping of items, dragging toys/furniture etc…The Strata Council member are not equipped to judge what amount of noise is considered reasonable and what amount of noise is considered unreasonable. We all experience life subjectively and what bothers one person may be entirely acceptable to another. For that reason, the Council will not be entering your unit to witness the noise level. You may want to hire an acoustic engineer to measure the level of the noise and compare it to normal levels.

- The Strata Council would like nothing more than to solve this dispute amiably. The Council offered to meet with you for a hearing but it was cancelled by you pending the Council reviewing all corresponding and pending attendance by your lawyer.

Analysis:

Policy Guideline #16 includes the following

"C. COMPENSATION

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The tenants claim the sum of $151.72 for reimbursement of over-holding costs, $2000 for breach of contract and $900 for aggravated damages after the landlord failed to obtain the Tenant's signature on the Form K at the time of signing the tenancy agreement. Section 146(1) of the Strata Property Act provides as follows:

146 (1) Before a landlord rents all or part of a residential strata lot, the landlord must give the prospective tenant

(a) the current bylaws and rules, and

(b) a Notice of Tenant's Responsibilities in the prescribed form.

(2) Within 2 weeks of renting all or part of a residential strata lot, the landlord must give the strata corporation a copy of the notice signed by the tenant.

(3) If a landlord fails to comply with subsection (1) or (2), the tenant

(a) is still bound by the bylaws and rules, but

(b) may, within 90 days of learning of the landlord's failure to comply, end the tenancy agreement without penalty by giving notice to the landlord.

(4) If a tenant ends a tenancy agreement under subsection (3), the landlord must pay the tenant's reasonable moving expenses to a maximum of one month's rent.

I accept the submission of the Tenants that the landlord was obligated under the Strata Property Act to provide them with a copy of the bylaws and a Notice of the Tenants' Responsibilities (this will be referred to as the Form K). However, I do not accept the submission of the tenants they are entitled to the compensation claimed for the following reasons:

- The Strata Property Act gives the tenant a remedy where the landlord failed to comply. That remedy includes the right to move out within 90 days and the obligation on the landlord to pay the tenant's reasonable moving expenses to a maximum of one month's rent. The tenants chose not want to take that remedy..
- A claim for compensation under the Residential Tenancy Act is brought under section 7 and 67. The Policy Guideline requires the applicant to establish, on a balance of probabilities that the other party failed to comply with the Act, regulation or tenancy agreement. The tenants failed to prove the landlord has breached this requirement and failed to prove damages that resulted. .
- The Strata Property Act imposes an obligation on the Tenants to comply with the bylaws and rules whether the Tenants signed the Form K or not. .
- The obligation to sign a Form K is common when renting a strata unit. The Tenants acknowledge they signed a Form K in 2012 after they had already moved in.
- I do not accept the submission of the tenants that the landlord's conduct was an attempt to coerce and threaten them to signing the Form K. The landlord was advising them of the positon of the strata manager and their change of policy.
- The landlord acted in a reasonable manner in trying to facilitate the move-in while at the same time advising the tenant of their rights to end the tenancy.
- The evidence provided by the Tenants indicates that their movers had cancelled their Feb. 1 spot on January 18, 2016.

- I determined the Tenants failed to prove any basis for the awarding of aggravated damages.

In summary I dismissed this claim without leave to reapply.

Tenants' claim for Devaluation of the Tenancy:
The tenants claim $1885 for the devaluation of the tenancy, $3000 for the breach of the covenant of quiet enjoyment and $3000 in aggravated damages for damages that result from the conduct of the upstairs tenants. The Amendment added an additional $2000 to for breach of Agreement and $3000 for aggravated damages.

The evidence produced by the Tenants show significant noise interference and disturbances from the upstairs Tenants. However, the decision of the strata council provides that the tenants failed to establish their complaints. Conduct complaints between different strata tenants and their owners are resolved through the process and procedure under the Strata Property Act. It is not appropriate for an arbitrator to make a determination where there is a decision of the strata council on the same issues especially where the other tenant and the owner of the other property was not a party. .

The tenancy agreement is the standard agreement taken from the Residential Tenancy Branch website and does not include any provisions that would require the landlord to represent the tenants in disputes involving other tenants before the strata council. However I am considering the tenants claims as a breach of the tenant's right to quiet enjoyment which is found in section 28 of the Act which provides as follows:

> **Protection of tenant's right to quiet enjoyment**
>
> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Policy Guideline #6 provides as follows:

"**B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT**

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.
…

The British Columbia Court of Appeal in Stearman v. Powers, 2014 BCCA 206 (CanLII) the Court discussed the concept of quiet enjoyment in the context of a commercial tenancy. The court dismissed a tenant's claim that the landlord breached the covenant of quiet enjoyment where a tenant ended the tenancy because of odors after it could not be determined what was causing it. The Court held as follows:

"Quiet Enjoyment

[18] Both the landlord and tenant approached the second ground of appeal as an issue of fact, or perhaps mixed law and fact, in their factums. The meaning of the landlord's obligation to provide "quiet enjoyment", however, must be first examined as a matter of law. The term was express in this case, but is implied into any lease. Such a covenant protects against a landlord's derogating from his own grant. Thus, Christopher Bentley, John McNair and Mavis Butkus, the authors of *Williams & Rhodes' Canadian Law of Landlord and Tenant* (6th ed., looseleaf), state that the term provides "assurance against the

consequences of a defective title and against any substantial interference, by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes." (At 9-1, my emphasis.) Similarly, Richard Olson, in *A Commercial Tenancy Handbook* (looseleaf), describes the covenant for quiet enjoyment as a right to "exclusive occupancy of the premises without interference by the landlord". (At 3.20.1; my emphasis.) The author cites *Firth v. B.D. Management Ltd.* (1990) 1990 CanLII 2110 (BC CA), 73 D.L.R. (4th) 375, in which this court observed:

> To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor. It is conceded by counsel that the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough – the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.).
>
> Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [At 379-80; emphasis added.]

[19] In *Kenny v. Preen* [1963] 1 Q.B. 499, cited in *Firth*, the Court of Appeal discussed the nature of the implied covenant for quiet enjoyment. Pearson L.J. noted that the covenant is not an absolute one protecting a tenant against eviction or interference by anyone, but is a:

> ... qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord.

His Lordship continued:

> The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. [At 511, emphasis added.]

> His Lordship also cited older cases, including *Budd-Scott v. Daniell* [1902] 2 K.B. 351 and *Markham v. Paget* [1908] 1 Ch. 697, for the proposition that the covenant protects against interference by the landlord with the possession which he himself has conferred on the tenant. (At 511-2.)
>
> [20] With all due respect to the trial judge, I do not think it can be said in this case that the landlord or someone claiming through him derogated from his grant of exclusive occupancy without interference. There was no finding by the trial judge that the odour was caused by any act or omission of the landlord or someone acting for him. Nor can it in my view be said that the odour was necessarily of a "grave and permanent nature" in any event. Again, there is no finding to this effect and under para. 5.04 of the lease, the tenant agreed that the landlord would not be responsible for any defect in or changes of condition affecting the premises, howsoever caused.

In *Waterman v. Universal Realty Ltd.*, 2009 SKQB 462 (CanLII), the court dismissed the claim of a tenant's claim for compensation caused by a third party not related to the landlord in any way who broke into the rental unit causing damage and theft of belongings. That case involved a residential tenancy situation with an Act that is similar to the British Columbia Act. The Court held:

> **"Breach of the right to quiet enjoyment**
>
> [15] Mr. Waterman says that the inaction by the landlord described above also constitutes a breach of his right to quiet enjoyment, as set out in s. 44 of the Act:
>
> > **44** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
> >
> > (a) reasonable privacy;
> >
> > (b) freedom from unreasonable disturbance;
> >
> > (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 45;

> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

[16] The essence of Mr. Waterman's argument is that his enjoyment of the leased premises was disturbed. The actions of the intruder deprived him of quiet enjoyment of the premises. Thus, since Mr. Waterman was deprived of quiet enjoyment, the landlord was in breach of the duty to provide quiet enjoyment.

[17] Mr. Waterman's quiet enjoyment of the premises was disturbed. It was not disturbed, however, by the landlord. Rather, it was disturbed by a person who was not within the control of the landlord.

[18] The right to quiet enjoyment provided in the Act is the same as the right of quiet enjoyment that is promised in a lease agreement. It is the right of a tenant to have the use of leased premises without interference, either in terms of title or in terms of physical use of the premises. Specifically, the tenant is entitled to use the premises without interference from the landlord or from someone, such as another tenant, who is acting through or under the landlord: see, for example, *Williams & Rhodes Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988), chapter 9.

[19] The right of quiet enjoyment does not guarantee to a tenant protection from interference by persons who are beyond the control of the landlord. The right of quiet enjoyment does not oblige a landlord to protect a tenant from such other persons.

[20] In this case, the intruder was not acting through or under the landlord. She was not within the landlord's control. Thus, the intruder's disturbance of Mr. Waterman's quiet enjoyment of the premises did not constitute a breach of the landlord's duty to provide quiet enjoyment to Mr. Waterman. The hearing officer did not err in law when he concluded that Mr. Waterman had not established a breach of s. 44 by the landlord."

The decision of the British Columbia Court of Appeal Stearman v. Powers is binding. I find the decision of Waterman v. Universal Realty Ltd. persuasive.

I determined the tenants failed to establish that that the landlords breached an obligation under section 28 of the Act for the following reason:

- The landlord did not cause the noise problems.
- The landlord does not have control over the upstairs tenant. If this was an apartment block where the landlord owned the upstairs unit the landlord could take steps to end the tenancy of the offending unit.
- The tenants failed to prove that "the landlord or someone claiming through him derogated from his grant of exclusive occupancy without interference (Stearman v. Powers). The conduct complained of by the Tenants was caused by another Tenant who was renting from a third party landlord.
- I accept the principle of law set out in Waterman v. Universal Realty Ltd. which provides as follows:

> "[19] The right of quiet enjoyment does not guarantee to a tenant protection from interference by persons who are beyond the control of the landlord. The right of quiet enjoyment does not oblige a landlord to protect a tenant from such other persons."

- There are no other provisions in the tenancy agreement that imposes an obligation on the landlord to represent the Tenant in disputes before the strata council.
- The tenants failed to prove that the landlord or someone claiming through the landlord has caused a derogation of the grant of exclusive occupancy without interference (Stearman v. Powers). .

In summary I determined the landlord is not liable for breach of contract including breach of the covenant of quiet enjoyment where the disturbances have been caused by another Tenant that the landlord has no control over.

If I am wrong with the above conclusion I determined that the landlord has acted reasonably in dealing with the Tenants complaints and with her efforts to resolve these disputes. As a result I dismissed the claim for breach of the covenant of quiet enjoyment and breach of contract. I do not accept the submission of the Tenants the landlord has been negligent in dealing with the Tenants complaints. This is not a situation where the landlord has "stood idly by".

- The landlord attempted to work with M, the rental manager for the upstairs tenant in passing on the tenants' complaints and in attempting to find an amiable resolution.

- I am satisfied the landlord acted reasonably in dealing with the strata property manager in forwarding the Tenant's concerns.
- I determined the tenants failed to prove that the landlord failed to make pivotal decisions that may have expedited a resolution of this situation.
- I determined the tenants failed to prove the landlord neglected or failed to make any personal efforts to conduct on site investigation. The landlord did make on site investigation. She made efforts to investigate and found that many of the complaints were not warranted In any event it was not the landlord but the strata council who made the decision. They have written to the Tenants stating they will not make on site inspection and suggesting they should obtain the services of an acoustic engineer.
- The landlord edited the tenant's version of their complaints. However I I do not accept the submission of the Tenants that this amounts to a breach of duty or that this would have changed the result.
- In any event the Tenants by-passed the landlord and on their own and contrary to the practice of the strata council sent in considerable evidence directly to the strata council and strata council members. Despite being asked not to do so they continued in with this. The strata council's decision refused to uphold the tenants' complaints and warned the landlord that she could be subject to fines if the tenants continued to bypass procedures and approach strata council members directly.
- I determined the tenants failed to prove that the landlord failed to disclose crucial elements and failed to disclose crucial information.
- In my view the expectations of the tenants as to how the landlord should have handled this matter before the strata council is unreasonable and not required by the law. In any event, the tenants by-passed the landlord and appears to have alienated the strata council in the process.

In summary I determined the Tenants failed to prove the landlord breached the tenancy agreement including the covenant of quiet enjoyment dealing with the handling of the noise complaints. As a result I ordered this claim be dismissed.

Tenants' Claim for Aggravated Damages:

Policy 16 includes the following statement:

> An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

- “Aggravated damages” are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.

In the Supreme Court of British Columbia decision in Sahota v. Director of the Residential Tenancy Branch. 2010 BCSC 750 the court concluded the Dispute Resolution officer did not err in awarding aggravated damages. The court stated

> [47]
> Aggravated damages are a compensatory award that takes account of intangible injuries to the plaintiff, such as distress and humiliation, caused by a defendant’s insulting behaviour. Aggravated damages are to compensate the plaintiff for such things as anguish, grief, humiliation, wounded pride, and damaged self-confidence or self-esteem suffered as a result of the defendant’s conduct: Vorvis v. ICBC, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085.
>
> [48]
> There is a close relationship between aggravated and punitive damages. The harshness of the defendant’s conduct may give rise to both. There need be no finding of harsh, vindictive, reprehensible and malicious conduct in order to award aggravated damages. That type of conduct supports an award of punitive damages. The conduct for the award of aggravated damages need only be high handed. However, it is important that a plaintiff not be compensated twice for the same harm or the defendant punished twice for the same type of moral culpability: Huff v. Price (1990), 1990 CanLII 5402 (BC CA), 51 B.C.L.R. (2d) 282 (C.A.).

I determined there is no basis for the award of aggravated damages. The landlord has not acted in an insulting or high handed manner. I am satisfied that the landlord has acted reasonably in presenting the tenant’s complaints and in dealing with this situation. The claims for aggravated damages are dismissed.

Conclusion:

In conclusion I determined the tenants failed to establish a claim against the landlord and as a result I dismissed the Tenants application without leave to reapply.

This decision is final and binding on the parties.

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: February 8, 2017

Residential Tenancy Branch