Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PETERSON RESIDENTIAL PROPERTY MANAGEMENT INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution wherein the Tenants sought $35,000.00 in compensation from the Landlord including recovery of the filing fee.

The hearing of the Tenants' Application was originally scheduled for May 27, 2019. The hearing did not complete and was adjourned to and continued on the following dates: July 11, 2019, September 12, 2019, November 28, 2019 and January 28, 2020. In total the hearing occupied 7.73 hours of hearing time.

Both parties called into each day of the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter-Evidence

The parties agreed that all evidence that each party provided had been exchanged.

By Interim Decision dated May 27, 2019 I ordered that neither party submit any further residence.

On May 30, 2019 the Tenants submitted a letter to the Residential Tenancy Branch wherein they requested that a letter from their "side by side neighbour" with whom they shared a deck be considered. During the hearing the Tenant, K.M. advised that the neighbours had been asked to be witnesses by the Landlord and declined to help.

The Landlord's representative, V.P., confirmed that she asked the neighbour to provide testimony at the hearing and they declined. She therefore submitted that the evidence should not be considered.

Pursuant to my Interim Decision of May 27, 2019, I decline to consider the Tenant's late evidence.

I also note that hearings before the Residential Tenancy Branch are oral hearings. A witness is therefore expected to attend the hearing and provide affirmed testimony and be available for cross examination. The evidence before me indicates the neighbour refused to attend the hearing.

I note that I permitted the Tenants to provide a summary of their claim after the hearing had commenced; I confirm that I have considered the Tenants' submissions provided July 9, 2019 in this my Decision; however, any additional *evidence* submitted by the Tenants after my May 27, 2019 Interim Decision (including the letter from the neighbour) is not admissible.

No other issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter, and specifically referenced by the parties, are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to them and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlord?

2. Should the Tenants recover the filing fee?

Background and Evidence

The Tenant, P.K., testified that the rental unit is a 2-bedroom apartment on the top floor of an 18-story building. P.K. further stated that the tenancy began April 5, 2017 and the Tenants paid $3,075.00 a month in monthly rent.

In support of their claim the Tenants submitted a typed document which indicated that they sought compensation for the following:

$500.00 per month for loss of use of the deck for 16 months (May-November 2017; June 2018-February 2019)	$8,000.00
$500.00 per month for loss of quiet enjoyment for 16 months due to noise, dust and construction	$8,000.00
Monetary losses between October 2018 and January 29, 2019 for times the Tenants were "forced to vacate their home"	$9,030.48
Increased rental costs Monthly rent in the new temporary furnished apartment $3,750.00 less amount paid for subject rental unit $3,075.00 = $675.00 per month for seven months until Tenants moved into the home they purchased.	$4,725.00
Moving costs due to moving twice in 8 months: (1/2 of quote of $11,966.27 from B.M. and S.)	$5,983.13
Compensation to the Tenant, K.M., for "damages to her health" and not healing from her injury	$5,000.00
Improvements to kitchen for professionally installed kitchen pullout metal drawers	$530.05
Filing fee	$100.00
Total	$41,368.66
TOTAL CLAIM (to fit within monetary jurisdiction of *Residential Tenancy Act*)	**$35,000.00**

In written submissions provided by the Tenants they write that when they signed the lease on March 25, 2017, they had no knowledge that a significant renovation project was about to begin. They suggest this information was known to the Landlord's representatives and not disclosed to the Tenants.

In terms of their claim for loss of use of their deck, P.K. stated that the rental unit included 1,406 square feet of interior space and 405 square feet of exterior footage, for

a total of 1,811 square feet. The deck faces north and affords a view of the mountains and a golf course; P.K. confirmed that the deck was the decisive factor in renting the unit as had there not been a deck, they would not have rented it.

P.K. claimed that one week after they moved in the renovations/repairs were "completely sprung on them". They were informed by the Landlord, that the east façade of the building was quite porous and as a result of wind and moisture, water was entering through the façade. These repairs required the erection of scaffolding on their deck which impacted their ability to use the deck as well their view. Further, P.K. claimed that workers accessed the scaffolding via their rental unit.

The Tenants claimed $500.00 per month for 16 months they claim they lost use of their deck in May – November 30, 2017, and June 2018 to February 2019. In written submissions provided by the Tenants the Tenants provide the following further details

> Projects causing Loss of Use of Our Deck include:
> (1) East Wall Concrete Grinding with Scaffolding, May, 2017-July 2017
> (2) Unsafe Rotten and Warped Deck condition and repair, July - November 2017
> (3) the completion of the East Wall Restoration Project with further concrete grinding and scaffolding across our deck, June – August 2018
> (4) the concrete grinding of the [N.R.] Roof Restoration Project, September 2018 – end of tenancy on February 28th, 2019.

The Tenants noted that they did not have photos or audio recordings of the loss of use of their deck for "Project 1" as they did not anticipate this matter would be litigated. In support of their claim, the Tenants submitted in evidence a drawing of the scaffolding on the deck. They also relied on a Notice to Tenants dated May 8, 2017 wherein they were instructed to seal up their home against debris, noise, construction and loss of privacy.

The Tenants allege their deck "was so rotten and warped that it was not safe to use following the July 2017 removal of the scaffolding from the east wall restoration and concrete grinding project". In support of this claim they provided photos of their deck. P.K. described the condition of the deck as a "health hazard" as he said the boards were warped and moving. He noted that the Landlord agreed that the boards needed to be replaced and those repairs followed the east façade repairs.

The Tenants further allege they could not use their deck between July 5 and July 20, 2018 due to scaffolding on their deck and "choking silica dust from grinding yet again". P.K. further stated that there were workers going in and out of the rental unit while the scaffolding was on their deck which further impacted their use of the deck.

P.K. testified that although the repairs to the deck were completed, it was done improperly and had to be done a second time the following year.

P.K. also testified that in their 23-month tenancy, there were three instances of scaffolding on their deck over the course of 16 months which made it impossible to use the deck at all, including:

- May-November 2017 when the repairs were done to the east façade and the subsequent deck replacement;
- May-December 2018 additional work on the east façade; and,
- August – December 2018; and January-February 2019 for the roof repair

P.K. confirmed that the work was done during regular construction hours, however, when the roof renovations were being done, the workers began very early in the morning and worked into the afternoon. The Tenant noted that the Landlord tried to minimize the impact on the tenants by restricting the hours the work occurred and stopping the workers from playing loud music, but the impact on the Tenants was immense.

The Tenant confirmed that the $500.00 a month claimed for loss of use of the deck was derived from the figure used by the Landlord when the Landlord compensated them $500.00 in June of 2017 for loss of use of the deck (and as noted in the “Tenant Ledger”). The Tenants further write that, aside from compensation for September 2018, they were not compensated for loss of use of their deck during the Roof Restoration Project from September 2018 to the end of their tenancy on February 28, 2019.

The Tenants also sought the sum of $500.00 per month, for 16 months, for loss of quiet enjoyment of their home and loss of privacy. P.K. testified that they used this figure as that was the amount the Landlord provided to them at various times throughout the tenancy as indicated on the Tenant Leger for “Noise, Dust and Construction”.

In their written submissions and testimony, the Tenants spoke extensively of the impact of the grinding, going so far as to describe the Roof Restoration Project work as “horrific grinding” and naming one audio file as “unbelievable relentless grinding”. P.K. testified that the concrete grinding was “extreme” and occurred “almost perpetually”.

In support of their claim the Tenants provided over 40 audio recordings of the grinding, and to a lesser extent hammering, taken over the following dates:

- “early September”;
- September 10, 11, 18, 2018;
- January 7, 8, 15, 16, 18, 21, 23, 31, 2019; and,
- February 19, 20, 21, 25 and 27, 2019.

The Tenants confirmed they uploaded multiple files per day (5 on January 18, and 11 on January 23, 2019 for instance) to show that on many days the grinding went on for hours a day. On one such day the Tenants recorded 30 seconds of a generator being started at 7:53 a.m., over an hour before work was supposed to start at 9:00 a.m.

The Tenants claimed to have received $4,945.00 in compensation from the Landlords. These rent reductions were noted on a Tenant ledger, dated April 26, 2019, which was provided in evidence. P.K. stated that this sum included a waiver in $1,309 in annual rent increases which the Landlord did not effect during that time.

P.K. confirmed that in January of 2019 they asked to end their tenancy as they could no longer live in the constant construction. P.K. also stated they had bought a new home on Vancouver Island and were intending to remain in the rental unit until their new home construction was completed (as they wanted to avoid moving twice) however, due to the construction, they could no longer remain in the rental unit.

The Landlord’s representatives declined the opportunity to cross examine the Tenant P.K.

The Tenant, K.M., also testified. She stated that they viewed the rental unit in March of 2017. She further stated that they were absolutely thrilled as the rental unit had just been renovated and was in pristine condition. She also noted that as the rental unit was on the top floor, the views were extraordinary, and confirmed that the size of the deck and the views from that deck were the reason they rented the unit.

K.M. stated that they were shown the rental property by another representative of the Landlord’s, whom she described as a young man, possibly named E. K.M. further stated that there were absolutely no discussions about the proposed renovations, or that they would not be able to use the deck.

K.M. stated that one week later, approximately April 12, 2017, the building manager, H.O., came to the rental property and told them that there was a project that was commencing very soon and they would lose use of their deck. K.M. described H.O. as very apologetic and very embarrassed about this information.

K.M. stated that they received a Notice to Tenants which indicated the work would take 3-6 weeks. K.M. further stated that although the work commenced as they indicated, the duration of the project was for the “entire summer”.

K.M. noted that they cooperated fully as they believed they would get their deck back at some point that summer. K.M. stated that they were not able to use the deck at all as it was covered by major scaffolding and external platform.

K.M. testified that they did not notice that the deck boards were warped, as they viewed the rental unit in the spring; she stated that as soon as the boards dried out from the winter rain the boards warped in the hot sun.

K.M. also testified that she suffered a severe right-hand crush injury in June of 2018 which required extensive physiotherapy; she characterized her physiotherapy as extremely time sensitive, occurring five times a day and for 1-1.5 hours each time. She further stated that due to the nature of her injury she required a stress-free environment to do her physiotherapy and recover and was denied that due to the grinding. K.M. stated that she was then diagnosed with Complex Regional Pain Syndrome in August of 2018 which was the same time that the roof replacement commenced. The Tenants provided documentation relating to the nature of K.M.’s injury as well as the resulting syndrome and claimed that the “environment created by the on-going construction projects on site severely restricted K.M.’s recovery and rendered the domicile uninhabitable for her.”

K.M. stated that although the construction was negatively impacting her recovery, the roof replacement project was supposed to be over in 6 weeks, such that they didn’t even consider ending the tenancy early.

K.M. also testified that most of the time the workers went over the roof to access the deck and did not access the roof through their rental unit. She clarified that to her, it was not the workers’ intrusion into their space that was the issue, rather, it was the concrete grinding that was the problem.

The Landlord's representatives were also offered an opportunity to ask questions of K.M. and they declined.

In written submissions the Tenants write that they felt forced to vacate the rental unit on several occasions simply to get away from the construction. They sought monetary compensation in the total amount of $9,171.12 for the cost of those trips including:

- Trip 1: On September 7, 2018 they "booked a trip away for early October (October 11-20) to vacate the construction site for what the Respondent promised to be the last few weeks of the roof replacement." This trip was 10 days long and to Ontario to visit family. The Tenants claim the cost of that trip for flights, car rental, gas, meals and miscellaneous expenses as $1,787.21.

- Trip 2: K.M. then left "again for health reasons to escape from the grinding noise" and went to her daughter's on Vancouver Island from October 24 to October 29. The cost of that trip for ferry, meals and gas: $346.24.

- Trip 3: On October 20, 2018 the Tenants booked a "last-minute" trip to California booking for the time period November 27 to January 2, 2019. The cost of that trip for gas, accommodation, meals was $6,417.20

- Trip 4: K.M. traveled to the Sunshine Coast for a doctor's appointment and to visit a friend, the cost of which was $129.51.

- Trip 5: K.M. then went to Vancouver Island on January 13, 2019 at a cost of $236.67.

- Trip 6: January 28, 2019 trip to Vancouver Island to secure a short-term temporary rental at a cost of $254.29.

(Notably, on their July 2019 Written summary, the Tenants indicated they sought the sum of $9,030.48 in compensation for these trips).

K.M. stated that when the ceiling in the master bedroom required repairs and the roof repair was not completed solidified the Tenants decided to vacate the rental unit. The Tenants provided their notice to vacate on January 28, 2019.

The Tenants secured accommodation on Vancouver Island near the location of the home they had purchased (which had yet to be completed). The Tenants sought their moving costs as well as their increased rental costs of $4,725.00 (the difference between what they paid for the subject rental unit and their subsequent unit). The Tenants submit that the "unbearable living conditions at the rental unit generated a crisis of their immediate need to move", such that the incurred the cost of moving twice. In this respect they requested the sum of $5,983.13

The Tenants also sought $5,000.00 in compensation related to the Tenant, K.M.'s hand injury. The Tenants submit that "due to loss of access to a calm, quiet home to recover from the extremely time-sensitive CRPS healing needs, we claim modest partial damages for K.M.'s loss of the use of her right hand, a devastating outcome that is likely lifelong."

The Tenants also sought $530.05 in compensation for pull out wire drawers they installed in the kitchen cabinets at the rental unit. The basis of their claim is articulated by the Tenants as follows:

> "The Respondent's refusal to compensate us for this valuable improvement…after showing strong interest and sending a representative to confirm this quality installation, was sent two days prior to our moving date, generating a last-minute complex restoration project. We request the same compensation value in order to compensate us for the many hours of restoration work, that we believe was punitively required.

In support of this aspect of their claim the Tenants provided photos of the shelving they installed as well as proof of the amounts paid by the Tenants.

Finally, the Tenants sought recovery of the filing fee and registered mail costs for a total of $142.47.

Landlord's Response

In response to the Tenants' claims, the Landlord called a witness, B.R. B.R. confirmed that she lives on the same floor, but "kitty corner" to the rental unit. She stated that she has lived at the rental unit for 10 years and confirmed that she was living in the rental unit during the time the repairs were being done to the rental unit. She also confirmed that she has a large deck similar to the subject rental unit.

Although B.R. initially gave evidence that the repairs occurred one year after they did, later in her testimony she clarified that the repairs occurred at the correct time.

B.R. described the roof repairs as a “skin” being put over the “barrel roof” for water protection. She stated that she understood it took longer than anticipated because of the weather and the danger posed by workers being up at that height during that time of year.

B.R. further confirmed that the Landlord replaced the decks. She stated that they had to resurface them all by putting some sealant down and then “nice planking”. She stated that everything was completed by the summer which she felt was wonderful.

In terms of the impact on her living situation, she confirmed that there was noise caused by “jackhammers through concrete”, but stated they did this during the work hours of 9:30 a.m. and 3:00 p.m. She further stated that the workers never worked during weekends. She also stated that they were always informed with notices to their suites. She also stated that she was a homeowner and understood that these things happen.

B.R. also confirmed that she received a rent reduction of $500.00 a month; she could not recall how long it was, but felt it was a “very nice gesture”.

In cross examination, B.R. confirmed that she was affected by the 2017 east wall grinding project. She confirmed that she was aware of the project as she heard it herself. She also stated that whatever they did on the east side they did on the west side, but to her all the work was a “non-issue”.

The Landlord’s General Manger, V.P., provided the following affirmed testimony. She confirmed that was the property manager from 2017 to February 2019 following which she became the general manager.

V.P. confirmed that the tenancy began April 1, 2017 as noted on the tenancy agreement. She also clarified that the rent was $2,975.00 per month, not $3,075.00, noting that the reason the Tenants paid $3,075.00 was because they paid extra for two parking stalls. This was confirmed in the residential tenancy agreement provided in evidence.

Although the Landlord provided substantial documentary evidence, V.P.'s testimony was primarily structured as a detailed response to the Tenants' Summary provided to the Landlord on July 9, 2019.

In terms of the "Lack of Disclosure" alleged by the Tenants, V.P. stated that the renovations were not planned. She stated that on March 25, 2017 when the Tenants signed the agreement, the Landlord had no idea that the renovations were going to start shortly thereafter.

V.P. confirmed that as of November 14, 2016 the exterior work was completed as evidenced by the "Notice of Certificate of Completion" provided in the Landlord's evidence. She stated that this project included caulking around windows, repair to concrete and stucco, and painting of all white areas. She stated that in 2016 they felt that they had completed all preventative maintenance to prevent any water ingress to the building in this tower. She reiterated that was why they did not plan any additional work on the tower in 2017 as they had completed this work the year prior.

V.P. stated that later, when the work was done the contractors informed the Landlord that some work needed to be done on another tower to replace some bricks; that project was scheduled for 2017.

The Landlord included in evidence an email from the building manager dated March 27, 2017 regarding tower 2, in which they wrote about water ingress in two units. V.P. stated that originally, they thought the contractors missed caulking. They then dispatched the contractor to investigate on March 29, 2017 at which time they suspected the issue was water ingress because of the bricks. They looked at several options to deal with these two units not realizing at the time that the issues were more widespread.

V.P. confirmed that in these discussions they indeed discovered that the issue was more extensive. They then had a meeting and were informed that the best approach was to deal with the entire wall since they could not determine where exactly the water was coming in.

V.P. further stated that at the end of April 2017, they decided to use a "swing stage" to deal with this issue. She confirmed that the units on the top floor were most impacted as the swing stage apparatus/anchors were attached to their roof. The Landlord also provided a photo titled "Roof dimensions" which shows where the roof anchor was.

V.P. also noted that when the contractors worked on the 18th floor, the Tenants were subjected to the drilling and work on their floor. Additionally, the Tenants were impacted as the workers accessed the balance of the east wall through their deck and the swing stage. She noted that the witness' unit was on the north wall and was also impacted in 2017.

V.P. confirmed that the Applicants were notified of the upcoming work a week after they moved in. She stated that they sent a Notice to all occupants of the building that the work would start on May 10, 2017, meaning that the contractor would bring materials, but the actual work started on May 11, 2017.

The Landlord provided a copy of an email from the contractor wherein the contractor noted that the subject Tenants would lose use of the area on their deck where the table was set up. The Landlord also provided a photo of this in evidence. V.P. stated that the Tenants could still use the deck after construction hours, evenings and weekends, except the areas where the equipment was.

V.P. stated that the workers never accessed the work area through the Tenant's deck, except the first day when they installed the equipment. All other times they accessed the work area through the roof and the swing stage.

In terms of the Tenant's claims as set out in the document titled: "Compensation Requested in February 4, 2019 Submission", V.P. stated that they disagreed that the Tenants were not able to use their deck for 16 months. She confirmed they agree there were periods of time they could not use the deck completely, but it was not for the 16 months claimed by the Tenants. In support, the Landlord submitted copies of the Notices to the tenants which set out the exact dates. V.P. further testified that in terms of the use of their deck the following dates are of import:

- They could partially use the deck between May 11, 2017 to July 5, 2017. In support of this, the Landlord included emails from the Tenant confirming that all equipment was removed from their deck on July 5, 2017.

- The Tenants had full use of their deck from July 5, 2017 to September 29, 2017 as no work was done.

- On October 13, 2017 the bricks were sprayed with a sealant such that the Tenants could not use their deck.

- Between November 8 to 24, 2017 the deck repairs were completed.

V.P. noted that less than two months after the brick work was done, the Tenants then complained about the condition of the deck and claimed it was unsafe. V.P. confirmed that the deck was as it was when the Tenants first viewed the unit and they accepted it as that. The Landlord did not agree that the deck was unsafe as claimed by the Tenants, but also wanted to please the Tenants. Further, as they had just completed the brick repairs, they wanted the Tenants to be able to use their deck in the summer of 2017; as such, the deck repairs occurred in November 2017 when the Tenants would be unlikely to use their deck in any event. V.P. stated that they did not plan to do the deck repairs in 2017 but acceded to the Tenants' requests.

V.P. confirmed that they paid $35,000.00 to have the decks off the subject rental unit, as well as another unit on the same floor. The other two top floor units did not ask to have their deck replaced.

The Landlord provided a copy of the invoice from MDR which set out the extent of the work as well as the timeline for the deck replacement; V.P. confirmed that as a result of the repairs, the Tenants could not use their deck from November 8-24, 2017.

In terms of compensation provided to the Tenants, V.P. noted that originally, she offered them a $200.00 reduction; eventually the Landlord agreed to the Tenants' request of $500.00. She didn't calculate the actual days they could not use their deck but agreed to their request to please them. She noted that it was a one-time reduction in 2017.

V.P. also noted that when it was time to do the annual rent increase, they decided to only increase by $20.00 but when the Tenants complained, the Landlord did not increase the Tenants' rent in March of 2018; as such in addition to the rent reduction, the Tenants had the benefit of not paying the annual increase.

V.P. noted that they also cleaned the curtains in 2018, not because it was their responsibility, but again because they wanted to please the Tenants and have them stay a long time. V.P. stated that they also provided other concessions, such as emptying a space in the commercial area to accommodate the Tenants' van.

V.P. testified that once the wall repairs and deck repairs were done in 2017 the Landlord believed that all the work was done to the building. Unfortunately, in 2018 they then got complaints about water ingress on the east side of the building where there are no balconies, only windows which V.P. described as the "central part" again when the rain started. This work was scheduled between July 9, 2018 and August 17, 2018 and it was similar to the work done in 2017 which was to deal with the water ingress in the bricks.

V.P. stated that form her perspective these Tenants were nice until they bought a home, at which time they began raising issues. V.P. noted that only on July 20, 2018 did the Tenants complain to the Landlord about the drilling. V.P. conceded that the work affected them, as it was on their deck and they noticed it, but they did not complain until July 20, 2018. V.P. submitted that the fact the Tenants did not have any noise recordings until September 2018, indicates that it was not unreasonable prior to that time.

V.P. disputed the Tenants' claim that the concrete grinding was constant. She also noted that concrete grinding and re-grouting are very different procedures, as the re-grouting was much less intrusive. V.P. stated that concrete grinding only occurred for a very short period of time and was not "constant" as alleged by the Tenants.

The Landlord provided in evidence a letter from the contractor regarding the brick repairs in which the contractor wrote as follows:

> "All the work we did on the repointing of the bricks on the east side of the building was done as per Work Safe BC regulations and procedures. At no time was there any excessive noise, as all we had were small tools for cutting and some grinding. There was no chipping involved. All work was done between the hours of 9 am to 5 pm."

The Landlord also provided an email from the contractor dated July 23, 2018 wherein the contractor wrote:

> We are using a grinder with a shroud connected to a vacuum, which collects more than 90% of the dust. We have asked the tenants to keep their windows closed during regular work hours. If they are concerned the windows are not airtight, it would be best to run some painters tape on the inside of their windows, as we are not mobilized directly outside of their windows.
>
> We have not been grinding since Thursday of last week, and probably won't be grinding again until Wednesday, so we can all review how best to alleviate any potential dust for these tenants.

V.P. noted that the Tenants complained about being exposed to *silica* dust. She further stated that every time they received a complaint the Landlord followed up with the safety coordinator and the contractor. She further stated that every time the Tenants saw dust they assumed it was silica dust, which is incorrect.

V.P. conceded that the silica dust from the concrete work is unsafe, however she stated that it was only dangerous to the workers, as the dust settles. She further noted that it is everywhere in the city and all they do is spray water. She also testified that all engineers, contractors and safety coordinators assured the Landlord that it was safe for the Tenants and no evacuations were necessary. She conceded it was inconvenient to have to have the windows closed, but not unsafe for the Tenants as they allege.

V.P. submitted that in terms of the timing of the work in 2018, the centre work started on July 9, 2018 and all equipment was removed from the deck August 17, 2018. They did not have any overlapping work. She further noted that they did the roof repair on August 20, 2018. The main reason to do both projects in the same year, was because the subject Tenants complained about a stain on their ceiling and they also complained that their new deck was unsafe. She noted that they complained about the old deck, and then they were complaining about the new deck.

On July 9, 2018 V.P. personally inspected the deck and the stain on the bedroom ceiling. She also had the maintenance manager there. She provided photos taken that date. One showed staining on the popcorn ceiling, the other showed what appeared to be one of the boards lifting. V.P. testified that when the deck repairs were done, they were done in four separate sections to facilitate lifting the sections and cleaning; she noted that the Tenants' complaint of "lifting boards" were in fact where two sections met. This is shown in one of the photos submitted by the Landlord.

V.P. noted that in the Tenant's document titled "Residential Tenancy Tribunal Submission" which was submitted on February 4, 2019, the Tenants indicated that the boards were installed in November 2017 and completed in December 2017. V.P. stated that this is incorrect as the deck repairs were completed on November 24, 2017. In support V.P. noted that in an invoice dated December 14, 2017 from M.D. which shows the last day worked as November 24, 2017. V.P. also noted that in an email provided by the Tenants in evidence, dated November 27, 2017, the Tenant, J.K., writes "Thanks [J.]. The deck looks pretty good". V.P. submitted that this was proof that the deck repair was completed in late November 2017, not in December as submitted by the Tenants.

V.P. also noted that on the invoice the workers indicated that it was done by “”Swing stage” which was much more expensive to the Landlord but was done to reduce the impact on the Tenants.

V.P. then addressed the Tenants’ claim that there was a “cluster fly insect infestation”. In evidence were copies of email correspondence regarding this issue. She noted that as soon as the Tenants complained about the flies the Landlord responded right away and sent pest control. She stated that seasonally cluster flies will appear and will last for some short period of time. The Landlord also provided in evidence information from B.J. of A.E.S. Inc. who informed that cluster flies are not harmful, but annoying.

V.P. stated that despite complaining about the flies, in an email dated November 11, 2017 the Tenants wrote they would deal with the issue themselves. V.P. noted that the Tenants claimed this was an inconvenience and breach of their right to quiet enjoyment despite the fact the Landlord responded immediately, hired pest control, and then took preventative measures.

V.P. noted that the Tenants also did not facilitate the pest control; she noted that they had someone come on June 18, 2018. The Tenants did not allow the treatment to occur as noted on the IPM Service Report, wherein the report writer wrote: “[rental unit] was also scheduled for today but she is home nursing a broken arm and was unable to vacate”. V.P. testified that the pest control people attended the rental unit several times, the first time the Tenants did not answer the door, the second time they would not allow treatment (as noted above) but eventually they allowed the company to attend at which time no cluster flies were seen. V.P. also noted that they did not charge the Tenants at all, even for the missed appointments.

V.P. further noted that they specifically did not do work on the Tenants’ deck in the summer as they wanted to allow the Tenants to enjoy the deck; rather, the work was done when the weather prevented use of the deck. V.P. submitted that this coincided with the Tenants’ use of the deck as evidenced by an email sent by the Tenants wherein the Tenant, P.K., explained that they cover their patio items in the fall before the rain stops; V.P. submitted, that this indicates the Tenants were not using the patio at the time the repairs were done.

V.P. also disputed the Tenants written submissions that they would lose use of their deck again in June 2018 due to scaffolding being set up. V.P. noted that no work was

done on the patio at this time or on the unit or the building at all. She confirmed that there was some work done on the air conditioning, but that occurred in July 2018. She further noted that the notice to the tenants that the work was going to occur was dated July 5, the work began July 9 and the air conditioner was installed on July 11.

V.P. noted that the Tenants write that on June 13, 2018, K.M. broke her hand and was to do home therapy and she claimed that she developed “Complex Regional Pain Syndrome” diagnosis. V.P. pointed out that no work was done on the building from November 2017, six months prior to her injury, to relate to the development of this alleged syndrome. She also submitted that the Tenants write that scaffolding was set up on their deck in June 2018, merely because that coincided with K.M.’s hand injury, not because there was actual construction going on.

In response to the Tenants’ submission that more grinding occurred in July 2018 on the east wall project., V.P. noted that the Tenant, K.M., sent an email on July 20, 2018 in which K.M. writes that she noticed that drilling was occurring. V.P. stated that the Landlord immediately contacted the contractor, by an email dated July 23, 2018; in response, the contractor noted they had not been grinding since July 19, 2018 and would not be grinding until the following Wednesday. V.P. submitted that this may explain why the Tenants did not notice right away because there was no noise or dust as they claimed.

In response to the Tenants’ allegation that they were not informed of the extent or duration of the roof repair, V.P. testified that the Tenants were fully informed by email, copies of which were provided in evidence. V.P. also testified that she contacted the roofing company herself. She also clearly explained the process and what was involved to the Tenants. The Tenants also alleged that they received the information directly from the contractor, which is not correct as they received it from V.P. directly.

In response to the Tenants claims that they are extremely sensitive to dust, V.P. also noted that in the same email communication regarding the roof repairs, she explained to the Tenants that she was not aware they were extremely sensitive to dust, as she would never have recommended they move into the building as it is in an area where there is considerable construction and therefore dust. She also reminded the Tenants that the building is 50 years old and they couldn’t guarantee there won’t be any further work on the building.

The Landlord also provided copies of the Building Notices, which were provided to the Tenants. In one such notice, dated August 20, 2018, the Tenants were informed as to the upcoming project and what the Landlord knew at the time. V.P. also noted that preparations began August 21, 2018 to the last week of October (not mid October as the Tenants allege).

V.P. further noted that they notified the Tenants that the penthouse level units would experience some vibration. The penthouse level units were also informed that materials and debris would be loaded from the "North elevation of the building" which is not part of anyone's rental unit. V.P. noted that the hoist went from the centre of the north wall to the ground right next to the tenants on the second and first floor. The occupants of the rental building were notified of the specified times that the items would be loaded and unloaded from there as there would be noise and dust during those hoisting activities. V.P. stated that the subject rental unit was not affected by hoisting activities.

V.P. further noted that the roof consisted of several areas such that not all work would affect the subject Tenants. In their written submissions, the Tenants allege that they did not use their rooftop patio because they were informed (by this Notice) that they should keep their windows closed. V.P. stated that their patio was projected by a huge dome (which is like a 2-storey building) and the Tenants could have used their patio during this work.

V.P. confirmed that it is the Landlord's position that the Tenants have been adequately compensated for loss of use of their deck and loss of quiet enjoyment.

In terms of the out of pocket expenses claimed by the Tenants for trips they took away from the rental unit, V.P. testified as follows.

In their written submissions the Tenants write that they booked a trip away for early October (October 2-11) to vacate the construction site:

> **"September 7, 2018**: We booked a trip away for early October to vacate the construction site for what the Respondent promised to be the last few weeks of the roof replacement."

V.P. noted that the Tenants booked this trip away on September 7, before grinding even started. As soon as the grinding started on September 11th, the Tenants recorded it right away and complained on that same date.

V.P. further noted that the Tenants did not advise the Landlord when they booked their trip; she submitted that the Tenants booked this trip because of their own personal needs, not because of the construction.

In further written submissions the Tenants write:

> **October 1, 2018: [P.K.]** wrote the Respondent asking when our deck furniture needed to be removed for the removal and replacement of the rotten rooftop deck boards, again expressing our dismay that we still await our capacity to enjoy our deck, which we planned to use on a daily basis 6 months prior to this.

V.P. stated that this statement is totally incorrect. She noted that at this time they had *new* deck boards at that time, not rotten as alleged. As well the rooftop was not wood, it is concrete.

The Tenants further write:

> **October 2018**: Unable to withstand further disruption, we left early in October to stay with a relative in Ontario for 10 days, incurring significant expense, but with assurances from the Respondent that the work essentially would be completed by the time we returned, provided by the Respondent on October 15, 2018. Cost of that trip for flights, car rental, gas, meals and miscellaneous expenses: $1787.21.

V.P. submitted that in this statement, the Tenants write they left because of the disruption, yet she noted they had already booked a holiday at that time.

V.P. noted that when they found out the Tenants were going to be away, they tried to schedule work on their patio, during that time as evidenced in an email dated October 1, 2018 (a copy of which was provided in evidence). At that time the Landlords also hired a moving company to move and store the Tenants' patio furniture.

V.P. stated that the Tenants were away from October 2-11, and then shortly after that they went away on another trip. She noted that they could not be disturbed at that time as they were away from the rental unit.

V.P. also submitted that the Tenants allege they booked the second trip (to California) because of the work being done on the rental unit; yet, as of October 20, 2018 they had already booked this trip, such that the Landlord submits it was for their own purposes, not to escape from the noise in the building as they allege. V.P. further submitted that as of October 15, 2018 the Landlord believed that the roofing project would be done by

October 15, 2018. On October 19 ,2018 the Landlord informed the Tenants that the project was expected to finish on November 2, 2018. The next day, October 20, 2018, the Tenants booked an extended trip to California from the end of November and into December; which his *after* the project was scheduled to complete. V.P. Submitted that as this holiday was from November 27-January 2, 2019 and the Landlord had informed them that the work would be done on November 2, this could not be in response to the work, rather it was a personal holiday. Although the work was later delayed somewhat; (on October 31, the Landlord posted a Notice confirming that the work would be done December 5, 2018), V.P. noted that again, as their trip was scheduled until January 2, 2019, it was clearly for personal reasons not responsive to the work being done.

V.P. also testified that everyone, including the Landlord's representatives and the contractors, worked with the Tenants as much as they could as these Tenants were the only ones who complained.

The Tenants then write that scaffolding was installed on the deck in November of 2018: V.P. submitted that it was the Tenants who personally allowed the contractors access to their suite to allow the installation of scaffolding. V.P. said they made this arrangement by themselves and did not talk to the Landlord about this V.P. was informed of these conversations by email dated November 19, 2018 wherein the Tenant wrote:

> In the course of our conversation, we mentioned that we will be out of town, beginning next Monday, for about a month. [D.] then suggested that the bulk of the noisy work above our suite should be undertaken during the hiatus of our occupancy. We of course agreed and are deeply appreciative to him for his expertise an understanding."

On November 22, 2018 V.P. responded as follows:

> "Thank you for your cooperation with the contractor's request. We appreciate it. Unfortunately [contractor] failed to notify me or [J.] about the necessity of the scaffolding on your balcony and arrangements made with you directly"

V.P. submitted that the contractors moved the work around the Tenants' schedules and their trips, thereby minimizing any disruption to the Tenants. In any event, V.P. noted that scaffolding was installed on November 20, 2018 and removed December 17, 2018.

The Tenants also complained that due to noise the Tenant, P.K., could not write a book. V.P. stated that they informed the Tenants they could use the recreation centre which is totally away from the construction area. V.P. reminded them there was a gym, lounge, library, pool, and other areas which would facilitate such writing. V.P. also stated that

from her experience during business hours this area is empty. She also stated that to her knowledge the Tenants never used this area and therefore did not mitigate their losses.

V.P. testified that that the Tenants complained that P.K. could not write a book, but they never said anything about K.M. not being able to do her physio and noted that the first time she heard this was when they received the arbitration package. She further stated that if K.M. had informed the Landlord that she could not do the physio, they would have accommodated this. V.P. also noted hat K.M. carried her physio equipment for all their holidays out of the country, out of province and on three trips to Vancouver Island, yet, at the same time claimed the recreation centre was *inconvenient* for P.K.'s writing.

V.P. then pointed out that the "Engineering Report" confirmed that the delay in the work was not in the Landlord's control. This document, dated April 26, 2019, confirms the extent of the work and the impact on the subject rental unit. V.P. also submitted that this document is consistent with the impact on the Tenants as during the wall repair in 2017/2018 the only complaint they received from the Tenants was dust, not noise.

V.P. reiterated that the Tenants only started complaining when they purchased their property on Vancouver Island, and that was also the same time they started recording everything. She said they were not complaining from May 2017 until approximately September 2018 except to complain about dust and submitted that after they purchased a property, they then they started compiling their evidence for this dispute.

V.P. submitted that the Tenants are exaggerating and simply making up a story for monetary compensation; as an example, she noted that in the Tenants' secondary written submissions the Tenants write:

> 4. Pressure washing and brick sealing of the East wall of our building, with scaffolding support across our deck: September-October 2018.

V.P. testified that there was no pressure washing and brick sealing in 2018, that work was completed in 2017.

V.P. also noted that the Tenants write on the last page of their secondary submissions:

> Finally, [K.M.'s] recovery from her injuries of 13 June 2018 was, and has continued to be, severely impacted by the extraordinary stress and loss of quiet enjoyment of our home that we experienced at [rental building]. When the injury occurred, we already had been exposed to 1.5 years of the effects of virtual non-stop restoration projects.

V.P. stated that this was totally incorrect, because the brick sealing was completed September 2017 and the deck replacement was completed in November 2017. On June 13, 2018 the Tenants stated they were exposed to "virtual non-stop restoration projects" but that is not true as *the work had been completed 7 months prior and no work was done all this time.*

V.P. further noted that on the Tenant's summary submitted on July 9, 2019, the Tenants also incorrectly write:

> (3) the completion of the East Wall Restoration Project with further concrete grinding and scaffolding across our deck, June – August 2018

V.P. submitted that the Tenants are now trying to add June, as that is the month K.M.'s hand injury occurred, yet the work did not start until July 9, 2018. She submitted that the Tenants were inconsistent in their own statements and are simply exaggerating in order to increase their monetary claim.

As a further example, V.P. drew my attention to the Tenants' May 6, 2019 written submissions wherein the Tenants wrote about the water in their unit in January 2019. V.P. stated that on January 3, 2019 the Tenants reported a leak when they came back from their winter vacation. V.P. attended and noted there was water ingress. This was when they installed the dehumidifier for their use when it is convenient. V.P. submitted that the Tenants write that the carpet was "soaking", but in fact there was one square foot of water on the carpet. V.P. also noted that that on January 25, 2019, the Landlord issued the Notice of Entry for the purpose of attending to the required repairs (a copy of the Notice was provided in evidence) and gave them a full schedule to complete the work. The Tenants said they did not want any inconvenience and the work could be done after they moved out. V.P. noted that although they requested the repairs occur after they moved out, in their May submissions they imply the Landlord was negligent in not repairing this right away.

V.P. also noted that in their written submissions the Tenants write that the ceiling was still wet, which V.P. stated is also not correct. V.P. further noted that they hired movers to move the Tenants items to ease the disruption on the Tenants. All that need to be done was to install the textured ceiling which couldn't be done if the ceiling was still wet.

In terms of rent reductions provided to the Tenants, V.P. noted that the Tenants' claim that they did not receive a rental reduction for February 2019, is also not true as they

cashed the cheque from the Landlords on February 28, 2019 in the amount of $1,100.00 which included $650.00 for January 2019 and $500.00 February 2019. The Landlord provided proof of this in evidence.

V.P. also noted that the Tenants were also compensated for the extra electricity for the dehumidifier. The Landlord also paid for the furniture movers to move their patio furniture, storage costs, and the estimated amount to return it (this was confirmed in a letter dated February 28, 2019).

V.P. further noted that the Tenants received a total of $5,866.04 in rent reductions, not the $4,950.00 sum to which the Tenants testified. V.P. noted that it was difficult to compensate the Tenants because they claimed inconvenience at times when they were not even there; for instance, they were even given a $600.00 rent reduction for December 2018, when they were away the entire month. Further, they claim they could not use their deck, yet it was during the months they would not use their deck in any event as it was winter. V.P. also noted that The Tenants were also compensated for working days only, not weekends as no work was being done. As well, the work was done at 3:00 p.m. such that they had all evening without disruption. These amounts were all set out in the Landlords' spreadsheet setting out the rent reductions which was given to all Tenants. V.P. confirmed that from the Landlord's perspective they have overpaid the Tenants.

In reply to the Landlord's testimony and submissions, the Tenants replied as follows.

In terms of the Landlord's submission that the Tenants could have used the recreation area in the building for her physio, the Tenant, K.M. testified that there was "no time". K.M. confirmed that she took her physiotherapy equipment with her on their holidays (which included a warm bath and a bin of textures for sensory stimulation) but as she needed to do physio numerous times during the day, she could not be in the recreation area.

In general response to the Landlord's submissions that the Tenants were inconsistent in their own documents, K.M. stated that they only made one mistake in terms of work in June of 2018, she stated that it was in fact started in July.

In response to V.P.'s testimony regarding rent reductions already paid, K.M. stated that she understood the $1,150.00 cheque was for December 2018 and January 2019, not February 2019.

In terms of the Landlords' submissions that the Tenants invited the contractors to access the deck through their rental unit, K.M. noted that they were cooperative with the contractors and had no idea that this had not been approved by the Landlord. They simply came to the door and asked for access.

In terms of the Landlord's submissions that the work was unanticipated, K.M. noted that in March of 2017, the Landlord was already having meetings about the water, as noted in the emails provided in evidence.

In reply to the Landlord's submissions that they have no documentation about the first summer, and the Landlord's suggestion that the Tenants were not bothered, K.M. stated that they did not take photos as they did not anticipate that the work would go on and on. She also confirmed that their "vigilance" had nothing to do with the purchase of their new home; rather, it was a result of the extensive disruption and upset from the project that they knew they had to document this.

In response to V.P.'s statement that they let the Tenants enjoy their deck in the summer;, K.M. stated that the fact is that the Tenants asked why the deck was not immediately replaced after the removal of the scaffolding, and were informed by the Landlord's representatives that it was because they could not get labour to replace the deck. She confirmed the deck was not replaced until November 2017.

K.M. also confirmed they did not ask for monetary compensation for P.K. not being able to write, as that was not part of their claim.

K.M. stated that the trips they planned were to get away from the construction noise, not for personal reasons. She also testified that in terms of the timing of the trips, they did so due to three reasons:

1. they had direct communication with the contractors who confirmed the job was much more extensive;
2. the work was not in fact done until March of 2019, which was long past the original completion date of October 2018; and,
3. they had a long history of all of the projects that they had endured during their time at the site not being completed on time.

K.M. stated that she needed to have peace and quiet to recover from her injury and as such they left the rental unit for extended periods of time.

In terms of just "cutting their losses" and getting out of the tenancy, K.M. confirmed that she and P.K. had extensive conversations about this, but they had already purchased their condo and it wasn't completed; to end their tenancy would involve two moves which they felt was just not reasonable. She also noted that they were also getting conflicting reports from the Landlord as to when the work would be done.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at**:**

www.gov.bc.ca/landlordtenant.

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 Tenants have 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.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

The Tenants allege the Landlord failed to disclose the imminent repairs when the Tenants negotiated the residential tenancy agreement. The Tenants submit that had they known they would be subjected to such construction noise and disruption they would not have rented the unit.

The Landlord submitted substantial documentation supporting a finding that the Landlord was unaware that extensive exterior work would be required in 2017. While the Landlord may have been aware of some water ingress at the time, I am not satisfied the Landlord knew the extent of the repairs required, or more importantly, that it would impact the subject rental unit.

The evidence indicates extensive repairs were done the year before. Unfortunately, either faulty workmanship, or the elements, or a combination thereof resulted in further work being required 2017. On balance I find the Landlord's representatives were unaware this work would be required, and I therefore find the Landlord, or their agents, did not mislead the Tenants or withhold any known information at the time the parties negotiated the tenancy agreement.

Tenant's Claim for Compensation for Loss of Use of the Deck

The evidence confirms that the Tenants use of their deck was impacted by construction during the tenancy. The Tenants seek $8,000.00, or $500.00 per month, in monetary compensation for loss of use of their deck for a total of 16 months; in their written submissions they claim they were not able to use their deck from May to November 2017 and from August 2018 to February 2019.

I accept the Tenants' evidence that the large outdoor deck was a deciding factor when they viewed the rental unit. The photos submitted by the Tenants confirm it was a lovely deck offering beautiful views of the mountains and the city.

The parties seemed to have agreed that the value of the Tenants' deck was $500.00. Whether this was a figure requested by the Tenants, or proposed by the Landlord, the Tenants' requested value of $500.00 relating to the use of their deck was not disputed by the Landlord. The only dispute was the number of months the deck was not able to be used by the Tenants.

While there were times the Tenants were not able to use the full area of their deck, I am not satisfied they lost complete use of the deck for 16 months as they allege.

The Tenants claim they were not able to use their deck both during the actual repairs to the deck, but also when the exterior walls were being repaired and waterproofed. The evidence indicates there were times the Tenants were cautioned against opening their windows; the obvious conclusion is that this would impact their ability to be out on their deck at those times as well as a result of dust. However, I am not satisfied the Tenants could not use their deck during the entire duration of the east wall façade repairs as presumably work closer to their unit would have greater impact than work further away.

I am satisfied, based on the documentary evidence before me, that the Tenants had partial use of their deck from May 11, 2017 to July 5, 2017. While the Tenants claim they lost *full use* of their deck during this time period due to concrete grinding and scaffolding, I find they have submitted insufficient evidence to support this claim. I accept that the scaffolding would have taken up some amount of their deck for a period of time, but I am not satisfied this rendered their entire deck unusable during that time. In all the circumstances, I prefer the Landlord's characterization of "partial loss" of use of the deck during this time period.

I also find the Tenants had full use of their deck from July 5, 2017 to September 10, 2017. I am not satisfied, based on the photos submitted in evidence, that the deck was unsafe or unusable during the summer of 2017.

Based on the audio files submitted by the Tenants, I find they were not able to use their deck from September 10-18, 2018 due to grinding and resulting dust. The audio files vary in terms of intensity throughout the time period however, it is clear the grinding was of such a proximity as to prohibit them from being outside. I make similar findings in respect of their ability to use their deck in January and February of 2019.

I also find the deck was also not useable during the October 13, 2017 brick spraying as well as during the November 8-24, 2017 deck repairs. Whether the deck repairs were necessary in 2017, or the work was done because the Tenants asked to have their deck repaired the fact is the deck was not usable during the repairs.

I also find the Tenants were not able to use their deck from November 20, 2018 to December 17, 2018 when scaffolding was again on their deck.

It is possible the Tenants ability to use their deck was impacted during other times. I am not able, based on the evidence before me, to provide a precise number of hours or days the Tenants could not use their deck. As such, I award the Tenants the nominal sum of $3,000.00 representing loss of full use of their deck for six months of their tenancy at the agreed upon $500.00 per month.

Tenant's Compensation Claim for Breach of Quiet Enjoyment

The Tenants also seek monetary compensation for breach of quiet enjoyment as a result of the noise and dust resulting from the construction at the rental unit and the presence of cluster flies. In this respect they seek an additional $500.00 per month for 16 months.

A tenant's right to quiet enjoyment is protected under section 28 of the *Residential Tenancy Act,* which reads 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.

Guidance can also be found in *Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment* which provides in part as follows:

> "…
> Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment.
> …
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.
> …
> A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it.
> …
> In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.
> …

The Tenants' right to quiet enjoyment must be balanced against the Landlord's obligation to repair and maintain a rental property pursuant to section 32 of the *Act.* When such repairs and maintenance occur, a tenant may be temporarily disturbed or inconvenienced. Section 32 provides that a tenant has a right to be free of "unreasonable disturbance".

In this case I find the Landlord attended to repairs and maintenance as needed and made their best efforts to ensure the work impacted the Tenants as little as possible. I am also satisfied that the Tenants were kept informed of the progress of the work, and any unexpected delays. The Landlord also paid to have the Tenants furniture moved and stored to ensure it was not damaged when the exterior of the building was being worked on. The Landlord also completed the deck repairs in the winter months which are typically cold and rainy in the city in which the rental unit is located, rather than during the summer months, to ensure the Tenants had use of their deck during the summer months. I am also satisfied the Landlord acceded to the Tenants' request that the ceiling repairs be completed after the tenancy ended.

The documentary evidence submitted by the Landlord indicates the Landlord's representatives were in regular communication with the contractors to ensure these Tenants were not unreasonably disturbed. In all the circumstances, I am satisfied the

Landlord's representatives did not sit idly by and allows others to negatively impact the Tenants' quiet enjoyment; rather, they were responsive to the Tenants' concerns and took reasonable steps to address those concerns.

The evidence confirms that four major renovation/remediation projects occurred during the 23-month tenancy including the east façade repairs, deck repairs and roof restoration project. While I find the Landlord made their best efforts to deal with these projects as expeditiously as possible, I find that the tenancy was devalued somewhat due to the cumulative duration of these projects.

In determining the amount, the tenancy was devalued I am persuaded by the audio files provided by the Tenants which indicate the intrusive nature of the grinding, hammering and construction noises during these projects.

I am also persuaded however, by the testimony of the Landlord's witness, B.R., that the construction was not as unbearable as portrayed by the Tenants. She testified that she lives on the same floor and endured the same construction projects. She did not express the level of frustration and upset as that conveyed by the Tenants. She was pleased with how the Landlord handled the projects and the rent reductions provided.

It is likely that the Tenant, K.M.'s hand injury contributed to the Tenants' obvious frustrations during the tenancy. They were clearly upset by the duration of the projects and what felt to them, like "constant construction". However, the evidence before me does not support the Tenants' perception. Although the Tenants submitted numerous audio files, it is notable that 10 of 42 were recordings made on one day: January 23, 2019; another five were recorded on January 18, 2019. While some of the recordings show loud grinding, some, such as those taken on September 10 and September 11 were barely audible. Further, it is notable that the Tenants were away for much of the construction which occurred in October 2018, December 2018 and some of January 2019.

The Tenants' testimony and written submissions clearly show they were very upset by the construction. I agree, however, with the Landlord's representative that the Tenants were prone to exaggeration. For example, it is notable that the Tenants failed to acknowledge that a portion of their payments to the Landlord included parking. Further, they claimed construction had been ongoing *continuously* prior to K.M.'s hand injury in June of 2018, yet the evidence does not support such a finding as the construction had ceased in November of 2017. They also erroneously claimed construction occurred in

June of 2018 and did not correct this error until it was pointed out by the Landlord's representative at the hearing. Similarly, the Tenants described the deck as being a "health hazard" in the summer of 2017, yet the photos submitted by the Tenants do not support such a finding. The Tenants also wrote that as of October 1, 2018 their "deck furniture needed to be removed for the removal and replacement of the rotten rooftop deck boards", yet this was *after* the boards had been replaced in 2017 such that the deck boards were not rotten. Additionally, in a letter dated January 3, 2019, the Tenants write they loss use of their deck for "all of the summer of 2017", they were "choking from silica dust", and that they suffered a "severe infestation of cluster flies"; I find that the evidence simply does not support these claims.

Although I have found the tenancy was devalued, I am not persuaded it was as problematic as the Tenants submit. I therefore award the Tenants the nominal sum of $3,500.00 for breach of their right to quiet enjoyment. In arriving at this figure, I note that the Tenants paid $2,975.00 per month in rent for a total of $68,425.00 in rent during their 23-month tenancy. In all the circumstances, I find the Tenants are entitled to approximately 5% return on the rent paid (over and above the amounts they have been awarded for loss of use of their deck).

Tenants' Claim for Compensation for Time Away from the Rental Unit

The Tenants also seek compensation for monetary losses they incurred at times they felt "forced" to leave the rental unit. In this regard, they submitted receipts for travel outside of the city, the province and the country.

While these trips no doubt provided the Tenants with a welcome break from the work being done at the rental unit, I find the cost is not recoverable from the Landlord.

The evidence confirms that the construction occurred during weekday work hours. While it possible for construction to displace tenants, such as when extensive renovations occur to their bathroom or kitchen, the interior of the subject rental unit in this case was not rendered uninhabitable.

Further, section 7 of the *Act* requires a party claiming compensation to minimize their losses. Had it been necessary for the Tenants to leave the rental unit for extended periods of time, which I am not satisfied was the case, the Tenants could have obtained less expensive accommodation closer to the rental unit.

The evidence confirms the Tenants purchased a property on Vancouver Island. Several of their trips were to Vancouver Island. One of their trips was to California and the other to Ontario. These trips were not inexpensive, as indicated by the $9,171.12 claimed by the Tenants. Further, and in particular, the trip over Christmas was booked at a time when the construction was scheduled to be completed. I find it more likely this trip was booked for personal reasons and not due to the construction at the rental unit. For these reasons I dismiss the Tenants' claim for related compensation.

Tenants' Claim for Increased Rental Costs

The Tenants also seek monetary compensation for increased rental costs in the amount of $4,725.00.

The parties entered into a fixed term tenancy agreement from April 1, 2017 to March 31, 2018. The agreement provided that following the end of the fixed term the tenancy would continue on a month to month basis; as such, either party was able to end the tenancy, provided they did so in accordance with the *Residential Tenancy Act.*

In this case, on January 28, 2019, the Tenants provided their one month's notice pursuant to section 45 and moved to a rental closer to the home they purchased on Vancouver Island.

In their written submissions provided in July of 2019, the Tenants write:

> "Due to a critical rental shortage in [the city in which their new home was built], and our need for short term rental vs a lease, we had very little choice in rental accommodation for the required six months before we take possession of our condo. Despite the higher rent, overall, we reduced our costs as best we could by moving close to our new home, rather than stay in [the city in which the rental unit was located] and face significant travel and hotel costs for necessary trips to oversee the final condo sale meetings/decisions and preparations."

While the Tenants claim they moved from the rental unit due to the ongoing construction, and claim they reduced their overall costs, the above passge indicates the Tenants benefitted from being closer to their new home which was under construction; in this respect, I am unable to find they in fact suffered a loss.

Further, although their new rental was more expensive than the subject rental unit, I was not provided sufficient evidence to show that the Tenants could not have rented something at the same cost as the subject rental unit. As noted previously the Tenants

have an obligation to mitigate their losses; in this case I am not satisfied the Tenants satisfied this obligation. I therefore dismiss their claim for monetary compensation for increased rental costs.

Tenants' Claim for Moving Costs

The Tenants also seek their moving costs. At the time the Tenants moved from the rental unit, the fixed term had expired, and the tenancy was on a month to month basis. Although the Tenants hoped to be able to remain in the rental unit until their new home was built, the Landlord could have ended the tenancy prior to that date, provided they did so in accordance with the *Act*.

Tenants are not guaranteed perpetual occupation of a rental unit such that moving costs are inevitable. I find these costs are therefore not recoverable.

Tenants' Claim for Compensation Related to K.M.'s Hand Injury

The Tenants also seek the sum of $5,000.00 for "compensation to the Tenant, K.M., for "damages to her health" and not healing from her injury".

As noted previously, the Tenants bear the burden of proving the Landlord breached the *Residential Tenancy Act.* While the Tenants provided evidence relating to the nature of K.M.'s injury, I am not satisfied any delay in K.M.'s healing, if there was such a delay, was related to anything the Landlord did, or failed to do in contravention of the *Residential Tenancy Act.* Further, the Tenants failed to provide any basis for the requested $5,000.00. Finally, it is notable that at the time of her injury the tenancy was on a month to month basis; accordingly, had the Tenants believed their living situation was negatively impacting K.M.'s recovery, they were able to end their tenancy with one month's notice. I therefore dismiss this portion of the Tenants' claim.

Tenants' Claim for the Cost of Improvements

The Tenants also sought the sum of $530.05 for professional installed kitchen pullout metal drawers. As aptly noted by the Landlord's representative, a Tenant is not entitled to monetary compensation for improvements to the rental unit, unless the Landlord specifically agrees to the improvements. This is set out in *Residential Tenancy Branch Policy Guideline 1* which reads in part as follows:

RENOVATIONS AND CHANGES TO RENTAL UNIT

1. Any changes to the rental unit and/or residential property not explicitly consented to by the landlord must be returned to the original condition.

2. If the tenant does not return the rental unit and/or residential property to its original condition before vacating, the landlord may return the rental unit and/or residential property to its original condition and claim the costs against the tenant. Where the landlord chooses not to return the unit or property to its original condition, the landlord may claim the amount by which the value of the premises falls short of the value it would otherwise have had.

There was no such evidence that the Tenants sought, or obtained, such approval from the Landlord for the installation of the kitchen and bathroom pullout metal drawers. As such, these costs are not recoverable.

Filing Fee and Registered Mail Costs

As the Tenants have been partially successful in their claim, I find they are entitled to recover the filing fee of $100.00.

The Tenants also seek recovery of their registered mail costs. Section 72 of the *Act* allows for repayment of fees for starting dispute resolution proceedings and charged by the Residential Tenancy Branch. While provisions regarding costs are provided for in Supreme Court Proceedings, they are specifically not included in the *Act*. I conclude that this exclusion is intentional and includes disbursement costs such as registered mailing costs; as such, their claim for recovery of their registered mail costs is dismissed.

Conclusion

The Tenants' monetary claim is granted in part. I find the Tenants are entitled to the sum of **$6,600.00** calculated as follows:

Compensation for loss of use of the deck for 6 months	$3,000.00
Nominal sum for loss of quiet enjoyment during the tenancy	$3,500.00
Filing fee	$100.00
TOTAL AWARDED	**$6,600.00**

I accept the Landlord's evidence, as confirmed in the Tenant ledger, and the testimony of V.P., that the Tenants have received at total of $5,866.04 in rent reductions. I therefore award the Tenants the balance of **$733.96.**

The Tenants are granted a Monetary Order in the amount of **$733.96.** This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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 27, 2020

Residential Tenancy Branch