# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes: MNDCL-S, MNRL-S, FFL

Introduction

In this dispute, the landlord seeks compensation for various matters under section 67 of the *Residential Tenancy Act* (the "Act"). In addition, they seek recovery of the filing fee under section 72 of the Act.

The landlord filed an application for dispute resolution on May 11, 2020 and a dispute resolution hearing was held on September 10, 2020 and adjourned to January 14, 2021. I issued an Interim Decision on September 10, 2020 which set out the reason for adjourning.

At the hearing on January 14, 2021, the landlord, her representative, one of the tenants (M.), and the tenants' assistant, attended. No issues of service were raised.

Issues

1. Is the landlord entitled to any or all of the compensation as claimed?
2. Is the landlord entitled to recovery of the filing fee?

Background and Evidence

I have only reviewed and considered oral and documentary evidence meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues in the application. Only relevant evidence needed to explain my decision is reproduced below.

This is a particularly difficult case, with neither party being what one might call a winner. The landlord lost a significant amount of rental income, and the tenants lost the ability to continue their tenancy. The situation which lead to the tenancy ending is tragic, and at no point lay with the fault or negligence of either party.

The tenancy in this dispute began on October 19, 2019. It was a fixed term tenancy that was supposed to end on October 19, 2020. Monthly rent was $1,250.00 and the tenants paid a security deposit of $625.00. A copy of the written tenancy agreement was submitted into evidence.

On or about April 27, 2020, the landlord (her representative) received “a frantic call” from the co-tenant M. (It should be noted that tenant T. resided in the rental unit; co-tenant M. was tenant T’s guarantor and did not reside with him in the rental unit.) In the frantic telephone call, M advised the landlord that T was a victim of a violent crime, for which he was hospitalized. (A few medical documents were submitted into evidence.). M advised the landlord that T needed to vacate the rental unit on an urgent basis and as soon as possible. The tenant M testified that she also texted the landlord about this.

The landlord’s representative testified that it was their understanding that the tenant would be moving out on May 7, and he booked an elevator with strata for the move.

On April 28, 2020, the tenant M sent an email to the landlord stating that T “is unable to continue with his rental apartment [. . .] We are informing you that by May 2, [his] belongings, with [*sic*] be moved out by movers/and cleaners.”

The landlord argued that no formal notice was given by the tenants to end the tenancy, as is required under section 45 of the Act. The notice given was by phone call, text, and email. The tenant and her assistant argued that given the exigent circumstances of the violent crime that had occurred, they were unable to do so at the time. The tenants’ assistant testified that the RCMP had told tenant M to “say nothing.” It was “literally a matter of life and death.” The tenants were unable to provide a proper notice at the time as tenant M was “gone, getting T out of the region” and that this was “a matter of necessity.” Indeed, it was the whole family who was in danger.

Tenant M’s written submission dated September 8, 2020 (which was submitted at that time in order to request an adjournment) included the following description of the events, which I consider relevant:

> [T] was the victim of horrific violent for which he was immediately hospitalized as a result of this injuries. [. . .] As a result of this crime, our family was advised by the RCMP and those with relevant experience in dealing with these situations, that [T] needed to leave his job, friends, family, and move out of the immediate area to ensure his safety.

Also submitted into evidence by the tenants is a copy of an email dated April 22, 2020 at 4:18 AM from an RCMP constable with the street enforcement unit, to tenant M, in which the constable sets out clear instructions on how tenant M and T can safely leave the area. While I shall not reproduce the content of this letter, it is fair to say that the tenants and their family were, at that time, in grave and imminent danger.

There is also a copy of a text message sent on April 28, 2020 by tenant M to another RCMP constable, in which she writes: “Corporal [redacted in this Decision]: moving and storage truck is there on Sat May 2-. Pls take off alert to the apartment address after May 2. I have informed the landlord, given written notice. I would like the fact the movers are still under protection.”

In respect of the landlord’s claim, they seek compensation in the amount of $6,250.00 for five months’ worth of rent (they were unable to find a new tenant during the pandemic, despite putting up multiple advertisements and postings, and despite hiring an agent and conducting approximately eighteen showings). In addition, they seek compensation of $200.00 for a strata-imposed fine for the non-use of a booked elevator; the tenant had moved out five days before and the elevator sat unused, much to the other residents’ inconvenience and frustration. The landlord seeks $150.00 for costs related to transportation to and from the rental unit in conducting inspections and showings (no receipt was provided for this amount claimed). Finally, the landlord seeks $100.00 for the application filing fee.

The landlord is no longer seeking $1,250.00 for rental agent fees, as the agent was unable to secure a new tenant, and thus they did not collect or charge the fee.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Section 7 of the Act states that if a party does not comply with the Act, the regulations or a tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Further, a party claiming compensation for damage or loss that results from the other's non-compliance must do whatever is reasonable to minimize the damage or loss.

Before turning to an analysis of whether the tenants are liable, however, I must first address the defense of the principle of frustration. The landlord's representative is correct in that this dispute is about a breach of contract, and that the circumstances giving rise to the breach – the violent crime – are separate. However, the tenant's assistant argued that these issues both need to be considered, and that one has a direct impact on the other. I am persuaded by this approach and will explain why.

At the outset, it is worth noting that section 92 of the Act states that the "*Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements." Further, it should be noted that section 91 of the Act states that except as modified or varied under the Act, the common law respecting landlords and tenants applies in British Columbia. Tenancy agreements are, after all, contracts, subject to the principles of contract law, including frustration.

"Frustration" is defined within *Residential Tenancy Policy Guideline 34* as follows:

> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
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> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The guideline reflects the decision in the Supreme Court of Canada's leading case on frustration, *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58, at para. 58 (and discussed in detail more recently in *Wilkie v. Jeong,* 2017 BCSC 2131) in which the court explained that

> The purpose of the doctrine of frustration is to relieve a contracting party from its bargain by bringing the contract to an end. The doctrine applies “when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract.’”

Broadly stated, there are two elements to the test:

1. a qualifying supervening event (one for which the contract makes no provision, which is not the fault of either party, which was not self-induced, and which was not foreseeable), which

2. caused a radical change in the nature of a fundamental contractual obligation.

The onus is on the relying party to establish both elements of the test. Tenant M and the tenants’ assistant argued that tenant T’s situation, which included a violent attack on T, and an imminent and ongoing threat to the safety of T’s family, were such that the tenants were incapable of continuing to rent. The violent incident occurred in late April 2020, and there is no indication or evidence before me to find that it was a result of either party’s conduct, was not self-induced, and, that it was not foreseeable.

On the second element of the test, a fact-specific analysis is essential because it is crucial to make findings concerning the foundation, or fundamental purpose, of the tenancy agreement. This is because frustration arises where the supervening event alters the parties' obligations such that performance of the tenancy agreement would result in something different from that contracted for.

The tenants’ obligations under the tenancy agreement were to pay rent and the landlord’s obligation was, *inter alia,* to provide a rental unit to the tenants who ordinarily would have had exclusive possession of the rental unit.

As a result of the violent crime and the related matter of the tenants’ lives being at risk, the situation made it impossible for the tenants to perform their obligations under the tenancy agreement. (Indeed, I find that, based on the oral and documentary evidence before me, including the email from the RCMP officer dated April 22, 2020 in which the officer provides clear instructions on how to get out of town, the tenants’ lives were at stake.)

In other words, the incident caused a radical change in the nature of a fundamental contractual obligation that put the tenants into a position where they were unable to

fulfill the terms of the tenancy agreement. And, while only briefly alluded to by the parties, it would appear that tenant T may be under the protection of the federal Witness Protection Program. Taking all of these facts into account, I am unable to find that the tenants continued to be in a position whereby they could continue being subject to the tenancy agreement.

In summary, it is without dispute that the violent incident and the ongoing threat from a criminal element was not the fault of the parties and was not self-induced. In these circumstances, the incident is a qualifying supervening event. Moreover, I find that the incident destroyed the basis for the tenancy agreement. For these reasons, I find that the tenancy agreement was frustrated. Given that the tenancy agreement was frustrated based on the principle of the doctrine of frustration, I find that the tenants did not breach the Act in respect of their obligations to pay rent beyond May 2, 2020. As such, they are not liable for the claim for unpaid rent.

There is no evidence before me that the tenants agreed to vacate the premises on May 7, 2020, and thus no basis on which the landlord may claim compensation for a strata fine incurred for the non-use of an elevator. Indeed, the documentary evidence of the tenants prove, on a balance of probabilities, that the tenants would be moving out on May 2, 2020. It is unclear on what basis the landlord believed that an elevator would be required on May 7. As such, I dismiss the landlord's claim for this amount.

In respect of the landlord's claim for transportation to and from the rental unit, no evidence, such as receipts or mileage logs or any such supporting documentation was submitted into evidence to support this claim. Accordingly, I dismiss this aspect of the landlord's claim.

Finally, as the landlord was largely unsuccessful in this application, I decline to grant recovery of the filing fee of $100.00.

That having been said, the doctrine of frustration does not absolve the tenants from the requirement to prove proper notice to end the tenancy under section 45 of the Act. They provided notice to end the tenancy less than a week before vacating the property.

Given that there was a *prima facie* breach of the Act, I award the landlord a nominal award equal to the amount of the security deposit currently held in trust. The landlord may retain the $625.00 of the tenants' security deposit in full satisfaction of this nominal award.

Conclusion

**I grant the landlord's application, in part, and order that they retain the tenants' $625.00 security deposit for the reasons explained above.**

**I dismiss the remainder of the landlord's application, without leave to reapply,**

If either party disagrees with this decision their remedy is to make an application for judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c 241.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: January 15, 2021

Residential Tenancy Branch