



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding DE BONIS HOLDING LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      FFT, CNC, OLC (Tenant)  
                                 OPC, FFL (Landlords)

### Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenant filed the application January 12, 2021 (the “Tenant’s Application”). The Tenant applied as follows:

- To dispute a One Month Notice to End Tenancy for Cause dated January 02, 2021 (the “Notice”)
- For an order that the Landlords comply with the Act, regulation and/or the tenancy agreement
- To recover the filing fee

The Landlords filed the application January 20, 2021 (the “Landlords’ Application”). The Landlords applied as follows:

- For an Order of Possession based on the Notice
- To recover the filing fee

The Tenant appeared at the hearing with G.B. V.D. and F.B. appeared at the hearing for the Landlords. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

Pursuant to rule 2.3 of the Rules, I told the Tenant at the outset that I would consider the dispute of the Notice and request to recover the filing fee and dismiss the request

for an order that the Landlords comply with the Act, regulation and/or the tenancy agreement as it is not sufficiently related to the dispute of the Notice. The request for an order that the Landlords comply with the Act, regulation and/or the tenancy agreement is dismissed with leave to re-apply. This decision does not extend any time limits set out in the *Residential Tenancy Act* (the “Act”).

The Landlords submitted evidence prior to the hearing. The Tenant did not submit evidence. I addressed service of the hearing packages and Landlords’ evidence.

The Agents for the Landlords confirmed receipt of the hearing package for the Tenant’s Application on January 23, 2021.

G.B. confirmed receipt of the hearing package and evidence for the Landlords’ Application.

During the hearing, the Agents for the Landlords advised that two One Month Notices to End Tenancy for Cause have been served on the Tenant. The second One Month Notice to End Tenancy for Cause is dated March 22, 2021. I heard the parties in relation to this second One Month Notice to End Tenancy for Cause. However, I have not decided the validity of the second One Month Notice to End Tenancy for Cause because the Landlords did not file an amendment seeking to add a request for an Order of Possession based on the second One Month Notice to End Tenancy for Cause. I find it would be unfair to consider the validity of the second One Month Notice to End Tenancy for Cause when it was not clear from the Application or an amendment that the Landlords would seek this at the hearing.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the Landlords’ documentary evidence and all oral testimony and submissions of the parties. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Should the Notice be cancelled?
2. Should the Landlords be issued an Order of Possession based on the Notice?
3. Is the Tenant entitled to recover the filing fee?

4. Are the Landlords entitled to recover the filing fee?

Background and Evidence

The Agents for the Landlords testified as follows. There is no written tenancy agreement in this matter. There is a verbal tenancy agreement between the parties. The tenancy started August 15, 2015 and is a month-to-month tenancy. Rent is \$908.00 due on the first day of each month. The Tenant paid a \$400.00 security deposit.

G.B. agreed with the above points other than the start date of the tenancy which he said was in 2012 or 2014.

There was no issue that the Notice was served and received by the Tenant on January 02, 2021.

The Notice is addressed to the Tenant and relates to the rental unit. I do note that the wrong unit number is noted for the rental unit address at the bottom of the Notice. It is signed and dated by an agent for the Landlords. It has an effective date of February 01, 2021. The ground for the Notice is a breach of a material term by not paying rent as of January 02, 2021.

G.B. took no issue with the form or content of the Notice when asked.

The Agents for the Landlords testified as follows. The Notice is based on late payment of rent for January. Payment of rent on the first day of each month is a material term of the tenancy agreement. The Tenant did not pay January rent until January 02, 2021.

G.B. submitted as follows. This matter is related to File Number 641. As of now, there are no arrears and the Tenant has paid rent in full. The Landlords are harassing the Tenant and have an ulterior motive for evicting the Tenant. The Tenant was looking to pay rent January 01, 2021 and talked to Landlord V.D. who said the Tenant could pay rent the following day. The Tenant wanted to pay rent on the first, but the Landlords were not on the premises. The Tenant paid rent on January 02, 2021. It is "ridiculous" that paying rent on the first day of each month would be a material term of the tenancy agreement. The Tenant pays rent by cheque.

In reply, the Agents for the Landlords testified that Landlord V.D. was at the building to receive rent on January 01, 2021.

The Agents sought an Order of Possession effective at the end of April.

The Landlords submitted correspondence to the Tenant or tenants about paying rent on the first day of each month dated:

- September 08, 2019
- November 03, 2019. This letter states that paying rent by the first is a material term and “that any further late rent payment will result in a” One Month Notice.
- December 01, 2019. This letter states that paying rent by the first is a material term and “that any further late rent payment will result in a” One Month Notice.
- April 02, 2020

The prior decision on File Number 641 states at page 4:

I find that the landlord has failed to provide sufficient evidence to support that prior to September 8, 2019 the tenant had received sufficient, written warning that monthly rent payments paid after the first of every month are not acceptable. I find **the continued acceptance of late rent payments** raises the issue of implied waiver. Although rent may be payable on the first of the month, the acceptance or implied acceptance of late payments, may contribute to ambiguity. In this case the landlord’s own evidence supports that **the tenant had made at least 7 rent payments between January 2019 and September 2019 on dates other than the first of the month, before the issuance of the first letter on September 8, 2019.**

A warning to a tenant must be unambiguous and clear. **By accepting late rent payments on multiple occasions without properly informing the tenant in writing that these payments were considered late, and could possibly be considered a breach of the tenancy agreement and the Act, the terms of the tenancy become ambiguous. I find that the landlord had accepted late rent payments for a long period of time, and had failed to clearly communicate to the tenant that this is not acceptable.** On this basis, I find that the landlord failed to provide sufficient evidence to support that the tenant was late in paying his rent prior to September 8, 2019.

(emphasis added)

## Analysis

The Notice was issued pursuant to section 47(1)(h) of the *Act* which states:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies...

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

The Tenant had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*. There is no issue that the Tenant received the Notice January 02, 2021. The Tenant's Application was filed January 12, 2021, within time.

The Landlords have the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules.

Policy Guideline 8 deals with material terms in a tenancy agreement and states:

### **Material Terms**

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the

Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

Although I would usually find terms about the rent amount and date it is due to be material terms of a tenancy agreement, I am not satisfied this is the case here as the Landlords permitted the Tenant to pay rent late numerous times before issuing the September 08, 2019 letter as found in the decision on File Number 641. If the rent amount and date it is due is a material term of the tenancy agreement, I would expect the Landlords to have addressed the issue the first time the Tenant paid rent late. There is no evidence before me that the Landlords did address the issue the first time the Tenant paid rent late. Further, a party cannot decide and assert part way through a tenancy that a term is a material term. Whether a term is material is established between the parties at the outset of the tenancy.

In my view, the proper avenue to address the Tenant's late payment of rent is through 10 Day Notices and One Month Notices for repeated late payment of rent, not a One Month Notice for breach of a material term.

In these circumstances, I am not satisfied the term about the rent amount and date it is due is a material term of this tenancy agreement. Therefore, I am not satisfied the Landlords had grounds to issue the Notice and I cancel the Notice. The tenancy will continue until ended in accordance with the *Act*.

The Tenant was successful in the Tenant's Application and therefore is permitted to recover the \$100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenant can deduct \$100.00 from one future rent payment.

The Landlords were not successful in the Landlords' Application and therefore are not permitted to recover the filing fee.

### Conclusion

I am not satisfied the Landlords had grounds to issue the Notice and I cancel the Notice. The tenancy will continue until ended in accordance with the *Act*.

The Tenant is permitted to recover the \$100.00 filing fee and can deduct \$100.00 from one future rent payment.

The Landlords are not permitted to recover the filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: May 03, 2021

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Residential Tenancy Branch