# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PROMPTON REAL ESTATE SERVICES INC. and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed on January 7, 2021, wherein the Landlord sought monetary compensation in the amount of $2,175.00 from the Tenants for breach of a fixed term tenancy agreement and recovery of the filing fee.

The hearing of the Landlord's application was scheduled for teleconference at 1:30 p.m. on May 11, 2021. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties were cautioned that recordings of the hearing were not permitted pursuant to *Rule 6.11* of the *Residential Tenancy Branch Rules*. Both parties confirmed their understanding of this requirement and further confirmed they were not making recordings of the hearing.

The parties agreed that all evidence that each party provided had been exchanged. No 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 parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

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

2. Should the Landlord be authorized to retain the Tenants' security deposit?

3. Should the Landlord recover the filing fee?

Background and Evidence

The Landlord's Leasing Manager, M.G., testified on behalf of the Landlord. She confirmed that this fixed term tenancy began March 15, 2020 and was to end March 31, 2021. Rent was payable in the amount of $1,975.00.

On November 30, 2020, the Tenants gave notice to end their tenancy effective December 31, 2020. M.G. stated that the rental unit was re-rented as of March 1, 2021 for $1,750.00 per month.

In the hearing before me the Landlord sought monetary compensation in the amount of $2,075.00 representing $1,975.00 in liquidated damages and recovery of the filing fee.

The residential tenancy agreement provided in evidence before me was not signed; however, the addendums to the agreement were. Of particular relevance to the application before me was an addendum which was signed by both Tenants and the landlord on February 28, 2020 and which included this clause with respect to liquidated damages:

> "3. Your lease agreement is for a one-year term. Should you vacate early, one full month worth of rent (liquidated damages) must be paid by certified funds with your notice of termination. The landlord and tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages as a result of rental income due to the tenant's breach of the terms of this agreement."

The Tenants opposed the Landlord's request for monetary compensation. The Tenant, K.P., testified that they felt they had no choice but to end the tenancy due to issues with their neighbours, and more problematically, the neighbour's dog who urinated and defecated in the common areas of the rental property to such an extent that the smell was unbearable. K.P. testified that she brought her concerns to the Landlord's attention for two months and nothing was done to resolve the situation. The Tenant also testified that she is allergic to dog hair.

The Tenant confirmed that she did not make an application to the Residential Tenancy Branch, although she did report her concerns to the concierge.

In response to the Tenant's submissions M.G. stated that no one else in the rental building (of which there are eight units) has complained about the smell of pet urine/feces.

Documentary evidence filed by the Landlord indicates that in June of 2020 the Landlord communicated with the SPCA regarding the neighbour's pet being left outside in the common areas of the building, where the dog urinates and defecates. Further documentary evidence indicates that on December 4, 2020 the Senior Strata Agent informed the Tenants that they had contacted the SPCA, warned the pet owner and fined them numerous times.

Analysis

In this section reference will be made to the *Residential Tenancy Act* (the "*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 Landlord has 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 Landlord seeks monetary compensation from the Tenants pursuant to a fixed term tenancy and in particular seeks to collect the liquidated damages payment pursuant to clause 3 of the addendum to the tenancy agreement; that clause has been reproduced in its entirety previously in this my Decision.

*Residential Tenancy Branch Policy Guideline 4—Liquidated Damages* provides in part as follows:

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.
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> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
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> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
> - If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
> - If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.
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> …
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> A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

Guidance can be found in the B.C. Supreme Court decision of *Super Save Disposal Inc. v. Blazin Auto Ltd.,* 2011 BCSC 1784.

> [26] The enforceability of a liquidated damages provision in an agreement engages two competing objectives: freedom of contract versus the right of the courts to intervene in a given case to relieve against an oppressive or unconscionable result flowing from enforcement of the liquidated damages term. It is well settled that the enforceability of such a term turns on whether it is a genuine pre-estimate of the expected loss that a party will sustain in the event of a breach of contract or a penalty clause so oppressive or unreasonable that equitable intervention is justified to prevent an injustice.
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> [27] On the authorities drawn to my attention in these appeals, the following non-exhaustive list of guiding principles can be identified.
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> [28] The characterization of the provision in issue is either a genuine pre-estimate of expected loss or a penalty requires a case-specific assessment: *32262 B.C. v. See-Rite Optical*, 1998 ABCA 89, at para. 15.
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> [29] The issue is to be decided upon the terms of the contract and "inherent circumstances" of each particular contract, *Dunlop Pneumatic Tire Co. Ltd. v. New Garage and Motor Co. Ltd.*, [1915] A.C. 79, per Lord Dunedin at pages 86 and 87.
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> [30] Though the parties may use the words "liquidated damages" or "penalty" in the agreement itself, the parties' characterization of the clause in the contract as one or the other is not conclusive: *Dunlop Pneumatic Tire Co. Ltd. v. New Garage and Motor Co. Ltd., supra*. Similarly, the absence of such characterizing phrases is neither fatal to the plaintiff's claim for liquidated damages or to the defendant's challenge that the clause at issue amounts to a penalty: *Bayliss Sign Ltd. v. Advantage Holdings Ltd.* (1986), 9 B.C.L.R. (2d) 230 (Co.Ct.), at p. 241. In each case, the court must make an assessment as to whether the clause is in truth a genuine pre-estimate of anticipated loss in the event of a breach, or an *in terrorem* clause inserted to compel performance of a contractual obligation.
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> [31] Judicial interference with a liquidated damages provision will be justified if enforcement of the term results in payment of a sum which is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: *32262 B.C. v. See-Rite Optical, supra*, at para. 13.
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> [32] Conversely, a liquidated damages provision is more likely to be enforced where the claim approximates the amount to which the claimant would otherwise have been entitled according to principles of general contract law:*32262 B.C. v. See-Rite Optical, supra*, at para. 16 to 18.

> [33] The onus of establishing that a stipulated sum is a penalty rather than a genuine pre-estimate of damages that the parties have agreed in advance will be sustained in the event of a breach of the contract, rests on the party against whom the stipulated sum is claimed. In *Sign-O-Lite Plastics Ltd. v. Medallion Management Inc.*, [1979] 16 B.C.L.R. 284 (Co.Ct.), the law in this area was summarized in these terms at p. 288:
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> > The fact that a sum may be a penalty is a matter which may be raised by the defendant by invoking the equitable jurisdiction of the court in the same manner as other vitiating elements such as duress and undue influence. This, of course, is done by entering an appearance and filing a statement of defence.
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> See also on this point *Super Save Disposal Inc. v. Rat Rod Kustoms Ltd.*, (30 March 2010), Surrey C64279 (B.C. Prov. Ct.) at paras. 5 and 8; and *Super Save Disposal Inc. v. Makhija Holdings Inc.*, 2011 BCPC 249, at para. 21; and finally, *Bayliss Sign Ltd. v. Advantage Holdings Ltd.*, *supra* at paras. 236 and 240.
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> [34] If the provision is found to constitute an unenforceable penalty, the plaintiff must prove its damages in the ordinary way and the defendant is entitled to advance the position that the plaintiff ought reasonably to have taken certain mitigating steps: *Bayliss Sign Ltd. v. Advantage Holdings Ltd., supra* at page 240.

A tenant in a fixed term is potentially liable for all rent payments for the duration of the term. However, this must be considered in conjunction with a Landlord's obligation pursuant to section 7 of the *Act* to take reasonable steps to mitigate their losses. In this case I find the Landlords mitigated their losses by re-renting the unit as soon as possible as well as by accepting a lower rent to ensure the unit was rented.

The evidence confirms that the Tenants ended their tenancy three months before the end of the fixed term. The rental unit was not re-rented until March 1, 2021, such that the unit remained vacant for two months. The unit was also re-rented at a rate of $1,750.00, some $225.00 less than the contracted amount. As such, the Landlord suffered a loss of two months rent, in addition to $225.00 for the month of March for a total loss of $3,725.00.

In the claim before me the Landlords sought one month's rent, which was the specified sum pursuant to the liquidated damages clause in the addendum to the tenancy agreement. I find this to be a genuine pre-estimate of damages, not a penalty, and therefore recoverable.

The Tenants claim the rental unit was uninhabitable due to the presence and smell of pet urine and faeces from their neighbour's dog.

Although not specifically argued by the Tenants during the hearing before me, the Tenants appear to be arguing that the tenancy was frustrated such that they should be relieved of their obligations pursuant to the tenancy agreement.

Guidance can be found in *Residential Tenancy Branch Policy Guideline 34—Frustration*, which provides 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.
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> The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

While the Tenants brought their concerns to the Landlord's attention, they did not take any formal steps, such as applying to the Residential Tenancy Branch for relief.

The Landlord's representative testified that no other occupant has complained of this issue. I accept their testimony in this regard. I also find the Landlord took steps to address the Tenant's concerns, such as reporting the issue to the SPCA. Documentary evidence also confirms the strata warned and fined the owners of the dog.

While the situation was undoubtedly unpleasant, I am not satisfied it was sufficient to relieve the Tenants of their obligations pursuant to the tenancy agreement. Nor am I satisfied the presence of pet urine and faeces in the common areas so radically

changed the circumstances of this tenancy that fulfillment of the contract as originally intended was impossible.

For these reasons I find the liquidated damages clause to be enforceable and I grant the Landlord's request for related compensation.

As the Landlord has been successful, I grant their claim for recovery of the filing fee.

Conclusion

The Landlord's claim for monetary compensation from the Tenants is granted. The Landlord is entitled to recovery of the $1,975.00 in liquidated damages as well as the filing fee for a total award of **$2,075.00.** I authorize the Landlord to retain the Tenants' $987.50 security deposit towards the amounts awarded and I grant the Landlord a Monetary Order in the amount of **$1,087.50.** this Order must be served on the Tenants and may be filed and enforced in the B.C. Provincial Court

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: June 10, 2021

Residential Tenancy Branch