Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNDCL-S MNDCT FFT

Introduction
This hearing was reconvened from an adjourned hearing originally scheduled for November 29, 2021.

This hearing was scheduled to deal with cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlord requested:

- a monetary order for money owed or compensation for damage or loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants requested:

- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

BO appeared for the landlord in this hearing, while AN appeared for the tenants. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The interim decision dated November 29, 2021 noted the requirements for service of the hearing documents for both parties. The tenants acknowledged receipt of all hearing documents, and that they were ready to proceed with this matter. The landlord also acknowledged receipt of the tenant's evidence for this hearing, and that they were ready to proceed with the scheduled hearing.

Issue(s) to be Decided

Are the parties entitled to the monetary orders applied for?

Are either of the parties entitled to recover the costs of their filing fees for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This tenancy originally began as a fixed-term tenancy on August 1, 2017, and continued on a month-to-month basis after July 31, 2018. The landlord had collected a security deposit in amount of $975.00, which has been returned to the tenants. As of February 2021, the monthly rent was set at $2,079.00 per month. An addendum was signed between the parties on February 22, 2021 to amend the tenancy agreement to renew the tenancy. The addendum stated that the month-to-month tenancy would be renewed for a fixed term of March 1, 2021 to February 28, 2022, and the tenancy would revert to a month-to-month after the end of the term. The addendum also stated that the landlord agreed to provided a monthly credit of $200.00 for the period of March 1, 2021 to December 31, 2021, resulting in a net monthly charge of $1,879.00 for this period. The addendum noted that the "rental credit is to recognize a temporary noise disturbance at the property", and is signed by both parties.

On April 22, 2021, the tenants served the landlord with written notice for the landlord to comply with a material term of the tenancy agreement, which was the tenant's right to quiet enjoyment. The tenants stated that the construction noise that started on February 9, 2021 had become significant and unbearable, and that the landlord failed to inform the tenants of the extent of the construction work that was being undertaken before signing the addendum dated February 22, 2021. The tenants stated that they would end the tenancy if the landlord failed to correct the matter by April 29, 2021. On April 30, 2021, the tenants gave official notice that they would be terminating the tenancy effective May 30, 2021. The tenants found a new rental unit, and were able to start that tenancy on May 15, 2021 for $2,150.00 per month.

The tenants filed this application to recover monetary losses which the tenants state were incurred due to the landlord's failure to comply with the Act and tenancy agreement. The tenants' monetary claims are detailed in the table below:

Item	Amount

Refund of 15 days rent for May 2021	$939.50
Move-in fee for new rental unit	300.00
Professional cleaning costs	388.50
Claims for nuisance and stress ($1,000.00 for stress and $500.00 for hazard pay)	1,500.00
Total Monetary Order Requested	**$3,128.00**

The tenants provided written submissions as well as oral testimony in support of their claims. The tenants provided a detailed timeline of the events that took place during this tenancy, and form the basis of their claims. As noted above, not every specific detail is reproduced here.

The tenants testified that construction had started at the rental building in October 2020, and the tenants started hearing noise from their rental unit in January of 2021. Prior to the commencement of the construction, the tenants first received an email from the building strata on August 13, 2019 containing an attachment with presentation slides for a meeting that would be held on August 15, 2019. As the meeting was only for owners, the tenants did not read through the documents.

The tenants state that they received further email notices in November 2019 and January 2020 addressed to the owner of the rental unit which referenced “upcoming envelope restoration”. The tenants did state that they did not take much notice as the notices were addressed to the owner, and only referenced exploratory work, and required access to particular suites which did not include the tenants’.

From August 2020 to February 2021, the tenants received periodic updates from the strata about the upcoming construction, which mostly pertained to the scaffolding work which would start in August 2020. In November 2020 to January 2021 the tenants received email notices referring to upcoming envelope restoration. The tenants state that they still did not take much notice as the messages referred to conducting exploratory work with required access to certain suites which did not include the tenants’.

The tenants state that they started being affected by the construction in October 2020 due to the scaffolding which was being put up. The tenants state that at this point they had not received any communication from the landlord or their agents about the construction. One of the tenants spoke to the concierge who informed the tenant that the landlord should have informed the tenants of the construction work, and that other tenants were receiving rent reductions from their landlords. The tenants did not feel affected enough by the construction to request a rent reduction at this time.

After the tenants started to hear construction noise in January 2021, the tenants communicated with the regional director for the strata on February 9, 2021 expressing frustration about the noise, and requesting further information about the project. The tenants received a response that the phase 2 of the scaffolding was expected to be

completed by February 2021, and that there would be noise when the demolition starts near the tenants unit. The tenants were informed that the project would be completed by November or December 2021. The tenants state that they were provided this information upon their own initiative by constructing strata, and still had yet to receive any notices or information from their landlord.

The tenants state that as they enjoyed living in their rental unit, and were expecting a baby in August 2021, they did not have any intentions to move. The tenants state that things changed in February 2021 when they started hearing intermittent construction noise which consisted of approximately ten minutes of drilling at a time. The tenants wrote to their landlord on February 9, 2021 requesting a $200.00 rent reduction until the construction was finished at the end of the year.

The tenants submitted a copy of the correspondence between the parties, which shows that the landlord had accepted the tenants' request for a rent reduction of $200.00 per month credit for the months of March 2021 through to December 2021 on the condition that the tenancy would be renewed for a ten month fixed term until December 31, 2021.

The landlord disputes the entire of the tenants' claims, and filed a cross-application to recover the liquidated damages for this tenancy in the amount of $585.00 as set out in the tenancy agreement. The tenants state that they had signed the addendum without realizing that the terms for the end of the fixed-term had been changed to February 28, 2022 instead of December 31, 2021.

The tenants state that they believe that in February 2021 that the landlord was aware, or should have been aware, of the amount of noise being made, and that the landlord failed to provide the tenants with further information about what the tenants should expect in the coming months. The tenants state that in March and April 2021 the level of noise and disturbance became so constant and intolerable that their level of enjoyment of the rental unit was significantly impacted. The tenants state that not only was the noise extreme and disturbing, the tenants' lost a significant amount of privacy due to the scaffolding and work being performed. The tenants were also affected by the dust from the construction, which necessitated that the windows and blinds remain shut.

One of the tenants was working from home due to the pandemic, and could not work from the office due the increased risk associated with their pregnancy. The tenants state that the construction noise significantly impacted the tenant's ability to perform their duties, and contributed to their stress. The tenants state that by mid-March 2021 they realized that the magnitude of work was more extensive than originally anticipated ,and would continue for weeks, if not months. The tenants continued to communicate with the agent for the strata, and was informed on April 16, 2021 that "a very rough estimates that they will start the windows the first week of May on the 2nd floor so it is going to be close to August". The tenants then requested a phone call from their landlord, which took place two days later, and requested that the tenancy revert back to a month-to-month agreement in order to provide the tenants with some flexibility in dealing with the matter.

The landlord's agent informed the tenants on April 18, 2021 that the landlord would not be allowing any changes. At this point, the tenants decided that despite being pregnant, the tenant would attempt to work in the office in order to manage the issue with the noise. The tenants state that this decision caused a significant amount of stress due to the concerns about contracting covid-19 while pregnant.

The tenants received a notice from the strata dated April 20 and April 26, 2021 stating that the entire building was now considered a construction zone, and that there would now be construction activity Monday to Friday from 7:30 a.m. to 4:00 p.m, and well as the occasional Saturday. The tenants state that the landlord did not attend to ascertain the extent of the construction or construction noise despite the tenants serving the landlord with the Notice on April 22, 2021, but noticed the landlord had listed their apartment for rent with an incentive of $200.00 per month.

The tenants submit that the landlords failed to provide the tenants with any information about the construction or noise and that the limited information they received was from the building's strata. The tenants also submit that the disturbance from the construction had increased significantly in March and April, and were left with no choice but to serve the landlord with notice to end the tenancy. The tenants were able to find new housing, and are claiming reimbursement for the $300.00 move-in fee, half the month's rent for May 2021 as the new tenancy had started on May 15, 2021, compensation for professional cleaning of the rental unit, as well as compensation for the stress the tenants had to endure.

The landlord responded that the parties had entered into a mutual agreement to amend the tenancy agreement to extend the term of the tenancy, and provide the tenants with a $200.00 credit for the loss of quiet enjoyment related to the construction. The landlord also argued that the tenants were well aware of the construction noise and disturbance prior to signing this addendum, and had the option of ending the periodic tenancy instead of renewing the fixed-term. The landlord notes that the tenants did receive correspondence from the strata about the construction, beginning with the presentation slide that was sent to the tenants. The landlord states that they were never provided with this information.

The landlord states that they had negotiated the agreement in good faith, and felt that the addendum already contemplated the loss of quiet enjoyment that the tenants would experience due to the construction. The landlord disputes the claims for monetary losses as the tenants chose to move out, and incur the expenses claimed. The landlord denies any wrongdoing or malicious intent in their actions, and argue that the tenants were the party that breached the agreement by ending the tenancy prior to the end of the fixed-term.

The landlord further notes that the construction work was performed in compliance with city bylaws, and that work estimates were only estimates, and that there was no way to anticipate a hard timeline for such a project.

Analysis

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the applicants must satisfy each component of the following test for loss established by **Section 7** of the Act, which states;

> ***Liability for not complying with this Act or a tenancy agreement***
>
> ***7*** *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*
>
> *(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the applicants bear the burden of establishing their claim on the balance of probabilities. The applicants must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the applicants must then provide evidence that can verify the actual monetary amount of the loss. Finally, the applicants must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Furthermore, section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been “a reduction in the value of a tenancy agreement.”

Section 28 of the Act speaks to a tenant’s right to quiet enjoyment:

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…

(b) freedom from unreasonable disturbance;…

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

Residential Tenancy Policy Guideline #6 gives further clarification on the tenants' entitlement to quiet enjoyment and related compensation:

A. LEGISLATIVE FRAMEWORK

Under section 28 of the *Residential Tenancy Act* (RTA) and section 22 of the *Manufactured Home Park Tenancy Act* (MHPTA) a tenant is entitled to quiet enjoyment, including, but not limited to the rights to:

• reasonable privacy;
• freedom from unreasonable disturbance;
• exclusive possession, subject to the landlord's right of entry under the Legislation; and
• use of common areas for reasonable and lawful purposes, free from significant interference.

B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT

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

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

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

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

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

In this case, I find that the landlord had acknowledged the tenants' loss of quiet enjoyment by agreeing to a $200.00 per month reduction in rent for a specified amount of time. However, the tenants argue that the addendum they had agreed to sign was unconscionable considering the fact that they believe that the landlord failed to adequately inform the tenants of the extent that they would be impacted, which the tenants argue had increased following the signing of the addendum that required the tenants to agree to a new fixed-term.

Residential Tenancy Policy Guideline #30 addresses fixed term tenancies. Effective December 11, 2017, a tenancy agreement may only include a requirement that the tenant vacate the rental unit at the end of a fixed term only in specific circumstances.

The tenancy automatically continues as a month-to-month tenancy on the same terms unless both the landlord and tenants agree to renew a fixed term tenancy with or without changes for another fixed term. The tenants argue that they had agreed to a new fixed-term with little knowledge of the extent that the construction would affect their lives, and furthermore, the tenants argue that the landlord had amended the original agreement for the term to end on December 31, 2021 to February 28, 2022 without their knowledge.

Although the landlord may argue that the tenants made the decision to enter into the new fixed-term agreement, I must still consider whether it was unconscionable for the landlord to require that the tenants to sign a new fixed-term agreement in exchange for the rent reduction.

Residential Tenancy Act provides by section 5 that:

This Act cannot be avoided

> **5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

> (3) A term of a tenancy agreement is not enforceable if
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> (a) the term is inconsistent with this Act or the regulations,
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> (b) the term is unconscionable, or
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> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 3 of the Residential Tenancy Regulation gives the following definition of "unconscionable":

> **3** For the purposes of section 6 (3) (b) of the Act *[unenforceable term]*, a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

In this case, the tenants had approached the landlord in order to negotiate a rent reduction for the loss of quiet enjoyment related to the construction noise, which is clearly noted on the addendum. The tenants were aware that the new negotiated terms included a renewal of the fixed term, albeit to December 31, 2021 rather than February 28, 2022 as noted on the addendum.

Although I accept the landlord's arguments that the tenants were informed of the construction through the strata's correspondence and communication, and although I accept the landlord's testimony that specific timelines beyond estimates cannot always be achieved, I find that the landlord still has the obligation as the owner of the rental unit to obtain and communicate any relevant information that would affect the tenants' right to quiet enjoyment. As noted above, the tenants have the right to quiet enjoyment of their rental unit, which is balanced with the landlord's duty to repair and maintain the rental unit. In this case, although the landlord did contemplate a loss of quiet enjoyment related to the construction, I find that the landlord failed in their obligations to provide the tenants with the necessary information required for the tenants to truly make an informed decision. Although the tenants did possess some knowledge of the construction and its impacts on them, this information was obtained through the initiative of the tenants. As noted by the tenants, much of the communication was addressed to the owner of the property, and the tenants understandably were under the assumption that the landlord would communication important information to them. Furthermore, I find that the requirement of the tenants to enter into a new fixed term agreement to be unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenants and the landlord in circumstances where the

tenants felt that they had no alternative but to accept the proffered agreement in order to be compensated for their loss, or alternatively move out or accept the disturbance with no compensation at all. I find that the landlord had used this advantage in order to influence the tenants to agree to a new fixed term agreement that was more beneficial to the landlord than the tenants. Although perhaps a mistake, I find that the landlord had extended the fixed term to February 28, 2022, which contributed to the stress the tenants felt in having to endure the increasing noise and disturbance from the construction.

By signing a addendum for a new fixed-term agreement, the tenants faced possible financial consequences if they were to move out before the end of the agreement, which is the case in this matter. The question is whether the requirement for the tenants to enter into a new fixed-term agreement can be considered oppressive or grossly unfair to the tenants.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

> **Unconscionability**
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> [28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (***Fountain v. Katona***, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:
> (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
> (b) proof of substantial unfairness of the bargain obtained by the stronger. ***Morrison v. Coast Finance Ltd***. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).
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> [29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (***Warman v. Adams***, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).
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> [30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (***Morrison***, at713).

> [31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (***Warman*** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in ***Morrison*** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (***Harry v. Kreutziger*** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

In this case, even though the tenants became aware of the construction though their communication with strata, and although the landlords did agree to provide the tenants with the requested rent reduction, I find that the landlords included an oppressive term that was more beneficial for the landlord than the tenants. I find that not only did the tenants feel that they had little choice but to agree to the new fixed-term in order to obtain the reduction in rent, the landlord had assumed that the responsibility fell on the strata to provide the tenants with the information the tenants required to make an informed decision before signing the addendum that ultimately prevented the tenants from moving out without financial consequences.

As noted by the landlords, the timelines provided for the construction work were merely estimates, and the amount and length of disturbance may vary in reality. I find it is grossly unfair of the landlord to have required the tenants to agree to a extend the fixed-term knowing that there was a possibility that the construction could extend longer, or impact the tenants even more significantly than it already had. I find that the evidence provided by the tenants clearly supports that despite their efforts to endure and accommodate the noise and disturbance, the tenants felt that they had no choice but to end the tenancy, even if it meant incurring additional expenses.

It is my view that the landlord included the fixed term provision in anticipation that the tenants might want to move out as the construction work progressed. I find the imposition of this term to be unconscionable considering the uncertain and variable nature of how long and extensive the disturbance would be, and accordingly, the term is of no force or effect.

As noted above, I do not doubt the significant impact that the construction work had on the tenants and their lives. Although I sympathize with the tenants, and the stress they had to endure during this tenancy, the burden still falls on the tenants to not only support the value of their claims, but also that these losses were due to the landlord's negligent or deliberate actions. The tenants argue that they had to end the tenancy due to the landlord's breach of a material term of the tenancy agreement, namely their right

to quiet enjoyment of the rental unit. The tenants gave notice under section 45(3) of the *Act* to end the tenancy effective May 30, 2021.

As per my finding above, I find the requirement of the tenants to agree to extend the term of the tenancy to be unconscionable. Therefore, the tenants had the right to end the tenancy in accordance with section 45 of the *Residential Tenancy Act* which reads in part as follows:

Tenant's notice

> **45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

I find that the tenants ended this tenancy in a manner that complies with the *Act*, as stated above. Accordingly, I dismiss the landlords' application for liquidated damages without leave to reapply. As the landlord was unsuccessful in their application, I also dismiss their application to recover the filing fee without leave to reapply.

I will now consider the tenants' claims. The tenants filed monetary claims to recover losses associated with the end of this tenancy, as well as for stress. As noted above, section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement.". In this case I note that the landlord had already provided the tenants with a rent deduction in amount of $200.00 per month for the months of March 2021 through May 2021.

The tenants filed a further claim of $1,000.00 for stress and $500.00 related to the risk related to returning to the tenant's workplace while pregnant and during a high risk time during the pandemic. As noted above, section 67 of the *Act* establishes that an Arbitrator may determine and issue an order for damages and loss arising from a party breaching the *Act*, regulations or tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. A claimant also has the duty to act reasonably to mitigate their losses.

I find that the tenants have not met the evidentiary burden on a balance of probabilities. I find that tenants' evidence does not sufficiently support that the losses claimed are a result of the landlord's failure to comply with the tenancy agreement and *Act.* Although I recognize that the tenants had moved out because they could no longer tolerate the

noise and disturbance caused by the construction, I am not satisfied that the tenants had suffered the losses in the amounts claimed, and that these losses are attributed to the landlords' contravention of the *Act.* As noted above, although the landlords could have provided more communication to the tenants in relation to the construction, I find that the tenants were provided with notices and information by the strata, and the landlord did provide the tenants with a reduction in rent for the tenants' loss of quiet enjoyment. The tenants had the option of requesting further reductions or applying for dispute resolution, but decided to move out instead.

I have considered the fact that the tenants experienced significant stress during this tenancy, and although the impact may have been greater due to the pandemic, I am not satisfied that this additional loss of quiet enjoyment can be attributed to the landlord's actions, nor am I satisfied that the tenants had sufficiently supported the amounts claimed for stress and hazard pay. Although I accept that there were risks to the tenant while attending their office while pregnant and during a pandemic, I find that the tenants failed to establish the monetary values associated with this risk. Accordingly, I dismiss this portion of the tenants' claims for stress and hazard pay without leave to reapply.

The remaining portions of the tenants' claims relate to specific expenses incurred by the tenants when moving out such as the cost of cleaning, move-in fees, and a refund for half a month's rent for the month of May 2021.

Residential Tenancy Policy Guideline #5 addresses the duty of the claimant to mitigate loss:

"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss[1]. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation[2]. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

The duty to mitigate losses is only one of the criteria that needs to be met when making a claim. As stated earlier in this decision, the claimants must not only prove the value of the loss, the claimants must also prove that the losses were solely due to the other party's contravention of the *Act* or tenancy agreement. Only after these requirements are met, can the applicant be successful in their claim. In consideration of the tenants' claim for move-in fees, I am not satisfied that the tenants had sufficiently supported that these fees were necessarily due to the landlord's contravention of the *Act.* I find that the move-in fees were a condition of the new rental agreement that the tenants had agreed to, and not necessarily a loss associated with the landlord's actions. Accordingly, I dismiss the tenants' claims for reimbursement of the move-in fees without leave to reapply.

Similarly, I am not satisfied that the tenants had sufficiently supported that it was necessary for the tenants to start the new tenancy on May 15, 2021, consequently costing the tenants further monetary losses. Although the tenants may have benefitted from this arrangement, I find that the landlord cannot be held responsible for the tenants' decision to overlap tenancies. Accordingly, I dismiss the tenants' claim for half a month's rent without leave to reapply.

Lastly, the tenants filed for reimbursement of professional cleaning fees. Although I am satisfied that the tenants had sufficiently supported that these expenses were incurred in relation to the end of this tenancy, I find that the tenants had an obligation to return the rental unit in reasonably clean condition. I do not find that the tenants suffered this loss due to the landlord's contravention of the *Act,* and I also dismiss this claim without leave to reapply.

As the tenants were unsuccessful with their monetary claims, I dismiss their application to recover the fling fee without leave to reapply.

Conclusion

I dismiss both the landlord's and tenants' entire application without leave to reapply.

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: April 21, 2022