

Introduction

- [1] On September 18, 2023, the Tenants filed a Tenant Application to Determine Dispute (Form 2(A)) (the "Tenants' Application") with the Residential Tenancy Office (the "Rental Office"). The Tenants' Application is seeking the following remedy:

To request the return of the security deposit.

- [2] On September 25, 2023 the Landlords filed a *Landlord Application to Determine Dispute* (Form 2(B)) (the "Landlords' Application") with the Rental Office. The Landlords' Application is seeking the following remedy:

To request an order directing my tenant to pay outstanding rent.

- [3] All documents were properly served in accordance with section 100.(1) of the *Act*.

- [4] On November 9, 2023, a teleconference hearing was held before a Residential Tenancy Officer (the "Officer"). Both Tenants ("R.L." and "J.M.") and one of the Landlords ("K.M.") participated in the hearing.

Issues to be Decided

- i. Do the Tenants owe rent to the Landlords?
- ii. Are the Tenants entitled to the return of the security deposit?

Summary of the Evidence

- [5] On November 20, 2022, the Landlords and the Tenants entered into a written one-year fixed-term tenancy agreement from December 1, 2022 to December 1, 2023 for the Residential Property. The Residential Property is a single detached house. Rent was \$2,300.00 due on the first day of each month. A security deposit was required and paid in the amount of \$2,300.00.

Tenants' Evidence and Submissions

- [6] The Tenants submitted 10 pages of documentary evidence, including written arguments, a copy of the tenancy agreement, and copies of Facebook message exchanges between K.M. and J.M.
- [7] The Tenants submitted that they do not owe the Landlords outstanding rent as the tenancy agreement ended by written agreement on August 31, 2023. The Tenants referred to copies of Facebook message exchanges between J.M. and K.M. On July 31, 2023, J.M. messaged K.M. asking if the tenancy agreement could end on August 31, 2023 due to the Tenants purchasing a house. On August 2, 2023, K.M. responded by saying "Sure that's fine!" J.M. argued that K.M.'s response was a written agreement to end the tenancy on August 31, 2023.
- [8] The Tenants testified that the Landlords did not return the entirety of the security deposit or file an application with the Rental Office to retain part of the security deposit within 15 days from the end of the tenancy, as required under the *Act*. J.M. testified that the Landlords returned \$1,322.50 of the security deposit to the Tenants and retained \$977.50.
- [9] The Tenants argued that, regardless, all damages claimed by the Landlords constituted reasonable wear and tear. R.L. argued that it was unreasonable for the Landlords to claim that the nail holes used to hang up pictures amounted to damage. R.L. further testified that the Landlords created damage themselves by incorrectly attempting to remove LED lighting. R.L. further argued that it was entirely unnecessary and excessive for the Landlords to have entire walls painted due to nail holes.

Landlords' Evidence and Submissions

- [10] The Landlords submitted 25 pages of documentary evidence, including a copy of the tenancy agreement, an invoice from a painting company, copies of Facebook message exchanges between J.M. and K.M., and photographs.
- [11] The Landlords argued that they were provided insufficient notice from the Tenants that they would be vacating the Residential Property and the Tenants therefore owe rent for September 2023. K.M. acknowledged that on August 2, 2023, she wrote "Sure that's fine!" to J.M. in response to being asked if the tenancy agreement could end on August 31, 2023. K.M. argued that this was not binding and that the Tenants should have provided the approved form to properly end the tenancy.
- [12] K.M. testified that she found a new tenant for October 1, 2023, however, she did not have a tenant for all of September 2023. K.M. argued that the tenancy agreement did not end until October 1, 2023, and that the Tenants owe rent to the Landlords for the month of September 2023.
- [13] K.M. testified that the Landlords returned \$1,322.50 of the security deposit to the Tenants and retained \$977.50. K.M. further testified that the Landlords did not account for interest accrued on the security deposit.
- [14] K.M. testified that the Tenants damaged the Residential Property beyond the standard of reasonable wear and tear due to leaving numerous dents and nail holes in walls, as well as leaving LED lighting behind which damaged the Residential Property. K.M. testified that she and her painter jointly agreed that it was necessary to paint the entirety of several walls to repair the damage. The Landlords submitted an invoice from the painting company which listed the total cost of materials and labour as \$977.50. The Landlords submitted photographs of the interior of the Residential Property which showed nail holes and some damage to walls.
- [15] K.M. argued that while the Landlords did not file an application with the Rental Office to claim against the security deposit, the Tenants agreed in writing for the Landlords to retain \$977.50 from the security deposit.
- [16] On September 13, 2023, K.M. messaged J.M. and said that she would return the security deposit once she received the bill from the painting company for repairs made to the Residential Property. K.M. later that day sent a photograph of an invoice for the painting company in the amount of \$977.50. J.M. responded on September 14, 2023, saying "Thank you. Do you have any pictures of the damage that you saw?"
- [17] Later on September 14, 2023, K.M. responded with numerous photographs and stated "Where every hole was the wall had to be repainted. The boarder batten behind the TV had to be replaced, there was 20 hooks in the basement that left damage when they were removed. Also the LED lights that were up all over the basement can't bell removed without peeling the paint as we have already tried. For a brand new home there was quite a lot of damage to the walls for 8 months."
- [18] Later that day, J.M. responded with a thumbs-up emoji. On September 20, 2023, J.M. sent K.M. a copy of the Tenants' Application. Later that day, K.M. also responded with a thumbs-up emoji.
- [19] K.M. argued that J.M.'s thumbs-up emoji response on September 14, 2023, constituted written agreement for the Landlords to retain \$977.50 from the security deposit for damages.

Analysis**i. Do the Tenants owe rent to the Landlords?**

- [20] The Officer notes the application of subsections 51.(3) of the *Act*, which states:

51. Termination by agreement

(3) *landlord and a tenant may make a written agreement, other than a tenancy agreement, to end a tenancy.*

53. Form and content of notice of termination

In order to be effective, a notice of termination shall be in writing and shall

(f) *when given by a landlord, be in the approved form.*

- [21] The Officer comments that in this matter where the Landlords are making a claim for unpaid rent, it is the Landlords' burden or onus to prove their claim on a balance of probabilities.
- [22] The Officer notes that the Landlords are claiming \$2,300.00 in outstanding rent for the month of September 2023. The Landlords argue that because the Tenants did not provide the Landlords with a Form 3 Tenant Notice of Termination, the tenancy did not end on August 31, 2023, and that it only ended when new tenants moved into the rental unit on October 1, 2023.
- [23] The Officer finds that the Landlords and Tenants agreed in writing to end the tenancy agreement effective August 31, 2023, pursuant to subsection 51.(3) of the *Act*. The Officer notes that on July 31, 2023, J.M. messaged K.M. to request that the tenancy agreement end on August 31, 2023, to which K.M. replied "Sure that's fine!" The Officer finds that K.M.'s response gave the Tenants permission to end the tenancy on August 31, 2023, prior to the end of the fixed-term tenancy on December 1, 2023.
- [24] Further, the Officer notes that a notice of termination is only required to be in the approved form when given by a landlord, pursuant to subsection 53.(f) of the *Act*.
- [25] The Landlords' Application is denied.

ii. Are the Tenants entitled to the return of the security deposit?

- [26] The Officer notes that subsections 40.(1), (2), (3), and (4) of the *Act* state:

40. Return of security deposit

- (1) *Except as provided in subsection (2) or (3), within 15 days after the date the tenancy ends or is assigned, the landlord shall either*
- (a) *issue payment, as provided in subsection (5), of any security deposit to the tenant with interest calculated in accordance with the regulations; or*
 - (b) *make an application to the Director under section 75 claiming against the security deposit.*

Landlord may retain amount from security deposit

- (2) *A landlord may retain from a security deposit an amount that*
- (a) *the Director has previously ordered the tenant to pay to the landlord; and*
 - (b) *remains unpaid at the end of the tenancy.*

Retention by landlord, other circumstances

- (3) *A landlord may retain an amount from a security deposit if*

- (a) *At the end of a tenancy, the tenant agrees in writing that the landlord may retain the amount to pay a liability or obligation of the tenant; or*
- (b) *After the end of the tenancy, the Director orders that the landlord may retain the amount.*

Consequences of non-compliance

- (4) *Where a landlord does not comply with this section, the landlord*
 - (a) *Shall not make a claim against the security deposit; and*
 - (b) *Shall pay the tenant double the amount of the security deposit.*

- [27] The Officer notes that in this matter where there is a dispute over a security deposit, it is the Landlords' burden or onus to prove, on a balance of probabilities, any and all claims made against the security deposit held by the Landlords in the amount of \$2,300.00, plus \$52.14 in accrued interest as of the date of this order, November 27, 2023.
- [28] The Officer notes that the Landlords stated that J.M. agreed in writing that the Landlords were able to retain \$977.50 from the security deposit by sending a thumbs-up emoji in response to K.M. describing damage to the rental unit. The Officer notes that J.M. denied that the thumbs-up emoji was telling K.M. that the Landlords were entitled to retain a portion of the security deposit. Rather, J.M. argued that the thumbs-up emoji was an acknowledgment that the message was seen.
- [29] The Officer notes the 2023 Saskatchewan Court of King's Bench decision of *South West Terminal Ltd. v Achter Land*, 2023 SKKB 116 ["South West Terminal"]. In that matter, the plaintiff and defendant had previously arranged for the purchase and sale of grain products over text message numerous times, often with the defendant accepting contracts with short one-word text message responses. On one occasion, the plaintiff drafted a contract, signed it, and texted a photograph of it to the defendant along with the message "Please confirm flax contract." The defendant then responded with a thumbs-up emoji. The parties disagreed on whether this constituted acceptance.
- [30] The court determined that in the "unique circumstances" of that case, the thumbs-up emoji response appeared to a reasonable person to be acceptance of the contract.
- [31] The Officer distinguishes this matter from that of *South West Terminal*. The Officer notes that there was no context of the parties having repeatedly accepted contracts with one another through curt text messages. Further, the Officer notes that in *South West Terminal*, the plaintiff texted the contract to the defendant, along with a request for confirmation of the contract. In this matter, K.M. explained the damage to J.M. and did not request any approval or confirmation from the Tenants.
- [32] The Officer notes that the copies of the Facebook message exchanges between K.M. and J.M. show that K.M. responded with a thumbs-up emoji to J.M.'s messages two times, the second of which was in response to J.M. sending a copy of the Tenants' Application to K.M. The Officer notes that clearly K.M.'s thumbs-up emoji in response to receiving the Application would not have been intended to convey that K.M. agreed with the allegations made by the Tenants in the Tenants' Application. The Officer finds that in the context of the parties' Facebook message exchanges, the thumbs-up emoji was used to signify that messages had been received.
- [33] The Officer finds that the Tenants are entitled to a return of the retained portion of the security deposit in the amount of \$977.50, plus accrued interest. As stated above, the Officer finds that the tenancy ended on August 31, 2023. That means the Landlords had until September 15, 2023 to either return the security deposit and interest or file an application with the Rental Office to retain the security deposit. The Officer finds that the evidence establishes that the Landlords did neither.

[34] The Officer refers to Order LR23-69, paragraph 15. where the Island Regulatory and Appeals Commission (the "Commission") makes these comments:

[15] *Subsections 40(2) and (3) are the only exceptions to the provisions contained in section 40. The Commission finds that there is no exemption from the rigours of section 40...*

[35] The Officer finds that the facts of this case do not present an application to the exceptions pursuant to subsections 40.(2) and/or (3) of the *Act*. The Officer finds that the Landlords did not comply with subsection 40.(1) of the *Act*, and is not exempted under subsection 40.(2) and/or (3) of the *Act*. Such non-compliance triggers subsection 40.(4) of the *Act*. The Officer finds that the Tenants are entitled to a return of their security deposit, including double the security deposit and interest accrued on the principle amount.

Conclusion

[36] The Landlords' Application is denied.

[37] The Tenants' Application is allowed. The Officer's calculations are as follows:

Item	Amount
Retained Portion of the Security Deposit	\$977.50
Interest (12/1/22 – 11/27/23)	\$52.14
Retained Portion of the Security Deposit (Double Awarded)	\$977.50
Total Compensation Awarded	\$2,007.14

[38] Section 14.(9) of the *Act* states:

Interest rate

A landlord shall credit interest to the tenant on the full amount or value of the security deposit, at the rate prescribed by the regulations, during the time the security deposit is held by the landlord.

[39] The Officer adjusts the interest accrued to the date this Order is issued.

[40] The Landlords shall pay the Tenants \$2,007.14, on or before December 18, 2023.

[41] **Order LD23-554 was served on the parties by email on November 27, 2023.**

IT IS THEREFORE ORDERED THAT

A. The Landlords shall pay the Tenants \$2,007.14, on or before December 18, 2023.

DATED at Charlottetown, Prince Edward Island, this 27th day of November, 2023.

(sgd.) Colin Trewin

Colin Trewin
Residential Tenancy Officer

NOTICE

Right to Appeal

This Order can be appealed to the Island Regulatory and Appeals Commission (the "Commission") by serving a Notice of Appeal with the Commission and every party to this Order within **20** days of this Order. If a document is sent electronically after 5:00 p.m., it is considered received the next day that is not a holiday. If a document is sent by mail, it is considered served on the third day after mailing.

Filing with the Court

If no appeal has been made within the noted timelines, this Order can be filed with the Supreme Court of Prince Edward Island and enforced as if it were an order of the Court.