

Introduction

- [1] On November 27, 2023 the Landlord filed a *Landlord Application to Determine Dispute* (Form 2(B)) (the “First Application”) with the Residential Tenancy Office (the “Rental Office”). In this application the Landlord requested an order for retention of the security deposit.
- [2] On November 29, 2023 the Landlord filed a second *Landlord Application to Determine Dispute* against the Tenant seeking rent owing.
- [3] The First Application and the Second Application are collectively referred to in this decision as the “Applications.”
- [4] On December 1, 2023 the Rental Office mailed and emailed the parties notice of a hearing scheduled for 11:00 a.m. on December 19, 2023.
- [5] On December 13, 2023 the Rental Office emailed an evidence package to the parties.
- [6] On December 19, 2023 the parties participated in a teleconference hearing before the Residential Tenancy Officer (the “Officer”).
- [7] The Officer notes that the security deposit plus interest totals \$716.06.

Preliminary Matters

- [8] At the hearing the Officer advised the Representative that the First Application for retention of the security deposit may have been filed after the 15-day deadline for filing this type of application. The Officer advised the Representative that there is a provision in the *Residential Tenancy Act*, RSPEI 1988, R-13.11 (the “Act”) that requires a landlord to pay a tenant double the security deposit when a landlord does not file within the 15-day deadline. The Officer also advised the Representative that this provision would be considered by the Officer in this decision.
- [9] At the hearing the First Application was amended to add an item (g) “Other” claim regarding cleaning and damage to the Rental Unit, which were also the Landlord’s bases for retaining the Tenant’s security deposit.
- [10] The parties agreed to allow two written tenancy agreements (dated January 16, 2023 and July 1, 2023) into the evidentiary record.
- [11] The Officer notes that, with regard to photographic evidence, the best practice is to date stamp all photographs at the time they are taken.

Issues to be Decided

- i. Does the Tenant owe rent to the Landlord?
- ii. Can the Landlord retain the Tenant’s security deposit? Or, must double the security deposit be credited to the Tenant?
- iii. Has the Landlord established a claim against the Tenant for damage and uncleanness?
- iv. Can the amount payable to the Tenant be offset against the amount payable to the Landlord?

Summary of the Evidence

- [12] The Rental Unit is a two-bedroom, one-bathroom apartment located in a 41-unit building that the Landlord has owned since December 31, 2017.

- [13] The Tenant moved into the Rental Unit on February 1, 2023 pursuant to a written, fixed term tenancy agreement dated January 16, 2023, for the period of February 1, 2023 to January 31, 2024. In the agreement the Landlord, the Tenant and the Tenant's witness, SJR were named. Rent in the amount of \$1,400.00 was due on the first day of the month and the security deposit totaled \$1,400.00.
- [14] On June 30, 2023 SJR moved out of the Rental Unit. The Landlord returned SJR's \$700.00 security deposit.
- [15] The Landlord, the Tenant and another tenant ("AK") were named in a second written, fixed term tenancy agreement dated July 1, 2023, for the period of July 1, 2023 to June 30, 2024. Rent in the amount of \$1,400.00 was due on the first day of the month and the security deposit totaled \$1,400.00.
- [16] On September 30, 2023 AK moved out of the Rental Unit. The Landlord returned AK's \$700.00 security deposit.
- [17] The Landlord and the Tenant were parties to an earlier Rental Office decision, Order LD23-501. The Tenant was required to move out of the Rental Unit.
- [18] On November 8, 2023 the Tenant moved out of the Rental Unit and the Landlord retained the Tenant's \$700.00 security deposit.

Landlord's Evidence and Submissions

- [19] The Representative's evidence is summarized as follows. The Tenant and SJR each paid \$700.00 to the Landlord for the security deposit before February 1, 2023. The Representative returned to SJR his \$700.00 security deposit after he moved out on June 30, 2023.
- [20] AK moved into the Rental Unit in July 2023. AK later moved in her mother and brother. The Representative, with the agreement of the Tenant, served AK an eviction notice. AK moved out on September 30, 2023 and the Representative returned AK her \$700.00 security deposit.
- [21] The Tenant and the Landlord knew that AK was moving out and the Tenant was trying to find a new person to sublet. The Landlord was working with the Tenant to find a new roommate. The Tenant found three potential people to move in but none worked out.
- [22] The Landlord informed the Tenant that he was responsible for the full \$1,400.00 of rent for October 2023. However, the Tenant emailed the Representative stating that he was only renting one room and the Tenant paid \$700.00 for October 2023. The Tenant was the only person living in the Rental Unit from October 1, 2023 to November 8, 2023. The Tenant did not pay any rent for the period of November 1 to 8, 2023.
- [23] The Tenant owes \$700.00 for October 2023 and \$373.33 pro-rated rent for November 1 to November 8, 2023.
- [24] The Landlord ensures that rental units are cleaned and damage is repaired between tenants. The Landlord rarely keeps security deposits and this may be the first security deposit that the Landlord has retained in ten years.
- [25] The Landlord retained the Tenant's security deposit because he did not pay all the rent due, the Tenant did not complete the full fixed term, and the Tenant left the unit in a damaged and unclean condition.

- [26] The parties did not complete a condition inspection report. The photographs submitted into evidence by the Landlord (Evidence Package pages 9 to 35) were taken in November 2023, at the end of the tenancy. The photographs show a drywall indent, grease on the top of the kitchen ceiling and other issues.
- [27] The Landlord was charged \$701.50 for repairing the bathtub, which is much less than having the bathtub replaced.
- [28] The Landlord has not returned to the Tenant the security deposit funds of \$700.00 that were originally paid by the Tenant in January 2023.
- [29] On November 14, 2023 the Representative submitted to the Tenant a Notice of Intention to Retain Security Deposit (Form 8 under the repealed *Rental of Residential Property Act* RSPEI 1988, R-13.1 (the "*RRPA*")). The Representative characterized service of the Form 8 to the Tenant as "filing." The Representative did not send a copy of the Form 8 to the Rental Office at this time.
- [30] On November 25, 2023 the Tenant completed an Application for Determination of the Security Deposit (Form 9 of the repealed *RRPA*).
- [31] The Representative was contacted by the Rental Office and the Representative then completed the First Application, using the information that had been contained in the *RRPA* Form 8.

Tenant's Evidence and Submissions

- [32] The Tenant's evidence is summarized as follows. On October 1, 2023 the Tenant sent the Landlord \$700.00 because AK, the other tenant, was required to move out by the Landlord. The remaining \$700.00 of rent was for the other bedroom, which was not rented by the Tenant. The Tenant is a student and could not afford to pay \$1,400.00 per month. The Tenant did not pay any rent for the period of November 1, 2023 to November 8, 2023.
- [33] The drywall damage shown in the Landlord's photograph (Evidence Package page 17) was in AK's bedroom. AK and her two guests left the Rental Unit in a terrible state and did not complete much cleaning before they left.
- [34] The bathtub had some stains at the beginning of the tenancy and more developed later. The bathtub tap was leaking, which may have caused additional staining.
- [35] The Tenant submitted photographs of the Rental Unit that were taken on September 30, 2023 (pages 37 to 44) and photographs taken on November 8, 2023 (pages 46 to 67), after the Tenant had finished cleaning. On September 30, 2023 the Tenant sent the Representative a photograph of the wall damage (Evidence Package page 38). The Tenant wanted the Representative to know about the damage and uncleanness before the Representative returned AK's security deposit.
- [36] SJR's evidence is summarized as follows. On February 1, 2023 the Rental Unit's bathtub was in good condition but it was not new or perfect. There were one or two dark patches or stains when SJR first moved in. SJR cleaned the bathtub while he lived in the unit.
- [37] The Landlord returned SJR his \$700.00 security deposit after he moved out on June 30, 2023. SJR visited the Rental Unit after June 30, 2023 to pick up mail. The last time SJR visited the unit the kitchen and bathroom were totally different. The kitchen sink was full of grease and the bathtub was very dark, not in good condition.

Order LD23-501

- [38] The Landlord and the Tenant were parties to an earlier Rental Office eviction dispute, which was determined in Order LD23-501. This decision states in part:

[17] *Based on the totality of the evidence provided, the Officer finds that the Landlord has established a valid basis to terminate the tenancy agreement due to the Tenant's non-payment of rent, pursuant to subsection 60.(1) of the Act. The Officer finds that the Tenant only paid \$700.00 of the \$1,400.00 rent due for the month of October 2023 because he said that was his portion of the rent.*

[18] *The Officer notes that the Tenant and A.K. signed a single joint tenancy agreement for the rental unit with a stated monthly rent of \$1,400.00. The Officer notes that the Tenant and A.K. were jointly and severally liable for payment of rent under the tenancy agreement. The Officer notes that following A.K.'s eviction, the Tenant, as the sole remaining tenant was required to pay the full amount of rent owing. The Officer further notes that the Tenant was entitled to find another cotenant to help pay for rent, as was done previously when A.K. replaced a prior co-tenant who vacated the rental unit, but the Tenant did not find a replacement co-tenant...*

IT IS THEREFORE ORDERED THAT

A. *The Notice is valid and the Application is denied.*

B. *The tenancy agreement between the parties shall terminate effective 5:00 p.m. on November 8, 2023. The Tenants and all occupants shall vacate the Residential Property by this time and date.*

A. *A certified copy of Order LD23-501 may be filed in the Supreme Court and enforced by Sheriff Services as permitted by the Act."*

[39] The Officer notes that Order LD23-501 is solely a delivery of possession (eviction) order and the decision does not order the Tenant to pay rent to the Landlord.

Analysis

Rent Owning – Relationship Between the Parties

[40] The Landlord's position is that that Tenant was responsible for all of October 2023's rent, in the amount of \$1,400.00. The Tenant's position is that he should only be responsible for half of the monthly rent for October 2023 (\$700.00) because he only rented one bedroom and the Landlord evicted the tenant living in the other bedroom of the unit.

[41] At the hearing the Tenant did not use the specific terms "joint tenants" or "tenants in common." However, the substance of the Tenant's evidence and submissions raise these legal terms and the effect on the Tenant's liability for rent, damage and cleaning.

[42] The Officer must determine whether the Tenant and AK were joint tenants or tenants in common.

[43] Although Ontario's residential rental law is different from Prince Edward Island, the general statement below of the relationships between landlords and tenants is applicable to this case.

[44] Ontario's Landlord and Tenant Board Interpretation Guideline 21 titled *Landlords, Tenants, Occupants and Residential Tenancies* describes the difference between joint tenants and tenants in common as follows:

"Where two or more persons are tenants of a rental unit, it is important to consider the nature of their relationship with the landlord to determine if the tenants are joint tenants, tenants in common, or, as in the case of a rooming house, they have separate and distinct tenancy agreements with the landlord and live separately from one another.

In a joint tenancy, there is a single tenancy agreement and the tenants are jointly and severally (individually) liable for the payment of the entire rent for the rental unit.

In the case of a tenancy in common, while all the tenants are occupying the same premises, each tenant in common has a separate tenancy agreement with the landlord even if all the tenants have signed one tenancy agreement. Each tenant in common is individually responsible for the payment of their share of the rent for the rental unit.

In the case of a rooming house, each tenant has a separate tenancy agreement with the landlord and each tenant lives separately. The tenants may all have access to certain common facilities such as washrooms, living rooms and kitchens.”

[Emphasis added]

- [45] The identification of two or more persons as tenants on a single tenancy agreement normally indicates that each tenant is jointly and severally liable for the entire amount of rent due. This means that a landlord could elect to claim against one tenant for the full amount of the monthly rent. However, the presence of a single tenancy agreement is not determinative of the relationship. The Officer must also consider the conduct of the parties.
- [46] The service of an eviction notice on AK, only one of the tenants named in the tenancy agreement, indicates separate tenancy agreements for AK and the Tenant. If the Tenant and AK were joint tenants, then it would be expected that both tenants would be evicted and required to vacate the Rental Unit. The Tenant would have been jointly and severally liable for the behaviour of AK, which would provide grounds for evicting both tenants.
- [47] The Landlord's conduct of returning the \$700.00 security deposit to SJR around June 30, 2023 and later \$700.00 to AK around September 30, 2023 also indicates separate tenancy agreements. If there was only a single tenancy, then the entire \$1,400.00 security deposit belonging to both tenants would be returned or withheld.
- [48] For these reasons, it appears that the Tenant and AK were tenants in common despite having a single written tenancy agreement.
- [49] Alternatively, even if the Tenant and AK were joint tenants pursuant to the July 1, 2023 written tenancy agreement, the service of an eviction notice to only AK would have severed the joint tenancy. The Tenant would have become a tenant-in-common and would only be responsible for a \$700.00 portion of the rent. The Landlord would have needed to negotiate a new tenancy agreement with the Tenant in order to hold the Tenant responsible for \$1,400.00 in rent per month.
- [50] The Representative and the Tenant had different understandings regarding the Tenant's liability for rent, particularly in the context of AK's eviction. There does not appear to have been a “*meeting of the minds*” regarding the Tenant being solely responsible for \$1,400.00 of rent.
- [51] The Officer notes that the Representative testified that the Tenant was responsible for finding a “subtenant.” However, the Landlord's practice of completing a single written tenancy agreement naming all occupants as tenants is inconsistent with a sublet arrangement. Further, the Landlord's practice of holding all security deposits and directly returning security deposits is inconsistent with a sublet arrangement.
- [52] When a sublet arrangement exists there are two distinct tenancy agreements. There is a first tenancy between a landlord and a tenant. There is a second tenancy between the tenant (who is also a sub-landlord) and a subtenant. The sub-landlord would serve the subtenant with any eviction notice. The sub-landlord would be the person holding the subtenant's security deposit. The subtenant would pay rent to the sub-landlord.

[53] For the reasons above, the Officer finds that as of September 2023 the Tenant was a tenant in common with AK. Therefore, the Tenant was only responsible for a portion of the entire rent, in the amount of \$700.00.

[54] The Tenant was also not responsible for damage or uncleanliness that was caused by AK or her guests.

Rent Owing – Conflict with Order LD23-501

[55] This decision conflicts with Order LD23-501. However, the Act permits the Officer to make a decision that conflicts with the decision of another Residential Tenancy Officer.

[56] Subsection 80(2) of the Act states:

“The Director shall make every decision based on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions made under this Part.”

[57] Subsection 80(2) of the Act is similar to subsection 64(2) of British Columbia's *Residential Tenancy Act* SBC 2002, c.78 (the “BCRTA”). In the British Columbia case *Khan v. Shore*, 2015 BCSC 830, the following was stated at paragraph [41]:

“As I noted above, the reasons clearly indicate that the arbitrator had reviewed both prior decisions and therefore would have been aware of the basis on which the second arbitrator considered the Landlord to be free to issue another Notice. The arbitrator would also have been aware that the second Notice had not been decided on its merits. I note, as well, that the arbitrator was not bound to follow the decisions of the previous arbitrators. Section 64(2) of the Residential Tenancy Act provides that

The Director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.”

[Emphasis added]

[58] The tenancy agreement between the parties was terminated in Order LD23-501 for non-payment of rent. However, in accordance with subsection 80(2), the Officer finds that the Tenant does not owe rent to the Landlord for October 2023 because he paid his \$700.00 portion of the rent.

[59] The Tenant was responsible for his portion of the rent for the period of November 1 to 8, 2023, in the amount of \$186.67 (8 days divided by 30 days multiplied by \$700.00), which remains outstanding.

[60] As the tenancy agreement was terminated effective November 8, 2023 and the Tenant moved out of the Rental Unit on this date, the Tenant is not responsible for paying any rent after November 8, 2023.

Double the Security Deposit

[61] The Officer notes that Order LD23-501 did not state that the Tenant must pay rent to the Landlord. Therefore, this earlier decision did not authorize the Landlord's retention of the security deposit pursuant to subsection 40(2) of the Act.

- [62] The facts of this case are similar to Order LR23-76 of the Island Regulatory and Appeals Commission (the “Commission”), where a landlord had served an *RRPA* Notice of Intention to Retain Security Deposit (Form 8) instead of filing a *Landlord Application to Determine Dispute* (Form 2(B)).
- [63] The Commission stated as follows:
- “12. The Residential Tenancy Act (“the Act”) became law on April 8, 2023. Section 40 of the new Act governs the return of security deposits and sets the requirements a landlord must follow in order to make a claim against a security deposit.*
- 13. The new RTA imposes a strict 15-day time limit. A landlord is required to either return the security deposit or make an application to the Director claiming against the security deposit, within 15 days after the tenancy ends (subsection 40(1)). Where a landlord does not comply with subsection 40(1), they are prohibited from claiming against the security deposit and must pay the tenant “double the amount of the security deposit” (subsection 40(4)).*
- 14. The policy behind the security deposit provisions in the new RTA appears to be to prevent landlords from withholding money from their tenants for long periods of time without actually making an application to claim against the security deposit. The new RTA puts the onus on a landlord to bring proceedings to prove his or her right to the tenant’s security deposit rather than putting the onus on the tenant to bring proceedings to get the security deposit back.¹*
- 15. In the present appeal, the Landlord served the Tenants with a Form 8, prescribed under the former Rental of Residential Property Act, ten days after the end of the tenancy. However, he did not make application to the Director within 15 days, or at all, as required by the new Act. Instead, the Tenants had to bring the Application that is the subject of this appeal in order settle the issue of the security deposit. It was the Landlord’s failure to follow the provisions of the new RTA and file an application with the Director, not the mere use of the wrong form, which triggered the consequences of subsection 40(4) of the Act.*
- 16. The language of section 40(4) is non-discretionary. ² Both the Commission and the Rental Office are administrative bodies created by statute and are bound to apply the legislation as written. In this case, the Landlord failed to comply with the requirements of the RTA and did not file an application with the Rental Office to make a claim against the security deposit within 15 days. Therefore, the consequences set out in subsection 40(4) apply.*
- 17. Accordingly, the Commission agrees with the outcome of Order LD23-456 and this appeal is dismissed. The Landlord shall pay the Tenants double the amount of the outstanding security deposit, plus accrued interest on the original (non-doubled) deposit amount...”*
- [64] The tenancy ended on November 8, 2023 and the Landlord was required to file the First Application for retention of the security deposit with the Rental Office by November 23, 2023. The Landlord filed the First Application on November 27, 2023 and therefore missed the 15-day deadline.
- [65] The Representative’s knowledge of the current rules for retaining a security deposit does not provide a basis for extending the 15-day deadline. The Officer notes that the Landlord did use the proper standard form rental agreement pursuant to the Act with regard to the July 1, 2023 tenancy agreement.
- [66] The Landlord must credit the Tenant the security deposit (\$700.00), interest on the security deposit (\$16.06), plus an amount equal to the security deposit (\$700.00). These amounts total \$1,416.06.

Damage and Uncleanliness

[67] As noted above, the First Application was amended to allow a claim for damage and cleaning. This claim is authorized pursuant to subsections 75(1) and 85(1) of the Act.

[68] Subsection 39(2) states:

(2) When a tenant vacates a rental unit, the tenant shall

(a) leave the rental unit reasonably clean and undamaged, except for reasonable wear and tear; and

(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

[69] The Tenant's evidence is that AK and her guests were responsible for damage and uncleanliness to the Rental Unit. The Tenant submitted into evidence message correspondence showing that on September 30, 2023 he advised the Representative of the damage and uncleanliness caused by AK and her guests. The Tenant is not responsible for damage and uncleanliness caused by AK and her guests because he had a separate tenancy, as determined above. The Officer finds that the Landlord has not established that damage and uncleanliness were caused by the Tenant.

[70] With regard to the bathtub, it is unclear that the Tenant is responsible for damage because this damage may have been caused by a leaking tap. Therefore, it has not been established that the Tenant caused this damage.

[71] The Officer finds that the Landlord's amended "Other" claim in the First Application for damage and uncleanliness fails for these reasons.

Offset of Monetary Amounts

[72] Clause 85(1)(j) states:

(1) After hearing an application, the Director may make an order

(j) determining the disposition of a security deposit, including

(i) authorizing a tenant to offset, in the manner specified in the order, money a landlord owes to the tenant against money the tenant owes to the landlord, and

(ii) authorizing a landlord to offset, in the manner specified in the order, money a tenant owes to the landlord against money the landlord owes to the tenant, other than a security deposit where the landlord has not made an application under clause 40(1)(b);

[73] Clause 85(1)(j) is consistent with section 40 of the Act as a tenant must be credited double the security deposit when a landlord does not file an application to retain the security deposit within the 15-day deadline. Even if a landlord establishes a valid monetary claim, the tenant must first be credited double the security deposit.

[74] The Officer notes that numerous Residential Tenancy Branch decisions in British Columbia offset awards for double the security deposit from monetary awards made pursuant to a landlord's application for damage, uncleanliness, or rent owing. The Officer also notes that subsection 40(4) of the Act is similar to subsection 38(6) of the BCRTA.

Conclusion

- [75] The First Application is denied and the Second Application is allowed in part. The Tenant owes the Landlord \$186.67 in rent for the period of November 1 to 8, 2023. However, the Officer offsets this amount from double the security deposit plus interest (\$1,416.06), which is owed by the Landlord to the Tenant.

Item	Amount
Security Deposit	\$700.00
Interest	\$16.06
Security Deposit (Double Awarded)	\$700.00
Less Rent Owing (Offset)	-\$186.67
Total Compensation Awarded to Tenant	\$1,229.39

- [76] The Landlord must pay the Tenant the net amount of \$1,229.39 by the timeline below.

IT IS THEREFORE ORDERED THAT

1. The Landlord must pay the Tenant \$1,229.39 by January 30, 2024.

DATED at Charlottetown, Prince Edward Island, this 9th day of January, 2024.

(sgd.) Andrew Cudmore

Andrew Cudmore
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.