

Introduction

- [1] On February 13, 2024 the Landlord filed a *Landlord Application to Determine Dispute (Form 2(B))* (the “Application”) with the Residential Tenancy Office (the “Rental Office”) seeking to retain the Tenant’s entire security deposit. The “Conclusion” part of the Application states as follows:
1. *The Lessee owes the Lessor for electricity to fuel the Lessee Tesla Electric Vehicle. Amount of \$854.70 on top of the security deposit.*
 2. *August 30 and August 31 rent totally \$197.26.*
 3. *The full security deposit amount should be forfeited since the Lessee continued to cause damage until he left the premises at [address]. This was brought up on January 16, 2024 in front of the Residential Officer Mr. Burke.*
 4. *Plus the request of the tenant paying out his lease in the Lessor December 4, 2023 docket numbers [three dockets listed].*
- [2] On February 22, 2024 the Rental Office emailed the parties notice of a teleconference hearing scheduled for 9:00 a.m. on March 19, 2024, along with a copy of the Application.
- [3] On March 14 and 15, 2024 the Rental Office provided the evidence package (“Evidence Package” or “EP”) to the parties.
- [4] On March 19, 2024 the Landlord and the Tenant’s representative (the “Representative”) participated in a teleconference hearing before the Residential Tenancy Officer (the “Officer”).

Issue to be Decided

- i. Can the Landlord retain the Tenant’s entire security deposit based upon the four claims in the Application?

Preliminary Matters

- [5] The Officer notes that, with regard to photographic evidence, the best practice is to date stamp each photograph at the time it is taken.
- [6] The Landlord advised the Officer that part of the evidence submitted to the Rental Office was not included in the Evidence Package. On January 22, 2024 the Landlord had filed an earlier *Landlord Application to Determine Dispute (Form 2(B))*. At the hearing the Landlord confirmed that the January 22, 2024 application is withdrawn, being Docket No. 24-076. However, the Landlord wanted this application included in the Evidence Package as part of the record.
- [7] At the hearing the Representative confirmed that she had a copy of the January 22, 2024 application. The Officer allowed the January 22, 2024 application to form part of the evidentiary record for this matter. The Representative submitted that this application permitted the Tenant to end the tenancy agreement because it was a change of the tenancy agreement.
- [8] The Officer notes that the application would have been a matter for the Rental Office to determine. The Landlord filing and serving this application to the Tenant is not a basis for the Tenant to end the tenancy agreement.
- [9] The Tenant submitted into evidence a 12 second video date stamped January 17, 2024 that was recorded by his Tesla Electric Car (the “Tesla”). The Representative stated that the Tesla’s camera is for security purposes and it only starts recording when something comes close to the vehicle. This feature allows for accidents to be recorded.

- [10] The Landlord disputed the admission of this recording into evidence because the Tenant did not have the Landlord's permission to use the Tesla as a surveillance device. The Landlord submits that the Tenant could have turned off the Tesla's recording device.
- [11] The admissibility of video evidence was considered by the Island Regulatory and Appeals Commission (the "Commission") in a 2007 decision (see Order LR07-02) under the former rental legislation, the *Rental of Residential Property Act*, RSPEI 1988, R-13.1 (the "RRPA"). It does not appear that the admissibility of video evidence has been considered by the Commission since the *Residential Tenancy Act*, RSPEI 1988, R-13.11 (the "Act") came into force on April 8, 2023.
- [12] Pursuant to clause 80(3)(c) of the Act, the Officer has broad discretion to accept evidence that would not be admissible under the laws of evidence. This clause states:

The Director has authority to

(c) receive or accept evidence and information on oath, affirmation, affidavit or otherwise, whether or not that evidence or information is admissible as evidence in a court;

- [13] The Act, the *Residential Tenancy Regulations*, EC269/23, and the tenancy agreement do not specifically prohibit the Tenant from having a security camera at the Unit. The Landlord has not indicated to the Officer a specific clause of another law that would prohibit the video from being part of the record.

- [14] Section 25 of the Act states:

The tenant and any person admitted to the residential property by the tenant shall not unreasonably interfere with the rights, quiet enjoyment and reasonable privacy of a landlord or other tenants in the residential property.

- [15] The evidence presented establishes that the Tesla has a camera that records video when motion is detected. The evidence also establishes that the purpose of the recording device is to record events where there is a possibility that the vehicle could be damaged. Therefore, it has not been established that the recording was made for an improper purpose.
- [16] Further, the vehicle was located outdoors in the driveway when the video was recorded, a location where there is a reduced reasonable expectation of privacy compared to the interior of a building. In these circumstances, the Officer finds that the Tenant has not breached section 25 of the Act regarding the January 17, 2024 video. The Officer finds that the recording is admissible for this matter.

Summary of the Evidence

- [17] The Unit is a two-bedroom, one-bathroom, single family dwelling that the Landlord has owned for approximately eight years.
- [18] In February of 2023 the Landlord and the Tenant entered into a written, fixed term tenancy agreement for the period of September 1, 2023 to June 30, 2024. The Tenant moved into the Unit on August 30, 2023, before the fixed term commenced. Rent in the amount of \$3,000.00 was due on the first day of the month and a \$3,000.00 security deposit was paid on or about August 31, 2023.
- [19] The tenancy agreement states that the rent includes payments for the following services and facilities: heat, water, hot water, electricity, stove, refrigerator, washer, dryer, WIFI, grass cutting, pillows, bedding, towels, blankets, dishes, cutlery, towels, pots, pans, drapes, lamps, sofa, table, chairs, breakfast bar stools, beds and other furniture.

- [20] On January 16, 2024 the Landlord and the Tenant were parties to an earlier Rental Office hearing. On February 16, 2024 Order LD24-052 was issued. This earlier decision is part of the record.
- [21] The Application identifies the following four claims against the Tenant's security deposit: (1) electricity charges based upon improper electricity usage; (2) rent owing for August 30 and 31, 2023; (3) damage to the Unit, including the back door; and (4) rent owing by the Tenant for the balance of the fixed term.

Landlord's Evidence and Submissions

- [22] The Landlord's evidence is summarized as follows.
- [23] The Landlord's electricity bills were excessive after the Tenant moved in. The Tenant charged his Tesla using electricity provided at the Unit. The *RRPA*, the *Act* and the tenancy agreement do not authorize the Tenant to use the Unit's electricity to charge the Tesla. The Landlord submitted into evidence Maritime Electric Statements showing the electricity cost from August 2, 2023 to February 1, 2024 (EP 190 to 195). The Landlord estimated that the Tesla's electricity cost was \$3.00 to \$5.00 per day. The Landlord estimates the Tesla's total electricity usage cost was \$854.70 and the Landlord submitted into evidence documents regarding this calculation (EP 186 to 189).
- [24] The Tenant moved into the Unit on August 30, 2023, before the fixed term commenced. The Tenant did not pay rent for August 30 or 31, 2023. The Landlord submitted into evidence a message from the Tenant sent on August 29, 2023 (EP 51) requesting to move into the Unit on August 30, 2023.
- [25] The Landlord and the Tenant did not complete a written move-in inspection report. The Landlord stated that the new condition inspection form is blank so the Landlord took photographs instead. The former condition inspection form had a checklist. The only issue with the former form was that it was made for unfurnished units.
- [26] The Landlord reviewed in detail the photographs and other documents submitted into evidence by the parties regarding damage to the Unit claimed against the Tenant.
- [27] With regard to the Unit's back door, the Landlord submitted into evidence an email dated December 18, 2023 with a quote from a contractor for replacement of the Unit's back door, in the total amount of \$2,372.48 (EP 114 and 115). The contractor's estimated installation date is approximately six months. The contractor's January 2, 2024 email to the Landlord states that the door replacement appointment is scheduled for June 10, 2024 (EP 117). The contractor's January 16, 2024 email states in part *"The tennant opened the door for me and it was clear the door had been forced (likely kicked) open."* (EP 118)
- [28] The Landlord also referred to paragraph [15] of Order LD24-052, which summarizes part of the Tenant's evidence as follows:
- "The Tenant admitted that the Rental Unit's door was jammed and he needed to use force to open it which caused a break. The Tenant argued that he did not kick the door."*
- [29] The Landlord also referred to paragraph [30] of Order LD24-052, in which a Residential Tenancy Officer made the following conclusion:
- ...As it relates to clause 28(1) and the replacement of the Rental Unit's door, the Officer accepts the Landlord's evidence and testimony that the earliest a professional can replace and/or repair the Rental Unit's door is approximately in six months..."*
- [30] The Tenant removed the strike plate from the door frame and left it above the shelf next to the door (EP 140) to ensure that the door would not function.

- [31] On February 7, 2024 the Landlord installed a two-by-four along the interior of the back door because it would no longer close due to the missing strike plate, which had kept the wood from fraying (EP 138 and 139). The two-by-four would prevent the Tenant or any unauthorized people from entering the Unit.
- [32] The Landlord characterized the letter submitted into evidence by the Tenant from L.W. as 99% incorrect.
- [33] The Tenant has not paid rent for February or March of 2024. The Landlord did not serve or receive from the Tenant a notice of termination. The Tenant did not advise the Landlord that he was moving out. At the earlier Rental Office hearing on January 16, 2024 the Tenant expressed an intention to continue living in the Unit (paragraph [6] of Order LD24-052). On February 2, 2024 the Landlord went to stick the Tenant's mail to the front door of the Unit and discovered that the Tenant had moved out.
- [34] The Landlord has not attempted to re-rent the Unit because the damage caused by the Tenant must first be fixed.
- [35] The Officer notes that clause 5 of Schedule "D" of the tenancy agreement states: "*No advertising of the house on any website.*" The Officer also notes that Order LD24-052 summarizes the parties evidence regarding the Tenant's earlier attempts to sublet the Unit. The decision also denied the Landlord's \$3,000.00 claim against the Tenant for the stress caused by the Tenant's alleged harassment regarding the sublet issue.

Tenant's Evidence and Submissions

- [36] The Tenant's and the Representative evidence is summarized as follows.
- [37] The Tenant submits that the tenancy agreement does not prohibit charging of the Tesla and electricity is a service included in the rent. However, the Tenant acknowledges an electricity claim for a smaller amount than the Landlord's claim.
- [38] The Tesla generates electricity consumption reports, which the Tenant submitted into evidence (EP 369 to 383). The Tenant calculated the Tesla's electricity usage at the Unit in the Tenant's documentary evidence. The Tenant later recalculated the electricity cost based on the increased Maritime Electric usage rates for the first energy charge block, from 15.32 ¢/kwh to 16.26 ¢/kwh. The Tesla's monthly electricity cost and total are calculated as follows:

September 2023	163 kwh x 16.26 ¢/kwh =	\$26.59
October 2023	140 kwh x 16.26 ¢/kwh =	\$22.76
November 2023	115 kwh x 16.26 ¢/kwh =	\$18.70
December 2023	195 kwh x 16.26 ¢/kwh =	\$31.71
January 2024	288 kwh x 16.26 ¢/kwh =	<u>\$46.83</u>
		Total: \$146.59

- [39] The Tenant acknowledges a \$146.59 claim for the electricity used by the Tesla. The Representative submits that the Tenant's calculation is based on the Tesla's actual electricity usage whereas the Landlord's electricity deduction is a projection.
- [40] The Landlord's Maritime Electric statements show the history of the Unit's electricity usage. The statements show some higher electricity usages for some months before the Tenant moved in compared to months after the Tenant moved in.

- [41] The Tenant disputes the Landlord's claim for August 30 and 31, 2023 rent. The Tenant submitted into evidence text message correspondence with the Landlord on July 18, 2023 (EP 384) which states in part:

Tenant

"... I'll keep you posted on when we think we'll be there so that we can catch you before you leave. Would you be okay with us arriving a few days early and storing some stuff in the place?"

Landlord

"No

I am pretty easy going.

I have booked the house off from August 29 to get the house ready for you and because my son and I are flying out...

I knew that you would be coming potentially a few days early because you said you would going to Nova Scotia...

Just keep me posted...

When I get back we need to go over the house and everything in person. New rules that need to followed by the landlord and tenant act..."

- [42] The Landlord did not raise the August 30 and 31, 2023 rent claim earlier in the tenancy.
- [43] The Unit had damage at the time the Tenant moved in and the Tenant disputes the Landlord's damage claims. The Tenant submitted into evidence photographs and a letter from L.W. dated March 1, 2024. The letter states that L.W. periodically visited the home since September and L.W. assisted with cleaning the Unit on January 31, 2024. L.W. also disputes that the Tenant is responsible for damaging the Unit.
- [44] The Tenant denies kicking the Unit's back door. The Tenant's documentary evidence includes the following comment (EP 235):

"October 10th 2023 - Day the door broke. Note that if the door had been "kicked" then both locking mechanisms would be broken, not just the deadbolt. Since the second locking mechanism was not damaged, the handle must have been rotated, so as to not catch the connection with the door jamb. It would be impossible to twist the knob and get enough leverage to kick in a door. This door was weak prior to me moving in, and the deadbolt lock jamming against the metal plate was an issue the landlord knew about. This could relate to extra pressure being required to open the door and relieve the tension:"

- [45] The Tenant immediately brought the door issue to the Landlord's attention in October but the Landlord did not attempt to address this repair until December.
- [46] The Representative is not aware of the Tenant serving the Landlord or receiving from the Landlord a notice of termination. The Representative did not dispute that rent was unpaid for February and March of 2024. The Representative disputes that the Unit is unfit for human habitation because the Tenant had lived in the Unit after the back door incident, from October 10, 2023 to January 31, 2024.

Analysis

Claim for Electricity Usage

- [47] Although electricity is an included service in the tenancy agreement, it does not appear that the parties agreed that the Tesla's fuel/electricity cost would be paid by the Landlord. In any event, the Tenant has acknowledged a deduction is appropriate for the actual cost of the Tesla's electricity usage at the Unit.
- [48] The Officer finds that the Tenant's calculation of the electricity usage is the most reliable evidence because it is based upon the actual electricity usage supported by reports generated by the Tesla. The Officer accepts the electricity usage charge of \$146.59, subject to two adjustments.
- [49] Harmonized Sales Tax of 15.0% applies to the electricity usage (\$21.99), which is partially offset in the Maritime Electric statements by the PEI Government Energy Rebate of 10.0% for the first energy charge block (\$14.66). The net additional electricity cost is \$7.33, for a total electricity cost of \$153.92.
- [50] The parties also provided evidence regarding alleged electricity wastage regarding open windows during cold weather. However, there is insufficient evidence to establish this claim.

Rent for August 30 and 31, 2023

- [51] The Landlord has claimed against the security deposit for rent owing for August 30 and 31, 2023. However, the evidence presented does not establish that rent is payable for these two days. The message correspondence between the parties does not discuss pro-rated rent for August 2023. On July 18, 2023 the Landlord responded to the Tenant's request for an early move-in date, in part stating: *"I am pretty easy going"* and *"I have booked the house off from August 29."*
- [52] A plain reading of the entire message and later messages indicates that the Landlord did not intend to charge pro-rated rent for August 2023. The evidence does not establish a request by the Landlord for pro-rated August 2023 rent until months after the tenancy commenced. Therefore, this claim against the Tenant is denied.

Damage to the Unit

- [53] The Tenant's evidence raises issues regarding the baseline condition of the Unit as of August 30, 2023.
- [54] There is a significant amount of evidence regarding the condition of the Unit during the tenancy and near the time that the Tenant moved out of the Unit. However, the evidence establishing the condition of the Unit at the move-in date is more limited.
- [55] The photographs from the beginning of the tenancy mainly show larger areas of the Unit and lack detail regarding the areas where the Landlord has claimed that specific damage occurred. Many of the photographs taken near the date the Tenant moved out are close up images showing a very specific part of the Unit. Some photographs are taken at a camera angle showing features that are not visible in photographs taken earlier in the tenancy.
- [56] Based upon the text message correspondence between the parties on July 18, 2023, it appears that both parties were aware of Prince Edward Island's new residential rental legislation.
- [57] The Landlord was required to complete a written inspection report pursuant to subsection 18(1) of the Act, which states:

The landlord and tenant, or their authorized agents, shall inspect the condition of the rental unit in each other's presence on the day the tenant is entitled to possession of the rental unit or on another day agreed on by them.

[58] Although the tenancy agreement was signed in February 2023, before the *Act* came into force on April 8, 2023, the parties were required to complete an inspection report. The exemption from inspection reports in section 109 of the *Act* only applies to “a tenancy that started before” April 8, 2023.

[59] Under the former residential rental legislation, the *RRPA*, landlords were not obligated to complete a written move-in inspection report. Therefore, it would not be expected that landlords would have completed a move-in inspection report for a tenant that moved into a rental unit prior to April 8, 2023. A written move-in condition inspection report would not be possible for tenancies of occupied rental units at the time the *Act* came into force.

[60] The Tenant moved into the Unit on August 30, 2023, almost 4.5 months after the *Act* came into force. The parties did not complete a written move-in inspection report as required by the *Act*. Such a document could have assisted with the Officer's determination of the baseline condition of the Unit from which to assess any damage that occurred during the tenancy.

[61] Subsection 28(4) states:

A tenant of a rental unit shall repair, in a good and professional manner, undue damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

[62] The Tenant has denied responsibility for undue damage to the Unit. The Landlord was not present when the claimed damage occurred. As discussed above, the baseline condition of the Unit has not been sufficiently established for the Officer to assess the damage claimed. For these reasons the Officer finds that the evidence does not establish that undue damage was caused by the actions or neglect of the Tenant.

[63] The Officer notes that the Tenant admitted that on October 10, 2023 he used force to open the Unit's back door and damage ensued. However, the evidence does not establish undue damage. The Tenant's evidence raises issues of pre-existing vulnerability and damage to the door frame, putting into question whether it was only a matter of time before the door frame broke. Photographs of the door frame show cracking along where two screws were installed to hold a strike plate (EP 242 and 243). The Landlord and the Landlord's contractor were not present when the door frame damage occurred.

[64] Even if the Tenant was responsible for undue damage of the back door, the Officer cannot conclude that temporary repairs were impossible for a six-month period. The photographs and other evidence provided by the parties do not establish catastrophic damage to the door frame that is incapable of being repaired for an extensive period of time. Had the Landlord commenced making arrangements to fix the door on October 10, 2023 then temporary repairs should have been completed well before February 2, 2024.

[65] The Officer notes that the evidentiary record for Order LD24-052 would have been different than the evidentiary record in this decision. The Officer is permitted to make a different determination and is not bound to follow Order LD24-052 pursuant to subsection 80(2) of the *Act*, which 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.”

[66] For the reasons above, the Officer denies the Landlord's damage claims.

Rent Owing

- [67] In Order LD24-052 a Residential Tenancy Officer was unable to issue a monetary order for rent owing because the amounts claimed were sought in advance of the rent due dates. The hearing date was January 16, 2024 and the Landlord was seeking rent owing for the months of February to June 2024.
- [68] This matter was heard on March 19, 2024 and the Application included a rent owing claim. The Officer is able to consider whether rent is owing because the rent due dates of February 1, 2024 and March 1, 2024 had passed as of the hearing date.
- [69] The Landlord became aware that the Tenant had vacated the Unit on February 2, 2024. The Tenant did not pay rent for February or March of 2024. Neither party served a notice of termination (Form 3, Form 4A or Form 4B). The Officer finds that the Tenant abandoned the Unit within the meaning of subsection 42(2) of the *Act* and the abandonment was discovered by the Landlord on February 2, 2024.
- [70] The Landlord was unable to mitigate rental income losses for February 1 and 2, 2024 because the Tenant did not notify the Landlord that he was moving out.
- [71] Section 46 of the *Act* states:
- Where a tenant abandons the rental unit, the landlord shall mitigate damages that may be caused by the abandonment to the extent that a party to a contract is required by law to mitigate damages.*
- [72] Section 46 is similar to section 29 of the *RRPA*, which also addressed a Landlord's duty to mitigate. It appears to the Officer that Commission Order LR20-39 is of assistance for determining this matter, which states in part as follows:
- "In addressing the lessor's duty to mitigate under section 29 of the Act, the Commission finds that the adequacy of mitigation, not just whether or not mitigation occurred, may be considered. The quantum of the claim and the remaining duration of the rental agreement are relevant facts to consider when addressing the adequacy of mitigation. What may be considered reasonable efforts to mitigate for a small claim or a short period of time may be lacking for a large claim or an extended period of time."*
- [73] As of February 2, 2024 there were almost five months remaining in the fixed term of the tenancy agreement. With a monthly rent of \$3,000.00, the potential rent owing claim against the Tenant would be approximately \$15,000.00. The terms of the tenancy agreement restrict the Tenant's ability to mitigate losses by subletting because advertising the Unit on any website is prohibited. Further, the Landlord's earlier \$3,000.00 claim against the Tenant related to subletting the Unit (Order LD24-052) would have a chilling effect on further attempts by the Tenant to sublet.
- [74] In these circumstances the Landlord was expected to make extensive efforts to re-rent the Unit. However, the Landlord's evidence at the hearing was that the Unit has not been advertised for rent because of damage by the Tenant. As the Landlord has not established that the Tenant is responsible for undue damage to the Unit, this is not a valid reason preventing the re-rental of the Unit. The Officer finds that the Landlord has failed to mitigate damages as required by section 46 of the *Act*. As a result, the Landlord's rent owing claim against the Tenant is limited.
- [75] The Unit is located in downtown Charlottetown and there is currently a low vacancy rate in the residential rental market. The Officer expects that, if the Landlord had completed reasonable mitigation efforts, then it would have taken the Landlord a minimum period of two weeks after February 2, 2024 to advertise the Unit, consider potential applicants and re-rent the Unit.

- [76] Although it may have taken a longer period for a new tenant to move in, an exact date is unknown because the Landlord has not properly mitigated losses. Therefore, the Officer finds that the Tenant is responsible for rent up to February 16, 2024, in the amount of \$1,655.17 (16 days divided by 29 days multiplied by \$3,000.00). The Tenant is not responsible for any rent for the Unit after February 16, 2024 and the tenancy is terminated as of this date.

Conclusion

- [77] In summary, a claim of \$153.92 is allowed against the security deposit regarding the Tesla's electricity usage at the Unit. The Landlord's rent claim for August 30 and 31, 2023 is denied. The Landlord's claims for damage to the Unit, including the back door, are denied. A rent owing claim is allowed for the period of February 1 to 16, 2024, in the amount of \$1,655.17. The Tenant is not responsible for any rent for the Unit after February 16, 2024 and the tenancy is terminated as of this date. The established claims total \$1,809.09 (\$153.92 plus \$1,655.17).
- [78] The security deposit interest totals \$43.53 for the period of August 31, 2023 to April 8, 2024, for an entire security deposit of \$3,043.53.
- [79] After deducting the Landlord's approved claims of \$1,809.09, the net amount of the security deposit to be returned to the Tenant by the timeline below is \$1,234.44.

IT IS THEREFORE ORDERED THAT

1. The Landlord will retain part of the Tenant's security deposit, in the amount of \$1,809.09.
2. The Landlord will return the balance of the Tenant's security deposit, in the amount of \$1,234.44, by April 29, 2024.
3. The Tenant is not responsible for any rent for the Unit after February 16, 2024 and the tenancy is terminated as of this date.

DATED at Charlottetown, Prince Edward Island, this 8th day of April, 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.