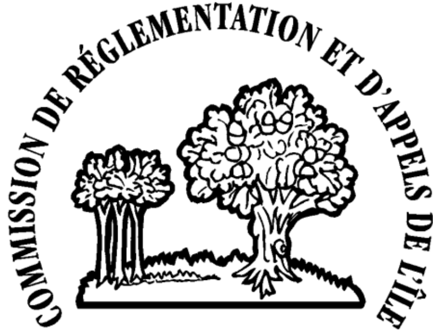

Docket LR12019
Order LR12-24

IN THE MATTER of an appeal under Section 25 of the Rental of Residential Property Act, by Elm Towers Inc. against Order LD12-222 dated August 21, 2012 issued by the Director of Residential Rental Property.

BEFORE THE COMMISSION
on Tuesday, the 9th day of October, 2012.

Allan Rankin, Vice-Chair
Leonard Gallant, Commissioner
Peter McCloskey, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Susan D. Jefferson

Commission Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal under Section 25 of the Rental of Residential Property Act, by Elm Towers Inc. against Order LD12-222 dated August 21, 2012 issued by the Director of Residential Rental Property.

Order

BACKGROUND

On September 5, 2012 the Commission received a Notice of Appeal dated the same date listing Albert Bryanton (Mr. Bryanton) and Brian Hooley (Mr. Hooley) as the appellants. The Notice of Appeal was signed by Mr. Bryanton and a review of the file suggests that the actual Appellant is Elm Towers Inc. (the Appellant). The Notice of Appeal requests an appeal of Order LD12-222 dated August 21, 2012 issued by the Director of Residential Rental Property (the Director).

By way of background, on May 28, 2012 a lessee Kris Champion (the Respondent) filed with the Director a Form 9 – Application re Determination of Security Deposit dated the same day to which was attached a Form 8 – Notice of Intention to Retain Security Deposit signed by the Appellant dated May 10, 2012.

The matter was heard by the Director on June 15, 2012. In Order LD12-222 the Director ordered:

"IT IS THERFORE ORDERED THAT

1. *The lessor shall receive a payment of $87.96 from the funds held in trust;*
2. *The lessee shall receive a payment of $57.04 from the funds held in trust;*
3. *The funds shall be disbursed after the appropriate appeal period has expired."*

The appeal was heard by the Commission on September 19, 2012. The Appellant was represented by Mr. Bryanton. The Respondent was also present.

EVIDENCE

Mr. Bryanton explained that in a January 2012 Director's Order involving completely separate tenants, the Director had found a "re-renting charge" of $100.00 to be a valid claim. The Appellant was therefore surprised when such a claim was not approved in Order LD-222 under what the Appellant believed to be very similar circumstances.

Mr. Bryanton explained that Mr. Hooley provides services for the Appellant. Specifically, he is a self-employed independent contractor, not an employee, and his role is to find good tenants. If a lease is completed, Mr. Hooley receives his compensation. If, however, as in the present matter, a lease is broken, Mr. Hooley does not get his commission for the tenant he found for the Appellant. The idea of the "re-renting charge" is to provide Mr. Hooley with some compensation for his time when a tenant does not meet their responsibility.

Mr. Bryanton also explained that he too is a self-employed independent contractor who provides property management services for the Appellant.

The Respondent explained that he had to deal with noise issues on numerous occasions while a tenant at the Appellant's apartment building. As a result, he had to resort to contacting the police. On March 28, 2012 he gave the Appellant an unsigned and undated typewritten letter of complaint [Exhibit E-14]. He also testified that he "chased after" Mr. Bryanton during the month of May in an effort to obtain the necessary termination forms.

DECISION

The Commissions agrees with the decision of the Director in Order LD12-222 for the reasons that follow.

The Commission accepts the evidence of the Respondent that he terminated the rental agreement early due to noise issues and it was noteworthy that he did file a written complaint. While he should have made a formal application to terminate the agreement early, he did attempt to obtain the forms from the Appellant. The Commission wishes to note for the benefit of tenants in general that such forms are available through the Office of the Director.

The Commission agrees with the Director in commending the Appellant for taking action to promptly re-rent the apartment.

In effect, there are two issues before the Commission. First, can a lessor charge a fixed service charge or fee for the termination of a rental agreement? Second, if it is not possible for a lessor to impose such a charge, to what extent and in what circumstances is a lessee required to reimburse a lessor for expenses incurred as a result of an early termination of a rental agreement?

It is the view of the Commission that the first issue may be determined decisively, with some precision and thus forms a useful precedent or tool for future application. However, the Commission is of the view that the second issue is more nebulous and will vary on a case-by-case basis ultimately based on a consideration of the evidence. That said, the Commission is able to determine the outcome of this present appeal with respect to the second issue and hopefully offer some guidance for future application.

The ***Rental of Residential Property Act*** (the ***Act***) does not make a specific provision for a landlord to claim fixed service fees. In the July 1, 2011 standard form rental agreement in evidence before the Commission [Exhibit E-8] a provision was added for a "$100 Lease fee". There was no explanation in that agreement as to what that fee was for or under what circumstances it would be charged. The Commission also notes that the agreement in evidence was not witnessed.

While there might be some policy merit in allowing a fixed service fee when a lease is terminated early by a lessee, the Commission is of the view that there would need to be a specific provision in the ***Act*** or its Regulations in order for the Director, or the Commission on appeal, to authorize the charging of such a fixed charge or fee.

Accordingly, as there is no specific provision in the ***Act*** to authorize a fixed service charge or fee, the Commission will not award a fixed service fee or service charge for an early termination of a lease.

However, the second issue is brought into focus in this appeal as the Appellant referred the Commission to Exhibit E-11 (c), an invoice from Brian Hooley, Property Management to Elm Towers Inc. claiming $150.00 for services related to the marketing and showing of the apartment in question due to a “lease break”. The Appellant seeks reimbursement of this purported expense.

The Commission notes that Mr. Hooley was not called as a witness to explain his role as an ‘independent contractor’ or be questioned on the invoice that he submitted.

The Commission also notes that there was no written contract or agreement [hereafter referred to as a service contract] in evidence which would set out the business relationship between Mr. Hooley and the Appellant.

The Commission notes that it is frequently the case that the ‘marketing and showing’ of an apartment to perspective tenants would be performed by an employee of a lessor and would be considered part of the ordinary cost of doing business, even where there was a need to re-rent an apartment following an early termination of a rental agreement.

It is reasonable of course for a lessor to seek specific out of pocket expenses, such as the cost of newspaper advertisements placed in an attempt to re-rent an apartment when a rental agreement is terminated early by a lessee or such as a ‘NSF’ charge levied by a bank. In both of these examples, the service providers, a newspaper and a bank, are quite obviously operating a separate line of business from the landlord. These expenses are clearly identifiable expenses over and above the normal cost of doing business.

However, it is more problematic where a lessor seeks reimbursement for an invoice submitted by someone who purports to be an independent contractor, but who could also be fairly characterized as an employee performing duties which fall within a landlord’s line of business.

The Commission finds that the burden of proof rests upon a lessor to establish, on the civil standard of the balance of probabilities, that the ‘independent contractor’ or service provider who performs a function within a landlord’s line of business truly operates at arm’s length from the lessor. If this burden of proof is met, the Director or the Commission may allow a lessor to seek reimbursement for invoiced expenses provided such expenses are not merely incidental operating costs.

In the present appeal, the Commission finds that the Appellant has not established that Mr. Hooley was an arm’s length independent contractor and accordingly, the Commission denies this appeal.

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Rental of Residential Property Act***

IT IS ORDERED THAT

1. **The appeal is denied and Director's Order LD12-222 shall remain in full force and effect.**

DATED at Charlottetown, Prince Edward Island, this **9th** day of **October**, **2012**.

BY THE COMMISSION:

(sgd. Allan Rankin)
Allan Rankin, Vice-Chair

(sgd. Leonard Gallant)
Leonard Gallant, Commissioner

(sgd. Peter McCloskey)
Peter McCloskey, Commissioner

NOTICE

Sections 26.(2), 26.(3), 26.(4) and 26.(5) of the ***Rental of Residential Property Act*** provide as follows:

> *26.(2) A lessor or lessee may, within fifteen days of the decision of the Commission, appeal to the court on a question of law only.*
>
> *(3) The rules of court governing appeals apply to an appeal under subsection (2).*
>
> *(4) Where the Commission has confirmed, reversed or varied an order of the Director and no appeal has been taken within the time specified in subsection (2), the lessor or lessee may file the order in the court.*
>
> *(5) Where an order is filed pursuant to subsection (4), it may be enforced as if it were an order of the court.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141y-SFN(2009/11)