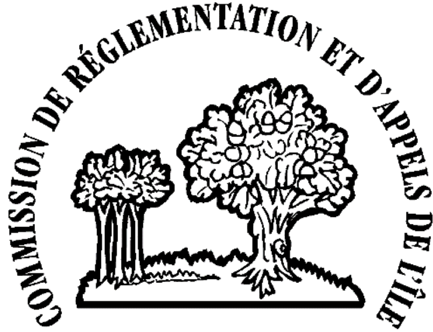

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LR17011
Order LR17-06

IN THE MATTER of an appeal filed under Section 25 of the Rental of Residential Property Act by Micheal Purchon against Order LD17-148 dated June 5, 2017 issued by the Office of the Director of Residential Rental Property.

BEFORE THE COMMISSION
on Wednesday, the 14th day of June, 2017.

John Broderick, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Susan Jefferson

Commission Administrator
Corporate Services and Appeals

IN THE MATTER of an appeal filed under Section 25 of the Rental of Residential Property Act by Micheal Purchon against Order LD17-148 dated June 5, 2017 issued by the Office of the Director of Residential Rental Property.

Order

BACKGROUND

On June 7, 2017 the Commission received a Notice of Appeal from a lessee, Micheal Purchon (the “Appellant”), requesting an appeal of Order LD17-148 dated June 5, 2017 issued by the Director of Residential Rental Property (the “Director”).

By way of background, on May 26, 2017, a lessor, Weymouth Properties Ltd. (the “Respondent”), filed with the Director a Form 2 – Application for Enforcement of Statutory or Other Conditions of Rental Agreement to which was attached a Form 4 – Notice of Termination by Lessor of Rental Agreement dated May 4, 2017.

The matter was heard by the Director on June 1, 2017 and in Order LD17-148 the Director ordered:

“IT IS THEREFORE ORDERED THAT

1. *Possession of the residential premises be surrendered to the lessor and the Sheriff is directed to put the lessor in possession of the residential premises on Thursday, June 8, 2017 at 11:00 AM.”*

The Commission heard the appeal on June 13, 2017. The Appellant was present and the Respondent was represented by Wayne Bevan (“Mr. Bevan”).

EVIDENCE

The Appellant testified that he did not recall receiving notice of the June 1, 2017 hearing before the Director. The Appellant testified that there is a large gap at the bottom of his apartment door which makes it easy to slide documents under the door. The Appellant testified that he did not know what the $71.00, which has apparently escalated to $101.00, claimed by the Respondent was actually for, as his rent has been paid. The Appellant did not recall the Respondent providing him with prior notice of any charges. The Appellant did recall getting a notice of increase of rent in the autumn of 2016, with that notice slipped through the bottom of his door. He noted that his rent was originally $529 per month and now it is $538 per month.

Mr. Bevan testified that an employee of the Respondent had picked up a Notice of Hearing from the Office of the Director. Mr. Bevan testified that he taped an envelope containing the Notice of Hearing to the outside of the Appellant's door. Under questioning from the panel, Mr. Bevan acknowledged that he did not knock prior to taping the envelope to the door. Mr. Bevan also acknowledged that he had not taken a photograph of the door with the envelope taped to it.

Mr. Bevan noted that he did not have a ledger with him accounting for the $71.00 sought on the May 4, 2017 Form 4, which now has increased to $101.00. Mr. Bevan testified that the Appellant had been on "EFT" [electronic funds transfer] and the Respondent took him off EFT. He submitted that the Respondent charges a fee of $30.00 when a rent deposit is returned due to insufficient funds, e.g. NSF. Mr. Bevan acknowledged that the Respondent's bank does not charge the Respondent any individual fee in such circumstances. Mr. Bevan acknowledged that the Appellant's rent is paid until the end of June. Mr. Bevan stated that the Appellant had ten days to pay the sum owed and he did not pay it. Mr. Bevan did not recall sending out a letter or notice of any kind each time the $30.00 fee was charged.

DECISION

The appeal is allowed and Director's Order LD17-148 is reversed for the reasons that follow.

The Appellant was not present at the June 1, 2017 hearing before the Director. Pursuant to subsection 25(1) of the ***Rental of Residential Property Act (***the ***Act***) a party must either be present at, or be represented at, a hearing before the Director in order to have a right of appeal to the Commission. This presumes that the party has received the lawful notice set out in section 33 of the Act, as to deny a party their right of appeal would be an absurdity if they did not receive notice of the hearing before the Director. Section 33 of the Act sets out the Notice requirements:

Service of notices

__33.__ (1) Any notice, process or document to be served by or on a lessor, lessee or the Director or the Commission is sufficiently served if

(a) delivered personally; or

(b) sent by ordinary, certified or registered mail

(i) to the lessor at the address given under section 31,

(ii) to the lessee at the address of the premises,

(iii) to the Director at the address of his office;

(iv) to the Commission at the address of its office.

Substituted service

(2) <u>Where a notice cannot be delivered personally to a lessee by reason of his absence from the premises or by reason of his evading service</u>, the notice may be served on the lessee

(a) by serving it on any adult person who apparently resides with the lessee;

(b) by posting it in a conspicuous place upon some part of the premises or a door leading thereto; or

(c) by sending it by ordinary, certified or registered mail to the lessee at the address where he resides.

Idem

(3) Where a document is delivered by ordinary mail, it is deemed to have been delivered on the third day after the date of mailing.
1988,c.58,s.33; 1991,c.18,s.22 {eff.} Nov. 4/91.

Emphasis added.

Mr. Bevan testified that he posted the Notice of Hearing, dated May 29, 2017 advising of a June 1, 2017 hearing, to the Appellant's door without first knocking or otherwise determining if the Appellant was at home in his apartment. Section 33 requires notice by personal service or by mail. There is no evidence before the Commission that the Director had mailed the Notice of Hearing to the Appellant.

While the Act does allow for substituted service in the form of posting a notice to the party's door, the Act reserves such substituted service for a situation where a notice cannot be delivered personally to a lessee by reason of his absence from the premises or by reason of his evading service.

An attempt at personal service would ordinarily commence with knocking on the door of the Appellant's apartment at a reasonable hour when he might be reasonably be expected to be home and waiting for an answer. In the present appeal, the Respondent did not first attempt personal service but rather relied on substituted service. Accordingly, the Commission finds that the Appellant was not served with the Notice of Hearing for the June 1, 2017 hearing in accordance with the service requirements of the Act.

The remedy for this defect in service is to provide the Appellant with an appeal hearing before the Commission, notwithstanding his absence at the hearing before the Director.

With respect to the merits of the appeal, the Respondent did not present into evidence an accounting for the $71.00 which is now claimed to have increased to $101.00. Mr. Bevan's explanation appears to be based on a $30.00 internal charge levied by the Respondent which does not correlate to a specific out of pocket bank charge.

The Form 4 Notice of Termination by Lessor of Rental Agreement, dated May 24, 2017, has checked off the following reason for termination:

(a) You have failed to pay your rent in the amount of $71.00, which was due on the first day of May 2017.

The Form 4 also has a May 24, 2017 date stamp with the following notation:

As of today the amount owing is $101.00.

The Form 4 sets out the following Particulars of Termination:

> *There is $71.00 owing on your account as there is a $30.00 charge each month when your automatic withdrawal comes back to us NSF. We are cancelling his automatic withdrawal as of May 4th even though it should be him that cancels it.*

Section 1.(n) of the Act defines “rent”:

> *(n) "rent" means the amount of the consideration, whether or not in money, paid, given or agreed to be paid or given by a lessee to a lessor for occupancy of residential premises and for any service, privilege or thing that the lessor may provide for the lessee, whether or not a separate charge is made therefor;*

Section 6. 8. Of the Act allows for a late rent penalty:

> *8. Late Payment Penalty*
> *Where the rental agreement contains provision for a monetary penalty for late payment of rent, the monetary penalty shall not exceed one per cent per month of the monthly rent.*

The parties entered into a rental agreement dated July 30, 2015. Attached to that agreement is a Schedule ‘D” Additional Terms or Conditions – Section IV of Rental Agreement. This Schedule “D” is permitted under the Act and sets out various additions to the standard form rental agreement. It includes the late payment penalty quoted above. The only other charge or fee listed is:

> *7 If you lock yourself out of the apartment, we will let you back in once at no charge. After that there will be a $25.00 charge. …*

There is no mention of a $30.00 fee for NSF charges in the rental agreement or in its attached Schedule “D”.

The evidence before the Commission is that the Appellant’s monthly rent is paid until the end of June 2017. There is no evidence presented of an accrued late payment penalty per section 6. 8. of the Act and paragraph 8 of the Schedule “D”. There is no evidence of any outstanding lockout charges per Schedule “D”. There is no evidence that the Respondent faced actual out of pocket expenditures levied by its bank attributable to the Appellant. Rather, the Respondent seeks to recover an internally generated NSF fee through the Form 4, for a sum of money which borders on that of *de minimis*, with non-payment of such fee resulting in the very serious consequence of the termination of the rental agreement and the eviction of the Appellant. Further, the Respondent has not provided any evidence that the Appellant was informed in writing of this fee as it continued to accumulate prior to the issuance of the Form 4.

The appeal is allowed. The Commission overturns Director’s Order LD17-148. The May 24, 2017 Form 4 is invalid as it seeks payment of a fee which is neither an out of pocket expense, nor referenced in the Act, nor the rental agreement nor its attached Schedule “D”.

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 allowed.**
2. **Director's Order LD17-148 is overturned.**
3. **The May 24, 2017 Form 4 Notice of Termination by Lessor of Rental Agreement is invalid and thus the rental agreement remains in effect.**

DATED at Charlottetown, Prince Edward Island, this **14th** day of **June**, **2017**.

BY THE COMMISSION:

(sgd. John Broderick)
John Broderick, Commissioner

(sgd. Jean Tingley)
Jean Tingley, 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)