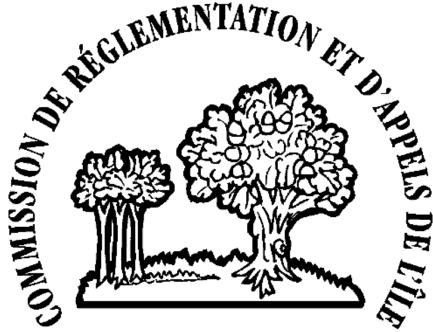

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LR20040
Order LR20-39

IN THE MATTER of an appeal under subsections 25(2) and 26(1) of *the Rental of Residential Property Act* filed by Cristina Radic against Order LD20-302 dated October 30, 2020, issued by the Director of Residential Rental Property.

BEFORE THE COMMISSION
on Friday, the 18th day of December, 2020.

Erin T. Mitchell, Panel Chair & Commissioner
M. Douglas Clow, Vice-Chair
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 under subsections 25(2) and 26(1) of *the Rental of Residential Property Act* filed by Cristina Radic against Order LD20-302 dated October 30, 2020, issued by the Director of Residential Rental Property.

Order

This appeal asks the question of whether a tenant is entitled to an Order authorizing termination of a fixed-term rental agreement. This appeal also explores the landlord's duty to mitigate.

Background

The Appellant, Cristina Radic ("Ms. Radic"), leased a room in the lower level of 35 Westview Drive, Charlottetown, PE (the "Premises") from Hart Hone Properties (the "Respondent") for a one-year fixed term from September 1, 2020 to August 31, 2021.

Weeks into the rental agreement, Ms. Radic took issue with the Premises, citing an odour and a lack of natural light in the room. She sought to terminate the rental agreement.

On October 2, 2020, Ms. Radic filed with the Director of Residential Rental Property (the "Director") an Application for Enforcement of Statutory of Other Conditions of Rental Agreement ("Form 2") seeking an order to authorize the termination of the rental agreement.

In Order LD20-302, the Director found that the rental agreement will continue to be in full force and effect until terminated in accordance with the *Rental of Residential Property Act* (the "Act").

Ms. Radic appealed.

The Commission heard the appeal on November 25, 2020, via telephone conference call. Ms. Radic was present. The Respondent was represented by William (Bill) Hart ("Mr. Hart").

Disposition

The appeal is allowed. Director's Order LD20-302 is reversed. The rental agreement shall continue, but shall be terminated as of March 31, 2021, as the Respondent only partly met a landlord's duty to mitigate.

The Issues

The Commission will consider the following questions in determining this appeal:

1. Should the rental agreement be terminated? If so, when?

2. What is a landlord's duty to mitigate and was it met?

Should the rental agreement be terminated? If so, when?

Ms. Radic testified that she arrived in Prince Edward Island in September 2020, and due to Covid-19 protocols was required to self-isolate for two weeks. She did so at the Premises. She testified that a few days into her isolation, she noticed an odour and advised Mr. Hart of same. The room is located in the basement of the Premises and is beside the washer and dryer unit.

Ms. Radic stated that the odour became so pervasive that her colleagues began noticing the odour on her clothing, even while away from the Premises. Ms. Radic called three witnesses, all of whom testified that they, too, had smelled the odour when they attended at the Premises as Ms. Radic was moving out.

Ms. Radic also testified that the lack of natural light in the room was problematic for her. There is a deck attached to the house, and the deck partially obstructs the window in the room. She stated that she had not been able to personally view the Premises prior to entering into the rental agreement, but instead had relied on video and photographs provided by Mr. Hart. She stated that she would not have entered into the rental agreement had she been able to view the Premises personally before signing.

Evidence before the Commission confirms that Mr. Hart was made aware of Ms. Radic's concerns, and that he made efforts to address them. He offered to purchase a dehumidifier, to have the room checked for mold, and to have the room cleaned. He also offered to purchase new light bulbs which could mimic more natural light. Ms. Radic nevertheless sought to terminate the agreement.

Mr. Hart acknowledged that from time to time moisture accumulation was an issue in the lower level of the Premises, and same was stated in the package of materials that was provided to all tenants. Those materials contain advice as to how to address the issue should it arise. He also stated that none of the other occupants in the house raised the same issues, including the others who lived in rooms on the same floor, and that the previous tenant to occupy the Premises did not have similar complaints.

The Commission finds no grounds to terminate the rental agreement. Ms. Radic entered into the rental agreement of her own volition, having viewed and accepted the video and photographs of the Premises. There is insufficient evidence to establish that Mr. Hart is in violation of the statutory conditions of the lease which require him to keep the Premises in a good state of repair and fit for habitation, nor is there any evidence that Mr. Hart misrepresented to Ms. Radic the nature of the Premises.

What is a landlord’s duty to mitigate and was it met?

In the present appeal, the rental agreement was to run from September 1, 2020 to August 31, 2021. By late September 2020, the Appellant had advised the Respondent of issues of concern and raised the matter of ending the lease. The Appellant indicated that she vacated the premises on October 15, 2020, and requested before the Director that the rental agreement be terminated effective November 1, 2020. The Director heard the matter on October 29, 2020, and issued Order LD20-302 the following day. As of the Director’s hearing, the Respondent had not made any efforts to mitigate. Order LD20-302 reminded the Respondent of the need to mitigate and quoted section 29 of the Act.

In his evidence before the Commission, Mr. Hart stated that he placed a Kijji advertisement for the premises following the hearing before the Director. While Mr. Hart does not reside in Prince Edward Island, his daughter does and she posted an ad at the educational institution she attends.

Section 29 of the Act reads:

> *29. If the lessee abandons the premises or terminates the rental agreement otherwise than in accordance with this Act, the lessor shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.*

Section 5 of the Act defines the nature of the relationship between a lessor and a lessee as a contractual relationship. Further, the common law rules apply, with respect to the effect of a breach of a material covenant by one of the parties to the contract. The duty to mitigate, referenced in section 29 of the Act, is a common law rule and principle that applies in contract law.

The duty to mitigate is an established principle in contract law, and arises in the context of assessment of damages for breach of contract. The general rules for the assessment of damages for breach of contract was outlined in *Keneric Tractor Sales Ltd.* v. *Langille et al.*, [1987] 2 S.C.R 440, which held that the award should put the plaintiff in the position he would have been in had the defendant fully performed his/her contractual obligations.

The duty to mitigate was further explained by the Supreme Court of Canada in *Red Deer College v. Michaels et al.*, [1975] 57 D.L.R. (3d) 386 at p.390 (S.C.C). The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a “duty” to mitigate should be understood in this sense.

This common law duty to mitigate when a breach of contract has occurred prevents plaintiffs from simply doing nothing and thereby accumulating losses.

While the matter of a lessor’s duty to mitigate does not appear to have been thoroughly reviewed by either the Courts of Prince Edward Island or the Commission, some other provincial jurisdictions do have a similar duty to mitigate, or in lay language, a “duty to minimize” damages.

The province of Nova Scotia’s *Rental Tenancies Act* (“RTA”) shares an almost identically worded section on the duty to mitigate. Section 6 of the RTA, includes the following:

> *Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.*

Given the very similar wording between the above-cited portion of the RTA and section 29 of the Act, as well as an absence of Prince Edward Island case law on the matter, a brief review of some Nova Scotia case decisions may provide some guidance to the Commission.

In the Nova Scotia Small Claims Court decision of *Bond* v. *Hall*, 2010 NSSM 31 the duty of mitigation was given a thorough analysis when the adjudicator stated:

> *[9] I turn then to the general law of contract and the duty to mitigate. In the case of Halifax Regional Municipality v. Amber Contracting (2009), NSCA 103, Hamilton, J.A. (dissenting on another point), stated as follows (paras 61-62):*
>
> > *[61] In contract law, the plaintiff must make reasonable efforts in good faith to mitigate its losses upon breach of contract.*
>
> *[62] However, contract law does not impose on the plaintiff the evidentiary burden to show that it mitigated its losses. Rather, the burden to show that the plaintiff failed to mitigate its losses and is trying to recover for losses that were avoidable, rests upon the defendant.*

The adjudicator in *Bond* v. *Hall* reviewed the law on the duty to mitigate, and further determined the onus to prove the duty to mitigate in paragraph 11, which states as follows:

> *[11] The onus in this case therefore to prove that there has been a failure to mitigate is on the party alleging a failure to mitigate.*

Regarding the specific facts of *Bond* v. *Hall*, and its application to the duty to mitigate, the adjudicator stated:

> *[12] Mr. Hall brought forward no evidence to show that Ms. Bond did not make reasonable efforts or that if she had, she could have found a replacement tenant. What he argued was that if the rent was reduced she probably could have found an alternate sub-tenant. As the matter of law, I have my doubts that Ms. Bond would be under a legal duty to reduce the rent amount in order to be seen to be exercising reasonable efforts to mitigate. The further question might be asked is why would it not be the defaulting party (i.e., Mr. Hall) making that type of decision, particularly where it is he who has defaulted and it is he who bears the primary obligation to pay the rent (to the sub landlord).*
>
> *[16] In my view, the law requires that there be some evidence on that point before reducing a claim for failure to mitigate. Without such evidence, it becomes a matter of pure speculation as to whether or not there actually was an avoidable loss which is the whole point of the mitigation doctrine in contract law.*

In *Watts* v. *Haverstock Estate*, 2016 NSSM 30 the adjudicator stated that:

I find that they have failed to fulfill this obligation to mitigate as they did not make efforts to rent the house when they received notice. Consequently, I deny claim

for rent for January 2016. However, I allow a portion of rent for December 2015, namely 50% or $400. I also disallow any claims for oil or power during any portion of these months.

In *Poirier* v. *Sinha*, 2007 NSSM 96 the adjudicator found mitigation to be properly done, and stated in paras 19 and 20 as follows:

> *(19) The landlord must mitigate his losses. I find he attempted to rent the premises shortly after they were vacated and ran an ad on Kijiji in each of June, July, August and September. There was no ad run in May 2016. The next ad was not placed until February, 2017. There were inquiries during each month. The Sinhas also showed the unit during these months. They attempted to rent the unit on the same conditions as the lease subject to this appeal.*
>
> *(20) I am not satisfied their efforts were sufficient to justify an award of rental payments for one year. The landlords had an obligation to repair the unit and attempt to rent it commencing May 1 and an ongoing obligation to keep it on the market. They did not do so. As noted below, many repairs were not commenced until later. In addition, I find Dr. Sinha took no alternative efforts towards mitigation of his losses, such as reducing the rent and seeking the difference from the tenant as a cost of mitigation. It would be extremely rare for this Court to award a full year's rent unless all reasonable attempts at mitigation have been exhausted. The evidence does not support any such finding.* [emphasis added]

The adjudicator in *Bond* v. *Hall* focuses on evidentiary burden and appears to favour an all or nothing approach, while the adjudicators in both *Poirier* v. *Sinha* and *Watts* v. *Haverstock Estate* seem to view the duty to mitigate proportional to the monetary amount being sought by the party seeking damages. In other words, the duty to mitigate is not a matter of toggling an "on-off switch" where once a party shows some evidence of mitigation, they are then entitled to the full relief they are seeking.

While the Act does not expressly set out objects or guiding principles of the legislation, the overall essence of the Act appears to be one of consumer protection. Thus, the legislator sought to balance the normal freedoms afforded to parties entering in a contract at common law, with statutory provisions to protect both parties, but particularly for the lessee as the typically more vulnerable party.

Section 9 of the *Interpretation Act* reads:

> *9. Enactments remedial*
>
> *Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. 1981,c.18,s.9.*

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.

As of November 1, 2020, there were ten (10) months left in the rental agreement. At a monthly rent of $600, the quantum of the claim would be $6,000. With such a lengthy time period and such a large quantum, the Commission would expect substantial efforts to mitigate the Respondent's losses. The placement of a Kijji advertisement and a posting at an educational institution, while a good start, does not, of itself, constitute substantial efforts to mitigate given the length of the remaining rental agreement and the quantum of the claim. The Commission finds that the Respondent only partly met the obligations of a lessor to mitigate.

Disposition

The Commission finds no grounds to terminate the rental agreement.

That said, as the Respondent only partly met the obligation to mitigate under section 29 of the Act, the Commission determines that an early termination of the rental agreement is appropriate.

The Commission determines that the remaining ten (10) months of the rental agreement (November 1, 2020 to August 31, 2021) shall be equally divided between the parties and therefore orders that the rental agreement be terminated effective March 31, 2021. The Appellant will continue to be responsible for paying the rent until said date, subject to the Respondent's ongoing duty to mitigate.

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. Director's Order LD20-302 is reversed.**

2. **The rental agreement shall continue but shall be terminated as of March 31, 2021.**

3. **The Appellant will continue to be responsible for paying the rent until said date, subject to the Respondent's ongoing duty to mitigate.**

DATED at Charlottetown, Prince Edward Island, this 18th day of December, 2020.

BY THE COMMISSION:

(sgd. Erin T. Mitchell)
Erin T. Mitchell, Panel Chair & Commissioner

(sgd. M. Douglas Clow)
M. Douglas Clow, Vice-Chair

(sgd. Jean Tingley)
Jean Tingley, Commissioner

NOTICE

Subsections 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.*