



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/CV/22/3946**

**Re: Property at 5A Keats Place, Dundee, DD3 6QH (“the Property”)**

**Parties:**

**Mr Stephen Flight, 21 Pitroddie Gardens, Dundee, DD3 9QR (“the Applicant”)**

**Mr Darren Whyte, Mr Kevin Whyte, 5A Keats Place, Dundee, DD3 6QH; 20A Leng Street, Dundee, DD3 6QJ (“the Respondents”)**

**Tribunal Members:**

**Neil Kinnear (Legal Member) and Ahsan Khan (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that**

**Background**

[1] This was an application for a payment order dated 28<sup>th</sup> October 2022 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant originally sought in his application payment of arrears in rental payments of £525.00 in relation to the Property from the Respondents, and provided with his application copies of the private residential tenancy agreement and rent arrears statement.

[3] The private residential tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, and the procedures set out in that Act appeared to have been correctly followed and applied.

[4] The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 10<sup>th</sup> January 2023, and the Tribunal was provided with the executions of service.

[5] Thereafter, the Applicant by e-mail from his representative to the Tribunal dated 30<sup>th</sup> January 2023 requested that the sum claimed be amended to £2,574.19, and provided an updated rent arrears statement.

[6] A Case Management Discussion was held at 14:00 on 23<sup>rd</sup> February 2023 by Tele-Conference. The Applicant did not participate, but was represented by Mr Forsyth, solicitor. The Respondents participated, and were not represented.

[7] Mr Forsyth advised the Tribunal that the First Respondent, Darren Whyte, had quit the Property on 27<sup>th</sup> January 2023, and that the rent arrears re-calculated to that date were now £2,235.48. The Tribunal noted that the First Respondent's address stated in the application may require to be amended by the Applicant.

[8] The Respondents had a helpful discussion with the Tribunal, in which they explained that the day after the date in the notice to leave the First Respondent had returned to the Property and found the locks had been changed. On enquiring with the Applicant's letting agent, they provided a key to him the following day and then withdrew from acting for the Applicant and told the First Respondent that the lease had ended. He had remained in the Property until late January 2023, and could not pay the rent as the lease had ended and as the letting agent was no longer able to accept payment.

[9] Mr Forsyth explained that due to a misunderstanding, the Applicant had thought the First Respondent was leaving the Property on the date set in the notice to leave and arranged to change the locks the day after. On realising the mistake, it was rectified. As the lease was not ended, and the First Respondent continued to reside there until 27<sup>th</sup> January 2023, he remained liable for the rent until that date.

[10] The First Respondent was unclear regarding his position legally, and had sought legal advice. However, his solicitor was unavailable prior to the Case Management Discussion, but he was due to meet with his solicitor to seek legal advice shortly. He asked the Tribunal to continue the Case Management Discussion to allow him to do that, and Mr Forsyth did not oppose that request in the circumstances.

[11] A continued Case Management Discussion was held at 14:00 on 31<sup>st</sup> March 2023 by Tele-Conference. The Applicant did not participate, but was represented by Mr Lawson, solicitor. The Respondents participated, and were not represented.

[12] The Respondents confirmed that they had taken legal advice. Their position was that the changing of the locks on the Property by the Applicant was an illegal eviction. The consequence of that was that the First Respondent as tenant had a monetary claim in that respect against the Applicant which would likely approach or exceed the sum sought in this application. Further, as the lease had been terminated when the locks were changed by the Applicant, the Respondents were not liable to pay rent from that point.

[13] Mr Lawson, after a brief adjournment to take the Applicant's instructions, confirmed that the Applicant did not accept either of these assertions by the Respondents. Mr Lawson's position was that neither was a valid legal defence to this application on the factual basis accepted by both parties.

[14] The Tribunal explained that it could not make any determination on whether or not there had been an unlawful eviction in this application. If the Respondents wished to make such a claim, then they required to raise a separate application to the Tribunal against the Applicant.

[15] The Tribunal also explained that if the Respondents wished to rely on the defence to this application which they had outlined, in circumstances where Mr Lawson contended that those did not amount to a legally valid defence, then they or someone representing them would require to present legal argument with reference to the law to the Tribunal in support of their assertion that the defence advanced was one open to them legally.

[16] The Respondents confirmed that they wished to argue that their defence was a legally valid one, but that they not having legal knowledge would need to bring a lawyer with them to a further hearing to make those arguments for them. They accordingly requested a further continuation to allow them to do so.

[17] Mr Lawson opposed a further continuation, but in the event that the Tribunal granted such a continuation, invited the Tribunal to make a direction that written legal submissions be lodged on behalf of the Respondents in advance of the date set.

[18] Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative or on an application by a party, to adjourn a Case Management Discussion.

[19] The Tribunal considered it to be reasonable to adjourn the Case Management Discussion in the whole circumstances in terms of Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[20] The Tribunal considered that it was in the interests of justice, and consistent with its overriding objective of dealing with the proceedings justly in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, to adjourn the Case Management Discussion for the purpose of allowing the Respondents one further opportunity to present legal arguments in support of their proposed defence.

[21] The Tribunal made a direction that detailed written legal submissions on behalf of the Respondents should be lodged no later than 14 days in advance of the date set.

[22] Finally, the Tribunal noted that this matter required to be dealt with at the continued Case Management Discussion, and that it was extremely unlikely that any further adjournments would be allowed.

[23] A further continued Case Management Discussion was held at 10:00 on 24<sup>th</sup> July 2023 by Tele-Conference. The Applicant did not participate, but was again represented by Mr Lawson, solicitor. The Respondents participated, and were again not represented.

[24] The Tribunal enquired why the Respondents had not complied with the Tribunal's direction and had not submitted written legal submissions. The First Respondent explained that he had been unable to engage a solicitor who was willing to represent him in this matter. As he had no legal training, he was not able to comply with the direction.

[25] However, the Respondents' position remained unchanged that the changing of the locks on the Property by the Applicant was an illegal eviction. The First Respondent had not yet brought an application in that respect to the Tribunal, but he was about to lodge such an application. He was confident his application would be successful, and that he would be awarded compensation which would greatly exceed the sum sought here.

[26] The First Respondent also asserted that he had not paid any rent after the illegal eviction as the Applicant's letting agent refused to act for the Applicant thereafter, and he could not pay the Applicant in circumstances where the police were involved due to the Applicant's aggressive behaviour towards him and his family.

[27] Mr Lawson noted that this latter assertion that he was unable to pay rent appeared inconsistent with the Respondents' assertion that none was due as a result of the tenancy being ended by the unlawful eviction.

[28] The Tribunal observed that in the event that it ultimately decided that the Applicant's actions did constitute an illegal eviction (which the Applicant denies), and that as a result the tenancy had ended, it seemed likely that the Applicant might have a differently legally-formulated claim for the period in which the First Respondent continued to reside in the Property after the tenancy ended.

[29] Mr Lawson indicated he would consider that matter, and whether the Applicant might wish to amend into his application an alternative position in the event that his primary legal submission that the tenancy continued was not upheld.

[30] Mr Lawson vigorously opposed any further adjournment of this application and invited the Tribunal to grant the order sought. He noted the length of time this application had been before the Tribunal, and that little progress had been made in resolving it due to repeated continuations obtained by the Respondents.

[31] The Tribunal had considerable sympathy with Mr Lawson's position, but noted that it was subject to the overriding objective to deal with the proceedings justly, and to ensure, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party with the presentation of their case without advocating the course they should take. However, the Tribunal should also avoid delay.

[32] Balancing these various factors, the Tribunal concluded that it would not continue the Case Management Discussion further. Instead, it would set a Hearing where the parties can lead their evidence both by the giving of evidence by witnesses, and by those witnesses referring the Tribunal to the specific parts of the documents lodged which they rely upon.

[33] There did appear to be a dispute on what factually occurred when the locks were changed at the Property, which appeared to have been on 19<sup>th</sup> October 2022, and on the legal issue of whether that terminated the tenancy agreement or not. In the event that the original agreement did end, there remained the question of whether further rent was due until the First Respondent left the Property, and if so, upon what legal basis.

[34] These issues would require to be resolved by the Tribunal after hearing evidence, and for that reason the Tribunal set a Hearing. After discussion, all parties and the Tribunal agreed that the Hearing should be in person at a venue in Dundee. All parties were reminded that they required in terms of the Tribunal's procedure Rule 22 to send to the Tribunal no later than 7 days prior to the Hearing a list of any documents and copies of all documents that the party wishes to rely upon (if they had not already lodged copies), and a list of any witnesses that the party wished to call to give evidence.

[35] Mr Lawson noted that the Applicant might seek to persuade the Tribunal in due course that it should award expenses against the Respondents in consequence of their conduct of the proceedings in terms of Tribunal Rule 40.

[36] The Tribunal observed that the First Applicant no longer resided at the Property. The First Respondent confirmed that he was happy to provide his address to the Tribunal, but not to the Applicant due to police advice standing the difficulties between them.

[37] Mr Lawson confirmed that he would not oppose the First Applicant's address, once provided to the Tribunal, being redacted for that reason, and the Tribunal agreed to that redaction.

## **Hearing**

[38] A Hearing was held at 10:00 on 14<sup>th</sup> November 2023 in person at Endeavour House, Dundee. The Applicant participated, and was again represented by Mr Lawson, solicitor. The Respondents participated, and were again not represented.

[39] The Tribunal heard evidence from the Respondents and from the Applicant's letting agent, Mr Paul Goodman. That was in relatively short compass as much of the factual background was not in dispute, and concerned only the question of what took place on 19<sup>th</sup> October 2022 and thereafter.

## **Findings in fact**

[40] Evidence was led by both parties. After hearing that evidence, the Tribunal found in fact:

- 1) That the First Respondent rented the Property from the Applicant from 16<sup>th</sup> July 2021 until 27<sup>th</sup> January 2023.
- 2) That the written private residential tenancy agreement provided at clause 8 that rent of £525.00 was payable in advance on the 16<sup>th</sup> day of every month by the tenant to the landlord.
- 3) That the Applicant served a notice to leave on the First Respondent, which notice specified 19<sup>th</sup> October 2022 as the end date of the lease.
- 4) That the Respondents advised that the First Respondent intended to leave the Property on 19<sup>th</sup> October 2022.
- 5) That after discussions between the First Respondent and his local authority housing department, the First Respondent advised the Applicant's letting agent, Mr Goodman, on 18<sup>th</sup> October 2022 that he would not be leaving the Property on 19<sup>th</sup> October 2022.
- 6) That on 19<sup>th</sup> October 2022 a locksmith attended the Property and changed the locks. The locksmith attended on the instructions of the Applicant, who had not been informed by his letting agent that the First Respondent no longer intended to leave the Property on that date.
- 7) That the First Respondent returned to the Property at between 4pm and 5pm on 19<sup>th</sup> October 2022 to find the locks had been changed, and contacted the Applicant's letting agent.
- 8) That the Applicant's letting agent had been provided with the new keys, and arranged for the keys to be collected from the Applicant's solicitor's office at around 3pm on 20<sup>th</sup> October 2022. The Applicant's solicitor had attempted to arrange to drop the keys into the First Respondent's place of work on the evening of the 19<sup>th</sup> October 2022 when he was then working, but had been unable to make arrangements with him to do so.
- 9) That the First Respondent thereafter continued to reside at the Property until he voluntarily removed from it on 27<sup>th</sup> January 2023.
- 10) That to the end date of the lease, the First Applicant had accrued rent arrears of £2,235.48.

## **Findings in fact and law**

[41] After hearing evidence, the Tribunal found in fact and law:

- 1) That the Respondents remained liable in terms of the lease agreement for payment of rent until the First Respondent left the Property on 27<sup>th</sup> January 2023.

## **The Respondents' evidence**

[42] The Respondents both gave evidence about the final months of the tenancy. They both explained that the Applicant served a notice to leave on the First Respondent, which specified a date to leave the Property of 19<sup>th</sup> October 2022. The Respondents had indicated that the First Respondent intended to leave on that date. However, after the First Respondent spoke with a housing officer at his local authority, he was advised that to avoid being deemed to have made himself intentionally homeless, he should not leave the Property and instead await the Applicant obtaining an eviction order from the Tribunal.

[43] The Respondents advised the Applicant's letting agent on 18<sup>th</sup> October that he would no longer be leaving the Property on the 19<sup>th</sup> October. However, when he returned to the Property between 4pm and 5pm on 19<sup>th</sup> October, he found that the locks had been changed and that he could not get in.

[44] The First Respondent contacted the Applicant's letting agent, which confirmed that it would provide him with the new key for the Property. The First Respondent worked his evening shift and then had to spend overnight at a friend's house before he collected the key from the Applicant's solicitor's office at about 3pm on 20<sup>th</sup> October 2022. He accepted that the Applicant's solicitor had made efforts to arrange for the keys to be provided to him at his work during his evening shift, but that it had not been possible to arrange that.

[45] Thereafter, the First Respondent asserted that he was no longer liable to pay rent for the Property upon the basis that he had been illegally evicted. He considered that the lease had come to an end, and noted that the letting agent had told him that it had "archived" the lease. In those circumstances there was no obligation on him to pay anything to the Applicant, and the letting agent was no longer dealing with the lease. He remained living in the Property until 27<sup>th</sup> January 2023, when he left to move into another property.

## **Mr Goodman's evidence**

[46] Mr Goodman explained that he was the letting agent for the Property. His agency had served a notice to leave on the First Respondent on the basis that the landlord wished to sell the Property. That notice specified a date to leave the Property of 19<sup>th</sup> October 2022. The Respondents had indicated after receiving the notice that the First Respondent intended to leave on that date. That information was passed on to the Applicant.

[47] Subsequently, the Respondents confirmed on 18<sup>th</sup> October 2022 that the First Respondent would not be leaving the Property the following day as a result of advice he had received from a housing officer at his local authority. Mr Goodman's evidence was that neither he, nor his agency, passed this information on to the Applicant.

[48] The Tribunal asked Mr Goodman about an e-mail exchange which he had with the Respondents on 19<sup>th</sup> October 2022. Mr Goodman sent an e-mail that day at 12:25 responding to the First Respondent's indication that he had spoken with the local

authority and had been advised that he would be considered intentionally homeless if he left the Property in response to the notice to leave, in which he stated "Darren, What they are suggesting is an eviction order, we would have to apply to the Housing Property Chamber for this which will take time. This will only make this whole situation a lot worse?". At 14:20 Mr Goodman sent a further e-mail which stated "Darren, Kevin, I have just spoken with the head of the Homefinders Unit and it is misleading what a council member has said. The notice is a legal document and at no point should a member of the council be advising to break the law, this will now incur further legal costs which you will now be expected to meet the cost of." The terms of these e-mails appeared to suggest that Mr Goodman was applying pressure to the Respondents to encourage the First Respondent to leave, and was legally entirely inaccurate in stating that the Respondents were being advised "to break the law" and would be liable for legal costs.

[49] Mr Goodman accepted that a tenant has a legal right not to leave in response to a notice to leave, and it was his position that his reference to "legal costs" was referring to rent arrears of the First Respondent.

[50] Mr Goodman explained that he was not aware that the Applicant had arranged for the locks to be changed on the Property. When the First Respondent contacted his agency to advise that he was locked out, his agency arranged for the Applicant to provide the new keys to be forwarded to the First Respondent. He understood that this happened the following day.

[51] Mr Goodman did not accept that the first Respondent had been unlawfully evicted. He had never left the Property but had been for a very short period denied access to it though a genuine mistake caused by miscommunication between the letting agency and the Applicant. The First Respondent's possessions remained within the Property throughout this period. Thereafter the lease continued until the First Respondent left on 27<sup>th</sup> January 2023, by which time he had accumulated rent arrears of £2,235.48.

## **Submissions**

[52] Mr Lawson submitted that the Tribunal should accept that the lease did not end on 19<sup>th</sup> October 2022, and that there had been no unlawful eviction. That being so, and where the First Respondent continued to reside at the Property until 27<sup>th</sup> January 2023, he remained liable for payment of the rent. The Applicant was entitled to payment of the sum sought in rent arrears. Mr Lawson also invited the Tribunal to make an award of expenses against the Respondents upon the basis that they had caused unnecessary continuations of the application.

[53] The Respondents submitted that he was no longer liable to pay rent for the Property upon the basis that he had been illegally evicted. He considered that the lease had come to an end, and noted that the letting agent had told him that it had "archived" the lease. In those circumstances there was no obligation on him to pay anything to the Applicant.



## Statement of Reasons

[54] The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

### **“First-tier Tribunal's jurisdiction**

- (1) In relation to civil proceedings arising from a private residential tenancy—
- (a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
  - (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
- (a) the prosecution of a criminal offence,
  - (b) any proceedings related to such a prosecution.”

The Tribunal accordingly has jurisdiction to hear civil proceedings arising from a private residential tenancy such as between the parties in this application.

[55] The Tribunal accepted the Respondents evidence as credible and reliable. The question the Tribunal required to answer was whether their assertion that the lease had come to an end on 19<sup>th</sup> October 2022 and that they were thereafter under no obligation to pay rent was legally correct or not.

[56] The Tribunal was unimpressed with the evidence of Mr Goodman, and with his conduct. As letting agent, he had duties to both the landlord and tenant. His e-mail of 19<sup>th</sup> October 2022 appeared to the Tribunal to be a clear attempt to bully the Respondents into leaving the Property on 19<sup>th</sup> October as previously arranged. His e-mail also made assertions which were entirely inaccurate by stating that the First Respondent deciding to remain at the Property was “breaking the law”, and in stating that the Respondents would be expected to meet further legal costs incurred.

[57] The Tribunal also noted the terms of text messages between the parties which had been lodged. The Applicant’s messages are extremely rude, unpleasant and threatening. Examples of text messages sent by the Applicant to the First Respondent are “I’ll take your dad’s house for money... we will meet though”, “You are a wee prick, I know you, your mum, your brother”, “Just get out my flat jakey cunt”, and “Multiple people watching you”.

[58] The Tribunal noted with concern the conduct of both the Applicant and Mr Goodman toward the Respondents. However, whether the Respondents remained liable to pay rent to the Applicant from 19<sup>th</sup> October 2022 to 27<sup>th</sup> January 2023 depends upon whether the lease was still in force after 19<sup>th</sup> October 2022 or had come to an end.

[59] The *Private Housing (Tenancies) (Scotland) Act 2016* provides that a private residential tenancy agreement may be brought to an end in one of three ways. The first is by the tenant giving the landlord notice in terms of section 48 of that Act. The second is by the landlord giving the tenant notice to leave and the tenant ceases to

occupy the let property in terms of section 50 of that Act. The third is by the landlord obtaining an eviction order from the Tribunal in terms of section 51 of that Act.

[60] The Tribunal has not issued an eviction order, and the First Respondent did not give notice to the landlord. The only basis upon which the lease might have ended is where the tenant has ceased to occupy the Property after receiving a notice to leave.

[61] It was agreed by the parties that the First Respondent received a notice to leave. The remaining question is whether the First Respondent ceased to occupy the let property. The Tribunal considered that the First Respondent did not cease to occupy the Property.

[62] The Tribunal considered that the First Respondent had been temporarily denied access to the Property when the locks were changed. However, as soon as this occurred the Applicant and his agents immediately made arrangements for him to be provided with the replacement key. After receiving this, the First Respondent continued to occupy the Property until 27<sup>th</sup> January 2023.

[63] The period of time during which he was denied access to the Property was brief and less than 24 hours. His property and possessions remained within the Property throughout that period, and once provided with the replacement keys he continued to occupy the Property until he left on 27<sup>th</sup> January 2023. In those circumstances the Tribunal was not persuaded that the First Respondent had ceased to occupy the Property in terms of section 50(1)(b) of the *Private Housing (Tenancies) (Scotland) Act 2016*.

[64] Not allowing entry to an occupier on one isolated occasion constitutes harassment rather than eviction (see *Stalker – “Evictions in Scotland” (2<sup>nd</sup> Ed)* at page 33, and the case of *R v Yuthiwattana* (1985) 80 Cr App R 55 referred to therein in which exclusion for one night was held not to constitute deprivation).

[65] The Tribunal observed that the First Respondent might have other potential remedies in respect of the short period of time when he was denied access to the Property and the attempts to pressure him into leaving without an order from the Tribunal by both the Applicant and Mr Goodman, but he remained liable for payment of the rent in terms of clause 8 of the lease agreement until it was terminated, as did the Second Respondent as guarantor.

[66] Finally, with regard to the Applicant’s claim for expenses to be awarded against the Respondents, Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides:

“(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.

(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.”

[67] The Tribunal accepted that the Respondents' conduct of the case had put the Applicant to unnecessary expense as a result of various continuations granted to them to obtain legal advice and/or representation.

[68] However, the Tribunal did not consider that the Respondents' conduct of the case was sufficient to be considered as unreasonable behaviour. The Respondents represented themselves and had no legal training. The Tribunal accepted that they had made genuine efforts to obtain legal advice and/or representation but had been unsuccessful in their attempts. The Tribunal did not consider in those circumstances that the Respondents acted unreasonably as defined in Rule 40 of the Rules.

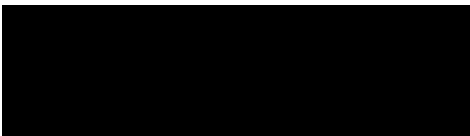
[69] That being so, the Tribunal did not award expenses against the Respondents.

### **Decision**

[70] In these circumstances, the Tribunal made an order for payment by the Respondents jointly and severally to the Applicant of the sum of £2,235.48.

### **Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**



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**Legal Member/Chair**

**14 November 2023**

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**Date**