Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations") and Section 71 of the Private Housing (Tenancies)(Scotland) Act 2016 ("the 2016 Act")

Chamber Ref: FTS/HPC/CV/23/1044

Re: Property at Broomwell, 35 Hillhead Road, Monikie, DD5 3QR ("the Property")

Parties:

Mrs Emma Kidd, Mrs Caroline Kidd, The Old School, Memus, DD8 3TY; The Old School Memus, FORFAR, DD8 3TY ("the Applicant")

Mrs Margaret Fyvie, Affleck House, Monikie, DD5 3QD ("the Respondent")

Tribunal Members:

Nicola Weir (Legal Member) and Eileen Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application for a payment order be refused.

Background

1. By application received on 30 March 2023, the Applicant sought a payment order against the Respondent in the sum of £1,200, being the tenancy deposit paid to the Respondent at the outset of the tenancy, which had been retained by the Respondent. Supporting documentation was lodged with the application.

2. Following initial procedure, the application was subsequently accepted by a Legal Member of the Tribunal, acting with delegated powers from the Chamber President, who issued a Notice of Acceptance of Application in terms of Rule 9 of the Regulations on 19 May 2023. Notification of the application was made to the Respondent by Sheriff Officer service on 22 June 2023 and the date, time and arrangements for a Case Management Discussion ("CMD") were intimated

to both parties, advising of the date by which any written representations should be lodged (11 July 2023). The Tribunal received representations from the Respondent dated 5 July 2023 stating that the Applicant had not contacted her and that she did not have contact details for them. The Applicant responded by email dated 18 July 2023 stating that they had tried to contact the Respondent and also that the Respondent had their contact telephone numbers and had been provided with their forwarding address.

Case Management Discussion

3. The Case Management Discussion ("CMD") took place by telephone conference call on 1 August 2023 before a different Legal Member but reference is made to the Notes on the CMD prepared by that Legal Member dated 1 August 2023. It is noted that the CMD was attended by both Applicants and by the Respondent. Both parties stated their respective positions. The Respondent's position was that she accepted that she had received a deposit of £1,200 which she had failed to place in a tenancy deposit scheme but that the deposit should not be returned to the Applicant due to the cost of repairs required to the Property following the Applicant's departure. The Respondent narrated some of the costs involved in these repairs and confirmed that she had invoices supporting the sums stated. The Respondent had further stated that the Applicant had not given her notice in writing that they wished to terminate the lease and that she only found out in January 2023 that they had vacated. The Respondent made no mention of being owed any rent. The Applicant did not accept responsibility for any of the repairs narrated by the Respondent, save for a broken window which the Respondent had stated cost £200 to repair. The Applicant stated that they had informed the Respondent on 22 October 2022 that they intended to vacate the Property, that they had hand delivered written notice to the Respondent on 1 December 2022 and had vacated on 2 December 2022, other than some belongings which they stored in the garage of the Property, with the agreement of the Respondent, until a later date. They enquired about return of the deposit through the Respondent's daughter in January 2023, when the broken window was discussed, but stated that the Respondent had never contacted them regarding the other repair issues alleged. The Legal Member adjourned the CMD to an Evidential Hearing and noted the issue to be resolved as:- *"Is the Respondent entitled to withhold return of the Applicant's deposit as a result of damage caused to the property?"* Following the CMD, the Legal Member also issued a Direction to parties dated 1 August 2023, together with the Notes on the CMD requiring parties to provide a list of witnesses and any documentation of evidential value that they wished to be considered by the Tribunal at the Hearing, at least 14 days prior to the Hearing.

Further procedure

4. On 19 October 2023, the Respondent lodged a note of the names of two witnesses that she intended to call at the Evidential Hearing; together with some photographs stated to show the access to the Property, the interior of the

garage, damage to the living room door, debris, an internal broken window and a window marked by footballs; and three invoices dated 3 February 2023 in the sum of £3,872.82, 8 March 2023 in the sum of £3,393.49 and 29 March 2023 in the sum of £1,406 (the contents of this third invoice were substantially redacted).

5. On 26 October 2023, the Applicant lodged some further written representations in relation to the Respondent's claims regarding repairs and the photographs and invoices lodged by her, together with screenshots of a call log showing dates and times of calls/attempted telephone calls between the parties, some photographs stated to show damp and associated issues at the Property and a typewritten statement of a Mr Harvey Kidd, the first Applicant's father, who had been an intended witness for the Applicant but who was unable to attend the Hearing due to a medical appointment.

6. On the morning of the Evidential Hearing, the first Applicant also emailed the Tribunal to advise that the second Applicant would require to leave the CMD at 10.30am to attend an urgent medical appointment.

Evidential Hearing

7. The Evidential Hearing took place by telephone conference call on 6 November 2023, commencing at 10am. It was attended by both Applicants and the Respondent.

8. After introductions and introductory remarks by the Legal Member, the Tribunal dealt with some preliminary issues. Both parties confirmed that they had had sight of the other party's respective representations lodged prior to the Hearing. The Respondent confirmed that she had provided the Clerk with contact details for her two witnesses, SAR Fyvie who was noted to be her daughter and R Harper, who was noted to be a retired employee who still helps the Respondent out. The second Applicant, Mrs Caroline Kidd, confirmed that her medical appointment had come about as an emergency, that she required to attend a scan at 10.30am and that she did not know how long it would take. The Legal Member also asked about the Applicant's witness, Mr Harvey Kidd, who was also unable to attend today due to a medical matter and explained that the statement of Mr Kidd that had been submitted did not have the same evidential value as an Affidavit nor giving evidence in person, as both the other party and the Tribunal would be unable to question or test the evidence of Mr Kidd. On being asked if the Applicant was wishing to seek a postponement, given these circumstances, both Applicants confirmed that they would prefer not to postpone and for the Hearing to proceed today. The first Applicant asked if it would be possible for her son, Mr Lewis Kidd, to give evidence today in place of his grandfather, Mr Harvey Kidd, as he had assisted Mr Kidd in the relevant matter. The Respondent indicated that she had no objection to this and it was therefore agreed by the Tribunal and Mr Lewis Kidd's contact details provided to the Clerk. The second Applicant thereafter left the CMD prior to evidence commencing.

9. Mrs Emma Kidd – the first Applicant

Mrs Kidd explained that the weekend before Halloween 2022, she stopped her car and spoke to Mrs Fyvie who was out at her bins and informed her that she and her partner had heard about an alternative property that had come up and that they intended to vacate the Property during the first weekend of December. She stated that Mrs Fyvie had been aware when the Applicant took the Property on that it was unlikely to be long-term as they really needed something that was closer to their children's schools. Then, on the Friday night, of the first weekend of December [2 December 2022], Mrs Kidd asked Mrs Fyvie if she could open the farm gate to allow access for their removal van. However, Mrs Fyvie refused, saying it was not possible due to works being carried out by contractors around the Property, which had churned up all the mud on the driveway. Mrs Kidd explained that they were moving their families into three separate properties that weekend and they ran into difficulties when the clutch on her own car went, resulting in them being unable to completely finish the move. She telephoned Mrs Fyvie and explained what had happened and asked if it would be possible for them to store some larger items in the garage of the Property, which Mrs Kidd stated Mrs Fyvie agreed to. They left the Property, locked up, returned most of the keys to Mrs Fyvie, retaining just the conservatory key so that they could access the garage. They intended that they would be returning in around five days to collect the items from the garage. However, there were then postal strikes which delayed the car parts arriving to fix Mrs Kidd's car. There was also a period of terrible weather, including snow, which further delayed matters. Mrs Kidd stated that they kept Mrs Fyvie informed throughout this period but that it ended up being into January 2023 before they were able to physically get back to the Property to uplift the items from the garage. On that occasion, Mrs Kidd stated that she had a fairly lengthy conversation with Mrs Fyvie's daughter whom she met on the driveway. She described the conversation as amicable and she had asked Mrs Fyvie's daughter about the arrangements for return of their deposit. Mrs Fyvie's daughter stated that her mother dealt with that side of things but also mentioned the conservatory window which had been broken. Mrs Kidd said that she had apologised about that and explained that the window had been damaged during the move and that she had no issue about the costs of repair to the window being deducted from the deposit. Mrs Kidd advised that they heard nothing further from Mrs Fyvie in subsequent weeks, despite trying to contact her by telephone and eventually sent a letter to Mrs Fyvie asking about the deposit. When there was no response, she checked with the tenancy deposit schemes and realised that Mrs Fyvie had not lodged the deposit in a scheme. Accordingly, they decided to seek recourse through the Tribunal. When asked to comment on the Respondent's position that the amount of the deposit was exceeded by the costs of repairs for which the Respondent considers the Applicant to be liable, Mrs Kidd maintained that the only damage she accepts is to the conservatory window, which had occurred on the day they were moving out. She accepted the cost of £200 stated by the Respondent as the cost of that repair and confirmed that that sum could be deducted from the £1,200 they were seeking from the Applicant, thereby reducing the claim to £1,000. Mrs Kidd stated that the other repair costs claimed by the Respondent are difficult to accept as there

had never been any mention of them until the Respondent first raised these issues during the CMD. She explained that relations with Mrs Fyvie had always been cordial and that Mrs Fyvie had been in the Property regularly whilst they were living there. Mrs Kidd had experience of living in older, rural properties and had accepted the condition of the Property as it was whilst living there. The Property was on the grounds of a working farm and there were several employees of the farm who were always on hand to attend to things. She also repaired things herself. There had never been any disputes with Mrs Fyvie regarding repair type issues despite the fact that the pipes broke every year, that the Property was difficult to heat, with stone walls, static windows and an old heating system and was damp in places, as she said was shown in some of the photographs she had produced. As to the alleged damage to the living room door shown in one of Mrs Fyvie's photographs, Mrs Kidd stated that the previous tenant had also had a dog and Mrs Fyvie was aware of that. Other issues were, according to Mrs Kidd, just normal wear and tear. She had not been aware of a window having been marked by footballs and apologised for missing that when they were moving out. She disputes that the Property was left in a mess and unclean. Mrs Kidd was aware that Mrs Fyvie had no intention to re-let the Property immediately after they vacated as there was lots of work ongoing around the Property, which was being hindered by the weather being so bad at that time of the year. Mrs Kidd's position in relation to the giving of notice was that there had been regular discussion with Mrs Fyvie regarding them vacating between her informing Mrs Fyvie of their intentions in the October and their discussions on 2 December 2022 when she asked Mrs Fyvie if the gate could be opened to allow access for their van and Mrs Fyvie refused. She was surprised by Mrs Fyvie's reaction and when Mrs Fyvie mentioned that they had not informed her in writing of the date they would be leaving. She told Mrs Fyvie that she had not considered that this was needed due to the conversations they had had. Mrs Kidd stated that, in response to what Mrs Fyvie had said, she quickly wrote out a letter, giving notice that they were leaving and put it in Mrs Fyvie's postbox at the end of her driveway as they were leaving.

Mrs Fyvie did not wish to ask Mrs Kidd any questions.

In response to questions from the Tribunal Members, Mrs Kidd advised that their official leaving date that they were aiming for was 2 December 2022 but that it was in fact the Sunday of that weekend [4 December 2022] before they were finished up moving out. Mrs Kidd said she would have to check her bank statement to be sure but think that they made their last rent payment at the beginning of 4 November 2022, which took them up to that first weekend in December. She added that they had not received any rent requests from Mrs Fyvie so assumed she did not consider any further rent to be due. As to the keys, Mrs Kidd reiterated that they returned all but the conservatory key to Mrs Fyvie when leaving the Property on 4 December. Mrs Kidd advised that her wife had been last to leave and put the keys in Mrs Fyvie's postbox at the end of her driveway. Mrs Kidd confirmed that she eventually got her car back from the garage at the end of December but there was then a period of really bad weather so it was around 10 January 2023 when she was able to get back to

the Property to collect the items stored in the garage and when she met Mrs Fyvie's daughter on the driveway and had the discussion with her. During the five week period in between, Mrs Kidd said she had spoken to Mrs Fyvie around three or four times on the telephone, to keep her updated about her car being delayed in the garage. The ongoing problems with the weather was also discussed. Mrs Fyvie had not met Mrs Kidd at the Property to check it over before they left in December, she thinks because Mrs Fyvie had so much going on at the farm around that time. She thinks it is strange that Mrs Fyvie never mentioned anything about the condition of the Property during that period, and nor did her daughter during the discussions in January (other than mentioning the window) as she is aware that Mrs Fyvie had been into the Property by then. She knows this because she did go past the Property at one point and saw a van in the driveway and the lights on. Mrs Kidd confirmed that the Property had been occupied by herself, her wife, their two younger sons and three older sons. When asked why they had arranged for the Property to be painted before leaving, Mrs Kidd explained that when they moved in, the walls had all been freshly painted so they felt a fresh coat of paint was the least they could do. It was a gesture of goodwill. They arranged for her father to do the painting, assisted by Mrs Kidd's son, as her father was a retired painter and decorator with 45 years' experience and could complete the work quickly. He painted all the walls white, except the living room, as Mrs Kidd said it was showing signs of dampness. This was done during that first weekend in December, when they were moving out. As to the heating in the Property, Mrs Kidd explained that, when they left, they did not switch the heating off. It was an old, oil-fired central heating system, which they always left on low and never switched off.

10. Mr Lewis Kidd – witness for the Applicant

Mr Kidd confirmed that his name was Lewis Kidd, that he was 16 years old, that he was the son of Mrs Emma Kidd and that he lives with her. He was asked some questions by Mrs Kidd. He stated that he had carried out some painting to the Property, together with his grandfather, when they were moving out. He confirmed that they fully prepped and painted the whole house, mainly white, except the living room as there was a lot of damp on the floor. He was aware of the broken Conservatory window. In response to questions from the Tribunal Members, Mr Kidd explained that he does not work with his grandfather, who is retired, and that he just assisted him with the painting. He does not know exactly when this work was done. He estimated that it was around this time last year [November 2022] when they moved out. He confirmed that he had lived at the Property with his family and when asked about the condition of the property when they vacated, Mr Kidd stated that the walls had been in good condition, other than the damp he had mentioned, and that the house had just needed a fresh lick of paint. He said that the painting had taken a day or so.

Mrs Fyvie had no questions for Mr Kidd, other than clarifying his name, as she knows him by another surname. Mrs Kidd confirmed that he is also known by the surname "Wilson".

11. Mrs Margaret Fyvie – the Respondent

Mrs Fyvie stated that her position was that the Property was not vacated by the Applicant until mid-January 2023 but that rent was only paid up to I December 2022 and that the state of the house and grounds was unbelievable. In response to questions from the Legal Member, Mrs Fyvie stated that there had been no discussion about the tenants leaving apart from the brief discussion at the top of the driveway in October which she stated was a two minute conversation. She said that the conversation was all about what Mrs Kidd would like to happen and that they hoped to get another rental property. She accepted that she had not asked for notice in writing as she did not think it necessary to state that as it is clear from the terms of the lease. She denied that there were any subsequent conversations at all with the Applicant until 1 December when she found out that they were moving out. She explained that the house and garage are joined together and that the tenants did not therefore vacate until mid-January when they removed their belongings from the garage. She could not say if the tenants were still around the Property during the period in between. She denied having any discussion about the tenants being permitted to store some belongings in the garage that they had been unable to remove. Mrs Fyvie confirmed that she could not open the gate when asked to do so by Mrs Kidd on 1 December as the road had been closed by the contractors. She maintained that this was the first evidence she had that the tenants were on the move and stated to Mrs Kidd that she had had no written warning. As to the return of the keys, Mrs Fyvie said that she had not been aware that the tenants had left the keys. In explanation, she stated that, on 4 December, she was unable to move down the driveway due to conditions and that she had not seen the tenants then. She said she spoke to Caroline Kidd by telephone on 13 December and asked about the keys and that Caroline said she had left them in the postbox. Mrs Fyvie said that she had then been able to get into the property around 14 December. She said that the tenants had not moved out by then as the garage was full of boxes and many of their possessions were still there. There was no contact with the tenants after that until mid-January when Mrs Fyvie's daughter spoke to Mrs Kidd whilst she was removing further carloads from the Property. Mrs Fyvie confirmed that her daughter had been in the Property and involved with a lot of the cleaning prior to the discussion in January. She does not know what was discussed between her daughter and Mrs Kidd in January as she was not there and does not know if her daughter mentioned anything about the condition of the Property, other than the window. Mrs Fyvie said that her daughter was not involved in the tenancies. Mrs Fyvie stated that normally, at the end of a tenancy, she would check it all over with the tenant, but that this did not happen here as she had not had notice. Mrs Fyvie maintained that she had received no letters from the Applicant. As to the suggestion about the living room being damp, Mrs Fyvie said that the house could have been ventilated by the Applicant opening a window. When asked about whether she had ever raised the issue of the repairs required or the condition the Property had been left in with the Applicant, Mrs Fyvie stated that there had been no contact but that she had tried to telephone the Applicants twice each when she realised from LPS Scotland that she had not placed their deposit in a scheme. She explained that this had been due to oversight on her part and apologised for it. She said that when she received service of the Tribunal papers on 22 June 2023, she contacted the Applicant to ask them to

meet with her as she thought they would have been able to make an agreement between themselves about matters.

At this point in her evidence, Mrs Fyvie stated that she did not consider that the repair costs were the main issue here. She clarified that her position is that she had not received notice in writing from the Applicant and that in terms of the lease, the Applicant required to give her 28 days' notice in writing. The rent stopped at the start of December and she considers that she is therefore due a month and a half of rent as the Applicant did not vacate until mid-January. The rent is £1,200 per month due in advance so the £1,200 deposit would cover the rent for December which she is due. The Legal Member referred to the Notes from the CMD which had taken place on 1 August 2023 from which it appeared that the Respondent had stated a different position, namely that she was entitled to retain the £1,200 deposit due to the cost of repairs for which she considered the Applicant liable and which made no mention of the Respondent being due rent in lieu of notice. Mrs Fyvie responded that she had raised at the CMD the issue of no written notice having been given and her position that the Applicant had not vacated until January. On being asked as to why she had then lodged documentation relating to the condition of the Property and repair costs incurred in advance of the Evidential Hearing, Mrs Fyvie stated that this is because she had been ordered to lodge this in terms of the Tribunal's Direction. Mrs Fyvie further explained, with reference to the photographs she had lodged prior to the Hearing, that some of these were lodged to show the size of the garage, which she said had been left full of the Applicant's possessions, and also the proximity of the garage to the house.

Mrs Fyvie then answered some questions from the Ordinary Member. She confirmed that she considered the garage to be part of the tenancy and that it had been full of the tenants' possessions. As to Mrs Fyvie's claim today that rent was owing, she confirmed that the tenants were living there for the whole of December and until around mid-January in that their possessions were still there. They had not vacated so she was unable to let it out again. Mrs Fyvie confirmed that she did subsequently re-let the Property and estimated that this was in March 2023, or maybe before March. As to the frozen pipes and why she considered the tenants liable for these, Mrs Fyvie explained that she did not have access to the Property, meaning the garage and house. She would otherwise have been in checking the house. She clarified that once she had the keys, she did enter the house on 14 December 2022. She stated that access to the house was normally effected via either the back or front doors. She accepts that she had the keys to the remainder of the property, other than the conservatory, from the December. Mrs Fyvie was asked what her usual way of contacting the tenants during the tenancy was, to which she responded that this had been by telephone, both she to them and vice-versa.

Mrs Fyvie was then asked some questions by Mrs Kidd. On being asked about them having a conversation about storing items in the garage, Mrs Fyvie maintained that there was no such conversation nor agreement regarding this. Mrs Fyvie was asked if it was not the case that she had had a discussion with their new landlord, Ms Kemp, well before December for the purpose of giving

them a reference. Mrs Fyvie responded that she does not give references but regarding the rent, at that point, the rent was paid. Mrs Fyvie was asked if it was only the tenants' possessions that were in the garage or did Mrs Fyvie have several items in there too, including two pianos, a wardrobe and bar stools. Mrs Fyvie accepted that some of her own possessions were also still in the garage. Mrs Kidd asked about the alleged frozen pipes and how many of these were situated in the conservatory which was the only place Mrs Fyvie did not have a key for. Mrs Fyvie said that this was irrelevant. Mrs Kidd suggested to Mrs Fyvie that this was all nonsense and that she was making it up as she went along. The Legal Member asked Mrs Kidd just to ask questions. Mrs Kidd then asked Mrs Fyvie why they were being accused of breaching the terms of the lease by not giving written notice when Mrs Fyvie had also breached the lease by not putting their deposit in a tenancy deposit scheme for which she has now apologised. Mrs Kidd did not see how it was fine for Mrs Fyvie to make a mistake but it was not fine for them to have made a mistake. Mrs Fyvie responded that she meant she had apologised to LPS Scotland for her mistake, not to the tenants. Before concluding her evidence, Mrs Fyvie was asked by the Legal Member to clarify if she had had a discussion with the Applicant's new landlord before December, as Mrs Kidd had asked her in cross-examination. Mrs Fyvie confirmed that she had.

12. <u>Ms Sarah Anne Rachel Fyvie – witness for Respondent</u>
Mrs Fyvie indicated that she preferred not to ask her daughter questions and would leave that to the Tribunal Members. Ms Fyvie confirmed her full name as above, her date or birth as being in 1966 and that she lives at the same address as her mother, the Respondent. Ms Fyvie confirmed that the tenants were on good terms with them during the tenancy and that she would see them from time to time around the Property and would wave to them, etc. However, it was her mum who dealt with the tenancy. She recalls that when they took the tenancy on initially, they had indicated that they wanted to buy somewhere else and would not likely be there that long. When asked about the tenants moving out of the Property, Ms Fyvie stated that they had telephoned her mum on the Friday night in December and said they wanted the gate opened for their removal van. Her mum was a bit taken aback as she did not know that they were moving out as they had not given any notice in writing. Ms Fyvie was not aware of any discussions having taken place between the tenants and her mum before that about them moving out. Ms Fyvie stated that the next time she herself saw the tenants was in January, she estimated around 6 January, when she spoke to Emma Kidd. Miss Fyvie confirmed that she saw Emma in the passing. Emma was loading her car with bits and pieces from the garden and said that she only had a couple more runs to do. Ms Fyvie thinks that she may have asked Emma about the keys as they were needing to let tradesmen into the house. As to discussions regarding the tenancy deposit, Ms Fyvie confirmed that she had said it was her mum who would deal with that but that they had noticed the broken window. Emma had explained what had happened and said it was fine for the cost of that to be deducted from the deposit. Ms Fyvie said she did not know when the tenants had moved out as she had not seen anyone around the Property but knows that there was stuff lying about, such as toys, bikes and furniture for a few weeks after the conversation between Emma and

her mother on the Friday night in December. When asked when the tenants themselves were no longer living at the Property, Ms Fyvie thinks this was before Christmas because she thinks they had wanted to be in their new house for Christmas. Ms Fyvie was asked if she or her mum had been into the Property before she had the conversation with Emma in January. She confirmed that they had been in around 16 or 17 December because they needed to turn off the water and to get the Aga on as there was no oil left in the tank. Their focus was to get heat back in the place. She confirmed that there was noone there when they went in. They were mainly in the kitchen and bathroom as they were turning off the water and they also went into the garage as there was an outside tap there and the garage was unlocked. She confirmed that there were quite a number of items left in the garage. She said she knew about the tenant's car having broken down but was unaware of any discussions between her mum and the tenants about them storing some of their belongings in the garage after they had moved out. Ms Fyvie said that her mum had keys to get into the house in mid-December and does not know how or when her mum got them. As to the conservatory key, Ms Fyvie confirmed that Emma Kidd had given it to her during their conversation in the January. When asked why she and her mum had gone into the Property to shut off the water in December, Ms Fyvie said that it was in case there were no occupants and with the really cold weather but the damage was already done by then as there were a load of burst pipes. She thinks that her mum thought the tenants were still there as Caroline Kidd had telephoned her mother and asked if they could stay longer.

Mrs Kidd had no questions for Ms Fyvie.

13. Mrs Fyvie was then asked if she still wanted to call her second witness but she confirmed that the repairs and condition of the Property were really a side issue and that her second witness was not necessary.

14. Mrs Kidd was asked to sum up. She stated that they had left the Property on 4th December and returned all keys to Mrs Fyvie then, other than the conservatory key. Mrs Fyvie had agreed to them storing some of their belongings that they were unable to move at that time in the garage. Mrs Kidd stated she did not then get her car back until 28 December. When she spoke to Mrs Fyvie's daughter, which Ms Fyvie had said was on 6 January and not mid-January, there was only mention made of the broken window. None of the other issues were mentioned even although the Fyvies had been into the house by then. As there was no contact after that, she later sent Mrs Fyvie a letter regarding return of the deposit after receiving advice from Citizens Advice Bureau. The only contact following that was at the end of June when Mrs Fyvie was made aware of the Tribunal involvement when they received a voicemail message from Mrs Fyvie asking them to meet her at her home to discuss, which they declined on the advice of CAB. Mrs Kidd said that they had painted and cleaned the Property before leaving and had also apologised if there were marks from a football on one of the windows. She thinks that it is a pity that things have got to this stage as they had always had a cordial relationship with Mrs Fyvie and does not understand why Mrs Fyvie would have made no contact or raised the issues about the condition of the Property or rent due until now. If

Mrs Fyvie had incurred such massive financial losses, this is all the more surprising. Mrs Kidd said that she had been unaware that there was any expectation to give written notice to terminate the lease. Mrs Fyvie did not ask her to put anything in writing and from the discussions they had had Mrs Kidd did not consider that she needed to do anything else or put anything in writing. She thinks that much of what Mrs Fyvie has said today is just nonsense and that Mrs Fyvie knows it is not true. However, she and her wife now wish to move on.

15. Mrs Fyvie did not wish to sum-up.

16. The Legal Member confirmed that the Tribunal would now bring the Evidential Hearing to a close and thanked the parties for their participation. The Legal Member indicated that the Tribunal Members would deliberate afterwards and that the parties would be advised of the outcome in writing.

Findings in Fact

1. The Respondent is the owner and landlord of the Property.

2. The Applicant was the joint tenant of the Property by virtue of a Private Residential Tenancy which commenced on 1 April 2021.

3. The Applicant moved out of the Property on or around 4 December 2022, leaving behind some possessions, mainly stored in the garage of the Property.

4. The Applicant had given verbal notice to the Respondent in or around October 2022 that they would be vacating the Property around the first weekend in December 2022.

5. The Respondent was aware that the Applicant had secured another property.

6. Prior to December 2022, the Respondent had had discussions with the Applicant's intended new landlord and had provided them with a clear 'rent reference'.

7. The Applicant did not give the Respondent at least 28 days' notice in writing in order to terminate the tenancy prior to vacating.

8. The rent due in terms of the tenancy was £1,200 per calendar month, payable in advance.

9. The deposit in terms of the tenancy was £1,200 which was paid to the Respondent by the Applicant at commencement of the tenancy.

10. The Respondent failed to place the deposit in a tenancy deposit scheme, contrary to the terms of the tenancy agreement.

11. Following the Applicant vacating the Property, the Applicant requested return of the deposit but the Respondent did not return same.

12. The Applicant lodged this application with the Tribunal on 30 March 2023, seeking a payment order against the Respondent in the sum of £1,200 in respect of the tenancy deposit.

13. The Respondent opposes the application and considers that no sums are due by her to the Applicant.

14. In the course of the Tribunal proceedings, the Applicant accepted that the sum of £200 could be deducted from the sum claimed in respect of the repair cost of a broken window at the Property for which the Applicant accepted responsibility.

Reasons for Decision

1. The Tribunal gave careful consideration to all of the background papers including the application and supporting documentation, the written representations from both parties lodged prior to the Hearing and the oral evidence given at the Hearing by both parties and their witnesses.

2. The Tribunal was satisfied that it had sufficient evidence on which to make its decision in the case and did not require to hear evidence from any additional witnesses nor to require any further documentation to be lodged.

3. On balance, the Tribunal accepted elements of both parties' cases. It accepted the First Applicant, Mrs Kidd's, evidence regarding the verbal discussions which had taken place with the Respondent, Mrs Fyvie, in advance of the first weekend in December 2022 and that Mrs Kidd had given verbal notice of their intention to leave the Property around that time and had explained to Mrs Fyvie that they had found an alternative property. The Tribunal considered Mrs Kidd's evidence in this regard to be credible and to be supported by Mrs Fyvie's own admission in evidence that she had had discussions with the Applicant's new landlord prior to the first weekend in December and had provided a rent reference for the Applicant to the new landlord. The Tribunal also accepted Mrs Kidd's evidence that Mrs Fyvie had not mentioned then need for written notice (prior to 1 December 2022) and that Mrs Kidd genuinely believed that she did not require to do so, against the background of the discussions which had taken place and relations between the parties having been cordial throughout the tenancy. The Tribunal also accepted the evidence of Mrs Kidd that she and her family members had all effectively moved out of the Property over the course of the first weekend in December 2022, had made rental payments covering the period up until then and returned all but the conservatory key by leaving them in Mrs Fyvie's postbox when leaving the Property on Sunday 4 December 2022. The Tribunal considered this evidence to be substantiated by the evidence of both Mrs Fyvie and her daughter, Ms Fyvie, both of whom had given evidence that they had entered the Property on or around 14 December

2022. Ms Fyvie stated in evidence that her mother had the keys in her possession by then enabling them to take entry. She also explained the primary purpose of them going into the Property was to shut off the water and put some heating on, given the cold weather. It was the Tribunal's view that if Mrs Fyvie had believed the Applicant still to be in occupation at that time, there would have been no need for her to enter the Property and take this action. Aside from the matter of written notice not having been given, Mrs Fyvie's position was that the Applicant had not vacated the Property until around mid-January 2023, given that they had not removed all of their belongings until then. Both Mrs Kidd and Mrs Fyvie confirmed that the Applicant had left a number of items in the garage of the Property and not removed them until a date in January 2023. Mrs Kidd's position was that the storage of these items in the garage had been with the agreement of Mrs Fyvie but that their retrieval had been delayed longer than Mrs Kidd had originally expected, due to delays with her car being repaired and unavailable to her, and due to the exceptionally bad weather. Mrs Kidd's position was that she had kept Mrs Fyvie informed during this extended period. Mrs Fyvie took no issue with what Mrs Kidd has stated regarding her car and the weather having delayed things but denied that she had agreed to the Applicant's belongings being stored in the garage. Mrs Fyvie's position was essentially that the Applicant had not vacated the Property until January in that she did not have vacant possession to the garage and thereby, the whole Property, until then and that this prevented her being able to re-let the Property. Mrs Fyvie did, however, concede, on being cross-examined by Mrs Kidd, that the garage had not been empty at the commencement of the tenancy as Mrs Fyvie also stored several large items there and that these items remained there throughout the tenancy and after the Applicant had removed their own items in January. Mrs Fyvie confirmed in her evidence that she had subsequently re-let the Property in or around March 2023. On balance, the Tribunal was not persuaded by Mrs Fyvie's arguments that the Applicant had not vacated until mid-January 2023, by virtue of some of their belongings remaining at the Property. The Tribunal considered that, to all intents and purposes, the Applicant had vacated the Property on 4 December 2022 and that the Respondent had taken back physical possession of the Property by around mid-December, evidenced by her actions in entering the Property to shut off the water and check the heating.

4. However, the Tribunal did accept the Respondent's position regarding the need for the Applicant to give written notice of at least 28 days in order to validly terminate the tenancy. The legal position regarding termination of a Private Residential Tenancy by the tenant is set out in Sections 48 and 49 of the 2016 Act as follows:-

"48Tenant's ability to bring tenancy to an end

(1)A tenant may bring to an end a tenancy which is a private residential tenancy by giving the landlord a notice which fulfils the requirements described in section 49.

(2)A tenancy comes to an end in accordance with subsection (1) on the day on which the notice states (in whatever terms) that it is to come to an end.

(3)But a tenancy does not come to an end in accordance with subsection (1) if—

(a)before the day mentioned in subsection (2), the tenant makes a request to the landlord to continue the tenancy after that day, and

(b)the landlord agrees to the request.

(4)In subsections (1) and (3), in a case where two or more persons jointly are the landlord under the tenancy, references to the landlord are to any of those persons.

49Requirements for notice to be given by tenant

(1)A notice fulfils the requirements referred to in section 48(1) if—

(a)it is given—

(i)freely and without coercion of any kind,

(ii)after the tenant begins occupying the let property,

(b)it is in writing, and

(c)it states as the day on which the tenancy is to end a day that is after the last day of the minimum notice period.

(2)A notice is to be regarded as fulfilling the requirements referred to in section 48(1), despite its not complying with the requirement described by subsection (1)(c), if the landlord agrees in writing to the tenancy ending on the day stated in the notice.

(3)In subsection (1)(c), "the minimum notice period" means a period which—

(a)begins on the day the notice is received by the landlord, and

(b)ends on the day falling—

(i)such number of days after it begins as the landlord and tenant have validly agreed between them, or

(ii)if there is no such valid agreement, 28 days after it begins.

(4)An agreement as to the number of days after which a minimum notice period ends is invalid for the purpose of subsection (3)(b)(i) if the agreement—

(a)is not in writing, or

(b)was entered into before the tenancy became a private residential tenancy.

(5)In a case where two or more persons jointly are the landlord under the tenancy, references in this section to the landlord are to any one of those persons."

The Tribunal also had regard to the terms of the tenancy agreement between the parties. Clause 3 headed "Communication" states:- "The Landlord and Tenant agree

that all communications which may or must be made under the Act and in relation to this Agreement, including notices to be served by one party on the other will be made in writing using hard copy by personal delivery or recorded delivery."

It was noted that the whole tenancy agreement had not been produced to the Tribunal so the Tribunal had not had sight of the clause relating to the tenant ending the tenancy. However, the wording of this clause in a Private Residential Tenancy is mandatory to reflect the legal position regarding the tenant giving notice in terms of the 2016 Act. The Tribunal noted the relevant clause contained in the Scottish Government's Model Agreement is as follows:-

"24. **Ending the Tenancy**

This Tenancy may be ended by:-

- **The Tenant giving notice to the Landlord**
  - **The Tenant giving the Landlord at least 28 days' notice in writing to terminate the tenancy, or an earlier date if the Landlord is content to waive the minimum 28 day notice period. Where the Landlord agrees to waive the notice period, his or her agreement must be in writing. The tenancy will come to an end on the date specified in the notice or, where appropriate, the earlier date agreed between the Tenant and Landlord."**

The Tribunal also noted that Mrs Fyvie referred in her evidence to the terms of the lease requiring 28 days' written notice.

Mrs Kidd did not dispute that they had not given advance notice in writing. As narrated above, Mrs Kidd's evidence was that she was not aware that they had to and that it was only after Mrs Fyvie stated to Mrs Kidd on 1 December 2022 that she had had no written notice from them, that she wrote out a notice and put in Mrs Fyvie's postbox. Mrs Fyvie's evidence was that she did not receive this notice. In any event, the Tribunal does not consider it necessary to determine whether that particular notice was given or not. The crux of the matter is that the terms of the Sections 48 and 49 above are unequivocal. The tenant can only bring the tenancy to an end by giving the landlord a notice which fulfils the requirements of section 49, which includes the requirements that it is in writing (Section 49(1)(b) and gives a minimum notice period of 28 days (Sections 49(1)(c) and (3)). The only proviso to this is if the landlord agrees in writing to the tenancy ending on an earlier date (Section 49(2). There was no evidence put forward to the Tribunal suggesting that the Respondent had agreed in writing to an earlier date. The Tribunal does not have any discretion, in terms of the legislation, to depart from the strict terms of Section 49 even where, as here, the Tribunal was satisfied that sufficient verbal notice had been given by the tenant to the landlord. Accordingly, the Tribunal considered that the Respondent was entitled to hold the Applicant to the requisite 28-day notice period, in terms of their rental obligations. In terms of the tenancy agreement, the rent was £1,200 per calendar month, payable in advance. Whether or not the Applicant gave written notice on 1 or 2 December 2022, the Applicant did not vacate the Property until 4 December 2022 and, accordingly, the Tribunal considered that the 28-day period did not begin until 5 December 2022 and

thereby did not end until 2 January 2023. It was not disputed by the Applicant that rent had only been paid up to 1 December 2022, given that this is when the Applicant considered the tenancy to be terminating. Accordingly, the Tribunal considered that the Respondent had been due approximately a month's rent of £1,200 in lieu of the 28-day written notice period. Given that the Applicant had also conceded that the sum of £200 in respect of the broken conservatory window could be deducted from the deposit, the Tribunal determined that the Respondent was entitled to retain the whole deposit of £1,200 and that the Applicant's claim for a payment order against the Respondent should be refused.

5. The Tribunal did have some sympathy for the Applicant in this matter, given that, had Mrs Fyvie placed the deposit in a scheme as she should have done, the dispute regarding return of the deposit would have been resolved much earlier, through the scheme's resolution process, albeit that the outcome of that process may have been the same. It was also regrettable, in the Tribunal's view, that Mrs Fyvie had not made any mention at the CMD in August 2023 nor in advance or at the outset of the Evidential Hearing that she considered that she was owed rent arrears in lieu of notice and was entitled to retain these rent arrears from the deposit. It was, in fact, only when Mrs Fyvie herself gave her evidence at the Evidential Hearing that it became apparent that this was the basis of her defence to the Applicant's claim, as opposed to the repair costs she had allegedly incurred and for which she considered the Applicant liable. The evidence of Mrs Kidd and Mr Kidd had already been heard by then and their evidence had, understandably, been focused on the condition in which the Property had been left and the alleged repairs. When questioned about this, Mrs Fyvie explained that she had made it clear at the CMD and earlier during the Evidential Hearing that, aside from the repairs, her position was that she had not been given written notice and also that the Applicant had not vacated until mid-January 2023. The Tribunal noted, however, that Mrs Kidd had, in any event, also covered the issues of notice and when they had vacated in considerable detail in her own evidence. Furthermore, Mrs Kidd had picked up the issue of rent arrears in her cross-examination of Mrs Fyvie and in her summing up, making the point that, similar to the alleged repair costs incurred, Mrs Fyvie had never contacted them claiming to be owed further rent. Ultimately, Mrs Kidd accepted that 28 days' written notice had not been given and the Tribunal considered this to be the determining factor in this application.

6. The decision of the Tribunal was unanimous.

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.

_____ **20 November 2023**

Legal Member/Chair **Date**