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 Section 71 of the Private Housing (Tenancies) (Scotland) 2016 Act

Chamber Ref: FTS/HPC/CV/23/4015

Re: Property at 76/ 10 Mortonhall Park Crescent, Edinburgh, EH17 8SX ("the Property")

Parties:

Rebecca Wesner, Ruizhe (Ben) Yang, 32 Southhouse Place, Edinburgh, EH17 8FD ("the Applicants")

Nicholas Twist, 14 Lumsden Loan, Edinburgh, EH17 8ZF ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

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

1. This is an application by the Applicants for civil proceedings in relation to a private residential tenancy in terms of rule 111 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Rules"), namely an order for payment of £120 being the balance of a deposit sum held by the Respondent.

2. The application was conjoined with an application for an order for payment where landlord has not complied with the obligations regarding payment of a deposit into an approved scheme or provision of prescribed information under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* (PR/23/4017).

3. The tenancy in question was a Private Residential Tenancy ("PRT") of the Property by the Respondent to the Applicants dated 23 July 2023 and commencing on that date. It was agreed between the parties that the Tenancy terminated on 23 October 2023.

4. The application was dated 6 November 2023 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £850 was due in terms of the Tenancy, paid to the Respondent, but never paid into an approved scheme, and after the Tenancy concluded on 23 October 2023, the Respondent returned only £730 to the Applicant having retained £120 in regard to having the locks to the Property changed. Prior to the case management discussion ("CMD") the Respondent lodged submissions and documents, containing vouching for the costs of the change of locks, and his version of part of the communications between the parties.

The Case Management Discussion

5. On 8 February 2024 at 10:00, at a CMD of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Applicants and the Respondent.

6. The Applicants confirmed that they insisted on the application and still sought an order for £120. The Respondent had lodged a copy of an invoice dated 24 October 2023 from RT Joinery for £120 for changing locks. The Applicants conceded that the Respondent had incurred that cost for changing locks, did not dispute it as a reasonable cost for the work, and accepted that they had received back £730 on 24 October 2023. The issue in dispute was whether the Respondent was entitled to seek to set off the sum of £120 against the deposit held in all the circumstances.

7. Both parties lodged a version of a WhatsApp exchange between the second Applicant and the Respondent on 24 October 2023, with the Applicants having lodged messages from prior to that date as well. The versions of the exchange of 24 October 2023 were not identical. After taking the parties through the differences, there was no disagreement as to the content of the text exchanges from October 2023 but it was necessary to read them together to see the full exchange. It was also noted that the time-stamps on the second Respondent's version were set one hour ahead of the actual time in Edinburgh. It was thus agreed between the parties that the following was exchanged between the second Applicant (on behalf of the Applicants) and the Respondent, following an agreement between them (earlier in 2023) that the Tenancy would end on 23 October 2023:
    a. On the evening of 18 October 2023, the Respondent asked for bank details so "I can transfer deposit once I've inspected the flat" and the second Applicant provided these within a few minutes.
    b. On 22 October 2023 at 16:14, the second Applicant texted to ask "When would you like to meet you tomorrow for the inspection?"
    c. On 22 October 2023 at 16:43, the Respondent replied:

        Hi ben It'll be later I've got a busy day
        If you pop the keys through the letter box and I'll inspect the flat tomorrow when I can
        Thanks

d. On 22 October 2023 at 16:46, the second Applicant texted back to say that the Applicants would "like to be there for the inspection" and asking to agree a time.
e. On 23 October 2023 (the day the Applicants move out and the Tenancy terminated), the second Applicant prompted the Respondent for a response on the inspection at 10:11 and 20:11, and then said at 20:12: "Also, we're expecting an important piece of mail for Rebecca Wesner, if you could let us known when you receive it that'd be great".
f. On 23 October 2023 at 20:16, the Respondent replied: "Hi ben not had any time as yet most probably pop up tomorrow morning". The second Applicant responded shortly after again highlighting the importance of receiving the piece of mail which "contains very important documents for us" and saying "it's really crucial that you let us know when it gets to the flat, thanks".
g. On 24 October 2023 at 17:53, the Respondent replied:

> *Hi Ben*
> *Thank you for cleaning the flat*
> *It's impeccable and I thank you*
> *I notice that there was a set of keys missing so I've had to call a lock smith to change the lock so I've had to deduct the fee which was £120 from the deposit*
> *As you can understand for security and piece of mind for the new tenants this was imperative*
> *I have refunded £730*
> *Thank you again for cleaning the flat and I wish you all the best in your new home*

h. There then followed ten messages (all short) from the second Applicant between 17:54 and 18:37, as well as multiple missed call notifications. (The Respondent said he had 31 missed calls between 17:56 and 18:27 but it is hard to confirm this number from the way the screenshots were shown. The second Applicant did not dispute he made calls which went unanswered, and did not offer an alternative number of missed calls.) The messages explained that the second Respondent "forgot to drop them [the second set of keys] off I was going to return them when I picked up the mail" and that the second Applicant "can drop them off right now if that's what you want". The messages objected to the deduction of "120 with zero communication". At 18:09 there is a message where the second Respondent said he will go "right now to meet you at the flat in person" if the calls are not responded to, and the series of messages ended at 18:37 with the second Applicant using foul language in a message where he said that he held the Respondent's actions to be illegal.

8. Context to the text exchange was given by both sides. Neither side actively disputed the comments of the other, but nor did they concede them. The Applicants stated:
   a. They were very anxious for a document (related to the first Applicant's employment) that they believed had long since been dispatched, so they had never arranged mail forwarding. They had hoped the letter would arrive before they left and, when it did not, that they could arrange a time to meet with the Respondent to collect the document from him when it did arrive at the Property.

b. The first Applicant had – as per the Respondent's direction – put her set of keys through the letterbox when leaving on the morning of 23 October 2023. The second Applicant had, however, left for the day to his university studies with his keys in his pocket, having forgotten to leave them at the Property.
c. The Applicants conceded that they had not communicated with the Respondent that they had the other set of keys and were able to hand them over. The Applicants further conceded that they never expressed to the Respondent, prior to the series of texts of 24 October 2023, that they proposed to hand the second set of keys over when collecting the important piece of mail.
d. The Applicants insisted that they had not intended to re-enter the Property and there was no connection between the desire for the urgent piece of mail (which they said they expected to collect at a mutually agreeable time from the Respondent) and the retention of the keys (which they said was purely inadvertent).
e. The Applicants disposed of the second set of keys (including the keys to the common doorways) after 24 October 2023, on the basis that they believed they were no longer required.

The Respondent stated:

f. He was unable to inspect the Property on 23 October 2023 but went around 06:30 on the morning of 24 October 2023 before he went to work. He had his own set of keys which he used to take entry.
g. He found only one set of keys left within the Property but was otherwise happy with the condition of the Property.
h. He claimed to have been concerned at the time about the keys being retained as he thought the Applicants would let themselves back in. He claimed that the Applicants' comments about the urgent piece of mail was part of his thinking.
i. While at work, he contacted a locksmith and instructed the change of locks. He was charged £120.
j. After work, he sent back the £730 and texted the second Applicant at 17:53 as detailed above.
k. The Respondent blocked messages and calls from the second Applicant after 18:27 on 24 October 2023. He claimed that this was because of the insistent series of missed calls and text messages, and in particular the text messages from the second Applicant saying he would turn up to the Property to see the Respondent (at 18:09), and the language used in the message of 18:27.
l. The Respondent said he subsequently had incurred a further £27 having additional keys cut for the common doorways of the block, but did not seek to recover that cost.

9. No motion was made for expenses or interest.

Findings in Fact

10. The Respondent, as landlord, let the Property to the Applicants under a Private Residential Tenancy dated 23 July 2023 and commencing on that date ("the Tenancy").

11. The Tenancy was brought to an end by mutual agreement on 23 October 2023.

12. In terms of clause 6 of the Tenancy, the Applicants were obligated to pay a deposit of £850 at the commencement of the Tenancy.

13. The Applicants paid a deposit of £850 to the Respondent at the commencement of the Tenancy.

14. The Respondent held the deposit funds personally, and had not placed the deposit into an approved Tenancy Deposit Scheme.

15. The Respondent supplied the Applicants with two sets of keys for the common doorways of the block and for the private doors into the Property.

16. On 22 October 2023, the Respondent requested that the Applicants leave the keys at the Property when vacating.

17. On 23 October 2023, the Applicants left only one set of keys at the Property when vacating, with the second set retained by the second Applicant.

18. On the morning of 24 October 2023, the Respondent inspected the Property and noted only one set of keys had been returned.

19. During the day of 24 October 2023, the Respondent arranged a locksmith to attend at the Property to change the locks to the private doors to the Property.

20. The Respondent incurred £120 on 24 October 2023 for the work and materials of the locksmith.

21. Prior to 17:54 on 24 October 2023 (that is, prior to being told that the locks had been changed), the Applicants made no attempt to inform the Respondent that they still held the second set of keys and were willing and able to return the set.

22. The Respondent paid the £730 to the Applicants by bank transfer on or about 24 October 2024, retaining £120 of the Applicants' deposit.

Reasons for Decision

23. I sought submissions from both parties on further procedure and both sought a decision made at the CMD. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by the parties, I was satisfied both that the necessary level of evidence had been provided through the application, further papers, and orally at the CMD, and that it was appropriate to make a decision at the CMD. I sought further final submissions and information from the parties before making my decision.

24. There was little dispute between the parties on the material points. I was not satisfied as to the reliability of the parties in some of their submissions and

answers, but these were not on matters which affected the relevant issues. Parties appeared to be restating their actions (and inactions) of 23-24 October 2023 in light of how they wished to present themselves now. For instance, the Respondent sought to suggest that he was always materially concerned about the Applicants re-entering the Property but cited the language used in the text exchange after he had changed the locks in support of this. For the Applicants, they had lodged a version of the WhatsApp exchange that appeared carefully filleted to remove the text with foul language (though the second Applicant admitted the content of the Respondent's version of the exchange when directly questioned on it). None of this, however, was relevant to the question as to whether the keys were returned on time (which they were not) or whether they had timeously been offered up to the Respondent prior to him changing the locks (which they were not).

25. The question is whether damages of £120 are a reasonable loss. An innocent party is entitled to be placed in the position they would be but for the breach of the other party. In this case the Respondent was entitled to have all keys returned by the last day of the Tenancy so as to have confidence that the Property was secure. In considering the damages, I was alert to the concepts of "mitigation of loss" by the innocent party, as well as that an innocent party need not undertake excessive steps or actions to mitigate their loss (sometimes termed the "agony rule"). The Applicants' submission is that the Respondent changed the locks too hastily, as the Applicants could have returned the keys. The implication is that the Respondent should first have asked for the keys back before changing the locks. The Respondent's response to that is that he was too busy at work to make enquiries with the Applicants (though he was not too busy to instruct a locksmith).

26. This is, however, to look at the loss as the cost of new locks. The actual loss of a tenant not returning keys (and not saying where the missing keys are) is the landlord's uncertainty over a potentially insecure property. An appropriate mitigation of loss was to change the locks quickly and cost-effectively. The Applicants do not dispute that £120 was spent and that this was an appropriate price for changing of locks. The Respondent was thus entitled to change the locks, especially as the costs was only £120 (and thus far less than the dramatic losses that may lead from lost keys). The alternative route of the Respondent reaching out to the Applicants to enquire as to where the keys were, and then attempt to recover the keys from a former tenant, all while not having certainty as to whether the keys would be returned, would seem to be excessive steps and not necessary for the Respondent to mitigate the loss. The Respondent was entitled to seek to set off the £120 from the deposit (albeit that had he complied with the 2011 Regulations he should never have been in a position to do so).

Decision

27. I refuse the application.

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.

8 February 2024

Legal Member/Chair **Date**