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/20/0465**

**Re: Property at 10 Hutton Place, Aberdeen, AB16 7HR ("the Property")**

**Parties:**

**Mr Paul Whitford, Mrs Maureen Whitford, 45 Mount Street, Aberdeen, AB25 2QX ("the Applicant")**

**Mr Gordon McGregor, 6 Annat Bank, Altens, Aberdeen, AB12 3NW ("the Respondent")**

**Tribunal Members:**

**Joel Conn (Legal Member)**

**Decision**

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

**Background**

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 Procedure Rules"), namely an order for payment of rent arrears. The tenancy in question is a Private Residential Tenancy Agreement of the Property by the Applicants to the Respondent dated 6 March 2019 and with start date on 8 March 2019.

2. The application was dated 11 February 2020 and lodged with the Tribunal shortly thereafter. The order sought in the application was for £2,100 of rent arrears being arrears for the three rental payments due on from 8 April to 8 June 2019, being £700 each. The lease for the said tenancy also accompanied

the application and bore a rental payment of £700 per month, payable on the 8th of each month.

3. At a Case Management Discussion ("CMD") of 7 October 2020, further to additional papers and submissions being lodged, the Applicants confirmed that they reduced their claim to £1,515.07 being made up as follows:

| | |
|---|---|
| Rent due 8 April to 7 May 2019 | £700.00 |
| Rent due 8 May to 7 June 2019 | £700.00 |
| Rent due 8 June to 7 July 2019 | £700.00 |
| Rent due 8 July to 12 July 2019* | £115.07 |
| Sub-total | £2,215.07 |
| Less: Deposit uplifted | -£700.00 |
| Total | £1,515.07 |

(*Calculated on the basis of annual rent of £8,400, pro-rated to 5 days)

**The Hearing**

4. On 10 November 2020, at a continued CMD of the First-tier Tribunal for Scotland Housing and Property Chamber at 14:00, conducted by the remote telephone conference call, there was an appearance by Judith Ritchie, Branch Director of Contempo Property, being the Applicants' letting agent. The Respondent represented himself.

5. I reviewed the matters that had arisen further to the original CMD of 7 October 2020, the Notice of Direction I had issued to both parties, and the further submissions (with supporting documents) that both parties had lodged.

6. I noted from the original CMD the following issues in dispute (set out in more detail in the Notes from that CMD):

*Rent arrears claim*

a) The Applicants relied on the date of termination of the PRT of 12 July 2019 based on an email of 20 May 2019 at 07:45:12 that the Applicants' agent said was received from the Respondent which gave that date as "confirmation of my notice to quit our contract... on the 12th of July 2019."

The Respondent stated that he had called the Applicants' agent letter that day and agreed that that day, 20 May 2019, would actually be the date of termination and that he need only set out a notice in writing and leave it at the Property with the keys when vacating that day.

On this, at the original CMD, parties had agreed the arithmetic of their respective positions on the rent arrears. The Applicants' figure of £1,515.17 was made up as stated above at paragraph 3. The Respondent said that arrears were £299.18 made up as follows:

| | |
|---|---|
| Rent due 8 April to 7 May 2019 | £700.00 |
| Rent due 8 May to 20 May 2019* | £299.18 |
| Sub-total | £999.18 |
| Less: Deposit uplifted | -£700.00 |
| Total | £299.18 |

(*Calculated on the basis of annual rent of £8400, pro-rated to 13 days)

*The Respondents' damages claim*

b) The Respondent (having declined to lodge an application under Rule 111) sought to retain the full arrears (whether found to be £299.18 or £1,515.17) against damages he said he incurred when, due to breaches of contract that he alleged the Applicants (or their agent) to have committed, he opted to terminate the PRT and move home for the second time in short succession. (In legal terms, he was arguing that he repudiated the contract due to the breach and the costs of moving home were his damages arising.)

Prior to this CMD, the Respondent provided an invoice for £2,000 dated 14 May 2019 from "Man with Van Aberdeen" for the moving costs for the Respondent and his family. The Respondent relied on a number of breaches of contract that he said resulted in his decision to terminate the PRT and move home. These were:

I. That there were frequent visits by the first named Applicant to the Property, unannounced, all in breach of clause 20 of the Tenancy's requirement to provide 48 hours notice.

II. That there had been breaches of clause 23 regarding data protection.

III. That he was forced to pay excessive electricity for the goldfish pond and for lights that he saw were left on in the shed from time to time.

IV. That he was promised a shed, and specifically a large shed, and never received one.

7. The various items in the Notice of Directions sought for the parties to expand on their respective positions on these issues in dispute and I took the Respondent and then the Applicants' agent through the matters in the Notice of Directions and the documents that had been lodged. Following the same order as above:

*Notice and arrears calculation*

a) The Respondent confirmed that he had not located his own copy of the email of 20 May 2019 at 07:45:12 but was willing to accept that he had

sent it and had lodged, as part of his own documents, a copy of the Applicants' copy of the email. He did not, however, regard it as notice binding on him under the PRT for two reasons:

- He believed it should have been obvious to the Applicants' agent that the purported termination date of 12 July 2019 was a typographical error, because it was so far off and in excess of the 28 days that he was required to give.

- He had a subsequent call with the Applicants' agent that morning where he said she had specifically agreed that the requirement for notice be waived; that 20 May 2019 would be treated as the termination date; and he need only produce a notice stating this and leave it at the Property when locking up that day.

  The Respondent produced a copy of a Notice dated 20 May 2019 and stating 20 May 2019 as the termination date, which he said he had located in his computer files and printed for the Tribunal. He said that this was the Notice he had been put through the door at the Property with the keys when he left.

I asked the Respondent whether he knew that 28 days notice was needed at the time of leaving the Property. He confirmed he did but said that the prospect of the notice period being waived or shortened was discussed by him with the Applicants' agent in calls prior to him moving out. The Respondent accepted that the Applicants' agent had sent him emails asking for a written notice, and specifically referring to 28 days notice being needed. He accepted that there were no emails by him to the Applicants' agent where he referred to the alleged discussion on a shorter or completely waived notice period.

I also asked the Respondent why he had not provided written notice to the Applicants' agent earlier. He said that they were awaiting his partner being provided a local authority tenancy. They received keys on 8 May 2019 but, with the stress of moving their family and three children, he did not issue a notice earlier than 20 May 2019.

In regard to the Applicants' position, the Applicants' agent said no such notice, or keys, had been found at the Property and she provided a "check out" report which she held supported this (in that there is no mention of finding such a document or keys in the report). The Applicants' agent said that she had no recollection of any conversation where she may have discussed accepting less than 28 days notice. She referred to the emails where she expressly did seek written notice of 28 days during a period where the Respondent had intimated his desire to move out, but had not provided any written notice. (Emails of 17 April, 29 April and 2 May 2019 were lodged by the Applicants and stated such.) Further, the Applicants' agent said she had no recollection of a call on 20 May 2019 when she was said to have agreed that day as the date of termination, or that the usual notice provisions of written notice to her email address (as per

clause 4 of the Tenancy agreement) should not be followed with a notice simply being left at the Property instead. She made comments at the original CMD to the effect that she would not routinely agree for notice periods and provisions to be waived or altered.

The Applicants' agent explained that her office had relied on the email of 20 May 2019, taking the termination date to be 12 July 2019, and scheduled agents to take possession in the days following that, with that occurring on 17 July 2019. The check out report bore that date.

*Damages*

b) As stated above, the Respondent had lodged an invoice for the removal costs. In regard to the alleged breaches, the papers and submissions on both sides were discussed:

I. The Respondent maintained that there were frequent visits by the first named Applicant to the Property, unannounced. He provided a date for only one: 6 April 2019 when the first named Applicant attended with builders and came to the door. At the original CMD, the Respondent confirmed that he had opted to invite the first named Applicant into the Property. In regard to all other visits, the Respondent insisted that there had been visits "every second or third day". He said that the first named Applicant had principally been feeding fish at the pond, but also made visits to a locked shed in which some of his belongings had been stored (the storage having been known about prior to the start of the Tenancy).

The Respondent insisted that these frequent visits had left his family in a state of alarm. His partner at the time had recently given birth and the Respondent explained that she found it particularly concerning to look out and see someone in her garden.

No dates (or even a span of dates) were provided for any visits other than that of 6 April 2019. The Respondent had referred, in emails of 16 April 2019 which had been lodged, to "unannounced visits" but only the visit of 6 April 2019 was specified by the Respondent (and even then he did not specific mention it in the emails).

I noted that the Applicants' agent responded on the 6 April 2019 visit in the email exchange of 16 April 2019 (in an email at 12:16), explaining that it was meant "as a friendly gesture". The Respondent rejected that as an explanation in his submissions but I noted that his email correspondence after the 12:16 email did not make reference to any other visits or contradict the Applicants' impression that there had been only this single visit.

The Respondent said that he was certain he had mentioned his concern about the visits to the Applicants' agent in a telephone call

but had not thought to put it in writing (except the very brief references in two emails on 16 April 2019).

The Applicants' position was brief. Their agent knew only of the 6 April 2019 visit which they regarded as innocent. The first named Applicant had been with his builder on site so as to pay the builder, knocked on the door "as a friendly gesture", and it had been the Respondent who had invited him in. There had been no other visits to the Property. The Applicants' agent could recall no phone call where any complaint or concern had been raised by the Respondent on visits.

(In regard to the fish pond, and any burden that it placed on the Respondent in looking after it, and the Respondent's actions in draining in and donated the fish to a rescue centre some time by 6 April 2019, there were submissions on both sides about this but I did not think they added to consideration of the application in general.)

II. Regarding data protection, the Respondent cited three issues.

The first was a call made by the Applicants' agent to the Respondent's mobile which was answered by the Respondent's partner. The Respondent said that the Applicants' agent asked the partner to pass on a message about paying a missed rent payment and pressing for written notice of termination. The Applicants' agent submitted that all she said was that she wanted to speak about rent and for the Respondent to call her back. She referred, in general, to difficulties reaching the Respondent and that he normally did not call her back.

The second was that in the tracing report lodged by the Applicants, tracing the Respondent to his new address for this application, it contained reference to the Respondent's vehicle which the Respondent though could only have been known from a photograph or investigations taken while he was at the Property. At the original CMD, I pressed the Respondent on whether such information or photograph could have been obtained from the public street. I did not understand him to dispute this possibility and no further information was provided by or at this CMD. I did not seek any submissions on this from the Applicants.

The third, introduced for the first time at this CMD, was that the neighbours at the Property were said to have contacted the Applicants direct in regard to a concern about vandalism at the Property. This information was then passed to the Applicants' agent who wrote to him about it some weeks later. He felt that any contact by the neighbours should have been with him, and not the Applicants. I explained that I did not see how the actions of a neighbour had any relevance to data protection obligations of the

Applicants or their agent and I did not seek any submissions on this from the Applicants.

III. In regard to the Respondent's view that he was forced to pay excessive electricity for the goldfish pond and for lights that he saw were left on in the shed from time to time, the Respondent explained that it was an issue that annoyed him at the time but he now accepted the consumption was minimal. He was more aggravated by other issues relating to the fishpond and shed (stated above and next). I did not seek any further submissions on this from the Applicants.

IV. In regard to the Respondent's position that he was promised a shed, and specifically access to the large shed already on the Property or a shed of similar size, but then never received it, there was material submission from both parties on this.

In short, there was a dispute on whether the Respondent had ever been lead to believe that the current shed was available to him, but it was agreed that he was aware from the start of the lease that it was locked by the Applicants and not available to him. Instead, it was agreed that another shed would be provided for him. Thereafter, there was a visit by builders on 8 March 2019 but the Respondent had sent them away as he felt the proposed location of the shed would mean he would cause damage to the garden wheeling his motorcycles in and out of it. He and the builder agreed an alternative location and there was a delay while the Applicants considered this.

The Applicants decided that the shed needed to stay in the original location and a revised visit was set of 6 April 2019 for the foundation to be built. At that time, the Respondent realised the size of the shed was too small for his needs and the work was again discontinued. The Applicants' agent then made clear that if the Respondent wanted a larger shed, that would need to be at his own cost. Shortly thereafter the Respondent made clear he wished to move out.

Little of the timeline was disputed between the parties but the core issue was whether there had been any agreement between the parties that the Applicants would supply a large shed sufficient for the Respondent to store his motorcycles. The Respondent explained that he therefore needed a shed the size of the shed that the Applicants already had at the Property (but which he was not permitted to use).

When pressed, the Respondent stated that he could not recall if a specific size of shed was discussed when the Applicants' agent agreed that a shed would be built for his use. The Applicants' agent was clear that no agreement was made on the size of shed.

**Findings in Fact**

8. On 6 March 2019, the Applicants let the Property to the Respondent by a Private Residential Tenancy with a start date of 8 March 2019 ("the Tenancy").

9. Under the Tenancy, the Respondent was to make payment of £700 per month in rent to the Applicants on the 8th of each month.

10. Under the Tenancy, the Respondent was to make payment of a deposit of £700. The Respondent made payment of the said deposit.

11. The Respondent sent an email to the Applicants' agent, to the email address designated for notices under clause 3 of the Tenancy Agreement, at 07:49:09 on 20 May 2019 stating: "Please take this email as confirmation of my notice to quit our contract at 10 Hutton Place, Aberdeen, AB16 7HR on the 12th of July 2019".

12. The date of termination of the Tenancy was 12 July 2019.

13. The Applicants did not retake possession of the Property until after 12 July 2019, in consideration of the Respondent's email of 20 May 2019.

14. As of 12 July 2019 there was unpaid rent of £2,215.17 due by the Respondent to the Applicant in terms of the Tenancy, being the rent arrears accrued in the three rental payments for 8 April to 7 May 2019, 8 May to 7 June 2019, and 8 June to 7 July 2019 plus pro-rated rent for 8 July to 12 July 2019 of £115.07.

15. The Applicants have uplifted the deposit of £700 and applied it against unpaid rent, leaving a sum due of £1,515.17 by the Respondent.

16. The Respondent provided no evidence of payment of any part of the said unpaid rent of £1,515.17.

17. The first named Applicant knocked on the door to the Property on 6 April 2019, when attending with his builder on a pre-arranged visit to start work erecting a shed. The Respondent, unsolicited, invited the first named Applicant into the Property.

18. On a single occasion the Applicants' agent called the Respondent's mobile phone and the Respondent's partner answered. The Applicants' agent left a message with her seeking the Respondent to call the Applicants' agent back.

19. The parties agreed that the Applicants would supply a shed for the use of the Respondent but no agreement was made as to the specific dimensions of the shed.

20. The Applicants made arrangements to have the shed constructed but the Respondent requested the work to cease when he realised that the dimensions of the shed that the Applicants were installing were smaller than he wished.

**Reasons for Decision**

21. The application was in terms of rule 111, being an order for civil proceedings in relation to a private residential tenancy.

22. There was much in dispute between the parties which even the above paragraphs combined with my Note from the original CMD do not fully cover. I was thus conscious that the application may require to be assigned to a Hearing to take evidence on the disputed matters. Ultimately, I was satisfied that the necessary level of evidence for civil proceedings under Rule 11 had been provided to support the Applicants' claim for £1,515.17 and discount the Respondent's defence to same. 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 and I have chosen to do so. On full consideration at this CMD, I did not see that as appropriate or necessary for this to proceed to a Hearing for the reasons that follow.

*Notice and rent arrears*

23. The arithmetic on rent arrears was agreed. The issue was whether the termination date was 20 May 2019 as the Respondent held or 12 July 2019 as the Applicants held.

24. There was no dispute that the Respondent had sent an email which would, absent anything else, amount to a note to terminate the Tenancy as on 12 July 2019. This begged the question whether there was anything that could vitiate the email as such a notice.

25. There was a dispute between the parties on whether the Applicants' agent and the Respondent had spoken by telephone on 20 May 2019 agreeing, despite the email, that the date of termination was 20 May 2019 and, further, that despite the terms of the Tenancy agreement (and all usual procedure for leases) that a written notice specifying that date need only be left at the Property. There was a further smaller dispute as to whether such a notice was left. These matters, on the face of it, would best be considered after a Hearing before a full Tribunal with full evidence heard.

26. Having considered the matter, I regard that the notice stands on its own wording. The Respondent, at best, holds that it contains an uninduced error. The notice was issued and constituted good notice which the Applicants were entitled to rely on.

27. I accept it would likely be competent for the parties to agree, subsequent to competent notice having been given, for the notice that be revised or waived. In regard to whether evidence should have been heard on that point, I was not

satisfied that any further evidence beyond what I had already been heard would come out at a full Hearing. The only benefit of a full Hearing would be for the assessment of that same evidence by two panel members. I was not required under the Procedure Rules to have that considered by a full panel at a Hearing and, in consideration of Procedure Rule 2 (the overriding objective), I did not think it proportionate.

28. I have formed a view that no such agreement was reached. I did not think that the Respondent's evidence was credible or reliable that the Applicants' agent would – in light of having just received an email containing clear notice setting the date of termination as 12 July 2019 – would then reach an agreement that agreed that very day (20 May 2019) as the date of termination. Such an agreement would thus ignore all regular procedure under a lease as well as ignore: the terms of the notice already received; the statutory requirement for 28 days notice; and the requirement in the Tenancy Agreement for notice to be sent to the Applicants' agent by email. Further, the Respondent's position would then require the Applicants' agent, having just made a very unusual and memorable agreement to terminate the PRT as at 20 May 2019, hold off from taking possession of the Property until after 12 July 2019.

29. In the circumstances, I am satisfied that the written notice issued by the Respondent by email stands unaltered and that the date of termination of the Tenancy was 12 July 2019. This means the arrears to the end of the Tenancy were £2,215.17, against which £700 of deposit was applied, reducing the figure due to £1,515.17.

*Damages*

30. In regard to the question of damages, I was not satisfied that there was sufficient evidence to merit a Hearing. Though I accept that the stricter rule of specification and relevancy in the Sheriff Court are not binding on this Tribunal process, the overriding objective contains with it broad provisions that allow for similar considerations. For instance, I am to deal "with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties", seek "flexibility in proceedings", use "the special expertise of the First-tier Tribunal effectively" and avoid "delay, so far as compatible with the proper consideration of the issues". I regard those provisions to include the requirement to avoid a Hearing at which one party will require to defend against allegations of breach of contract that remain entirely lacking in specific detail, or appear fundamentally weak in law.

31. Turning to the four alleged breaches:

    a) There remained no detail as to the allegedly "frequent" and "unannounced visits" by the first named Applicant to the Property. The Respondent submitted that his partner could give evidence on this but, having been afforded sufficient time, no specification was provided that gave any indication of a single other date when a visit may have occurred. I did not regard this matter as appropriate to remit to a Hearing, given that the Applicants would have no idea as to what they were responding to.

Further, the Respondent made no effort to seek remediation of the alleged breach in writing. Despite frequent emails on the shed, the Respondent did not make a single adverse comment in writing asking for the visits to stop or be remediated. If there had been such an alleged breach, for the Respondent to rely upon it in repudiating the contract he should have taken steps to seek the breach's remediation rather than simply leaving the Property and seeking damages for removal costs. Further, there is no specification to suggest the breach was material enough to justify such action, and the Respondent did not take any steps commensurate with a material breach.

Considering the evidence that I did hear, taking the Respondent's evidence at its highest, the first named Applicant must have visited the property around 10 times between the start of the Tenancy at the draining of the fish pond if he was feeding the fish "every second or third day". In addition, there were allegedly visits to the shed plus the visit of 6 April 2019 with the builder. All of which was said to have caused great alarm to the Respondent's partner and children but he put nothing in writing and further invited the first named Applicant into the Property on 6 April 2019. I prefer the Applicants' agent's evidence that no discussion was made by telephone about the visits and that the only visit that the Respondent ever took issue with at the time.

b) In regard to the alleged breaches of data protection, only the call with the Respondent's partner could be construed potentially as such. Taking the Respondent's evidence at its highest, I do not think that a single call by the Applicants' agent to the Respondent's partner (when calling the Respondent's mobile) would amount to a material breach justifying the damages sought even if the Applicants' agent mentioned unsolicited that there had been a missed rental payment or that the Respondent needed to provide a written notice of termination. I reserve my position on whether these would amount to a clear breach of data protection in the circumstances presented, where it may be implied that the Respondent's partner had authority from the Respondent to take a message.

   Therefore I do not see any merit in a full consideration of the strengths and weaknesses of the evidence from both sides.

c) The Respondent withdrew his reliance on any excessive electricity charges. But for this, I would have struggled to ascertain how this was a breach of contract.

d) The Respondent accepted that he was offered a shed, and declined it. He provided no evidence that the shed offered was smaller than agreed, because he conceded there probably was no agreement on any specific size of shed. There is, simply, no breach of contract in this regard.

In all the circumstances, I could not identify any material breaches of contract that merited the Respondent's repudiation of the contract (by issuing a notice to

terminate) and damages. Specifically, either I could not identify a breach at all, or there was insufficient specification of any potential breach on which further evidence may have been heard.

**Decision**

32. In all the circumstances, I was satisfied to make the decision to grant an order against the Respondent for payment of the sum of £1,515.17 to the Applicants with interest at 8% per annum from today's date until payment.

**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.**

J.Conn

**10 November 2020**

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**Legal Member: Joel Conn** **Date**